

1949

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

Utah Supreme Court

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**In the Supreme Court  
of the State of Utah**

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LEWIS BROTHERS STAGES,  
ORSON LEWIS, doing business as  
*Plaintiff,*

vs.

STATE TAX COMMISSION,  
*Defendant.*

Case No. 7311

**FILED**

MAY 20 1949

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**BRIEF OF DEFENDANT**

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CLERK, SUPREME COURT, UTAH

**G. HAL TAYLOR,**

*Attorney for Defendant*

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# In the Supreme Court of the State of Utah

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ORSON LEWIS, doing business as

LEWIS BROTHERS STAGES,

*Plaintiff,*

vs.

STATE TAX COMMISSION,

*Defendant.*

Case No. 7311

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## BRIEF OF DEFENDANT

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### PRELIMINARY STATEMENT

The fundamental facts in this case are not in dispute and plaintiff's Statement of Facts, as outlined in its brief, is substantially correct and the material parts thereof are adopted by the defendant for the purpose of this case.

### QUESTIONS INVOLVED

1. As pointed out by the plaintiff, the major issue in this case is a judicial construction of Title 80, Chapter

15, Section 4, Utah Code Annotated, 1943, which imposes a tax equivalent to two per cent of the amount paid “(1) to common carriers \* \* \* as defined by Section 76-2-1 Revised Statutes of Utah, 1933, \* \* \* for all transportation \* \* \* provided, that said tax shall not apply to \* \* \* street railway fares \* \* \*.”

2. Whether the Tax Commission did in fact construe the Kearns operation of Lewis Brothers Stages as being within the designated exemption.

3. If the court finds that such construction did in fact exist, whether such construction of the statute is correct.

We will discuss these three questions chronologically as outlined by plaintiff in its brief under plaintiff's Statement of Errors.

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

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

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

## REPLY TO PLAINTIFF'S ARGUMENT

## I.

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

In discussing this question raised by plaintiff, it is submitted that the only question to be determined is the proper definition of the term "street railway fares." Plaintiff cites portions of the Utah Supreme Court Case, *Utah Light and Traction Company v. State Tax Commission of Utah*, 92 Utah 404, 68 Pac. 2d 759, in support of plaintiff's position that the exemption of "street railway fares" was intended to cover situations such as the Kearns operation. Plaintiff has apparently read the law as set forth in the *Utah Light and Traction Company* case and makes the novel assertion that "the Kearns operation was only an integral part of an emergency street transportation system in and about Salt Lake City." (Plaintiff's Brief, P. 10) and further, "It must be recognized that it was only an extension of a street transportation service during a war emergency which the traction company lacked facilities to make." (Plaintiff's Brief, P. 11) Plaintiff cites no case, and indeed it is believed none can be found, to support such contention. There is no assertion, nor is there any evidence in the record, which would indicate that Plaintiff's Kearns operation had anything at all to do with the operation of the Salt Lake City Lines.

This court, in deciding the *Utah Light and Traction Company Case* said

“Scrutiny of the language of the statute leads to the same result. In Section 4 (b), the tax is imposed as follows: ‘A tax equivalent to two (2) per cent of the amount paid: (1) To common carriers, or telephone or telegraph corporations as defined by Section 76-2-1 of the Revised Statutes of Utah, 1933,’ to which is added the proviso that such tax is not to apply to ‘street railway fares.’ Turning to section 76-2-1, we find the definition of common carriers ‘includes every railroad corporation; street railroad corporation; \* \* \* engaged in the transportation of persons or property for public service over regular routes between points within this state.’ Subdivision 14. In the same section, the term ‘street railroad’ is defined as including ‘every railway, and each and every branch or extension thereof, by whatsoever power operated, being mainly upon, along, above or below any street, \* \* \* within any city or town,’ etc. Subdivision 7. It would seem to follow that when the phrase, ‘street railway fares,’ was used the legislative intent was that such language had reference to the fares paid on every street railway, ‘and each and every branch or extension thereof, by whatsoever power operated.’ *This language negatives the idea of an intention to classify or discriminate against the users of motorbuses or trolley coaches and to favor the riders of street cars particularly where, as in plaintiff’s case, the street car lines, bus lines and trolley routes are necessary parts of an integrated street railway system.*” (Italics supplied.)

