

1949

## Orson Lewis dba Lewis Bros. Stages v. State Tax Commission : Brief of Plaintiff

Utah Supreme Court

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In the Supreme Court  
of the State of Utah

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ORSON LEWIS, doing business as  
Lewis Bros. Stages,

*Plaintiff,*

vs.

STATE TAX COMMISSION,

*Defendant.*

Case No. 7311

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PLAINTIFF'S BRIEF

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# In the Supreme Court of the State of Utah

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ORSON LEWIS, doing business as Lewis Bros. Stages,	} <i>Plaintiff,</i>	Case No. 7311
vs.		
STATE TAX COMMISSION,		
	<i>Defendant.</i>	

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## PLAINTIFF'S BRIEF

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### STATEMENT OF THE CASE

As a result of an audit of the accounts of Lewis Bros. Stages by the auditing division of the State Tax Commission, a sales tax deficiency assessment was levied against Orson Lewis, doing business as Lewis Bros. Stages, under date of February 16, 1949 (R. 2). This assessment is based upon the plaintiff's failure to collect and pay a sales tax upon fares collected for the transportation of passengers to and from Salt Lake City and Kearns, Utah (R. 4). The plaintiff objected to this assessment on the grounds that Title 80, Chapter 15, Section 4, Utah Code Annotated, 1943, exempts "street railway fares" from the sales tax and that said exemption applied to the fares received by the plaintiff in his operation

from Salt Lake City to Kearns, Utah, and intermediate points along said route (R. 17). The plaintiff further objected to the assessment upon the grounds that the Tax Commission had construed said exemption to apply to operations analogous to the Kearns operation, and that the Tax Commission had told the plaintiff that his operation would also be construed as being exempted (R. 17-19).

After the above objections were made and on March 2, 1949, a hearing was granted before the Tax Commission (R. 22). On March 5, 1949, the Commission rendered its decision sustaining the deficiency assessment previously levied (R. 68-70). A writ of certiorari was issued in response to a petition filed March 11, 1949 (R. 73). The State Tax Commission made its return under the writ on March 30, 1949 (R. 75).

## STATEMENT OF FACTS

### *A. "Instigation of the service."*

During the months of July and August, 1942 Mr. Orson Lewis, doing business as Lewis Bros. Stages, was contacted by Donald Hacking, a member of the Public Service Commission, who requested that Mr. Lewis consider assuming the responsibility of furnishing transportation to and from Kearns, Utah (R. 33, 56). At that time Mr. Lewis stated that he felt he would be able to enter into such an undertaking and consequently made preparations to do so (R. 56). Shortly before commencing these operations army personnel contacted Mr. Lewis concerning the fare which would be charged on the run to and from Kearns (R. 57). Mr. Lewis informed them of

the proposed fare and also informed them that a 2% sales tax would be charged. Until this time Lewis Bros. Stages had been operating intrastate operations upon which he had always charged a sales tax (R. 57). The army personnel objected to this charge (R. 57). However, Mr. Lewis informed them that they would have to settle the matter with the Tax Commission (R. 58). On the following day the army personnel informed Mr. Lewis that a sales tax was not charged by the Salt Lake City Lines or Airway Motor Coach Lines, Inc., and that since the Kearns operation would be similar and analogous to the above mentioned operations a sales tax should not be included in the fare (R. 58). The only concern Mr. Lewis had in the charging of the sales tax was one of making sure that such a tax would not be levied on the operations unless he would be able to include the tax in the fare (R. 58). With this in mind, he contacted Mr. Shields, his attorney, who in turn called the Tax Commission and was informed that there would be no tax liability incurred in the furnishing of transportation to and from Kearns (R. 50, 59).

#### *B. Nature of the operations.*

The operations to and from Kearns consisted of picking up military and civilian personnel at the depot of Lewis Bros. Stages and all along the route going to Kearns, and the letting off of passengers at the Kalunite plant at 33rd South, Taylorsville, and at Kearns. On the return trip passengers were picked up at Kearns, Taylorsville, and the Kalunite plant at 33rd South, and the passengers were let off all along the route back to Salt Lake City (R. 59-60). Seventy per cent

(70%) of all the passengers were picked up at places other than at the depot and paid fares upon the buses (R. 61), although there were no customarily fare boxes on the buses (R. 60). The volume of passengers being hauled amounted to as high as 13,000 per day and as high as 2,000 per hour during rush hours (R. 60-61). Frequent stops were made, letting passengers off at any place on the return trip to Salt Lake City, and frequent stops were made to pick up passengers all along the route to Kearns (R. 60, 62). No tax was in fact charged the passengers (R. 61), and the operation to Kearns was discontinued when Kearns was deactivated (R. 37).

