

1949

John C. Davis v. Ogden City, Utah, and Clyde M. Weber : Brief of Defendants

Utah Supreme Court

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George S. Barker; City Attorney;

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CASE NO. 7241

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHN C. DAVIS, Attorney at Law,
for himself and all other duly
licensed and active practicing at-
torneys and counselors at law,
similarly situated, within the State
of Utah,

Plaintiff,

vs.

OGDEN CITY, UTAH, a Municipal
Corporation, and CLYDE M. WEB-
BER, Ogden City Recorder,

Defendants.

BRIEF OF DEFENDANTS

FILED

GEORGE S. BARKER,

City Attorney and

Attorney for Defendants.

CLERK, SUPREME COURT, UTAH

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Defendants.

Case
No. 7241

BRIEF OF DEFENDANTS

May it please the Court:

This proceeding involves the validity of a Business License Tax (Ordinance No. 307) of the City of Ogden. -

Plaintiff, an attorney at law, practicing within the State of Utah, for himself and all other duly licensed and active practicing attorneys and counselors at law,

similarly situated, within the State of Utah, has applied for and there has issued herein out of this Court an Alternative Writ of Prohibition, commanding the City to refrain and desist from the enforcing of the payment of the license tax imposed by said Ordinance, against the plaintiff, until the further Order of this Court thereon and praying that said Writ be made permanent.

To the petition of the plaintiff, defendants have filed a general demurrer. There is thereby presented to the Court a question of law, as to whether or not lawyers may be subjected to the payment of the license tax required by the Ordinance before they may lawfully engage in business, or in the practice of their profession, within the corporate limits of Ogden City. In other words there is presented to this Honorable Court for determination, the question of whether it is within the powers granted and conferred upon Cities by the Legislature, to pass a valid ordinance levying a revenue tax upon members of the legal profession.

STATEMENT OF FACTS

On April 15, 1948, the Board of Commissioners of Ogden City, passed an Ordinance making it unlawful for any person to engage in business within the corporate limits of Ogden City, without first obtaining a Business License as therein provided, or to violate any provision, or fail to comply with all of the appropriate provisions thereof; and providing that any violation or failure to comply with any provision of said Ordinance should be punishable as a misdemeanor as provided by the ordi-

nances of Ogden City.

The scale of computation of the fees provided for by said Ordinance is as follows:

Twenty (20) cents per One Thousand (\$1,000.00) of gross receipts.

The minimum fee shall be Five Dollars (\$5.00); the maximum fee shall be Seven Hundred Dollars (\$700.00).

The license year under said Ordinance shall be the calendar year.

The Ordinance in question contemplates the payment of an annual license fee for the privilege of doing business within the corporate limits of the city and provides that any license fees due and unpaid under the Ordinance and all penalties thereon shall constitute a debt to Ogden City, and shall be collected by Court proceedings and in the same manner as any other debt in like amount, which remedy shall be in addition to all other existing remedies.

Business as used in the Ordinance shall include all activities engaged in or caused to be engaged in with the object of gain or economic profit, but shall not include the acts of employees rendering service to employers.

The term doing business is defined by said Ordinance as follows:

(a) Business as used in this ordinance shall include all activities engaged in or caused to be engaged in with the object of gain or economic

profit, but shall not include the acts of employes rendering service to employers.

(b) The words engaging in business as used herein shall specifically include, but not be limited to, engaging in selling any tangible property either at retail or wholesale, engaging in the manufacture of tangible property and selling the same for retail, and the rendering of personal services for others for a consideration by persons engaged in any profession, trade, craft, business, occupation or other calling.

The annual license fee exacted by said Ordinance is based on "gross receipts". The Ordinance expressly provides that only receipts from that portion of the business engaged in within the corporate limits of Ogden City, shall be included in gross receipts and provides that sales in inter-state commerce are not licensed and are not reportable under said Ordinance.

The Ordinance in question was enacted for the express purpose of raising revenue with which to defray the mounting costs of city government. The much needed revenue is to be raised by levying a license fee or tax upon those engaging in business within the City limits, including the rendering of personal services for others for a consideration by persons engaged in any profession, trade, craft, business, occupation or other calling. This provision clearly places a part of the tax burden on those persons who receive the benefits of city government, but some of whom, up to now, have paid no part of the expense of upkeep of the City.