and further:

“The trolley coach and motorbus substitutions in place of street cars on rails or as an extension



of the rail system are ordinarily considered as being within the scope of street railway service and systems or auxiliary thereto. *City of Columbia v. Tatum*, 174 S. C. 366, 177 S. E. 541; *Russell v. Kentucky Utilities Co.*, 231 Ky. 820, 22 S. W. (2d) 289, 66 A. L. R. 1238; *Anderson v. Knoxville Power & Light Co.*, 16 Tenn. App. 259, 64 S. W. (2d) 204."

It is not for counsel to suggest to this court what interpretation should be placed upon the quotations from the *Utah Light and Traction Company* case. However, it would appear from a reading of the entire case that the Tax Commission erroneously required the Traction Company to report trolley coach and motorbus fares while exempting fares paid by streetcar riders within the same integral street railway system. It is, therefore, submitted that in order for a transportation system to qualify under the exemption of "street railway fares" the motorbuses or trolley coaches operating within the system must be an extension or branch of a street railway system.

This court in two other cases has considered what constitutes a street railway. The first case decided was *Utah Rapid Transit Company v. Ogden City et al*, 58 Pac. 2d 1, 89 Utah 546 (1936). In this case the plaintiff sought a writ of prohibition prohibiting the defendant city from purchasing and operating motorbuses as a common carrier within the city of Ogden. Prior to that time the plaintiff had been operating a street railway



within the limits of Ogden City and then began using motorbuses in connection therewith. The sole question in the case was whether or not the city had authority to own and operate buses within the city for the purpose of transporting passengers. The statutes of Utah permitted the city to maintain and operate a street railway. The contention of the defendant was that the purpose of such grant of power to municipalities to operate street railways was to enable them to furnish transportation over the streets and the means employed to that end were largely in their discretion. The court clearly held that the authority to operate a street railway does not imply authority to operate motorbuses. The court said:

“ \* \* \* but to say that the former means of transportation (street railway) fairly includes the latter (operation of motorbuses) is to extend the import of the word “railway” far beyond its meaning.”

The court quoted from the case of *Simoneau v. Pacific Electric Railroad Co.*, 159 Cal. 494, 115 Pac. 320, 323, wherein that court quoted from the case of *Hannah v. Metrop. St. R. Co.*, 81 Mo. App. 78, 79 as follows:

“ ‘A street railway’ has been variously defined. As the name indicates, the primary meaning of ‘street railway’, or ‘street railroad’ is one constructed and operated on and along the streets of a city or town for the carriage of persons from one point to another in such city or town or to and from its suburbs.”

The Utah Supreme Court went on to say: " " "

"A street railway is such regardless of the motive power used. \* \* \* While no particular motive power, and no particular location along the street is an essential characteristic of a street railway, yet a way or road without rails is not a railway or railroad. \* \* \* No case has been called to our attention and we have been unable to find a case in which a motorbus line not run on rails has been held to be a street railway."

In fact, the Utah Court said the contrary was held to be the case in *Woodward v. City of Seattle*, 140 Wash. 83, 248 P. 73, 75. In that case Seattle owned a street railway system. It acquired a bus, and while operating the same in connection with their street railway a passenger was injured by negligence of the bus driver. An action was brought against the city and the court held that notwithstanding the city had the authority to operate a street railway it was without authority to operate motorbuses. In its decision the court said:

"The power granted by statute is restricted to railways; and to say that the term 'railways' may be construed to include motorbuses and motorbus routes is to say that the term also includes all manner of transportation, including that by water and air. It is common knowledge that for many years street railway systems have been operated without the operation of motorbuses in connection, and this is conclusive that such operation is not indispensable."

