

1949

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

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.

Hugh Vern Wentz; Attorney for Defendants and Respondents;

Recommended Citation

Brief of Respondent, *Shaw v. Orem City*, No. 7376 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1162

This Brief of Respondent 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 RESPONDENTS

FILED

HUGH VERN WENTZ,

Attorney for Defendants and
Respondents.

CLERK, SUPREME COURT, UTAH

INDEX

	Page
Statement of Facts.....	2
Argument	2
Statement of Issues.....	2
I. Did the trial court err 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 I, of the Constitution of the State of Utah?.....	3
II. Did the trial court err 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).....	8
III. Did the trial court err 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?	9
Conclusion	13, 14

INDEX (Continued)

Page

STATUTES CITED

Section 46-0-44, Utah Code Annotated, 1943.....	4
Section 15-8-84, Utah Code Annotated, 1943.....	4
Section 46-0-131, Utah Code Annotated, 1943.....	5
Section 46-0-125, Utah Code Annotated, 1943.....	6
Section 46-0-86, Utah Code Annotated, 1943.....	6
Section 37-0-1, Utah Code Annotated, 1943.....	6

ORDINANCES

Ordinance 91, Section 1, of Orem City Ordinances....	3
--	---

CASES CITED

RIGGINS, et. al. vs. DISTRICT COURT OF SALT LAKE CITY, et. al., 89 Utah 183; 51 Pac. 2nd, 645	3
BROADBENT et. al. vs. GIBSON, et. al., 105 Utah 53; 140 Pac. 2nd, 939.....	5
GRONLUND vs. SALT LAKE CITY, 194 Pac. 2nd, 464	5, 7
TOWN OF NORTH HEMPSTEAD vs. GREGORY, 65 New York Supplement, 867, 53 App. Div. 350....	9
IN RE McKEE, 57 Pac. 23.....	12
STATE vs. MASON, 94 Utah 501.....	13

Constitutional Provisions:

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

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 RESPONDENTS

STATEMENT OF FACTS

Statement of facts as found in Appellant's brief are substantially correct.

ARGUMENT

Counsel for the Appellant, in their brief, have set up under the heading of "Statement of Errors" three principal grounds. The issues raised by the "Statement of Errors" are the following:

I

Did the trial court err 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 I, of the Constitution of the State of Utah?

II

Did the trial court err 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)

III

Did the trial court err in holding that Ordinance No. 91 is valid and constitutional and not violative of the pro-

visions 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 V and XIV of the Constitution of the United States of America.

I

DID THE TRIAL COURT ERR 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?

The section of the ordinance which is brought into question reads as follows:

“Section 1: 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.”

The basis for the authority of the municipality to regulate the sale and use of intoxicating liquors is to be found under the police power as set forth in the case of RIGGINS, et. al. vs. DISTRICT COURT OF SALT LAKE CITY, et. al, 89 Utah 183; 51 Pac. 2nd 645, as follows:

“The police power of the State to regulate the manufacture, sale, and use of intoxicating liquors is

not limited to liquors which are in fact intoxicating, but extends to kindred non-intoxicating liquor."

The right of control of the sale of alcoholic beverages is expressly set forth in the police power of the State by Section 46-0-44, Utah Code Annotated, 1943, as follows:

"This act shall be deemed an exercise of the police powers of the state for the protection of the public health, peace and morals; to prevent the recurrence of abuses associated with saloons; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages; and all provisions of this act shall be liberally construed for the attainment of these purposes."

Section 15-8-84, Utah Code Annotated, 1943, provides as follows relative to the rights of municipalities:

"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, good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein; and may enforce the obedience to such ordinances with such fines or penalties as they may deem proper; provided, that the punishment of any offense shall be by fine in any sum less than \$300 or by imprisonment not to exceed six months, or by both such fine and imprisonment."

The grant of power contained in the foregoing Section includes the power to enact Sunday closing ordinances which do not conflict with the determined restrictions upon

such legislation. The Legislature has, by Section 46-0-131, Utah Code Annotated, 1943, delegated to cities and towns within their corporate limits the "power to license, tax, regulate or prohibit the sale of light beer." The question then becomes one of whether or not the ordinance of Orem City violates any of the constitutional provisions of the Federal and State Constitutions. In determining constitutionality, statutes and ordinances are presumed to be constitutional until the contrary is clearly shown. It is only when an ordinance manifestly infringes upon some constitutional provision that it can be declared void. In this connection, every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality. (See *BROADBENT, et, al. vs. GIBSON, et. al.*, 105 Utah 53; 140 Pac. 2nd, 939.)