It is not claimed in the petition filed herein that the funds to be raised under the provisions of this Ordinance are for other than a public purpose or that the City is not in dire need of the additional revenue which these licenses will produce. Under our State Constitution (Article XI, Section 5, sub. (a) and state statutes (Sections 15-8-39; 15-8-40; 15-8-80, Utah Code Annotated, 1943) cities such as Ogden may raise revenue by levying and collecting a license fee or tax on any business within the limit of the city, and regulate the same by ordinance. (Sec. 15-8-80, Utah Code Annotated, 1943). Nearly every city has a financial crisis. Operating costs are at a new high. Cities must cut services or find new revenue sources. Intensive studies conducted by the city officials of Ogden, indicated that the method employed by the Ordinance in question was the only method that would raise a sufficient amount of revenue to meet the needs and requirements of the City. It would appear to be eminently fair and perhaps the fairest method that could be devised, of requiring every citizen engaging in business within the corporate limits of the city to pitch in and carry his share of the load of the cost of city government, including those engaged in the business of "rendering of peronal services for others for a consideration".

The petition filed herein attacks the validity of the Ordinance on six separate grounds. The six propositions raised and discussed by the plaintiff will be referred to herein in the same order as presented by the plaintiff.

ARGUMENT

Under the general grant of powers to Cities of the State of Utah, is the following:

15-8-80. License Fees and Taxes.

They may raise revenue by levying and collecting a license fee or tax on any business within the limits of the city, and regulate the same by ordinance; provided, that no Utah city or town shall collect a license fee or tax hereunder from any solicitor or salesman who solicits, obtains orders for or sells goods in such city or town solely for resale; and no enumeration of powers of cities contained in title 15, chapter 8, Revised Statutes of Utah, 1933, shall be deemed to limit or restrict the general grant of authority hereby conferred. All such license fees and taxes shall be uniform in respect to the class upon which they are imposed.

This is the statute which now authorizes cities to levy taxes for revenue, along with Section 15-8-39, (License of Certain Businesses) Utah Code Annotated, 1943 and other incidental statutes covering specific matters. The above quoted statute (15-8-80) was the authority relied upon by the City in drafting the license Ordinance under consideration. Therefore, the validity of the Ordinance will stem from the interpretation of the above statute.

PROPOSITION NO. 1

The two cases, Ogden City vs. Boreman, 20 Utah 98, 57 Pac. 2d 843 and Morgan vs. Salt Lake City, 78 Utah 403, 3 Pac. 2d 510, enter into a quite thorough dis-

cussion of this statute. The legislative history of the statute prior to 1935 and the changes therein are clearly set forth in those two cases.

It appears that the original forerunner of the above statute was Subdivision 87, Section 206, page 134, Revised Statutes of Utah, 1898. The statute read as follows:

The city shall have the power—

To raise revenues by levying and collecting a license fee or tax on any private corporation or business within the limits of the city, and regulate the same by ordinance. All such license fees and taxes shall be uniform in respect to the class upon which they are imposed.

At the same time the above quoted statute was in force and effect, the following statute was also in force and effect:

To license, tax, regulate, hawking, peddling, pawn-brokerage, employment agencies, the keeping of ordinaries, theatrical and other exhibitions, shows, and amusements, and the business conducted by ticket scalpers, distillers, brewers, money-changers, brokers, keepers of public scales, runner of stages, cars, public houses, or other persons or things, and to revoke such license at pleasure; to license, tax, and regulate banks, bath houses, livery stables, skating rinks, smelters, crushers, express companies, restaurants, hotels, taverns, theatres, opera houses, music halls, boarding houses, eating houses, chop houses, laundries, barber shops, second hand or junk stores, and to forbid the owners or persons in

charge of said stores from purchasing or receiving any article whatever from minors without the written consent of their guardian or parents; to license, tax and regulate the business conducted by hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, watermen, and all other persons pursuing like occupations and to prescribe their compensation; to license, tax and regulate the business conducted by merchants, retailers, shop and shopkeepers, butchers, druggists, photographers, assayer, confectioners, and fruit peddlers.

Subdivision 38, Sec. 206, p. 129, Revised Statutes, 1898.

In 1888, the first quoted statute, Subdivision 87, Section 206, page 134, was included in the compilation of that year. At the same time, included in the compilation, was a statute specifically authorizing cities to tax lawyers. The statute was cited as 1 Compiled Laws of Utah, 1888, page 331, Section 288.

In 1898, when the Revised Statutes of that year were enacted, the Legislature deleted the specific authorization as to the licensing of lawyers. However, the other two licensing and taxing statutes were retained substantially as above quoted.

It was with this background that Ogden City attempted to levy a license tax upon a lawyer, based on the claim that the first quoted statute, Subdivision 38, Section 206 (the general statute) authorized such taxation. As a result of this attempt to license, the case of Ogden City vs. Boreman *supra*, came before the courts.

