

1959

# J. Seal v. Alma E. Powell and Margeret E. Powell : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](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.

Robert B. Hansen; Attorney for Appellant;

---

## Recommended Citation

Brief of Appellant, *Seal v. Powell*, No. 9044 (Utah Supreme Court, 1959).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3330](https://digitalcommons.law.byu.edu/uofu_sc1/3330)

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](mailto:hunterlawlibrary@byu.edu).

---

---

# In the Supreme Court of the State of Utah

---

J. SEAL,

*Plaintiff,*

—vs—

ALMA E. POWELL and  
MARGARET E POWELL, his wife,

*Defendants.*

FILED

JUN 23 1959

Clerk, Supreme Court, Utah

Case

No. 9044

---

## Brief of Appellant

---

ROBERT B. HANSEN  
*Attorney for Appellant*  
65 East 4th South  
Salt Lake City, Utah

---

---

# TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	X 2
STATEMENT OF POINTS .....	X 4
ARGUMENT	
POINT I. THE ACTIVITIES OF PLAINTIFF'S ASSIGNOR DO NOT COME WITHIN THE MEANING OF A "REAL ESTATE BROKER" WITHIN THE MEANING OF SEC. 61-2-2, U.C.A. 1953, AND CONSEQUENTLY SEC- TIONS 61-2-1 AND 61-2-18, U.C.A., 1953 ARE NOT APPLICABLE TO THE CONTRACT IN QUESTION .....	X 5
POINT II. SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, IMPOSE AN UNREASONABLE BURDEN ON INTERSTATE COMMERCE AS APPLIED TO PLAINTIFF'S ASSIGNOR AND ARE THEREFORE TO THAT EXTENT UNCONSTITUTIONAL .....	X 6
POINT III. SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, ARE UNCONSTITUTIONAL UN- DER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FED- ERAL CONSTITUTION TO THE EXTENT THAT THEY REQUIRE PLAINTIFF'S AS- SIGNOR TO OBTAIN A REAL ESTATE BROKER'S LICENSE UNDER THE CIRCUM- STANCES OF THIS CASE .....	X 12
POINT IV. SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, VIOLATE THE FIRST AMEND- MENT OF THE FEDERAL CONSTITUTION AND ARE THEREFORE UNCONSTITU- TIONAL TO THE EXTENT THEY REQUIRE PLAINTIFF'S ASSIGNOR TO OBTAIN A BROKER'S LICENSE UNDER THE CIRCUM- STANCES OF THIS CASE .....	X 15

# TABLE OF CONTENTS—Continued

## AUTHORITIES CITED STATUTES

	Page
61-2-1, U.C.A. 1953 .....	4, 8
61-2-2, U.C.A. 1953 .....	4, 6, 8
61-2-18, U.C.A. 1953 .....	4

## CASES

Amsel v. Brooks, 414 Conn. 288, 289, 106 A. 2d 152 .....	13
Anderson v. Johnson (1945) 108 U 417, 160 Pac 2(d) 725 .....	6
Black Forest Realty & Investment Co. v. Clarke (1929) 86 Colo. 454, 282 P 878 .....	8
Calve Bros. Co. v. Norwald, 143 Conn. 609, 612, 124 A 2d 881 .....	13
Cyphers v. Allyn .....	13
First Federal Savings & Loan Assn. v. Connelly, 142 Conn. 483, 489, 115 A 2d 455 .....	15
Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444 .....	18
Howard v. Heinig, 191 Wisc. 166, 210 NW 414 .....	7
Little v. Smith, 257 P 962 (Kan) .....	11
Lovell v. City of Griffin, 303 U.S. 444, 58 S Ct. 666 .....	17
Matthews-Pelton, Inc. v. LeBlanc (1930) 13 L.A. APP 596, 126 SO 449 .....	7
Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 630 .....	18
Post Printing & Publishing Co. v. Brewster (DC) 246 Fed. 321 ....	10
State v. Conlon, 65 Conn. 478, 486, 33 A.519 .....	15
State v. Feingold, 77 Conn. 326, 333, 59 A.211 .....	15
State v. Gordon, 143 Conn. 698, 705, 125 A.2d 477 .....	13
State v. Porter, 944 Conn. 639, 643, 110 A. 59 .....	16
State of Utah v. Salt Lake Tribune Publishing Co., 68 U 187, 249 Pac. 474 .....	9
United Interchange, Inc. of Mass. v. Harding, 154 Mo 179, 145 A 2(d) 94 .....	17
United Interchange, Inc. v. Speliacy, 144 Conn. 647, 136 A 2(d) 801 .....	13
Walp v. Moorar, 76 Conn. 515, 521, 57A. 277 .....	15

