

1959

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

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

OCT 13 1959

J. SEAL,

*Plaintiff and Appellant,*

Ct.

Supreme Court, Utah

—vs.—

Case No.

9044

ALMA E. POWELL and MARGARET  
E. POWELL, his wife,  
*Defendants and Respondents.*

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REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

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STATEMENT OF POINTS

POINT I.

THE ACTIVITIES OF PLAINTIFF'S ASSIGNOR,  
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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 THE CONDUCT AND ACTIVITIES OF UNION.

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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 AS APPLIED TO THE FACTS OF THIS CASE.

## POINT IV.

SECS. 61-2-1, 62-2-2 AND 6-2-18, UCA 1953, AS THEY APPLY TO THE FACTS OF THIS CASE ARE UNCONSTITUTIONAL AS BEING IN VIOLATION OF THE PRINCIPLE OF FREEDOM OF THE PRESS.

## ARGUMENT

## POINT I.

THE ACTIVITIES OF PLAINTIFF'S ASSIGNOR, UNION, DO NOT FALL WITHIN THE DEFINITION OF "REAL ESTATE BROKER," CONTAINED IN SEC. 61-2-2, U.C.A. 1953.

On Page 5 of respondent's brief, it is stated that the activities of Union consist of the following:

(1) It lists or attempts to list real estate

(2) It advertises real estate

(3) It assists or directs in the procuring of prospects calculated to result in the sale of real estate.

With respect to (1) above, the word "lists" has a definite meaning in the real estate industry as denoting the acceptance of a seller's proposal to sell his real property and to endeavor to find purchasers for it. This Union did not attempt to do, and the statement in respondents' brief that it did flies in the face of the stipulation of facts in this case where that word was stricken out and initialed by attorneys for the parties for the very reason that Union did not undertake or endeavor to find any purchasers for advertiser's property but agreed only to perform the advertising services contracted from which prospective purchasers might contact the advertising seller directly (R. 10, 11).

As to (2) above, such activity is not defined as a real estate broker under any of the italicized phrases of that section as it appears on respondent's brief except to the extent that "or assists or directs in the procuring of prospects" literally encompasses this and many other activities. (3) above, of course, raises the same question. Thus, on this point, this Court is again furnished with the problem it had before in the *Anderson* case where it was held

that those words are not to be given literal application. Respondents endeavor to distinguish that case. Surely, however, one who, without a license, personally contacts prospective sellers for a real estate broker is assisting to some extent in procuring of prospects. To the extent that there is a difference in degree, appellant submits that the activities of Union's agents are more remote than that of the plaintiff in the *Anderson* case. The distinction as to what assistance brings one within the terms of the subject section made in that case is "those which result in legal liability between the parties." Certainly nothing the agent of Union does in any way effects legal liability between any buyer and seller any more than the activities of the stenographer or man who introduces the real estate broker do.

## 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 THE CONDUCT AND ACTIVITIES OF UNION.

Appellant does not take issue with the authorities cited by respondent under this point but contends that they do not have any application to our case. It is idle to say that there is no interference (or that the interference is inconsequential) with an admittedly interstate activity

of publishing and advertising because the latter are not prohibited (and could not be since they are done outside the state) when burdens are placed upon the procuring of advertisers which makes it difficult or impossible to sustain the publication since advertising contracts are the sole source of revenue for such an enterprise.

Respondents' attempts to distinguish the cases of *Utah v. Salt Lake Tribune Publishing Company* and *Post Printing and Publishing Company v. Brewster* on the ground that the legislation there prohibited the advertising itself acknowledges that the state could not directly prohibit circulation of the advertising in question. Is it any more lawful to prevent such circulation by preventing the solicitation of the advertising matter to be circulated? If one may lawfully publish and circulate advertising, why may he not assemble the material?

Respondents contend that the requirements for Union's agents to qualify as real estate brokers are not unreasonable. Appellant asks why should it be necessary to pass an examination in real estate law, acquisition of titles, deeds, leases, mortgages, land contracts, agency contracts, liens, zoning, taxation, and the provisions of Chapter 61, U.C.A. 1953, for one who solicits from prospective sellers the business of advertising their property? Respondents have failed to suggest why competency in

such real estate details should be necessary for advertising the properties for sale. Respondents, further, omit entirely any reference to the provisions of Section 61-2-6 which also requires of persons who are not licensed real estate brokers of other states who have reciprocal laws and maintain a place of business there: (1) 3 years experience as a real estate salesman or its equivalent, (2) maintaining a place of business here (3) personal knowledge recommendations as to character by three Utah property owners.

