

1949

Leon Shaw v. Orem City, Victor Durham, E. H. Johnson, A. A. Richards, Woodruff Jensen, and Philo Edwards : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

McCullough, Boyce & McCullough; Attorneys for Plaintiff and Appellant;

Recommended Citation

Brief of Appellant, *Shaw v. Orem City*, No. 7376 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1161

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

LEON SHAW,

Plaintiff and Appellant,

vs.

OREM CITY, a municipal corporation and VICTOR DURHAM, E. H. JOHNSON, A. A. RICHARDS, WOODRUFF JENSEN, and PHILO EDWARDS, Councilmen constituting the City Council of said corporation,

Defendants and Respondents.

Case No.
7376

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY,
STATE OF UTAH

HONORABLE WM. STANLEY DUNFORD
McCULLOUGH, BOYCE & McCULLOUGH

Attorneys for Plaintiff and Appellant

FILED

OCT 13 1949

I N D E X

	Page
STATEMENT OF FACTS	1
STATEMENT OF ERRORS	4
ARGUMENT	5
PROPOSITION I. THAT THE PROVISIONS OF SEC. 15-8-84, UTAH CODE ANNOTATED, 1943, DO NOT AUTHORIZE OR PERMIT THE ENACTMENT OF THE ORDINANCE IN QUESTION, BUT IF IT WERE TO BE SO CONSTRUED AS TO GRANT TO RESPONDENTS AUTHORITY SO TO DO, SAID SEC. 15-8-84 WOULD BE VIOLATIVE OF THE PROVISIONS OF ARTICLE 1, SECTIONS 1, 2, 7, 11, 22, 24, 25, 26, 27; ARTICLE XI, SECTION 5 AND ARTICLE V, SECTION 1, OF THE CONSTITUTION OF THE STATE OF UTAH	5
PROPOSITION II. THAT THE LOWER COURT IN MAKING ITS DECISION READ INTO THE DECISION EVIDENCE WHICH WAS NOT PRESENTED TO THE COURT BY EITHER PLAINTIFF OR DEFENDANT AND WHICH WAS NOT AGREED TO BY EITHER PLAINTIFF OR DEFENDANT	8
PROPOSITION III. THAT SAID ORDINANCE IS INVALID AND UNCONSTITUTIONAL AND VIOLATIVE OF THE PROVISIONS OF ARTICLE I, SECTIONS 1, 2, 7, 11, 22, 24, 25, 26, 27 AND ARTICLE XI, SECTION 5 OF THE CONSTITUTION OF THE STATE OF UTAH AND OF AMENDMENTS V AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA	10
CONCLUSION	14

STATUTES CITED

15-8-84, Utah Code Annotated, 1943	2, 4, 5
46-0-86, Utah Code Annotated, 1943	11
27-0-1, Utah Code Annotated, 1943	11
46-0-45, Utah Code Annotated, 1943	11
Chapter 64, Utah Code Annotated, 1943, Title 104 (Declaratory Judgment Statute).....	3

CASES CITED

	Page
Gronlund v. Salt Lake City--Utah--; 194 P. 2d 464 at p. 466	6, 7, 8, 12
State v. Mason, 94 Utah 501 at p. 508; 78 P. 2d 920, 923; 117 A.L.R. 330	6
Broadbent v. Gibson, 105 Utah 53; 140 P. 2d 149	12
Eden v. People, 161 Ill. 296; 43 N.E. 1109	12
City of Tacoma v. Krech, 15 Wash. 296; 46 P. 255	12
ExParte Jentzsch, 112 Cal. 468; 44 P. 8023.....	12
Salt Lake City v. Revene, 101 Utah 504; 124 P. 2d 537	12

Constitutional Provisions:

Article I, Sections 1, 2, 7, 11, 22, 24, 25, 26 and 27, Constitution of the State of Utah	3, 4, 5, 10
Article XI, Section 5 of the Constitution of Utah	3, 4, 5, 10
Article V, Section 1 of the Constitution of the State of Utah	4, 5
Amendments V and XIV of the Constitution of the United States	3, 5, 10

Miscellaneous:

50 American Jurisprudence, Sundays and Holidays, Section 8	5
---	---

IN THE SUPREME COURT of the STATE OF UTAH

LEON SHAW,

Plaintiff and Appellant,

vs.