## TEXTS

30 Am. Jur. 278, 40 .....	15
48 A.L.R. 563 .....	11
56 A.L.R. 540 .....	8
57 A.L.R. 105 .....	11
115 A.L.R. 952 .....	11
167 A.L.R. ....	8
5 R.C.L. 703 .....	11

NOTE: PAGE NUMBERS HAVE  
BEEN RE-NUMBERED IN ERROR. PAGE  
NUMBER IS ONE NUMBER L

# In the Supreme Court of the State of Utah

---

J. SEAL,

*Plaintiff,*

—vs—

ALMA E. POWELL and  
MARGARET E POWELL, his wife,

*Defendants.*

Case

No. 9044

---

## Brief of Appellant

---

### STATEMENT OF FACTS

On December 4, 1957, the defendants executed a document at Salt Lake City, Utah, offering to pay Union Interchange, Inc., a foreign corporation with principal offices at Los Angeles, California, the sum of \$1,350.00 for certain advertising services three months after defendants' advertisement for the sale of a motel for \$105,000.00 was completed and sent to real estate brokers and potential buyers throughout the nation. This offer was accepted by the Union Interchange, Inc., at Los Angeles, California, on

December 9, 1957. Plaintiff contends that a valid contract existed between defendants and the Union Interchange, Inc., and that the latter fully performed said agreement. Defendants did not pay anything on the advertising agreement referred to, and plaintiff as assignee of Union Interchange, Inc. brought this action for breach of contract. Defendants filed a Motion to Dismiss on the grounds that no action could be maintained for the services in question because the party rendering said services was not licensed to act as a real estate broker pursuant to provisions of Secs. 61-2-1, 61-2-2, and 61-2-18, U.C.A. 1953. The State of Utah through its Attorney General filed an amicus curiae brief in the matter which cited only the provisions of our statutes just mentioned. Defendant's motion was argued on December 23, 1958, pursuant to a stipulation filed with the lower court at that time which set forth the pertinent facts upon which defendants' Motion Dismiss was based (R 10, 11). On April 14, 1959, the Honorable Martin M. Larson made and entered an order granting defendants' motion and dismissing plaintiff's complaint with prejudice. Plaintiff appeals from that order.

As set forth in the stipulation, plaintiff's assignor publishes two publications in which advertisements are carried and their business consists of advertising businesses and income property on a national basis. The contracts are performed by advertising the sales information and distributing it nationally in Union's two publication which are published in Los Angeles, California. Plaintiff contends that no real estate broker's license is required to engage in such activities. Defendants claim that such activity is unlawful without such a license. To obtain the license in question the party seeking the same must, among other things, (1)

furnish a \$1,000.00 bond conditioned on conducting his business in accordance with Chapter 2 of Title 61, U.C.A. 1953, (2) furnish character references of Utah property owners who have know him for at least three years, (3) pass an examination on subjects related to real property transactions.

## STATEMENT OF POINTS

### POINT I

THE ACTIVITIES OF PLAINTIFF'S ASSIGNOR DO NOT COME WITHIN THE MEANING OF A "REAL ESTATE BROKER" WITHIN THE MEANING OF SEC. 61-2-2, U.C.A. 1953, AND CONSEQUENTLY SECTIONS 61-2-1 AND 61-2-18, U.C.A. 1953, ARE NOT APPLICABLE TO THE CONTRACT IN QUESTION.

### POINT II

SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, IMPOSE AN UNREASONABLE BURDEN ON INTER-STATE COMMERCE AS APPLIED TO PLAINTIFF'S ASSIGNOR AND ARE THEREFORE TO THAT EXTENT UNCONSTITUTIONAL.