From the statement of the Supreme Court of the State of Utah in the above case and from the decisions which it favorably quotes, there is little doubt that the law in Utah must be considered to be that the term "street railway" cannot include, at least ordinarily, motorbus transportation or any other form of transportation not run on rails, or at least a basic street railway system which includes an extension or branches on which trolley coaches or motorbus substitutions in the place of streetcars on rails are being utilized.

The second Utah case was *Utah Light & Traction Company v. Public Service Commission*, 101 Ut. 99, 118 Pac. 2d 683. The salient facts pertinent to our problem are that the plaintiff brought an action for the revocation of the order of the defendant issuing a certificate of convenience and necessity to the Airway Motor Coach Lines as a common carrier between Salt Lake City and nine smaller communities in the South end of Salt Lake County.

One of the contentions made by the plaintiff was that the Commission's order was contrary to law for the reason that the statutes required the application for a certificate of convenience and necessity to show that the applicant had received the required consent, franchise or permit of the proper county, city, municipal or other public authority before he could secure a certificate of convenience and necessity. The plaintiff asserted that Airway Motor Coach Lines had no such franchise. For

that reason the issuance of the certificate was contrary to law. The Supreme Court dealt with this contention by saying that a city or municipal corporation had not authority under the statutes of the state of Utah to grant or require an automobile corporation to have a local franchise to engage in business, though the statutes permit them to grant a franchise to a street railway company. The court states in very clear language:

“That an automobile corporation such as this (Airway Motor Coach Lines) is not a street railway was held in *Utah Rapid Transit Co. v. Ogden*, 89 Utah 546.”

For this and other reasons the order of the Public Service Commission was affirmed. Consequently, it seems clear that Lewis Brothers Stages cannot claim to be a street railway. In addition to this, in view of the *Utah Rapid Transit Company* case, it would seem almost without question that the term street railway may not be extended to include motorbus lines though such lines operate in essentially the same manner as a street railway.

In considering what the characteristics of a street railway consist of, the following brief quotations would seem helpful:

(1) “*The right to lay rails in a public street is the distinguishing feature of a street railway.*” (*Atlantic City and S. R. Co. v. State Board of Assessors*, 96 Atlantic 568, 571)

(2) "Street railways are only such as are authorized to occupy and *use the streets of a city or town under franchise from the municipality.*" (*Lewis v. Omaha and C. B. S. Ry. Co.*, Iowa, 138 N.W. 1092, 1094)

(3) "A street railway is intended merely for local convenience and to *facilitate travel from point to point within the municipality or suburban district and immediately adjacent thereto.*" (*Hartzell v. Alton, Grante and St. Louis Traction Co.*, 104 N.E. 1080, 1081, 263 Ill. 205)

(4) "The fundamental purpose of a street railway is to *accommodate street travel*, and not to travel to or from points beyond the city's lines." (*City of Aurora v. Elgin, A. & S. Traction Co.*, 81 N.E. 544, 547, 227 Ill. 485)

(5) "Street railways are \* \* \* to enable inhabitants of municipalities to pass from one portion of their territory to another and to stop at *frequent and convenient points* according to the regulations of the company." (*Sparks v. Phila. and C. R. Co.*, 61 A. 881, 882, 212 Pa. 105)

(6) "The tracks for a street railway are ordinarily laid to *conform to street grades. Its cars run at short intervals, stopping at street crossings to take on and let off passengers and not freight.*" (*Hannah v. Metrop. St. R. Co.*, 81 Mo. App. 78, 82, citing *Williams v. City Elec. Ry. Co.*, 41 F. 556)

(7) "Further distinction is made in the case of *Hartzell v. Alton, Granite and St. Louis Traction Co.* previously cited. Therein the courts

state that the law makes a clear distinction between a street railroad and a railroad. *A street railroad is a railroad laid down on streets of a town or city for purpose of carrying passengers from one point to another in the city or to and from its suburbs, but a railroad runs across country carrying both passengers and freight and takes on the character of a commercial railroad. (Italics supplied.)* These cases are amply supported by many others holding similarly.