OREM CITY, a municipal corporation and VICTOR DURHAM, E. H. JOHNSON, A. A. RICHARDS, WOODRUFF JENSEN, and PHILO EDWARDS, Councilmen constituting the City Council of said corporation,

Defendants and Respondents.

Case No.
7376

BRIEF OF APPELLANT

STATEMENT OF FACTS

The facts in this case are found in the first four paragraphs of plaintiff's complaint, which were admitted in defendants' answer and in a stipulation made in open court between the parties, and are substantially as follows:

That plaintiff is a resident of Utah County, State of Utah, doing business as a tavern operator in Orem City, Utah, which business is duly licensed as required

by law. That plaintiff's principal business consists of the sale of draught and bottled beer to the general public. That in connection with said business and incidental thereto plaintiff sells to the general public such items as candy, soft drinks, tobacco, cigarettes and cigars. (R. 1, 2, 31, 32).

That Orem City is a municipal corporation organized and existing under and by virtue of the laws of the State of Utah. That the defendants, Victor Durham, E. H. Johnson, A. A. Richards, Woodruff Jensen and Philo Edwards, constitute the duly elected, qualified and acting City Council of Orem City, Utah. (R. 1, 31, 32).

That for many years prior to May 29, 1947, that is from approximately 1934 until May 29, 1947, the sale and offering for sale of beer in Orem City was permitted and was lawful on Sunday. (R. 32, 43) That on or about June 25, 1948, said city council, relying on Sec. 15-8-84, Utah Code Annotated, 1943, passed Orem City Ordinance No. 91, Section 1 of which reads as follows:

“It shall be unlawful for any persons to engage in the business of the sale of light beer *at retail* in bottles or on draught within the corporate limits of Orem City on the first day of the week commonly called Sunday.” (R. 1, 5, 6)

That said ordinance became effective July 1, 1948. That all other ordinances of Orem City relating to Sunday closing have been repealed by the city council of Orem City so that there is now no Orem City Sunday closing ordinance prohibiting or making unlawful the sale, or offering for sale, of any other item, service or commodity

on Sunday except beer. That said Ordinance No. 91 prohibits the sale and offering for sale on Sunday of *beer only*. (R. 12, 32)

That there are within the corporate limits of Orem City approximately ten licensed beer dealers all but two of which have draught beer licenses. That there are within the corporate limits of Orem City a great number of other businesses all of which may, and many of which do operate in the usual manner on Sunday. That included in such businesses are the following: Cleaning establishments, bank, automobile service stations, garages, auto parts store, implement store, clothing stores, meat markets, grocery stores, drug store, pool hall, furniture stores, motion picture theatre, ice cream parlor, confectionary. That this list of business is representative but not all inclusive of the businesses which exist within the corporate limits of Orem City and may or do operate on Sunday. (R. 33, 45)

On September 3, 1948, plaintiff commenced the instant action under Chapter 64, Utah Code Annotated, 1943, Title 104, known as the Declaratory Judgment Statute whereby plaintiff sought to have the ordinance in question declared unconstitutional and invalid as being in violation of the provisions of Article I, Sections 1, 2, 7, 11, 22, 24, 25, 26 and 27 and Article XI, Section 5 of the Constitution of the State of Utah, and of Amendments 5 and 14 of the Constitution of the United States of America. (R. 1, 3) The case was argued before the lower court on the stipulated statements of facts contained in paragraphs 1 to 4 of plaintiff's complaint and as

stipulated in open court. No evidence for or on behalf of any of the parties was presented. On the 31st day of March, 1949, the lower court issued its memorandum decision and on the 8th day of June, 1949, final judgment was entered against the plaintiff, in which judgment the lower court upheld the constitutionality and validity of said Ordinance No. 91. From this judgment plaintiff appeals. (R. 26-28, 35)

STATEMENT OF ERRORS

1. The court erred in holding that the provisions of Section 15-8-84, Utah Code Annotated, 1943, do authorize or permit the enactment of the ordinance in question and do grant to respondents authority to enact said ordinance without being in violation of the provisions of Article I, Sections 1, 2, 7, 11, 22, 24, 25, 26 and 27, Article XI, Section 5 and Article V, Section 1 of the Constitution of the State of Utah.