### *C. Operating authority.*

The operation was created to meet wartime demands upon local transportation services and was commenced by direction of the Public Service Commission of Utah (R. 33) without a hearing and before the issuing of a certificate of convenience and necessity (R. 59-62). The certificate actually issued authorized the hauling of passengers between Salt Lake City and Kearns along a designated route. However, Lewis Bros. Stages had oral authority to pick up and let off at Taylorsville (R. 35, 42) and at the Kalunite plant (R. 40), and may have been authorized "to pick up and discharge anywhere along the route where no other services were available" (R. 39).

The present standard applied by the Commission in determining if the exemption should apply is shown by Exhibit A, which is as follows:

### *Distinguishing Features of Street Railway*

1. Street Railway is intended for local convenience to facilitate transportation of persons from point to point within municipality or suburban district.
2. Sale of tickets and passes on cars, and not from terminals.
3. Use of Fare Boxes.
4. Frequency of stops to pick up and deposit passengers along streets of city and suburban areas.
5. Should operate under permit or franchise from city or municipal corporation.

NOTE: In exempting street railway fares from "*Sales Tax*" the legislature undoubtedly had in mind avoiding the inconvenience and loss of time involved in making change in tokens and pennies on the bus or street car.

I am of the opinion that for sales tax purposes the above listed distinguishing features of a street railway constitute a sound basis for determining what fares are subject to the tax. On this basis, which I believe is also in substantial conformity to the present printed regulation on the matter involved, I favor holding quite closely to our present policy. In other words, Inter-urban Railway fares should continue to be held taxable and fares of buses operated entirely within cities or as part of an old established street railway system as in S. L. City, should continue to be held not subject to the tax.

Between these two cases these are borderline cases,



the status of which might well be subjected to review and possible re-classification—Such cases as Airway Motor Lines. Heber Bennion, Jr. (R. 21).

### PLAINTIFF'S CASE

The plaintiff contends that the major issue in this case is that of construing Title 80, Chapter 15, Section 4, Utah Code Annotated, 1943, in an endeavor to determine the legislative intent in granting the street railway exemption. Incidental and subordinate to this main issue is the one of determining if the present requirements insisted upon by the Commission concerning this exemption are valid ones, and if the Commission did not in fact, at the instigation of the Kearns operation, construe said operation along with that of the Airway Motor Coach Lines, Inc., as being within the designated exemption.

### STATEMENT OF ERRORS RELIED ON

Plaintiff relies upon the following propositions as constituting error in the decision of the State Tax Commission.

I. The exemption created by the Legislature was intended to cover situations such as the Kearns operation.

II. The exemption has previously been liberally construed by the Utah Supreme Court and the Utah State Tax Commission.

III. The Kearns operation complies with the valid tests now being applied by the State Tax Commission, as outlined in Exhibit A.

## I.

THE EXEMPTION CREATED BY THE LEGISLATURE WAS INTENDED TO COVER SITUATIONS SUCH AS THE KEARNS OPERATION.

The first sales tax law, Chapter 63, Laws of Utah, 1933, by Section 4, taxed all services rendered by any utility of the state. At the second special session of the Legislature of 1933 the section was amended by adding the following:

“ \* \* \* provided that said tax shall not apply to intrastate movements of freight and express or to street railway fares.”

The Utah Supreme Court in *Utah Light & Traction Co. v. State Tax Commission of Utah*, 92 Utah 404, 68 P. 2d 759, 760, has this to say upon construing the amendment:

“In construing the language of the amendment, it is for us to first determine the intent of the Legislature when it ‘excepted street railway fares’ from the payment of the sales tax. For its meaning, we must look not alone to the *letter* of the statute, but to the *intent* of the legislature and the *purposes* of the act.” (Italics added).