Counsel for Appellant rely on the case of *GRONLUND vs. SALT LAKE CITY*, 194 Pac. 2nd, 464. But in the words of the Court the ordinance before the Court was not a general Sunday closing law. The Court, in the Gronlund case, pointed out that the ordinance in question did not prohibit the performance of labor in the pursuit of gainful occupation, works of charity, and necessity excepted on Sunday, but that it referred to mercantile pursuits and limited those pursuits by limiting the sale on that day of all commodities with certain exceptions. Thus, the Gronlund case is not authority for holding that the Orem City ordinance prohibiting the sale of beer on Sunday is unconstitutional.

A test uniformly adhered to by the Courts is to the effect that if the ordinance or statute permits sale of certain commodities and forbids sale of others, those commodities in both the permitted and prohibited classes must be

separately tested to determine whether the classification is natural and reasonable, so that those classes of merchandise, sales of which cannot interfere with health, morals, peace and good order of the community, may all be permitted and those which do not bear a reasonable relation to the health, morals, peace and good order of the community may all be prohibited.

The Orem City ordinance does not permit anyone to sell beer on Sunday and does not affect the sale of any other commodities on Sunday. So, in that sense, all persons in the class are treated alike and all commodities in the class are treated alike. The only question is whether beer should be treated differently than milk or vegetables or other commodities.

The Utah Code Annotated, 1943, Section 46-0-125, provides as follows:

“Beer may be manufactured, sold, delivered, distributed, bottled, shipped or transported or removed for storage or consumption or sale within this state, or possessed or consumed therein or imported into or exported therefrom in the manner and under the conditions prescribed in this act, or in the regulations, and not otherwise.”

The Utah Code Annotated, 1943, Section 46-0-86, 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;”.

The Utah Code Annotated, 1943, Section 37-0-1, provides as follows:

“The following named days are legal holidays in this state: Every Sunday”

Thus, under the ordinance, Sundays are legal holidays and, accordingly, no person or agency whatsoever may sell beer on Sunday, whether from any place devoted exclusively to such sales, or where such sales are carried on as incidents of other merchandising activity, or whether from private licensed places of business or from public owned liquor stores. Accordingly, it cannot be said that the ordinance is discriminatory between persons similarly situated. Said ordinance does not deprive persons of equal protection of the law.

The Court, in the case of GRONLUND vs. SALT LAKE CITY, 194 Pac. 2nd, 464, stated:

"It is conceded by Applicant that under relevant statutes of this state pertaining to the grant of municipal power, prohibition by ordinance of commercial pursuits on Sunday is valid where the prohibition bears a reasonable relation to the preservation of health, or tends to improve the morals, peace and good order of the community so long as it violates no constitutional provision and does not conflict with general state law."

The question, then, is whether or not the Oerm City Ordinance tends to improve the morals, peace and good order of Orem City. The recital of the facts as given by Appellant sets forth that there are 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. The Court can take judicial knowledge as to the fact that sale of 3.2 beer brings together large groups of people and especially large groups of people where the sale is permitted on Sunday, with the consequent production of loud and tumultuous noise and laxity of conduct, and that it brings together per-

sons who have little or no regard for religious belief, which religious belief was the original basis for the passing of ordinances and statutes establishing Sunday as a day of rest. The later cases set as a basis for Sunday closing, the need of a day of rest regardless of religious observance, the theory being that a compulsory day of rest improves a man's capacity to work and increases his contribution to the welfare of society. Thus, it can be seen that the prohibition of the sale of 3.2 beer on Sunday bears a direct relationship to the preservation of health and does tend to improve the morals, peace and good order of the community.

II

DID THE TRIAL COURT ERR 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)

It is a well established principle that the Trial Court may take judicial notice of matters that have happened according to the constant and invariable course of nature, or

of such general and public notoriety that everyone may fairly be presumed to be acquainted with them. This rule is aptly stated by the Court in the case of *TOWN OF NORTH HEMPSTEAD vs. GREGORY*, 65, New York Supplement, 867, 53 App. Div. 350, in the following language:

"We must be allowed to know what is known by all persons of common intelligence."