2. The court erred in making its decision by reading into the decision evidence which was not presented to the court by either plaintiff or defendant and which was not agreed to by either plaintiff or defendant, which evidence is as follows:

(a) That the ordinance in question does tend to improve the morals; peace and good order of the community through its prohibition of the sale of beer on Sunday. (R. 33)

(b) Reference to the unrestricted sale of 3.2 beer (R. 25) and to congested traffic on Sundays in Orem City. (R. 26)

3. That the court erred in holding that Ordinance No. 91 is valid and constitutional and not violative of the provisions of Article I, Sections 1, 2, 7, 11, 22, 24, 25, 26, 27 and Article XI, Section 5 of the Constitution of the State of Utah and of Amendments V and XIV of the Constitution of the United States of America.

ARGUMENT

PROPOSITION I. THAT THE PROVISIONS OF SEC. 15-8-84, UTAH CODE ANNOTATED, 1943, DO NOT AUTHORIZE OR PERMIT THE ENACTMENT OF THE ORDINANCE IN QUESTION, BUT IF IT WERE TO BE SO CONSTRUED AS TO GRANT TO RESPONDENTS AUTHORITY SO TO DO, SAID SECTION 15-8-84 WOULD BE VIOLATIVE OF THE PROVISIONS OF ARTICLE I, SECTIONS 1, 2, 7, 11, 22, 24, 25, 26, 27, ARTICLE XI, SECTION 5 AND ARTICLE V SECTION 1, OF THE CONSTITUTION OF THE STATE OF UTAH. (Statement of Error No. 1)

It is a well known general rule that "municipal corporations possess and can exercise only such powers as are expressly granted them, necessarily incident to the powers expressly conferred, or essential to the accomplishment of the declared objects and purposes of the corporation." (50 Am. Jur. Sundays and Holidays, Sec. 8) *Therefore, the municipal government must legislate reasonably with respect to the OBJECTS and PURPOSES to be accomplished otherwise such action will be construed to be beyond its power and authority.*

Section 15-8-84, Utah Code Annotated, 1943, grants the general power and authority to municipal corporations to:

" . . . pass all ordinances and rules, and make

all regulations not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of the property therein.”

It is appellant’s contention that since the ordinance as framed does not extend to all vocations and to the sale of all merchandise except necessities, it is not designed to effect the purposes for which limited police powers are granted to municipalities.

This court in the case of *GRONLUND v. SALT LAKE CITY*, -U-; 194 P. 2d 464, at page 466, states as follows: “*THE PURPOSE OF SUCH STATUTES IS TO PROTECT SOCIETY BY ESTBLISHING A COMPULSORY DAY OF REST.*” If such is the purpose of the Sunday Closing law, what difference is there between an employee working in a tavern and an employee working in a grocery store, pool hall, automobile service station, garages, automobile parts store, implement store, furniture store, motion picture theatre, ice cream parlor, confectionary, etc., to mention but a few of the businesses that exist in Orem City. (R. 45) Certainly the labor of a tavern employee is no more arduous than the labor of some of the others.

In *STATE v. MASON*, 94 Utah 501, at page 508, 78 P. 2d 920, 923; 117 A.L.R. 330, this court stated: “In order to see whether the excluded classes or trans-

actions are on a different basis than those included, we must look to the *purpose* of the act. *The objects and purposes of a law present the touchstone for determining proper and improper classifications.*" As stated by this court in *GRONLUND v. SALT LAKE CITY* (cited supra), the object and purpose of Sunday Closing laws "*is to protect society by establishing a compulsory day of rest.*" The employee of a tavern is as much in need of that day of rest as the employee in a grocery store, pool hall, etc. How is it promotive of the health, safety, morals, peace, good order, comfort and convenience of the inhabitants of Orem City to prohibit the working of employees of taverns while permitting the employment of grocery store clerks, pool hall operators, icemen, movie theatre employees, etc? This court specifically answered this question in *GRONLUND v. SALT LAKE CITY* -U-; 194 P. 2d 464, at page 467, when it stated:

"Whether the purpose of the ordinance in question be conformable to the original purpose of such acts, to protect religious observance of the Sabbath or that of the protection of Society by establishing a compulsory day of rest, it is not clear why the prohibition of the sale of commodities is in furtherance of such purpose or object and the prohibition of the various permitted commercial activities is not. It is difficult to conceive why it is promotive of the health, safety, morals, peace, good order, comfort and convenience of the inhabitants of Salt Lake City to prohibit in effect the working of a salesman or saleswoman on Sunday, while permitting employment of common laborers, artisans, stenographers and laundresses.