The Tax Commission in Exhibit A recognizes, as does the case just quoted, that the main determination is one of ascertaining legislative intent, and in Exhibit A it states what the Commission believes was the intent of the legislature and the purpose of the exemption. Its statement is as follows:

"NOTE: In exempting street railway fares from 'Sales Tax' the legislature undoubtedly had in mind avoiding the inconvenience and loss of time involved in making change in takens and pennies on the bus or street car." (R. 21).

There can be no dispute but what the Tax Commission is right in its statement of the legislative intent. However, it would appear that the Commission lost sight of this controlling factor in its current reconsideration of the Kearns operation. Can it be said that the payment of 5 and 8 mills and making change therefor to 13,000 soldiers in one day and 2,000 soldiers in one hour is any less burdensome than would be similar transactions upon the buses of the city lines? We think not. A more difficult and burdensome task with the resultant slow-down in the transportation system would be difficult to imagine. In fact, it would probably have been more difficult than on the city lines since the plaintiff was unable to secure fare boxes into which the fares could be paid. *Actually, the Kearns operation was only an integral part of an emergency street transportation system in and about Salt Lake City.*

As in most cases of statutory construction, the matter ultimately becomes a question of degree. On the one hand, there is no dispute that the Salt Lake City Lines were intended by the legislature to be exempt. On the other hand, intrastate operations between a fixed termini wherein all or substantially all of the passengers were picked up and discharged at the bus terminals were not intended to be exempted or defined as street railways. In the later case, the tickets and payment

of sales tax could be handled at the depot prior to departure time. The plaintiff does not question the latter case, since prior to any knowledge of any street railway exemption he collected and paid and still pays a sales tax on fares received for transporting passengers from Salt Lake City on one hand to Tooele, Park City, and Wendover on the other. *Concerning the Kearns operation, however, it must be recognized that it was only an extension of a street transportation service during a war emergency which the Traction Co. lacked facilities to make.* As is more specifically discussed later, Kearns is definitely within the suburban area of Salt Lake City. Concerning the payment and collection of fares, the evidence is uncontroverted to the effect that 70 per cent of all fares were collected on the buses. Actually, not all fares for transportation on the Salt Lake City Lines are purchased on the buses. Tokens, 13 for a dollar, 50 school tickets for two dollars, and weekly passes can be procured at various sales stands within the city. The distinction between the service offered by the Salt Lake City Lines and the Kearns operation is slight, indeed; far too slight to justify a discriminatory construction of the exemption. In the Utah Light & Traction Co. case, *supra*, at page 407, the court states:

“If there is to be a classification, it, to be valid, must rest upon ‘some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’ ” (Citation of authorities).

There is nothing in the statute from which it can be inferred that there was an intention to discriminate between

one group of passengers' who rode an independent bus system during a war emergency from those who were served by the normal city bus system whose facilities could not meet the additional demand.

Realizing that the main issue is one of determining legislative intent, can it be said that the legislature, if confronted with this case, would say that such a discriminatory distinction should be drawn, thus requiring the soldiers of Camp Kearns to pay a sales tax? Looking not at the letter of the statute, but rather at the intent of the legislature, as the Supreme Court says we must, and to the purposes of the act which is conceded to be the alleviation of the burden of collecting the tax on buses, it cannot be seriously contended that the Kearns operation does come within the exemption.

## II.

THE EXEMPTION HAS PREVIOUSLY BEEN LIBERALLY CONSTRUED BY THE UTAH SUPREME COURT AND THE UTAH STATE TAX COMMISSION.

In 1936 the Supreme Court in the case of *Utah Rapid Transit Company v. Ogden City*, 89 Utah 546, 58 P.2d 1, restrictively construed the term "street railway" to the extent that it held that the power to operate a street railway did not grant the power to operate a motor bus transportation system. As a result of this decision the Tax Commission concluded that it was required to construe the exemption of street railway fares from the sales tax as limited strictly to fares

from street cars, to the exclusion of fares paid on trolley coaches and motor buses. The Traction Co. objected to this construction, and in the case of *Utah Light & Traction Co. v. State Tax Commission of Utah*, supra, the Supreme Court held that there was no substantial basis for such a restrictive construction insofar as the sales tax exemption was concerned, and also held that the exemption should likewise apply to fares collected on the motor buses. The Traction case on its facts is admittedly a stronger case than the one now before the court in that it involved an old street railway company which was using substituted modern equipment. However, the Tax Commission in its application has not limited the exemption to the factual situation of that case. The exemption has been construed to apply to the operations of the Geneva Transportation Company, operating in and about Provo, and the Ogden Transportation system, both of which it is suggested cannot qualify as extensions of an old railway system. The Kearns run, on the other hand, was in fact just an *extension*, by an independant carrier, of street transportation in the Salt Lake City metropolitan area during a war emergency.

