

1959

J. Seal v. Alma E. Powell and Margeret E. Powell : 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.

Russell C. Harris; Walter L. Budge; Gary L. Theurer; Attorneys for State of Utah;

Recommended Citation

Brief of Respondent, *Seal v. Powell*, No. 9044 (Utah Supreme Court, 1959).
https://digitalcommons.law.byu.edu/uofu_sc1/3331

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.

UTAH
OCT 14 1959

LAW LIBRARY

IN THE SUPREME COURT OF THE STATE OF UTAH

J. SEAL,

Plaintiff and Appellant,

vs.

ALMA E. POWELL and

MARGARET E. POWELL, his wife,

Defendants and Respondents.

Case No.

9044

AUG 10 1959

FILED

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENTS and Brief of State of Utah as Amicus Curiae

RUSSELL C. HARRIS

Attorney for Respondent

WALTER L. BUDGE

Attorney General

GARY L. THEURER

Assistant Attorney General

Attorneys for State of Utah

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS.....	3
ARGUMENT	3
POINT I —	
THE ACTIVITIES OF APPELLANT'S ASSIGNOR, UNION, FALL WITHIN THE DEFINITION OF REAL ESTATE BROKER CONTAINED IN SEC- TION 61-2-2, UTAH CODE ANNOTATED 1953.....	3
POINT II —	
SECTIONS 61-2-1, 61-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, DO NOT IMPOSE AN UNREASONABLE BURDEN ON INTERSTATE COMMERCE AS APPLIED TO THE CONDUCT AND ACTIVITIES OF UNION.....	6
POINT III —	
SECTIONS 61-2-1, 61-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, ARE NOT UNCON- STITUTIONAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION AS APPLIED TO THE FACTS OF THIS CASE.....	9
POINT IV —	
SECTIONS 61-2-1, 61-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, AS THEY APPLY TO THE FACTS OF THIS CASE ARE NOT UNCON- STITUTIONAL AS BEING IN VIOLATION OF THE PRINCIPLES OF FREEDOM OF THE PRESS	12
CONCLUSION	14

Authorities Cited

8 Am. Jur. 993, Brokers, Sec. 7.....	10
11 Am. Jur. 22, Commerce, Sec. 21.....	7
33 Am. Jur. 336, Licenses, Sec. 17.....	9
12 C. J. S. 13, Brokers, Sec. 8.....	10
15 C. J. S. 268, Commerce, Sec. 11.....	6
16 C. J. S. 1123, Constitutional Law, Sec. 213(8)c.....	13

TABLE OF CONTENTS — (Continued)

Cases Cited	Page
Boston & M. R. R. v. Armburg, 285 U. S. 234, 52 S. Ct. 336, 76 L. Ed. 729	6
Great Northern R. Co. v. Washington, 300 U. S. 154, 57 S. Ct. 397, 81 L. Ed. 573.....	7
Pittsford v. City of Los Angeles (Cal.), 122 P. 2d 535.....	13
Reuben H. Donnelly Corp. v. City of Bellevue (Ky.), 140 S. W. 2d 1024.....	13
Slater v. Salt Lake City, 206 P. 2d 153.....	7, 13
Valentine v. Christensen, 316 U. S. 52, 62 S. Ct. 920.....	13

Statutes Cited

Laws of Utah 1921:

Chapter 110	4
-------------------	---

Utah Code Annotated 1953:

Section 61-2-1	3, 4, 6, 9, 12
Section 61-2-2	3, 4, 6, 9, 12
Section 61-2-6	8, 9, 11
Section 61-2-18	3, 6, 9, 12

IN THE SUPREME COURT OF THE STATE OF UTAH

J. SEAL,

Plaintiff and Appellant,

vs.

ALMA E. POWELL and

MARGARET E. POWELL, his wife,

Defendants and Respondents.

Case No.
9044

BRIEF OF RESPONDENTS and Brief of State of Utah as Amicus Curiae

STATEMENT OF FACTS

This case comes here from an order of the district court granting respondent's motion to dismiss. The State of Utah filed an amicus curiae brief in the district court supporting respondent's motion because of the State Security Commission's interest in enforcing and administering the real estate licensing laws.

The appellant, J. Seal, is an assignee of an out of state corporation (Union Interchange, Inc.), which corporation was the party involved in the original transaction out of which this action arises. The order granting the motion to dismiss was on the basis of a stipulation of the parties.

Respondent adopts appellant's statement of facts but points out the following matter contained in the stipulation:

"* * * Agents of Union in the State of Utah acquire information as to the names of individuals who desire to sell businesses and real property. Such agents then approach the individuals and seek to solicit from them contracts to advertise their property with Union. A contract form is produced which is so drafted that the individual in signing such is in effect making an offer to Union. The agents of Union act as solicitors of such contracts. * * * "

Respondent Powell's property was not sold pursuant to Union's agreements to advertise.