### POINT III

SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, ARE UNCONSTITUTIONAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION TO THE EXTENT THEY REQUIRE PLAINTIFF'S ASSIGNOR TO OBTAIN A REAL ESTATE BROKER'S LICENSE UNDER THE CIRCUMSTANCES OF THIS CASE.

### POINT IV

SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, VIOLATE THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION AND ARE THEREFORE UNCON-

STITUTIONAL TO THE EXTENT THEY REQUIRE PLAINTIFF'S ASSIGNOR TO OBTAIN A REAL ESTATE BROKER'S LICENSE UNDER THE CIRCUMSTANCES OF THIS CASE.

## ARGUMENT

### POINT I

THE ACTIVITIES OF PLAINTIFF'S ASSIGNOR DO NOT COME WITHIN THE MEANING OF A "REAL ESTATE BROKER" WITHIN THE MEANING OF SEC. 61-2-2, U.C.A. 1953, AND CONSEQUENTLY SECTIONS 61-2-1 AND 61-2-18, U.C.A. 1953, ARE NOT APPLICABLE TO THE CONTRACT IN QUESTION.

This court has previously considered the proper scope of the provisions of Sec. 61-2-2, U.C.A. 1953, in the case of *Anderson v. Johnson*, (1945) 108 U 417, 160 Pac(2d) 725, in holding that one who assisted a real estate broker in obtaining the listing of a farm was not a real estate broker or a real estate salesman within the meaning of said section and failure by him to obtain such a license did not bar his recovery on an agreement with the real estate broker to pay him for such assistance. The concurring opinion in that case pointed out that to take this section literally would cover anyone who was in any way connected with a transaction involving real estate, such as the abstractor or a stenographer in the real estate office. It was there stated:

"A reading of the statutes regulating real estate brokers makes it apparent they were enacted for the benefit of the public to protect them from dishonest and unscrupulous real estate agents. Such protection of the public is not needed from the casual or remote influence of a stenographer or of a person who introduces a real estate broker to one



who may wish to deal with him. Neither the stenographer nor the man who introduces the broker in the examples I have mentioned are active participants in any contract affecting real estate or any liability of the persons entering into such contracts or listings. The dealings which the statutes aim to protect the public in are those which result in legal liabilities between the parties. Nothing the stenographer or the man who introduces the real estate broker does has that effect. This is true even though the real estate broker contracts to pay the man who introduces him a part of his commission in the event he makes a sale."

In the case of *Matthews-Pelton, Inc. v. LeBlanc* (1930) 13 L.A. APP 596, 126 SO 449, it was held that one who assists a licensed broker to procure an offer to purchase the property of another does not thereby become a real estate broker so as to be prevented from ~~receiving~~ covering promised compensation.

If one who personally introduces a prospect to a broker is not required to obtain a license of the type in question, afortiori one ought not to need such a license to make an introduction through printed advertisements mailed to brokers and prospective purchasers.

Although the wording of our statute is broader than the comparable statute of the State of Wisconsin, appellant believes that the reasoning of the Wisconsin Supreme Court in the case of *Howard v. Heinig*, 191 Wisc. 166, 210 NW 414, should be applied to this case. There the court held that one who is hired on a commission basis to put on a sales campaign and arrange for advertising of real estate was not required to have a broker's license since he was not engaged in negotiating any actual sales. The

case of *Black Forest Realty & Investment Co. v. Clarke* (1929) 86 Colo 454, 282 P 878, is to the same effect. The agreement in question here required plaintiff's assignor only to disseminate information which would tend to interest prospective buyers in business property of its customers and acquaint them with an opportunity to negotiate for the purchase of such property. Plaintiff's assignor did not agree to, nor did it, enter into any negotiation in any manner between these prospective sellers or any others and parties indicating an interest in purchasing the same.

An annotation on the question "Who is a real estate agent, salesman, or broker within the meaning of license statutes?" is found in 56 A.L.R. 540 and supplemented in 167 A.L.R. 774. None of the cases discussed there, however, are too helpful on the point in issue, and appellant believes that this is so because plaintiff's assignor was engaged solely in the advertising and publishing business which is separate and distinct from the real estate business.