“We are not advised that the work of a seller of haberdashery is so much more arduous than that of a ditch digger as to require that the law protect the former and not the latter from the possibility of being employed seven days a week. . . . As thus viewed and as gauged by the grant of municipal power hereinabove referred to, we find the prohibitions of the ordinance bear no reasonable relationship to the objectives to be accomplished by enactments made pursuant to such grant. Of this ordinance, it can be said that, *‘there is no fair reason for the law that would not require with equal force its extension to others which it leaves untouched.’* ”

The objectives and purposes to be accomplished by Sunday Closing laws as expressly laid down by this court is, *“to protect society by establishing a compulsory day of rest.”* (GRONLUND v. SALT LAKE CITY, cited supra). The employee of a tavern is in the same position as the employee of a grocery store, pool hall, ice cream parlor, etc., and *“there is no fair reason for the law that would not require with equal force its extension to grocery clerks, pool hall operators, movie theatre employees, etc., which it leaves untouched.”*

PROPOSITION II. THAT THE LOWER COURT IN MAKING ITS DECISION READ INTO THE DECISION EVIDENCE WHICH WAS NOT PRESENTED TO THE COURT BY EITHER PLAINTIFF OR DEFENDANT AND WHICH WAS NOT AGREED TO BY EITHER PLAINTIFF OR DEFENDANT. (Statement of Error No. 2)

The lower court in attempting to rationalize its

decision read into the record evidence which was not presented to the court by either plaintiff or defendant and which was not agreed to by either plaintiff or defendant. (R. 25, 26, 33) The lower court at page 33 of the record makes a finding of fact that the ordinance in question does tend to improve the morals, peace and good order of the community through its prohibition of the sale of beer on Sunday. There is not one scintilla of evidence that this is a fact. The lower court at page 25 of the record speaks of the "*unrestricted sale of 3.2 beer.*" There was no evidence produced and none could be produced to show that appellant, a tavern owner, is engaged in the "*unrestricted sale of 3.2 beer*" or for that matter, that there is "*unrestricted sale of 3.2 beer*" in the entire city of Orem. The assumptions by the lower court as to the results from the "*unrestricted sale of 3.2 beer*" are fictitious, without evidentiary foundations and certainly not a matter of "*common knowledge.*" On the contrary it is common knowledge that the sale of beer is rigidly governed by state law. (Liquor Control Act, Title 46, Utah Code Annotated, 1943.)

Furthermore, there is no evidence in the record or otherwise to show that the burden of automobile traffic in the city of Orem is any greater on Sunday than on any other day of the week. (R. 25) Such reading of evidence into the record only demonstrates the lower court's attempt to justify a predetermined result, rather than base its decision on the evidence legally and lawfully presented by the parties to the dispute. As a

matter of fact the automobile traffic in Orem City on Saturday night far exceeds that which is present on Sunday and yet the so-called "unrestricted sale of 3.2 beer" is not prohibited on Saturday night. Based on the lower courts reasoning the appellant should be able to read this into the record on appeal on the theory of the lower court's doctrine of "common knowledge." Appellant submits that such evidence is equally as legitimate and admissible as that proposed by the lower court.

PROPOSITION III. THAT SAID ORDINANCE IS INVALID AND UNCONSTITUTIONAL AND VIOLATIVE OF THE PROVISIONS OF ARTICLE I, SECTIONS 1, 2, 7, 11, 22, 24, 25, 26, 27 AND ARTICLE XI, SECTION 5 OF THE CONSTITUTION OF THE STATE OF UTAH AND OF AMENDMENTS V AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA. (Statement of Error No. 3)

Appellant further contends that the ordinance is unconstitutional for the reason that it is arbitrary, discriminatory, and a denial of equal protection of the laws.

The lower court placed great emphasis upon the fact that no person or agency could sell beer on Sunday in the city of Orem, therefore, there could be no unlawful discrimination between persons similarly situated, could not deprive persons of equal protection of the laws, and does not violate the provisions of uniformity of application. (R. 23) Appellant asserts that the lower courts reasoning is without foundation. The lower court stated (R. 22): "Through the licensing provi-

sions as set forth, and through stores and package agencies set up by the commission under the statute, are, thus, the only two means by which beer may be lawfully sold within this state.

“If, then, the agency of the state could sell beer on Sunday while the ordinance prohibited it within Orem, the ordinance would be discriminatory in that it did not uniformly affect persons similarly situated.”