In that case the defendant, Boreman, a duly licensed attorney before the Supreme Court of the Territory was charged with practicing law in Ogden City without a license as required by ordinance. The Justices court found him guilty. Defendant appealed to the District Court where he was found not guilty and discharged on the ground that the ordinance under which the defendant was convicted was void so far as it required a license from Ogden City to practice law.

The case was then taken to the Supreme Court to test whether Ogden City had the power under the then existing statutes to exact a license fee from an attorney practicing in the City. The Supreme Court ruled that the City did not have such authority. The rational of that opinion is very important, however, in determining the question now presented, as we believe the case can be distinguished because of the rational and the legislative history of the present act, since that time.

In the Boreman case the Court held that "where a part of an act has been repealed, it must, although of no operative force, still be taken in construing the rest. The propriety of comparing repealed statutes with those remaining in force, or subsequently enacted, for the purpose of construing the latter, is not to be questioned in the absence of any reference to them in the statute under consideration." Continuing the Court held, "By repealing the clause providing for licensing and taxing lawyers, and enacting the general clause referred to, leaving lawyers and the professions generally out of such reenact-

ment, impels the conclusion that the legislature intended to deprive the cities of the power to impose a license fee or tax upon lawyers that they had formerly possessed. There must have been an object and purpose in this deliberate repeal in one section and omitting to insert its provisions in the act as reenacted, having special reference to licensing and taxing in cities. And when Subdivision 87 is considered with reference to Subdivision 38 and the repeal of Subdivision 6 of Section 288, it is evident that it was not intended that lawyers should be licensed or taxed under its provisions.”

To summarize, the Boreman case, *supra*, held that the general licensing and taxing statute must be considered in *pari materia* with all the other taxing and licensing statutes, and in view of the express legislative history of licensing statutes. The legislative intent was found to be that lawyers should not be taxed. The general statute was held to be limited to the more specific enumeration of persons and businesses that could be licensed.

The case of *Morgan vs. Salt Lake City* discussed the Boreman case at considerable length and gave a similar summary of the case. However, that case does not place sufficient emphasis on the fact that a prior statute authorizing the taxing of lawyers had been repealed and the Court was guided strongly by the legislative intent thereby shown. The Court there again held that the specific enumeration in the present Section 15-8-39, limited the general powers conferred by Section 15-8-80.

However, the Morgan case did lay down a specific interpretation of the word business as used in Section 15-8-80. The Court there said:

“What ordinarily is meant by the term “business”? It is a pursuit or occupation. It denotes the employment or occupation in which a person is engaged to procure a living. It is synonymous with calling, occupation, or trade, and is defined as any particular occupation or employment habitually engaged in for a livelihood or gain.”

Morgan vs. Salt Lake City, *supra*.

With this general case law background, the present statute, Section 15-8-80 was before the legislature in 1935. The legislature at that time amended the statute to specifically override the impact of the Boreman and Morgan cases, as far as requiring the reading of Section 15-8-39, or the enumerated persons and businesses to be taxed. The legislature in Chapter 24, Laws of Utah, 1935, changed the statute to read as follows:

“They may raise revenue by levying and collecting a license fee or tax on any business within the limits of the city, and regulate the same by ordinance; provided, that no Utah city or town shall collect a license fee or tax hereunder from any solicitor or salesman who solicits, obtains orders for or sells goods in such city or town solely for resale; *and no enumeration of powers of cities contained in Title 15, Chapter 8, Revised Statutes of Utah, 1933, shall be deemed to limit or restrict the general grant of authority hereby conferred.* All such license fees and taxes shall be uniform in respect to the classes upon which they are imposed. (Italics added.)

It will be noticed that both reasons for the Boreman case are now out of the present case. By specifically giving cities a general grant of power, as above set out, the legislature over-rides the implication that the general statute shall be limited either to the specific statute or to the legislative history adhered to in the Boreman case.

It appears therefore that the question before the Court turns upon whether the profession and lawyers in particular, come within the classification of "business" as defined in the Morgan case, *supra*. As above set out, the definition as given by this Court is sufficiently broad to include the professions. Since in the consideration of the Morgan case the Court had discussed the Boreman case and lawyers, it can very well be assumed that if the Court considered that the word "business" did not embrace the professions and lawyers in particular, the decision would not have placed such a broad interpretation upon the statute.

It would seem that the interpretation of the statute by this Court would carry the most weight in construing this statute. However, even so, when we look to other states we find sufficient authority to the effect that a lawyer can be licensed under a general statute for licensing businesses.