It is evident that the word "advertise" as used in Sec. 61-2-1, U.C.A. 1953, does not refer to advertising as a business but is limited to advertising that one is acting as a real estate broker or salesman. The word "advertise" is also used twice in Sec. 61-2-2, U.C.A. 1953. There it is first used with respect to advertising *options* on real estate or improvements thereon, which is not applicable in our case since no options on defendants' real estate or improvements were advertised in the case at bar. The second usage there is the same as that of the preceding section. Otherwise, appellant's assignor can only be brought within the provisions of that section by means of the words "or assists or directs in the procuring of contracts . . .

calculated to result in the sale, exchange, leasing, or renting of any real estate." As noted above in the Anderson case, it was not the legislative intent that this should be applied literally, and since this is so and appellant's assignor was even further removed than the plaintiff in that case, the sections of our statute in question ought not to be applicable to this case.

## POINT II

SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, IMPOSE AN UNREASONABLE BURDEN ON INTER-STATE COMMERCE AS APPLIED TO PLAINTIFF'S ASSIGNOR AND ARE THEREFORE TO THAT EXTENT UNCONSTITUTIONAL.

In the case of *State of Utah v. Salt Lake Tribune Publishing Company*, 68 U 187, 249 Pac 474, this court held that it was unconstitutional for a state to prohibit the publication of advertisements for the sale of cigarettes and related products in a newspaper circulated in interstate commerce where the sale of such products in the state of publication is restricted but not prohibited. There this court said:

"If it is lawful, therefore, to deal in and to sell cigarettes, why is it not lawful to inform those who may legally purchase an article where they may do so? It may be true that the state within its police power may, as a matter of regulation, seek to minimize the sale of an article, the use of which it may deem injurious to the public health; and if it may do that, it may, perhaps, regulate or prohibit the advertisement of such an article. Where, however, as is the case here, the article in question is an article of commerce which is protected by the interstate commerce clause of the federal Const-

tution, it may well be doubted whether the state can interfere with the sale of an article which is so protected. The conclusion, therefore, seems irresistible that, in view that the advertisement published by the Salt Lake Tribune in and of itself constitutes interstate commerce and where the State of Utah could not interfere, and further that the article likewise was protected both by the laws of Utah permitting its sale and to the extent that the article was shipped into the state in original packages was also protected from interference by the state, the defendant was clearly within its legal rights in publishing the advertisement, and that the statute in question constitutes an undue interference with interstate commerce and therefore cannot be upheld."

There the following quotation from *Post Printing and Publishing Co. v. Brewster* (DC) 246 Fed. 321, was cited with approval:

"The sale of cigarettes in the State of Missouri, where the newspapers of plaintiff are published, is ~~A LAWFUL BUSINESS AND THE TRANSMISSION BY PLAINIFF~~ of the intelligence where and on what terms cigarettes may be purchased by its subscribers, by way of advertisements inserted in such newspaper, is perfectly legitimate and proper. Further, it must be regarded as settled that sale of cigarettes in a foreign state to a citizen of this state, and their carriage from said foreign state into this state and here delivered in original packages in consummation of such sale made in a foreign state is legitimate interstate commerce, which is beyond the power of the Legislature of this state to prohibit or unduly restrict or burden (citing cases). In other words, while the business of bartering, selling, or in any other manner disposing of cigarettes in this state, or the business of advertising in any manner by any one within this state of the business of selling or disposing of

cigarettes, is by the act in question properly prohibited, yet by reason of the exclusive control of Congress over interstate commerce it must, I think, be held, as the conduct of interstate commerce in cigarettes may not by a state be prohibited or unreasonably burdened, it follows, of necessity, the business of advertising such interstate commerce business, which advertising itself not only is a form of interstate commerce, but further adheres in the very conduct of the interstate cigarette business itself, is also beyond the power of the state to prohibit or make criminal and punish, and this for the reason it can not be thought possible to make the advertisement of a lawful business unlawful and punishable as a crime (citing cases)."