The Court, in reasoning to the point of improving the morals, peace, and good order of the community, noted the question of effect of sale of beer on the individual and the traffic on the streets in Orem City on Sunday. These matters are certainly matters of common knowledge. There is nothing in the record which shows that the Court has relief solely on these points, but that said points were used by the Court along with the reasoning of the Courts in other adjudicated cases. Certainly, there is nothing in the reference to traffic and the reference to the effect of beer on persons that constitutes error on the part of the Trial Court.

III

DID THE TRIAL COURT ERR 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?

Briefly stated the provisions of the State and Federal Constitutions which the Appellant claims are violated by the Orem City Ordinance are as follows:

Constitution of Utah:

Article I, Section 1:

"All men have the inherent and inalienable right
 to acquire, possess, and protect property
"

Article I, Section 2:

". . . . All free governments are founded on
 their authority for their equal protection and benefit.
"

Article I, Section 7:

"No persons shall be deprived of life, liberty, or
 property without due process of law."

Article I, Section 11:

". . . . Every person shall have
 remedy by due course of law"

Article I, Section 22:

"Private property shall not be taken or damaged
 by public use without just compensation."

Article I, Section 24:

"All laws of a general nature shall have uniform
 operation."

Article I, Section 25:

"This enumeration of rights shall not be construed
 to impair or deny others retained by the people."

Article I, Section 26:

"The provisions of this Constitution are manda-
 tory and prohibitory unless by express words they are
 declared to be otherwise."

Article I, Section 27:

“Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.”

Article XI, Section 5:

“Corporations for municipal purposes shall not be created by special law. The legislature, by general laws, shall provide for the incorporation, organization, and classification of cities and towns in proportion to population, which laws may be amended or repealed.”

Constitution of the United States:

Amendment V:

“No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.”

Amendment XIV, Section 1:

“. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The salient points of the provisions quoted is to the effect that property cannot be taken without due process of law; that property when taken must be compensated for; that all laws of a general nature shall have uniform operation; and that there shall be equal protection of the law to all persons.

Appellant contends that his rights to sell beer is a property right, and that the depriving him of the right to sell beer on Sunday deprives him of that property right, and that the deprivation of such rights violates his rights of due process of law.

In the case of *IN RE McKEE*, 57 Pac. 23, the Court said, in speaking of due process of law:

“We, therefore, hold that the proceedings by which the petitioner was tried and convicted were legal proceedings under a valid law of the State, enforced by a public authority, and although not sanctioned by long custom or age, but newly devised, in the discretion of the law making power of the State in furtherance of the general good, yet such procedure has due regard to the rights and preserves the principles of liberty and justice in conformity with the provisions of the Fourteenth Amendment to the Constitution of the United States and therefore the conviction is legal and by due process of law.”

Practically any law which places a restriction on individuals or their property rights, strictly speaking, is violative of the provision of taking property without due process of law. However, this fact, in and of itself, is not violative of the provision pertaining to due process of law. It is only where such regulations or limitations are not reasonably adopted to the preservation of the public welfare through improvement of the safety, morals, peace or good order of the community, that the restriction or limitation violates the Constitutional guarantees of the right to own and protect property and to be safe against deprivation without due process.

Considering next the question of uniformity of operation and equal protection of the laws, this Court's attention

is called to the case of STATE vs. MASON, 94 Utah 501, which reads as follows:

“A denial of the law’s equal protection presupposes an unreasonable discrimination between those included and those excluded from the Act, whether the Act confers privilege or a right or imposes a duty or an obligation.”

The Orem City Ordinance permits no person to sell beer upon the prohibited day, and all persons in other activities are permitted to engage in all manner of transactions except the sale of beer. Thus, there is no discrimination between persons similarly situated. Any person is prohibited from selling beer on Sunday, and it is not a case of one person being permitted to sell beer and another person being prohibited. The question, then, is whether or not the classification is reasonable and, certainly, the distinction between the sale of beer, which goes to the question of morals and public welfare, is quite different from a sale of milk, fruits and vegetables, which certainly has nothing to do with morals, peace and good order of the community.

CONCLUSIONS

It is submitted that the prohibition of the sale of beer on Sundays in the City of Orem is a valid exercise of the power of the municipality, and it bears reasonable relation to the preservation of health, and tends to improve the morals, peace and good order of the community, and that it does not violate any constitutional provisions of the State of Utah or of the United States; that the “Statement of Errors” numbered I to III, set forth by the Appellant, are with-

out merit. It necessarily follows that the findings and judgment of the Trial Court should be sustained and affirmed.

Respectfully submitted,

HUGH VERN WENTZ,

Attorney for Defendants and
Respondents.