(Throughout this brief, appellant's assignor, Union Interchange, Inc., shall be referred to as Union.)

STATEMENT OF POINTS

POINT I

THE ACTIVITIES OF APPELLANT'S ASSIGNOR, UNION, FALL WITHIN THE DEFINITION OF REAL ESTATE BROKER CONTAINED IN SECTION 61-2-2, UTAH CODE ANNOTATED 1953.

POINT II

SECTIONS 61-2-1, 61-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, DO NOT IMPOSE AN UNREASONABLE BURDEN ON INTERSTATE COMMERCE AS APPLIED TO THE CONDUCT AND ACTIVITIES OF UNION.

POINT III

SECTIONS 61-2-1, 61-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, ARE NOT UNCONSTITUTIONAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION AS APPLIED TO THE FACTS OF THIS CASE.

POINT IV

SECTIONS 61-2-1, 62-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, AS THEY APPLY TO THE FACTS OF THIS CASE ARE NOT UNCONSTITUTIONAL AS BEING IN VIOLATION OF THE PRINCIPLE OF FREEDOM OF THE PRESS.

ARGUMENT

POINT I

THE ACTIVITIES OF APPELLANT'S ASSIGNOR, UNION, FALL WITHIN THE DEFINITION OF REAL ESTATE BROKER CONTAINED IN SECTION 61-2-2, UTAH CODE ANNOTATED 1953.

Chapter 2 of Title 61, Utah Code Annotated 1953, entitled Real Estate Brokers, is the law regulating real estate brokers and the licensing thereof. The regulation of real estate brokers, as defined, is an exercise of the police power for the protection of the public in the sale

of property. The Utah statute was enacted in 1921. See Chapter 110, Laws of Utah 1921. Part of the title of that act provided as follows:

“An Act to define real estate brokers and real estate salesmen; to provide for the regulation, supervision and licensing thereof; * * *.”

It is significant, we think, that the Legislature took pains to define “real estate broker” as they did, rather than to rely on what might be a commercial or trade definition. The Legislature was undoubtedly aware of the abuses and opportunities for abuse, sharp practices and cheating in the field of real estate selling and brokering. Prior to regulation there were numerous accounts of foul dealing by salesmen, brokers or “between men,” resulting in losses to property owners.

Section 61-2-1, U.C.A. 1953, provides as follows:

“It shall be unlawful for any person, copartnership or corporation to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license under the provisions of this chapter.”

The following Section 61-2-2 defines “real estate broker.” It is broad in its coverage:

“The term ‘real estate broker’ with the meaning of this chapter shall include all persons, partnerships, associations and corporations, foreign and domestic, who for another and for a fee, com-

mission or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, *or lists or offers or attempts or agrees to list*, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells, or offers to sell or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate *or who advertises* or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate *or assists or directs in the procuring of prospects* or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. * * *

(We have emphasized those phrases which particularly bring the circumstances of this case within the definition.) We submit that the conduct of Union was within the definition of a real estate broker. Union is a corporation; its services are rendered for another and for a fee. Its activities include the following: It lists or attempts to list real estate; it advertises real estate; and it assists or directs in the procuring of prospects calculated to result in the sale of real estate. Certainly the conduct as shown by the facts stipulated to and as stated in appellant's brief fall within the definition as a matter of analysis.

The facts of the Anderson case, cited by appellant on page 5 of his brief, do not bear similarity to the facts here. There, the party merely made contacts with prospective sellers for a real estate broker. Nor is the language of the Anderson opinion helpful. This is not the case of a "stenographer" or "a person who introduces a real estate broker to one who may wish to deal with him." Here, Union's agents approach a prospective seller, advise him of their services and program, and solicit from him for a fee the business of advertising his property. They then obtain from the seller a written contract.

The Wisconsin case cited in appellant's brief at page 6, *Howard v. Heinig*, is not in point for the reason mentioned by appellant — that the wording of the Utah statute is broader.

POINT II

SECTIONS 61-2-1, 61-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, DO NOT IMPOSE AN UNREASONABLE BURDEN ON INTERSTATE COMMERCE AS APPLIED TO THE CONDUCT AND ACTIVITIES OF UNION.