The Tax Commission has further adopted a liberal attitude in construing this exemption as is evidenced by the testimony of two former members of the State Tax Commission. Mr. Gibson made this statement concerning the attitude of the Commission:

“The statute—I cannot remember the wording of it, but the general substance is that any operation of a street railway system would be exempt from sales tax, and our general problem was not to technically

interpret the word 'street railway system,' but interpret that as the meaning of a method of operation, and wherever we found an operation that conformed to the method of operation of a street railway system that we didn't think was prohibited by specific provision of law—in other words, if we could construe them to be operating as a street railway system, they were as such exempt from the tax." (R. 27).

Commissioner Bennion was even more specific concerning the attitude of the Tax Commission. He made this statement:

"It seems to me that in some cases there was not much question as to whether a tax was exempt, or whether it should apply, but there were other cases where it was somewhat difficult to determine. My impression is that the position that we took at the time was that we were in a war emergency, that operations generally weren't normal, that conditions had arisen which were not contemplated by the Legislature when it enacted the Sales Tax Act, and therefore that situations arose in which it might be difficult to determine the intent of the law, or the application of the law. And it is also my recollection that the Commission took the position in general that we shouldn't apply the statute too strictly because of the fact that war emergencies had to be met, that operations weren't normal, and were only temporary.

"Q. But did you, in your memory, does it impress itself upon you that the hauling of soldiers was one of the things, wasn't it, you were inclined to be tolerant of?

"A. Yes, that is true, and in some cases the Commission did make exemptions. I can't really remember

which cases it was for it has been quite a long time back.” (R. 43, 44).

In actual application, this theory of a liberal interpretation was given effect. The operations of the Airway Motor Coaches was construed as being exempt although the case was recognized as being a marginal one as is evidenced by the following quotation from Exhibit A:

“Between these two cases there are borderline cases, the status of which might well be subjected to review and possible reclassification — such cases as Airway Motor Lines. Signed Heber Bennion, Jr.” (R. 21).

That this operation was specifically considered is supported by the testimony of Commissioner Gibson which was given without any prompting or prior mention of Airway Motor Coaches. His testimony is as follows:

“Q. Would that include Salt Lake City and suburban towns and communities within close proximity to Salt Lake:

“A. They had what they called Airway Buses.

“Q. Airway Motor Lines?

“A. Airway Motor Lines running from Salt Lake City to Sandy, and in the area and was construed to be a street railway system, if my memory serve me correctly, and no tax on that.” (R. 32).

That the exemption was construed to comply to the Airway company is further corroborated by the fact that no tax was



in fact levied against or paid by Airway.

In comparison, the nature of the Airway operation is very similar to the Kearns operation. In 1940 Airway Motor Coaches received a certificate of convenience and necessity to transport passengers to and from Salt Lake City and the following outlying communities: Murray, Sandy, Crescent, Draper, Midvale, West Jordan, Riverton, Taylorsville, and Bennion, Utah. The authority contained in their certificate was analogous to the authority contained in the Kearns certificate in that it did not authorize the carrier to pick up and let off at all places within Salt Lake City. The proximity of the above mentioned towns as compared to that of Kearns to Salt Lake City is shown by the map at page 28 of this brief. It will be noted that 6 out of the 9 towns are actually farther from Salt Lake City than is Kearns.