The Utah case last referred to was the subject of an annotation on the question "Statute or ordinance in relation to advertising as interference with interstate commerce" in 48 A.L.R. 563, which has been further supplemented in 57 A.L.R. 105, and 115 A.L.R. 952. The principles there enunciated are believed to support this appeal. In 48 A.L.R. 563, the conclusion is summarized thusly:

"The general principle as formulated in 5 R.C.L. 703 is that the state or municipality may, in the exercise of its police power, enact statutes and ordinances to protect the public health, morals, or safety, and public convenience, provided they are local in their character and affect interstate commerce incidentally only."

The Salt Lake Tribune case has been cited favorably or distinguished in all of the cases which have cited it subsequently. It furnished important authority for the holding in *Little v. Smith*, 257 P 962 (Kan) which held that their statute prohibiting the advertising of cigarettes and cigar-

ette papers in any newspaper or periodical published in Kansas is an undue interference with interstate commerce and otherwise violated the federal constitution and was therefore void.

It can not be contended that the sale of real property is not a lawful business and while such activity is not protected under the interstate commerce clause, it is not an activity that can be constitutionally prohibited and certainly is lawful in any event under our law. Since the activity itself is lawful and constitutionally protected, it must follow under the reasoning of the above authorities that the advertisement can not be constitutionally prohibited or unreasonably burdened. The sections in question would if lawfully applicable to appellant's assignor require its solicitors to (1) furnish \$1,000.00 bond conditioned on the solicitor conducting his business in accordance with the requirements of Chapter 2 of Title 61, U.C.A. 1953, (2) furnish letters of recommendation from three citizens owning real property here who have known such parties for three years, (3) successfully pass examinations in English, arithmetic, bookkeeping, real estate principles and practice, including the elements of land economics, real estate law, acquisition of titles, deeds, leases, mortgages, land contracts, agency contracts, liens, zoning, taxation, and the provisions of Chapter 2 of Title 61, U.C.A. 1953. Such requirements are, for the most part, wholly unrelated to the lawful business in which appellant's assignor is engaged. That such requirements would be an unreasonable burden on the commerce in which Union Interchange, Inc. is engaged can hardly be questioned.

### POINT III

SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, ARE UNCONSTITUTIONAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION TO THE EXTENT THAT THEY REQUIRE PLAINTIFF'S ASSIGNOR TO OBTAIN A REAL ESTATE BROKER'S LICENSE UNDER THE CIRCUMSTANCES OF THIS CASE.

In the case of *United Interchange, Inc. v. Spellacy*, 144 Conn 647, 136 A 2(d) 801, the Supreme Court of Connecticut declared unconstitutional a statute designed specifically to require real estate licenses for the type of activity involved in this case. The plaintiff there was a publisher's representative in certain eastern states in a similar capacity to Union Interchange in certain western states and the facts are substantially identical to the instant case. There the court had this to say on the point in issue:

"We shall consider first the argument advanced with regard to due process and equal protection of the laws. Successfully to pass the test of constitutional validity in these respects, the act as amended to embrace these plaintiffs must be a proper exercise of the police power of the state. We have recently examined the basic principles applicable to police legislation regulating the conduct of business and professional activity. *State v. Gordon*, 143 Conn. 698, 705, 125 A.2d 477; *Calve Bros. Co. v. Norwald*, 143 Conn. 609, 612, 124 A. 2d 881; *Cyphers v. Allyn*, supra, 705; *Amsei v. Brooks*, 414 Conn. 288, 289, 106 A. 2d 152. The test is whether (1) some need for serving the public health, safety, or general welfare makes the regulatory legislation necessary or desirable, and (2) whether the legislation serves that need in a way which is not arbitrary, discriminatory, and confiscatory to an unreasonable

and unnecessary degree. In passing upon the need and in fashioning the method of serving it, the legislature under its police powers has a broad discretion. The limitation upon this discretion is drawn by the courts at that point where the regulatory measures fail to serve the public good, or serve it in a despotic way.