The lower court then cites 46-0-86 Utah Code Annotated, 1943 which provides:

“No sale or delivery of *liquor* shall be made on or from the premises of any state liquor store or package agency, nor shall any store or package agency be kept open for the sale of *liquor*: (a) on any legal Holiday.”

Sundays are legal holidays under the provisions of 27-0-1, Utah Code Annotated, 1943, therefore the lower court concluded that no person or agency could sell beer on Sunday in Orem City.

Appellant contends that by the provisions of 46-0-45 Utah Code Annotated, 1943, the term “liquor” does not include “*light beer*” and, in fact, the statute expressly negatives the inclusion of the word “*light beer*” within the term liquor. And, by the provisions of 46-0-45, Utah Code Annotated, 1943, “*light beer*” is expressly defined as “*beer containing not more than 3.2 per centum of alcohol by weight.*” Therefore, if we correct the reasoning of the lower court in accordance with the law, the Liquor Control Commission can sell beer on Sunday, hence there is discrimination between persons similarly

situated and the ordinance is void and unconstitutional. (*BROADBENT v. GIBSON*, 105 Utah 53; 140 P. 2d 149; *GRONLUND v. SALT LAKE CITY* (supra, R. 22 and 23)).

The ordinance is further discriminatory between persons similarly situated as the ordinance in question prohibits any person to engage in the business of the sale of light beer AT RETAIL on Sunday in Orem City but permits others to sell light beer AT WHOLESALE on Sunday in Orem City.

The sale of beer is by the Utah legislature, subject to the provisions of the Liquor Control Act, made lawful and legal. The sale of beer under the provisions of the Liquor Control Act is made a "respectable business." Certainly the courts of the state of Utah and the lesser political bodies of the state have no power or authority to upset the mandate of the Utah Legislature. Whatever concepts of right and wrong were used in determining that beer could be sold legally within the state of Utah, it is the Utah Legislature which makes such determination.

To single out a legal and respectable business and say willy nilly that it shall not be allowed to operate on Sunday is arbitrary and discriminatory and therefore unconstitutional and void. (*EDEN v. PEOPLE* (Ill.) 161 Ill. 296, 43 N.E. 1109; *CITY OF TACOMA v. KRECH* (Wash) 15 Wash, 296, 46 P. 255; *EX PARTE JENTZSCH* (Cal) 112 Cal. 468, 44 P. 8023; *SALT LAKE CITY v. REVENE*, 101 Utah 504, 124 P. 2d 537)

This court stated in *GRONLUND v. SALT LAKE CITY*, 194 P. 2d 464, at page 468:

“Even bearing in mind the rule that the classification upon which a Sunday closing law is based is within the discretion of the legislative branch and hence will be upheld unless clearly arbitrary, it is difficult to conceive of a fair reason for some of the items excepted. It is readily apparent that some of the exceptions are clearly based on necessity. But as to others, even considering the desirability of promoting recreational activity on Sunday, no fair reason suggests itself as to why their sale should be permitted on Sunday while the sale of other commodities is prohibited. Neither sporting equipment nor nursery products are such from the standpoint of the buyer or seller that they cannot be purchased on a week day, though it is the intention of the buyer to use the equipment and plant the tree or flowers on Sunday. Neither is it likely to deteriorate over Saturday night or be depleted during Sunday. Boxing gloves and baseball bats are at least as stable as butter and bananas. The same may be said of dentifrices and toiletries, tobacco and beer. The classification being on a commodity basis, it is arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or a can of coffee.”

In conformity with the above quotation, but conversely, it is logical to say, “*it is arbitrary to permit the sale of a can of orange juice or a can of coffee on Sunday and prohibit the sale of a can of beer.*”

CONCLUSION

By reason of the fact that the ordinance in question is not designed to accomplish the purposes of a Sunday closing law and is thus an illegal and unjustified extension of the powers granted to municipal corporations by the statutes of this state, and the fact that the court in making its decision read into the case evidence which was not agreed to by the parties or adduced at the trial, and inasmuch as the ordinance is violative of provisions of the Constitution of the State of Utah and of the Constitution of the United States as hereinabove set forth, it is respectfully submitted that the ordinance in question is invalid.

Respectfully submitted,

McCULLOUGH, BOYCE
& McCULLOUGH
*Attorneys for Plaintiff
and Appellant*

By:

Leland S. McCullough
of counsel