As to the number of passengers and frequency of the runs, there can be no comparison between the two operations. Airway hauled members of established communities who occasionally traveled to Salt Lake City, while the Kearns run had to meet the demands of soldiers who went into Salt Lake City every opportunity they had. The Kearns operation likewise is an a fortiori case to the Airway operation insofar as operating authority is concerned since there is evidence that during the war emergency the Public Service Commission allowed and directed that service be granted by Lewis Bros. Stages which was not in strict compliance with its certificate of convenience and necessity. Mr. Hacking, Chairman of the Public Service Commission, made this statement:

"A. Not under the terms of the issued certificate. In this—I think I can explain what you are talking about, Mr. Shields. During this period, the establishment of Kearns and other war installations, as you men will recall the gas rationing, tire rationing, and other things were in effect, and there was a large influx of military and civilian personnel in here. The Commission, during that period of time, didn't hold to the same degree of formality with respect to issuance of authority that they do ordinarily, and in many respects temporary authority was issued without hearing, and in a lot of cases carriers were directed by the Commission to enlarge their operation, by specific order of the Commission. During that time there were installed along the routes of many of the carriers new installations. I think there was one in connection with the routes of Lewis Brothers Stages. And we, by what we called a 'War Service Order' directed all of the interstate carriers who didn't hold, in many cases, any intrastate rights, and in some cases held limited intrastate rights—directed them to pick up and discharge passengers all along their route whenever they had available seats. And that was—we issued such an order without hearing. We didn't know whether or not the order in all respects was fully legal, but anyway it was never contested, and the Commission required compliance with it. Now, that General Order No. 10, or that War Service Order No. 10, probably didn't specifically cover any situation between here and Kearns, but at least, *the Commission with its knowledge and consent did permit, and may have orally directed that Lewis Brothers pick up and discharge people anywhere along their route where there was no other service available to them.*" (R. 38, 39).

There is an additional factor which is not found in the Airway operation, and that is that the Kearns operation was

instigated to prevent further demands being placed upon the Traction Co. which was then operating at its maximum to sustain the additional volume of traffic created by the war effort generally. *The war emergency necessitated this extension of street transportation service by an independent carrier.*

The plaintiff, however, does not need to rely upon this analogous situation to show that the Commission originally construed such operations as being in nature a street railway operation. The testimony of Mr. Shields and Mr. Lewis is not controverted, but rather it is given foundation by the testimony of Mr. Gibson and Mr. Bennion to the effect that the Kearns operation also was specifically considered and construed as being exempt.

From the evidence in the record it cannot be denied that the Kearns operation was construed at its instigation as being exempt by the Utah State Tax Commission.

It is recognized that an erroneous construction made by administrative commissions will not be upheld, *Utah Hotel v. Industrial Commission*, 107 Utah 24, 151 P.2d 467; *Olson Company v. State Tax Commission*, 109 Utah 563, 578, 168 P.2d 324. However the Olson case has this to say about administrative constructions:

“Where there is an ambiguity in the statute as to whether the latter does or does not cover a particular matter, a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question

under the statute will be one factor which the court may take into consideration as persuasive as to the meaning of the statute. Especially is that true where the agency, as in this case, is one on whom the legislature must rely to advise it as to the practical working out of the statute and where practical application of the statute presents the agency with economic opportunities and experiences for discovering deficiencies, inaccuracies, or improvements in the statute."

In the Utah Hotel case, at page 32, the court makes this statement concerning administrative construction:

"An administrative interpretation out of harmony and contrary to the express provisions of a statute cannot be given weight."

In the present case it is contended that the construction made by the Commission is not "out of harmony and contrary to the express provisions of a statute," but, on the contrary, is a logical and necessary construction and should be upheld. Especially is this true when it is considered that the plaintiff in good faith relied upon this construction and did not collect the tax. If our government is to be respected and upheld it must retain the confidence of the people generally, and if this is to be accomplished men in responsible positions must be sustained in their official acts. Once again, if the legislature were confronted with this problem, would it say, "Members of the Tax Commission, take your positions lightly, for there is no responsibility behind your acts," and, "Mr. Taxpayer, if you rely upon the counsel of the Tax Commission you shall be penalized," and, "Soldiers of Camp Kearns, it would not have been burdensome for you to have paid this

sales tax since you rode an independently operated segment of a metropolitan and suburban emergency transportation system and since you did not pay your fares into regular fare boxes?"

### III.

THE KEARNS OPERATION COMPLIES WITH THE VALID TESTS NOW BEING APPLIED BY THE TAX COMMISSION AS OUTLINED IN EXHIBIT A.