Lent vs. City of Portland, 42 Or. 488, 71 Pac. Pac. 645, 646.

In the case of *Ex parte Galusha*, 195 Pac. 406, the California court in construing words contained in the Los Angeles City Charter, empowering the city to li-

cense and regulate “any lawful business or calling” held to authorize the city to tax persons practicing law, since the words “Business” and “calling” include persons following the professions, as well as those engaged at work of a more purely commercial nature. In the course of the opinion the Court said (p. 407) :

“Clearly these terms include those following the professions as well as those engaged in work of a more purely commercial nature. It is true that some cases seem to hold that, in delegating the power to tax attorneys, a state must specifically mention them (St. Louis vs. Laughlin, 49 Mo. 559) ; on the other hand, it has been held that where a city was authorized in general words to tax ‘all such callings, trades and employments as the public good may require,’ a tax might be imposed on the occupation of attorney at law. (Abram vs. City of Roseburg, 55 Or. 359, 105 Pac. 401, Ann. Cas. 1912 A, 597).”

Continuing the Court said :

“In the absence of constitutional or statutory restrictions, there is no reason for making a particular exception to the legal profession, and where, as in the present case, the wording of the charter is sufficiently broad to include other professions in the delegation of the power to tax, it must be held to embrace, the legal profession.”

With all due respect to the splendid traditions of the legal profession and the decisions of the courts with respect to the power of cities to subject members of the profession to the provisions of city ordinances levying taxes for revenue, we are wondering if there is not a

great deal to be said in favor of what the California court said in the Galusha case, *supra*: "In the absence of constitutional or statutory restrictions, there is no reason for making a particular exception to the legal profession." To the layman at least, it appears to be a work of super-arrogation, when members of the legal profession are heard to say and take the position that they are outside the pale of the power to tax for revenue when it comes to subjecting them to the provisions of a city ordinance, calculated and intended to raise revenue with which to defray the cost of city government and compelling members of the profession, along with others, to bear their part and portion and make their contribution thereto.

We earnestly submit that it is the duty of this Honorable Court to re-examine the question, especially in view of the trend of modern decisions, and the constantly changing conditions of society. It has become common-place that what may have been good law in one decade is not good law in another.

The taxing power of a city is general and extends to all persons, including lawyers.

Hay vs. Leonard, 46 SE 2d 653.

The following cases hold that lawyers can be licensed under the general powers conferred on cities:

In re: Kaffenbury, 101 N. Y. S. 501. Ex Parte Galusha, *supra*.

The following cases have a bearing upon the ques-

tion here presented:

City of Coos Bay vs. Arie No. 538 of Fraternal Order of Eagles et al. Supreme Court of Oregon, 170 Pac. 2d 389; Garrett Freight Lines, Inc. vs. State Tax Commission et al, 135 Pac. 2d 523; Hill et al vs. City of Eureka (California), 94 Pac. 2d 1025.

In summary, therefore, it can be said that the amendment of the Utah statute in 1935 by the legislature, removed the rule of both the Boreman case, *supra* and the Morgan case, *supra* from the picture. The general grant of authority to license, tax and regulate all businesses within the City, we believe to be the intent of the present law, unimpeded by the specific statute or legislative history. We respectfully submit that the definition of "business" as laid down in the Morgan case, *supra*, is broad enough to include lawyers and the other professions.

All presumptions are in favor of the validity of the tax.

Hay vs. Leonard, 46 SE 2d 653.

Unless the ordinance is invalid prohibition will not lie.

McQuillin Municipal Corporations, Section 852, Note 55.

PROPOSITION NO. 2

Proposition No. 2, "as to whether the practice of law is subject to taxation for revenue, without any attempt at regulation." It is frankly admitted that the

City is not attempting to regulate the practice of law or attorneys, but is merely interested in raising revenue. The City by the ordinance in question, does not attempt to place additional requirements or qualifications over those set by the State of Utah. There is nothing in the ordinance which attempts or purports to be a regulation of the practice of law. It must be regarded as a purely revenue measure as far as it effects attorneys at law. Under the provisions of Section 15-8-80, Utah Code Annotated, 1943, the City has the power to impose license fees for revenue. Under what seems to be the great weight of authority, the City may levy or impose a tax for revenue, without attempting to regulate the activity upon which the revenue tax is levied.

Ruckenbrod vs. Mullins, 102 Utah 548; 133 Pac. 2d 325; 144 A. L. R. 839.