"The 1955 amendment prevents the plaintiffs from carrying on a lawful business unless they obtain real estate brokers' and salesmen's licenses. This is done by defining the activities of the plaintiffs as 'engaging in the real estate business' and requiring of them brokers' and salesmen's licenses in order to continue their activities. It is true that legislatures may define the terms used in their enactments and that courts are bound to accept their definitions. *First Federal Savings & Loan Assn. v. Connelly*, 142 Conn. 483, 489, 115 A. 2d 455, and cases cited. This rule extends only to the meaning to be given by the courts to the terms defined. It does not prevent the courts from examining the definition to see whether it logically and fairly describes the purported object of the definition.

"United's business is primarily advertising. It differs from newspaper and magazine publishers generally in the respect only that it limits the range of its advertising activities to specific types of property. Its purposes are to bring to the attention of prospective purchasers properties available for purchase and to the attention of prospective sellers buyers who are looking for particular kinds of properties. These are the fundamental purposes of all sales advertising. United's salesmen secure written contracts from property sellers or buyers to advertise in its publications. These salesmen assist in the preparation of these advertisements. The contracts and the advertisements are then submitted to United and thereafter published in 'Buyers Digest' and 'Brokers Bulletin.' It does not appear, however, that these salesmen advise as to price and for that



reason should have some knowledge of real estate values, nor that they direct or assist in the negotiations between the interested parties and so must know something about real estate incumbrances, taxes, zoning, and other regulations, and other similar factors involved in a real estate deal. Why then should the officers of United and its salesmen be required to take a written examination to establish their competency to carry on the real estate business with all of the detail which that involves? The terms of payment prescribed by United are such that its salesmen have no occasion to handle its customers' funds. Why then should its salesmen be required, in order to carry on its business, to post surety company bonds in substantial amounts, renewable annually?

"The only reason advanced for the need and design of this amendment is to prevent fraud, a purpose which has always been considered legitimate for the exercise of the police power when the facts warranted it. *Walp v. Mooar*, 76 Conn. 515, 521, 57 A. 277; *State v. Feingold*, 77 Conn. 326, 333, 59 A. 211. A legitimate purpose, however, cannot justify an unreasonable and unnecessarily arbitrary and discriminatory method of accomplishing it.

"The legislative power to regulate a business fraught with particular danger to the public is much wider than in the case of an ordinary lawful business such as advertising. 'In the one business no citizen has an absolute right to engage; in the other all citizens have a right and an equal right to engage. The difference is vital.' *State v. Conlon*, 65 Conn. 478, 486, 33 A 519; *State v. Porter*, 94 Conn. 639, 643, 110 A. 59; 30 Am. Jur. 278, 40. Where the business is a lawful one and involves no particular danger to the public, 'the regulation must not be unreasonably in excess of what is necessary to accomplish the supposed end; and in the case of a business in which all citizens have a right and an equal right to engage, the principle of equality

of rights must, in this State, be observed.' *State v. Porter*, supra, 645. This is not to imply that activities such as the plaintiffs carry on cannot, consistently with constitutional limitations, be regulated. That is not the issue in this case. Rather, the question for decision is whether this particular legislation is consistent with those limitations.

"The amendment purports to describe the business of the plaintiffs as promoting 'the sale of real estate through the listing of . . . property in a publication issued primarily for such purpose or for referral of information concerning properties to licensed real estate brokers or both.' Cum. Sup. 1955, & 2339d (c). The finding discloses that this is in fact a fair description of what the plaintiffs purport to do. That being so, there is no sound reason for requiring them to take a written examination on their competency as real estate brokers and salesmen, to furnish a corporate surety bond and to pay substantial fees for the original issuance of their licenses and for the annual renewal thereof. Such requirements are unnecessarily burdensome and discriminatory.

"The view which we have taken makes it unnecessary to consider the plaintiffs' claim that the constitutional guarantee of freedom of the press was violated.

"We hold that the provisions of 2339d which embrace the plaintiffs' activities within the definition of what constitutes 'engaging in the real estate business' and the activities of a 'real estate broker' or a 'real estate salesman' violate the constitutional rights of the plaintiffs and are null and void."