The court in the Utah Light and Traction Company case and plaintiff in its brief on page 12 indicate that in determining this matter we must look not to the letter of the statute, but rather to the intent of the Legislature. The most that can be said with regard to the intention of the Legislature is as Judge Wolfe pointed out in his concurring opinion in the traction company case that "the Legislature did use the term 'street railway' here to mean street transportation system." We submit that no broader interpretation should be given to street transportation system than is given in the traction company case and that, if a street transportation system is to be exempt from the collection of sales tax on their fares, there must be at least partial compliance with the definition of common carrier as set forth in Title 76-2-1, Revised Statutes of Utah, 1933.

To now question what the Legislature meant by street railway fares is purely speculative and we believe that the best indication of what the Legislature intended is what the Legislature said. Counsel has cited no case



and we have been unable to find one single case in which the words "street railway" are construed to mean a bus transportation system or any other type of transportation system except one which is operated on *rails*. To hold that the plaintiff in this case is not subject to this tax would be to entirely nullify the statute imposing the tax on common carriers. If Lewis Brothers Stages be exempt from the sales tax, considering their mode of operation, then we would submit that every transportation company operating in the state of Utah is also exempt.

Several portions of the record should be specifically consulted with regard to this question. The testimony of Mr. Hacking, Chairman of the Public Service Commission, with regard to the operations of Lewis Brothers Stages indicates conclusively that Lewis Brothers Stages had no authority to operate a transportation system which could possibly be construed as "street railway." (R. 32-42) This testimony indicates that the Lewis Brothers Stages could pick up passengers at any place on the out-bound trip but could not discharge on the out-bound trip, and likewise the Lewis Brothers Stages could pick up passengers on the in-bound trip but could not discharge passengers along the route until reaching Salt Lake City.

In response to question by counsel as to whether Lewis Brothers Stages had any certificate of convenience and necessity allowing them to pick up and discharge



passengers within the metropolitan area of Salt Lake City, Mr. Hacking answered: "They have no such certificate: never have had to my knowledge." (R. 41) To the same effect Mr. Orson Lewis testified on cross examination as follows:

Q. "Mr. Lewis, you testified you picked up and let off passengers between your terminal, Salt Lake and Kearns; where did you pick up the passengers?"

A. "Any place on our route.

Q. "And on your out-bound trip, where did you let them off?"

A. "33rd South.

Q. "That is the first let off?"

A. "Yes." (R. 62)

We submit that, in view of this and other testimony, Lewis Brothers Stages wholly fails to meet the fourth test used by the Commission which provides "(4) Frequency of stops to pick up *and* deposit passengers along streets of a city *and suburban areas.*" (Italics supplied.)

One other principle which we feel must be considered in construing this particplar section is that announced by this court in the case of *Norville v. State Tax Commission*, 98 Utah 170, 97 Pac. 2d 937, wherein the court held "But, likewise, statutes exempting taxpayers from

a general taxing statute are construed strictly against those seeking to escape the tax burden." *Stillman v. Lynch*, 56 Utah 540, 192 Pac. 272, 12 A. L. R. 552; *Parker v. Quinn*, 23 Utah 332, 64 Pac. 961; *In re Steehler's Estate*, *supra*; 25 R.C.L. Sec. 309, at p. 1093.

As we view this case the plaintiff is claiming to be exempt from a general taxing statute and it is our contention that the exemption of street railway fares is an exemption from a general taxing statute and is to be strictly construed against the plaintiff.