At this stage, it would be appropriate to state certain general rules as they apply to the application of the commerce clause. The power of Congress to regulate interstate commerce does not forestall all state action affecting interstate commerce. A state may legislate in respect of their local concerns even though such legislation may indirectly and incidentally affect interstate commerce. 15 C.J.S. 268, Commerce, Sec. 11; *Boston & M.R.R. v. Armburg*, 285 U.S. 234, 52 S.Ct. 336, 76 L.Ed. 729. A state, therefore, may in the exercise of its police powers legislate so as to affect commerce so long as the

interference does not impose an unreasonable burden on interstate commerce. Furthermore, a state may regulate the local activities of a corporation engaged in interstate commerce and the imposition of a reasonable expense thereof upon such a corporation is not a burden upon interstate commerce. 11 Am. Jur. 22, Commerce, Sec. 21; *Great Northern R. Co. v. Washington*, 300 U.S. 154, 57 S.Ct. 397, 81 L.Ed. 573. The case of *Slater v. Salt Lake City*, 206 P.2d 153, hereinafter discussed, states as follows:

“* * * It is not every incidental interference with interstate commerce that gives rise to a claim of unconstitutionality. Matters which are largely local in character can be dealt with by the state, even though the regulations, in some degree, interfere with the free flow of commerce between the states. * * *”

There are two answers to appellant's second contention. In the first place the application of this statute to the activities of Union would not constitute an unreasonable burden on interstate commerce. The force of the Utah law does not apply to the publication of Union's advertising journals. It applies only to the initial conduct of Union in their contacts with Utah residents who own real property located in the state. Utah's enforcement does not interfere with or affect the publication or distribution of Union's two national publications. Secondly, Union's activities in this state, as previously pointed out, are such that justify the exercise of state regulatory action under the police powers. Union's agents seek out prospective sellers; they solicit from them for a fee the business of advertising their proper-

tics; they attempt to have the seller sign contract forms. Such conduct does not constitute an isolated transaction.

Under Point II of appellant's brief, beginning at page 8, there are two cases cited: State of Utah v. Salt Lake Tribune Publishing Co. and Post Printing and Publishing Co. v. Brewster. Both cases involve state statutes which sought to prohibit the advertisement of cigarettes. The statutes were held unconstitutional on the ground that inasmuch as the shipment and sale of cigarettes across state lines constitutes interstate commerce, the legislation prohibiting the advertising of such commodities placed an unreasonable interference or burden on interstate commerce. These cases are not in point and are not analogous to the facts here. The state does not seek to prohibit the described conduct by Union; it merely desires to impose reasonable regulations.

The Utah statute, Section 61-2-6, prescribes the requirements for real estate brokers licenses. It is submitted that those requirements are not unreasonable under the circumstances concerning the methods employed by Union. It is noted that in the same section provision is made for the licensing of non-resident brokers. It provides:

61-2-6(c). "A non-resident of this state may become a real estate broker by conforming to all the provisions of this act, except that such non-resident broker regularly engaged in the real estate business as a vocation, and who maintains a definite place of business and is licensed in some other state, which offers the same privileges to the licensed brokers of this state, shall not be required to maintain a place of business within

this state. The commission shall recognize the license issued to a real estate broker by another state as satisfactorily qualifying him for license as a broker, provided that said non-resident broker has qualified for license in his own state by written examination and also that said other state permits licenses to be issued to licensed brokers in this state, without examination. * * *

These requirements do not impose a prohibition on Union's activities in Utah. Union may engage in the activities heretofore described by obtaining a license. It is significantly stated at the outset of Section 61-2-6:

"* * * With due regard for the paramount interest of the public, the board of real estate examiners may require and pass upon such proof as may be deemed necessary to determine the honesty, integrity, truthfulness, reputation and competency of each applicant; and shall require the applicant to pass an examination, and prescribe the passing grade, covering the fundamentals of the English language, arithmetic, bookkeeping, real estate law, acquisition of titles, deeds, leases, mortgages, land contracts, agency contracts, liens, zoning, taxation, and the provisions of this chapter. * * *

POINT III

SECTIONS 61-2-1, 61-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, ARE NOT UNCONSTITUTIONAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION AS APPLIED TO THE FACTS OF THIS CASE.

A state under its police powers has the right to regulate any business, occupation or trade in order to protect the public health, morals and welfare. 33 Am. Jur. 336, Licenses, Sec. 17. A state may under its general police powers regulate the business of brokers, including

real estate brokers. 12 C.J.S. 13, Brokers, Sec. 8; 9 Am. Jur. 993, Brokers, Sec. 7.

It is conceded, as previously stated, that the activities and conduct of Union's agents are not precisely identical with the commonly accepted functions of a real estate broker or salesman under a trade or commercial definition. However, the definition contained in the Utah Code, Section 61-2-2, quoted above, is sufficiently broad to include those who list or attempt to list properties, advertise, or assist in the procuring of prospects.

Appellant cites and relies heavily on two New England cases, *United Interchange Inc. v. Spellacy* and *United Interchange Inc. of Mass. v. Harding*. It is noted that in both of these cases the original statutes defining the practice of real estate brokering were recently amended, broadening them to include the activities and methods of operation of Union. The Utah statute is sufficiently broad without amendment to include the activities of Union.