Exhibit A in part is as follows:

"Distinguishing features of Street Railway.

(1) Street railway is intended for local convenience to facilitate transportation of persons from point to point within municipality or suburban districts.

(2) Sale of tickets or passes on cars, and not from terminals.

(3) Use of fare boxes.

(4) Frequency of stops to pick up and deposit passengers along streets of city and suburban areas.

(5) Should operate under permit or franchise from city of municipal corporation.

NOTE: In exempting street railway fares from "sales tax" the legislature undoubtedly had in mind avoiding the inconvenience and loss of time involved in making change in tokens and pennies on the bus or street car." (R. 21).

It will be noted that the proposition now under con-

sideration states that there was compliance with the *valid* tests created by the Tax Commission. Also it should be noted that the Commission insisted upon the presence of all of these requirements before it would hold that the exemption applied. Commissioner Twitchell, who was in charge of administering the sales tax law and was, no doubt, most familiar with the attitude of the Commission in applying the above requirements, asked this question at the hearing:

“Q. One other question, Mr. Hacking. For the purpose of defining a street railway, or its equivalent under the intended meaning of the sales tax act, the Commission has worked out 5 guides or rules *all of which we hold must be present in order to qualify for the exemption.*” (R. 41).

The plaintiff contends that only three of the above requirements can be sustained and, consequently, insistence upon complete compliance with all five of them was error. The two which the plaintiff submits cannot be sustained are number 5 and number 3.

Requirement number 5 requires the securing of a franchise or permit from the city or municipality. This very question was considered in *Utah Light & Traction Co. v. Public Service Commission*, 101 Utah 99, 110, 118 P.2d 683, wherein the plaintiff contended that Airway Motor Coach Company was required to secure a franchise from Suburban communities to the south and west of Salt Lake City. Concerning this contention, the Supreme Court states as follows:

“A franchise is the privilege of doing that which does not belong to the citizens generally by a common

right. 12 R.C.L. p. 174. As to streets, it is the right to do something in the public highway which except for the grant would be a trespass. *People v. State Board of Tax Com'rs.*, 174 N. Y. 417, 67 N.E. 69, 63 L.R.A. 884, 105 Am. St. Rep. 674; 12 R.C.L. p. 175. Thus the right to lay rails, or pipes, or string wires or set poles along a public street is not an ordinary business in which everyone may engage, or a use everyone may make of the street, but is a special privilege, a franchise to be granted for the accomplishment of public objects. They are required only in cases in which it is sought to impose upon the street a special burden which cannot be imposed generally, that is, to burden the street with a special privilege which the public generally may not likewise enjoy. Business such as that of the Airways does not so burden the street. It uses the streets only for purposes of travel and transport and *is not subject to franchise requirements.*"

It will be noticed from the record that the Commission stressed this requirement. At the close of the examination of both Mr. Hacking and Mr. Lewis, Commissioner Twitchell specifically inquired if a franchise had been obtained from Salt Lake City (R. 42, 64).

It is submitted in view of the case of *Utah Light & Traction Co. v. Public Service Commission*, *supra*, that this requirement cannot be sustained where motor carriers are concerned. It was error for the Commission to insist upon the presence of this requirement.

Requirement number 3 pertained to the use of fare boxes. This requirement, standing alone, might be construed as



showing that the Commission was interested in the fact that the fares were to be paid on the buses. However, such a construction is not possible in view of requirement number 2 which specifically states that tickets and passes are to be sold on the cars and not from terminals. It is submitted that requirement number 2 is a valid test in view of the fact that the legislature was concerned with the burden of collecting a sales tax. However, it is difficult to believe that the legislature was concerned with the receptacles into which the fares paid on the buses were to be placed. Concerning this requirement, Mr. Lewis testified as follows.

“A. Well, we tried to secure fare boxes, the same as street car buses, but they weren’t available.” (R. 60).

Strict compliance with this requirement cannot be sustained

It is conceded that the plaintiff did not have a franchise or a permit from Salt Lake City for the Kearns run, nor did the plaintiff have fare boxes as they are known on the Salt Lake City Lines.

In view of the above discussion, a decision based upon lack of compliance with 2 invalid requirements is error.  
Compliance with Valid Requirements.