## II.

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

This section of plaintiff's brief urges upon the court that there has been an administrative construction by the Tax Commission which, in considering cases of this kind, should exempt the Lewis Brothers Stages from the payment of this tax. We submit the fact to be that the record will not sustain the position of the plaintiff; that there has never been any administrative construction of this particular exemption, i.e., "street railway fares." True it is that the testimony of Mr. Shields (R. 48-53) indicates that in representing the plaintiff at that time, Mr. Shields had some discussion with members of the Tax Commission concerning the general problem of the sales tax and the conduct of the Lewis Brothers Kearns operation. We submit that, accepting Mr. Shields'

testimony at its face value, this does not establish an administrative construction with regard to the exemption herein involved. Mr. Shield's testimony (R. 50) indicates that Mr. Bennion's impression of the Kearns operation was that it was in the nature of a streetcar business. Mr. Shields testified as follows:

“So I came up to the Capitol the next morning, and I talked to Mr. Bennion, and it seems to me he was in this room (indicating), right here in a little room, as I remember, and I talked to him about it, and he said: ‘That is going to be just an in-and-out business, if what they tell us is so. There will be several thousand soldiers out there, and the Government is opposed to a tax on them. They claim it is in the nature of a street-car business, and everybody is trying, the Chamber of Commerce here are trying to save the soldiers’ expenses wherever it can be done, and make it as comfortable for them as it can be,’ and he said, ‘I think you are perfectly alright.’”

We also point out in this connection that the testimony of Mr. J. Lambert Gibson (R. 25-32) and the testimony of Mr. Bennion (R. 42-45) indicates that neither of these two commissioners have any present recollection of having considered the matter of the exemption from the sales tax of Lewis Brothers Stages. One of the great difficulties when considering the administrative construction of the statute by an administrative body, particularly where such administrative construction rests upon verbal conversations, is that it cannot be ascertained with any degree of certainty as to exactly what

matters the alleged conversations contained. This difficulty is particularly exemplified by the testimony of Mr. Leonard Amodt (R. 54-56). Mr. Amodt testified having talked to Mr. Barney, one of the auditors of the State Tax Commission, and testified as follows:

Q. "You remember at the instigation of this Kearns line, Mr. Orson Lewis informed you that you would have to compute the sales taxes on the fares, but apparently you had some doubt about this, or wanted to make a further check, and you called Mr. Barney whom you knew quite well, as he was an auditor of the Tax Commission at that time?"

A. "Yes, that is right."

Q. "In substance, in your conversation, did he state that under the circumstances which you outlined he doubted whether the sales tax should be charged by you; it was his impression that it shouldn't be charged?"

A. "That was his opinion."

Q. "Something to that effect?"

A. "Yes, that was his opinion."

Mr. Amodt further testified on cross-examination of counsel for the Tax Commission as follows: (R. 55)

Q. "Mr. Amodt, you say that Mr. Barney told you that under the circumstances as outlined

no sales tax applied. Do you recall what circumstances you outlined to him?

A. "I called Mr. Barney on the telephone, on my phone one night, and explained our operation to Kearns."

Q. "Do you recall what you said?"

A. "What?"

Q. "Do you recall what you said?"

A. "I explained the operation, saying '*We are operating a bus system similar to Salt Lake City Lines.*' There was no detail about it. As long as I called him, I didn't want it to go on record; but I did call, and explained to him our operation. (Italics added.)"

Q. "You indicated to him it was similar to Salt Lake City Lines?"

A. "Yes. I told him passengers were picked up and let off at different points."

It can be seen readily from this testimony that the impression of the nature of the plaintiff's Kearns operation held both by the Tax Commission and by Mr. Lewis' auditor was that this operation was similar to the Salt Lake City Lines as it was operating at that time.

We submit that the evidence in the record does not sustain any administrative construction at all which would exempt the plaintiff herein from the collection and

payment of sales tax on its Kearns operations. Admittedly, there has been a misunderstanding which has an apparent unfortunate result with regard to this particular taxpayer. However, mere hardship or misfortune does not and in fact cannot excuse the payment of taxes.