All businesses may be licensed for revenue and the State Bar Act does not preclude the city from imposing the tax upon legal business.

State vs. Keller, 191 So. 542; City vs. Railway, 142 Pac. 1067.

PROPOSITION NO. 3

Proposition No. 3, that the ordinance in question is discriminatory would seem to be of little merit because it merely carries out the general plan of taxing business, as such, and not the income or employee.

The terms used in the ordinance are merely descriptive of what constitutes business and does not by its terms exempt any particular class of business. An em-

ployee is not engaged in business for himself, as the term business is commonly understood.

The purpose and intent of the ordinance is to levy a license tax on the business.

A tax on a business based on gross receipts does not apply to the employee. Therefore, the elimination of the employees is not a discrimination.

Hay vs. Leonard, 46 SE 2d 653.

PROPOSITION NO. 4

Under this designation plaintiff says "That the city is without power to levy gross income taxes upon its residents would seem almost to be accepted without argument." This proposition may be readily conceded. The objection is answered by the fact that the ordinance in question is not, and is not intended to be construed as an income tax.

We feel that there can be no reasonable doubt that this ordinance levies a fee for the privilege of engaging in business, occupation, trade or profession within the corporate limits of Ogden City. There can be no reasonable doubt that the fee required to be paid is measured by Twenty (20) cents per One Thousand \$(1,000.00) Dollars of gross receipts, of all business, trade or profession or other activities. The tax is on the business, occupation, trade or profession. It is absurd, therefore, to say that the ordinance imposes an income tax. It nowhere taxes income as such.

COURT OF APPEALS OF KENTUCKY,
 City of Louisville, et al, Appellants vs. Wil-
 liam Sebree, et al., Appellees.

214 SW 2d 248; 304 Ky. 420.

This case decided by the Court of Appeals of Kentucky on August 6, 1948, decided and held that a Louisville ordinance was not an income tax but a tax upon the privilege of conducting a business within the city. The Louisville ordinance had many more of the aspects of an income tax than the ordinance of Ogden City.

All businesses may be licensed for revenue and the State Bar Act does not preclude the city from imposing the tax upon the legal business. (State vs. Keller, 191 So. 542; City vs. Railway, 142 Pac. 1067.) However, the statute under which the tax is imposed requires that the tax must be uniform. Classification is permitted to achieve uniformity. A tax on gross receipts of all businesses is the most uniform tax. The use of gross receipts in determining the amount of the tax is merely incidental to the tax to achieve uniformity. (City vs. Railway, supra.) It does not convert the tax from an occupation tax to an income tax.

The power of taxation is a legislative function and unless restrained by the constitution the power vested in the legislature is supreme and not subject to review by the courts. A tax imposed upon occupations is not an income tax, but a tax on business. (Salt Lake City v. Christensen, 95 Pac. 523; Newton vs. Atchinson, 1 Pac. 288.)

PROPOSITION NO. 5

Proposition No. 5 raises the question of what may be termed separation of powers i. e. The invasion by the City of the Judiciary or the Judicial branch of the government. It is respectfully submitted that this objection is more artificial than real, even though an attorney is in some respects an officer of the court.

By the ordinance in question, the City is not attempting to in any respect regulate, but only to raise revenue. Each business or activity within the corporate limits of the City should be required to bear its proportionate or corresponding share of the burden of maintaining city government.

PROPOSITION NO. 6

The objection raised under Proposition No. 6 seems to be that the licensing of an attorney by the City limits, or tends to limit, the right of clients to have an attorney of their own choosing. This contention we believe to be without merit in fact.

The canon of law i. e. the right to engage in the practice of law, has always been intended to be limited to the proposition that such attorney must be properly qualified and licensed to practice within the locality.

This very specious argument should not be advanced by plaintiff as affording a loophole or means of lawyers escaping taxation and avoiding their fair share of the burden of supporting and maintaining his share of the burden of city government, if otherwise lawfully

subject to that responsibility, along with other business men of the community.

The petition filed by the plaintiff is, what may be termed a class suit. It does not seem that approximately 600 lawyers practicing in the State of Utah, could possibly be affected, unless they are engaged in a general practice with a place of business in Ogden.

38 Am. Jurisprudence, Page 46, Section 355;
39 Am. Jurisprudence, Page 921-2, Section
47-49.

We respectfully submit that the demurrer of the defendants to the petition filed by the plaintiff should be sustained and the Alternative Writ of Prohibition heretofore issued by the Court in this matter should be vacated and set aside.

Respectfully submitted,

GEORGE S. BARKER,
City Attorney and
Attorney for Defendants