Concerning the 3 remaining requirements, it is conceded that they are proper factors to be considered. By definition a street railway is confined to a municipality and the surrounding suburban area. The requirement that frequent stops be made and the fares be paid on the buses are the main



reasons why the collection of a sales tax would be burdensome. It is the contention of the plaintiff that the Kearns operation complies with these requirements.

Test numbers 2 and 4 provide for the payment of fares on the buses and that frequent stops be made in picking up and discharging passengers. The evidence is clear that 70 per cent of all fares were paid on the buses and it likewise follows that 70 per cent of all passengers were picked up other than at the terminal. There is no question but what Lewis Bros. Stages could and did pick up passengers at any corner within Salt Lake City on its outgoing trip, as well as picking up and discharging passengers at the Kalunite plant and in Taylorsville. At Kearns, which was laid out in the nature of a community, passengers were picked up and discharged at the various street intersections and at numerous other loading stops. And again on the return trip, passengers were picked up at Taylorsville and the Kalunite plant and were discharged at any desired place on the entire return trip, including any corner within the city limits of Salt Lake City. Passengers picked up at the numerous loading stations mentioned above paid their fares on the buses. It is submitted that making change, including change for the sales tax to 9,100 passengers (70 per cent of 13,000 hauled on peak days) as they entered the buses was surely the type of burden and delay which the legislature intended to alleviate when it created the exemption.

Concerning the question of whether the Kearns operation was sufficiently local or within a general metropolitan area as

required by the Commission, it may be best to compare this operation with the service now offered by Salt Lake City Lines and which was formerly given by Airway Motor Coach Lines, Inc. The proximity of these suburban communities which now receive service from the Salt Lake City Lines as compared with Kearns is shown by the map at page 28 of this brief.<sup>6</sup>

It will be observed that Kearns is much closer to Salt Lake City than 6 of these other towns now actually being served by a transportation system which the Commission concedes is the best example of what was meant by a street railway. Also, those riding the buses to these outlying towns are required to pay an increased fare and are not permitted to be discharged within the city limits wherein city buses provide service. Actually, during normal times the plaintiff would not have been asked to give this service, but rather, such service would have been given by the city lines as it does to these other outlying communities. But during the war the city lines had been required to give additional service to places such as the small arms plant, and in view of the unavailability of equipment the facilities of the city lines could not handle the additional needs required by the soldiers of Camp Kearns. Consequently, during the war emergency the plaintiff was asked to *supplement* the service of the normal street transportation system within the Salt Lake City metropolitan and suburban area.

## CONCLUSION

The burden of collecting mills on the Kearns run was the type of burden which the legislature intended to avoid

when it exempted "street railway fares" from the sales tax. This was recognized by the Tax Commission when it first considered the Kearns operation and such a conclusion is supported by the Supreme Court in the Traction Co. case, *supra*, wherein it held the term "street railway" to be generic and to mean a street transportation system. Upon reconsideration, the operation should still be construed as being exempt since it complies with the valid tests now applied by the Tax Commission. This conclusion is especially warranted when it is remembered that the plaintiff during a war emergency was asked to *supplement* and give service which in normal times would have been given by the city lines; and in view of the fact that the plaintiff relied upon the assertion made by the Tax Commission that no tax need be collected. Concerning this last point the following statement from the dissenting opinion in *Olson Co. v. State Tax Commission*, 109 Utah, 563, 582, 168 P.2d 324, should be seriously considered.

"I must dissent wholly from the holding that the Tax Commission, interpreting and applying an act such as this, can supervise another's business as to taxes he must collect and pay, year after year, directing him to collect and remit taxes on certain transactions, and not to collect taxes on other types of transactions, and then years later comes back and says,

'Because you followed our instructions and directions, you shall now be penalized by being required to pay out of your own pocket the taxes we told you not to collect, and also be subjected to a severe penalty because we have now changed our mind and way of doing business.'

"Bear in mind that the merchant collecting the sales tax does so as the agent or employee of the tax commission and under its supervision and direction and not as part of his own business."

The deficiency assessment now being levied is not only inequitable but illegal in view of the fact that the Kearns operation was an integral part of a wartime street transportation system and was originally so construed by the Tax Commission.

The present order of the Tax Commission should be reversed and set aside.

Respectfully submitted

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