Counsel for the plaintiff makes a somewhat lengthy comparison with the operations of Airway Motor Lines and concludes, apparently from the testimony of Mr. Gibson, that Airway Motor Lines paid no tax and, therefore, the plaintiff should pay no tax. Considering the fact to be that Airway Motor Lines paid no tax, this in itself cannot and does not excuse this taxpayer from paying the tax. Plaintiff recognizes that an erroneous construction made by an administrative body will not be upheld and cites *Hotel Utah v. Industrial Commission*, 107 Utah 24, 151 Pac. 2d 467, and *E. C. Olsen Company v. State Tax Commission*, 109 Utah 563, 587, 168 Pac. 2d 324.

This court has considered the problem of administrative construction many times and that portion of the E. C. Olsen case set forth in plaintiff's brief (P. 18) covers the rule quite well. Before there can be an administrative construction of a statute or for that matter a judicial construction, the statute must be of such a nature that it is susceptible of construction. In this case we submit that the exemption from the collection of sales tax on "street railway fares" is not susceptible of construction and that the exemption means what it says.

Therefore, we conclude and assert the fact to be that there is, in the first place, no sufficient evidence of administrative construction of this exemption and, secondly, if the court should determine that there has been such administrative construction, that an interpretation of the statute which would hold a motorbus operation such as Lewis Brothers Stages to be a "street railway" is out of harmony with the provision of the statute and cannot be given weight, particularly in view of the fact that this is an exemption from a general taxing statute and must be strictly construed against the taxpayer.

### III.

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

This portion of plaintiff's brief is a continuation of plaintiff's argument that there is an administrative construction of that portion of Title 80-15-4, which exempts "street railway fares." A compliance by a street transportation system of the tests set forth in Exhibit A would, it is admitted, constitute a "street railway." Plaintiff contends that only three of the requirements can be sustained and that No. 3 and No. 5 are erroneous and that to require complete compliance was error.

Requirement No. 5, which holds "(5) *Should operate under permit or franchise from city or municipal corporation,*" contemplates a type of street transportation sys-



tem which does in fact require a franchise from Salt Lake City Corporation. Plaintiff cites the case of *Utah Light and Traction Company v. Public Service Commission*, 101 Utah 99, 110, 118 Pac. 2d 683, as holding “they (franchises) 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. A business such as that of the Airways **does not so burden the street.** It uses the streets only for the purpose of travel and transport and it is not subject to franchise requirements.” Plaintiff concludes then that this requirement cannot be sustained where motor carriers are concerned. (Plaintiff’s brief, P. 18) We submit, however, that contrary to plaintiff’s interpretation of this particular requirement that the inference is strong that motorbus operations such as the Lewis Brothers Stages cannot and do not qualify as a “street railway.”

Distinguishing feature No. 3 “*Use of fare boxes*” it is submitted is a valid test and, while not conclusive, is one factor which is considered by the Commission in determining what constitutes a “street Railway” and we submit, while it is not of too much importance, the Commission found as a matter of fact that the taxpayer had no regular fare boxes. (Findings of Fact No. 4 - R. 69)

Of the three remaining requirements, plaintiff con-

cedes that they are proper factors to be considered and contends that the plaintiff's Kearns operation complied with these requirements.