#### POINT IV

SECS. 61-2-1, 61-2-2, AND 61-2-18, U.C.A. 1953, VIOLATE THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION AND ARE THEREFORE UNCONSTITUTIONAL TO THE EXTENT THEY REQUIRE

## PLAINTIFF'S ASSIGNOR TO OBTAIN A REAL ESTATE BROOKER'S LICENSE UNDER THE CIRCUMSTANCES OF THIS CASE.

The Supreme Court of Main in the case of *United Interchange, Inc. of Mass. v. Harding*, 154 Mo 179, 145 A 2(d) 94, after citing the case of *United Interchange v. Spellacy*, supra, said:

"The Connecticut court rested its decision entirely upon the improper exercise of the police power and deemed it unnecessary to discuss the possible invasion of freedom of the press although it recognized the issue. We might properly do the same but are prompted to comment on this issue because of the far reaching consequences of any encroachment on that freedom. Since the advertising activities of the daily newspaper and the family magazine differ from those of the petitioners only in the fact that the advertising accepted by the latter is restricted to the field of income producing real estate, the decision in the instant case is of vital concern to the whole press. The protection of the freedom of the press is intended primarily to safeguard the *public* in its right to the circulation of information. This freedom is protected within this state by the fourteenth amendment to the Constitution of the United States and by the Constitution of Maine. The latter document is specific and concise in this respect. Art. 1, Sec. 4 provides in part: '... no laws shall be passed regulating or restraining the freedom of the press.' Historically, the struggle for the freedom of the press was primarily directed against the power of the licensor and was addressed to obtaining liberty to publish 'without a license what formerly could be published only with one.' *Lovell v. City of Griffin*, 303 U.S. 444, 58 S Ct. 666. The liberty of the press is not of course license to libel or to print the scandalous or the immoral. Rather does the freedom relate to 'previous restraints' before pub-

lication as well as to protection from penalties for publishing what is harmless to the public welfare. The meaning of and recognized exceptions to these basic rules are reviewed in *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 630. Efforts to undermine this freedom by the device of requiring license or imposing a discriminatory tax have been steadfastly resisted. *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444. The evidence discloses that petitioners supported by advertising sales, publish and circulate a magazine which contains information, opinion, and advertising. We are not here concerned with any abuse of liberty. No one would seriously contend that the publication of advertisements for the sale of real estate is a proper subject for any 'previous restraint.' The press can be deprived of its liberty as quickly by previous restraints which destroy its sources of revenue as by a rigid censorship. If by an artificial licensing device, the business of these petitioners can be curtailed or terminated, we see no obstacle to further encroachment on freedom of the press by restrictive legislative device aimed at specific media or even at the whole industry. As was said in *Grosjean v. American Press Co.*, supra, at page 449 (of 56 S. Ct.) . . . 'and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . To allow it to be fettered is to fetter ourselves.' We cannot sanction any breach in the wall of protection.

"For these reasons so much of R. S. 1954, Ch. 84 as was enacted by the amendment contained in P. L. 1957 Ch. 32, must be held unconstitutional and null and void as applied to the activities of these petitioners."

In that case the statute in question was directly aimed at the type of activity involved in this case and was, there-

fore, like the one involved in the Connecticut case and not like the one involved in this case. To the extent, however, that this court might find that appellant's assignor was required to obtain a license under the provisions of the Utah statutes in question, that case would, if followed, require the holding that those statutes as applied to such a party are unconstitutional as violating the freedom of press as well as the equal protection and due process and commerce clauses of the federal Constitution.

### CONCLUSION

The activities of plaintiff's assignor do not come within the provision of our real estate licensing statutes; consequently no such license was required to lawfully seek compensation for the services in this case. Accordingly, the order of dismissal should be vacated and the case remanded to the District Court of Salt Lake County for further proceedings.

If it is held that the activities of plaintiff's assignor were such that the statutes in question required a broker's license in order to recover for the services of appellant's assignor, to that extent said statutes in question are void as they conflict with the commerce clause, the due process clause, the equal protection clause, and the first amendment of the federal Constitution. The order of dismissal based thereon was, therefore, in error and should be vacated and the case remanded to the District Court of Salt Lake County for further proceedings.

Respectfully submitted

**ROBERT B. HANSEN**

*Attorney for Plaintiff*

65 East 4th South

Salt Lake City, Utah