The *Spellacy* case does not quarrel with the principle that real estate brokers may be regulated or that the activities of Union may be regulated "consistently with constitutional limitations." The basis of that decision is that the type of regulation exercised against the activities of Union is not constitutional; that it is unreasonable to require these salesmen to take written examinations, to furnish a corporate bond and to pay substantial fees. (In Utah the fee to take the examinations is \$10 and the license fee is \$20. The renewal fee is \$10.)

Consider the activities of Union and its salesmen.

They contact Utah citizens and solicit contracts from them relating to their real estate. They aid and advise them in drafting their proposed advertisement. Upon signing the contract, the seller is obligated to pay the stated fee or commission. The matter is then out of the seller's hands. Whether the property is sold or not, he must pay the fee. He must rely on the good faith of the company to publish the advertisement as contracted. It is submitted that the New England cases failed to take note of the real potential harm to the public from these activities. Because Union's agents approach prospective sellers of real property, represent that they advertise only real estate and propose to charge a fee or commission, many sellers may reasonably believe that no fee will be charged unless the property is sold. It is only reasonable to assume that the high pressure salesman in his eagerness to close a deal, either intentionally or inadvertently, leaves the property owner with the impression that only in the event the property is sold will the fee be charged.

The licensing regulations of the Utah statute are not unreasonable as applied to these activities. It is noted that Section 61-2-6, U.C.A. 1953, vests in the Board of Real Estate Examiners certain discretionary powers as to the type and content of examinations to be passed by applicants. The board may, therefore, vary the examinations that are taken by the various classes of brokers or salesmen to conform to the type of broker or salesman applicant.

POINT IV

SECTIONS 61-2-1, 62-2-2 AND 61-2-18, UTAH CODE ANNOTATED 1953, AS THEY APPLY TO THE FACTS OF THIS CASE ARE NOT UNCONSTITUTIONAL AS BEING IN VIOLATION OF THE PRINCIPLE OF FREEDOM OF THE PRESS.

The enforcement of the real estate laws as applied to Union's activities does not constitute violations of the guarantee of freedom of the press.

The Harding case, upon which appellant relies primarily in support of his fourth point, in turn cites three United States Supreme Court cases as support. None of those cases support appellant's proposition as applied to the facts of this case, and we submit do not support the holding in the Harding case. In *Lovell v. City of Griffin*, the ordinance in question as stated by the court "... absolutely prohibits the distribution of any literature of any kind . . ." The ordinance was composed as a direct prohibition of the distribution of the printed matter. In *Near v. Minnesota*, the Minnesota statute prohibited the producing, publishing, circulating or selling of an obscene, lewd, malicious, scandalous, etc. publication. In *Grosjean v. American Press Co.*, the Louisiana statute imposed a 2% license tax on the privilege of engaging in the publication business. The tax was based on the extent of the circulation of the publication. The laws in each of these cases imposed direct prohibitions and burdens on the publication and circulation of the printed matter.

The Utah statute imposes no restraint or prohibition on Union's publication or circulation of its periodicals. The statute merely seeks to impose reasonable regula-

tions on persons who come into the State of Utah and do business with Utah residents in the listing, advertising or attempts to procure buyers of real estate. Nor is the license fee a tax upon the publication or circulation. The regulation of Union's activities may have some slight affect on appellant's sources of revenue. However, the affect on appellant's publication and circulation of its periodicals is so remote and obscure as to be of no consequence.

It is submitted that the Maine Supreme Judicial Court erred in holding that governmental regulation of the activities of Union violated the guarantee of freedom of the press. It is an established principle that the constitutional guarantee of freedom of the press does not impose restraints on governmental regulation of commercial activities such as commercial advertising. 16 C.J.S. 1123, Constitutional Law, Sec. 213(8)c. See also *Valentine v. Christensen*, 316 U.S. 52, 62 S. Ct. 920; *Slater v. Salt Lake City* (1949 Utah), 206 P.2d 153; *Pittsford v. City of Los Angeles* (California), 122 P.2d 535; and *Reuben H. Donnelly Corp. v. City of Bellevue* (Ky.), 140 S.W.2d 1024. In the Slater case, supra, a city ordinance made it unlawful for any person to peddle, offer for sale, etc. a variety of items, including magazine subscriptions upon any of the streets of Salt Lake City without having a license. The ordinance was attacked as being unconstitutional. This Court upheld the ordinance and said that:

“* * * the right of free speech cannot be used as a shield to protect commercial activities carried on in streets or on sidewalks.”

CONCLUSION

It is respectfully submitted that the holding of the trial court should be sustained.

RUSSELL C. HARRIS
Attorney for Respondent

WALTER L. BUDGE
Attorney General

GARY L. THEURER
Assistant Attorney General
Attorneys for State of Utah