Test No. 4 "*frequency of stops to pick up and deposit passengers along streets of city and suburban areas.*" The crux of this test, it is submitted, and plaintiff's assertion that the Kearns operation meets such test, is based upon plaintiff's basic theory that the Kearns operation was an "extension of street transportation service by an independent carrier" (Plaintiff's Brief - P. 18) or "the Kearns operation was only an integral part of an emergency street transportation system in and about Salt Lake City." (Plaintiff's Brief - P. 10) The frequency of stop test, it is submitted, requires that the passenger service offered by the transportation system is such that the inhabitants of a municipality can pass from one point within the municipality to another and frequent stops must be made for the purpose of loading and discharging passengers. As heretofore pointed out, the plaintiff's Kearns operation did not *pick up and discharge* passengers on its outgoing trip, nor did it *pick up and discharge* passengers on its in-bound trip. The evidence in the record clearly shows that plaintiff's only authority and only mode of operation was to pick up passengers on the way out of Salt Lake City and to take these passengers to Kearns or, conversely, to pick up passengers at Kearns and deposit said passengers at various points within Salt Lake City. Plaintiff's operation did not meet the require-

ment of frequency of stops to pick up *and* deposit passengers along the streets of Salt Lake City, or for that matter the suburban area surrounding Salt Lake City. The Findings of Fact No. 5 (R. 69) made by the Commission should be sustained.

Test No. 2 "*Sale of tickets or passes on cars and not from terminals*" we submit was only partially complied with. Mr. Lewis, in his testimony (R. 63) testified that the tickets were sold at terminals and also that tickets were sold on the buses. It is submitted, in view of this testimony, that plaintiff's Kearns operation complied only partially with such test, for the reason that they did maintain a ticket terminal.

As to the remaining test as set forth in Exhibit A "*(1) street railway is intended for local convenience to facilitate transportation of persons from point to point within municipality or suburban districts,*" we contend that, unless the court adopts plaintiff's theory that their Kearns operation was an extension of a normal street transportation system, the operation totally fails to comply with such test. The Kearns operation was intended to facilitate transportation of persons from Salt Lake City to Kearns, Utah, and not within the municipality or within the suburban district. True it is that a minor portion of plaintiff's operation, conducted with the acquiescence of the Public Service Commission and its General Order No. 10, which applied to all carriers both interstate and intrastate (R. 39), might be inter-

preted as a partial compliance with Test No. 1. However, it could as well be applied to any intrastate carrier or to plaintiff's operations between Salt Lake City and Tooele, Bingham, etc. Such nominal compliance, we submit, does not establish a mode of operation on the part of plaintiff's Kearns operation which could be interpreted as local transportation from point to point within a municipality. Plaintiff did not and could not operate within Salt Lake City. Mr. Hacking on cross examination testified as follows: (R. 37-38)

Q. "Do you recall under the terms of that certificate, could Lewis Brothers Stages pick up passengers at their terminal in Salt Lake City, and discharge them on the outbound trip at, say, Fifth South?

A. "No.

Q. "Could they discharge them, or what was their first discharge point on their out-going route?

A. "Their discharge point on the written certificate was Kearns, on the pick-up going out.

Q. "On the pick-up going out; they could not discharge passengers until they got to Kearns?

A. "That's right.

Q. On the return trip, they could pick them up, I assume, anywhere within Kearns. Were there other places that they could pick up?

A. "Well, no. Kearns was their origin point on their return trip, the only origin point.

Q. "And they could discharge any place on the inbound trip within Salt Lake City; is that right?

A. "That is right."

## CONCLUSION

In conclusion the defendant, State Tax Commission, respectfully submits that, in view of the authorities cited and arguments presented herein, this court should deny plaintiff's claim that the fares collected were exempt as being "street railway" fares, pursuant to the provisions of Title 80-15-4, Utah Code Annotated, 1943.

Defendant further submits that no administrative construction has been established by the record in this case by reason of which it can be claimed that the plaintiff's fares were exempt, or if such administrative construction can be said to have been established, then the conclusion must be, we submit, that such interpretation was erroneous and cannot be given weight.

The plaintiff herein was not a "street railway" and the fares collected were not "street railway fares."

WHEREFORE, defendant prays that the decision heretofore rendered in this matter be affirmed and judgment rendered accordingly.

Respectfully submitted,

G. HAL TAYLOR,

*Attorney for Defendant*