### 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 AS APPLIED TO THE FACTS OF THIS CASE.

Appellant contends that it is unconstitutional for a legislature to arbitrarily define an advertiser as a real estate broker or salesman. Apparently, respondents do not dispute the fact that Sec. 61-2-2 has done this to the extent it includes the activities of Union. Further, respondents have not taken issue with appellant's brief that this can not be done consistently with constitutional principles.

Appellant does not argue that real estate brokers may not be regulated or that the activities of Union may

not be regulated "consistently with constitutional limitations." What appellant does contend is that Union can not be regulated in the same manner that a real estate broker may be constitutionally regulated when Union is not a real estate broker and that it is unconstitutional to define one as a real estate broker who is not one in fact.

Respondents contend that the New England cases of *United Interchange, Inc. v. Spellacy* and *United Interchange, Inc. of Massachusetts v. Harding*, failed to take note of the potential harm to the public from activities such as Union. This is a presumptuous statement and not in accordance with the fact. In *United Interchange v. Spellacy* the Connecticut Supreme Court said:

"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 police power when the facts warranted it (citing cases). A legitimate purpose, however, can not justify an unreasonable and unnecessarily arbitrary discriminatory method of accomplishing it (citing cases).

"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, 519) 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, 94 Conn. 639, 643, 11A 59; 30 Am. Jur. 278, 40) "

In order to constitute a reasonable exercise of the police power, there must be a reasonable connection between the requirements of the law and the purpose to be achieved by it. In this case the purpose ostensibly would be to prevent misrepresentations concerning selling of such advertising. Are these requirements reasonably calculated to achieve such purpose or are they calculated to prevent such business? Fraudulent sales are just as likely and possible in many other fields and the equal protection clause would require that all persons similarly situated would be treated likewise.

The supposed danger can adequately be taken care of as in the normal case of fraud, a defense asserted by the respondents in this case. The advertising fee is not payable until *after* the services have been performed and

the advertiser need not rely solely on the good faith of Union as respondents assert.

Under this point, respondents have made no attempt to contend that as applied to Union, Sec. 61-2-2, U.C.A. 1953, defines as a real estate broker a party who is not such. They concede that such activities "are not precisely identical with the commonly accepted functions of real estate broker or salesman under a trade or commercial definition." Not only are they not precisely identical but are not in any way within any acceptable definition of what constitutes a real estate broker. Respondents have cited no cases which constitutionally permit a party being arbitrarily defined and classified in a group in which he in fact does not belong. In *Whitcomb v. Emerson*, 46 Cal. APP 2(d) 263, 269, 115 Pac. 2(d) 892, a statute providing for the licensing of cosmetologists after examination defined the term 'cosmetology' in such a way as to include hair dressing, massage, and manicuring. The plaintiff in that case had long practiced as a masseuse. The board charged with administering the statute ordered her to cease performing any active cosmetology until she had obtained a license. The plaintiff had never studied hair dressing or manicuring, had no training or proficiency in these particular branches of cosmetology as defined by the statute, and could not pass an examination in them. The court held that although an activity

not harmful in itself might endanger the public health, safety, and general welfare if practiced by an inexperienced and incompetent person and, therefore, be a proper subject for regulation, a statute which prevented a person from carrying on the lawful occupation of masseuse unless she could also qualify under the statute as a hair dresser was an unconstitutional exercise of legislative power. A similar line of reasoning controlled the court's decision in the following cases: *Proulx v. Heron*, 127 Colo. 168, 176, 255 P. 2(d) 755; *Berry v. Summers*, 76 Idaho 446, 452, 283 P(2d) 1093; *People v. Schaeffer*, 310 Ill. 574, 580, 143 NE 248; *Scully v. Hallihan*, 365 Ill. 185, 191, 6 NE 2(d) 176; *Johnson v. Ervin*, 205 Minn. 84, 88, 285 NW 77; *People v. Ringe*, 197 N.Y. 143, 149, 90 NE 451; *Evans v. Baldrige*, 294 Pa. 142, 144 A 97; *Timmons v. Morris*, 271 F 721, 727; *Baker v. Daly*, 15 F 2(d) 881, 882.

In the very recent case of *Union Interchange v. W. A. Savage*, 342 P2 249, the California Supreme Court held there was substantial doubt as to the constitutionality of statutes prohibiting identical activities of this appellant's assignor.

#### POINT IV.

SECS. 61-2-1, 62-2-2 AND 6-2-18, UCA 1953, AS THEY APPLY TO THE FACTS OF THIS CASE ARE UNCONSTITUTIONAL.

# TUTIONAL AS BEING IN VIOLATION OF THE PRINCIPLE OF FREEDOM OF THE PRESS.

Respondents' argument that there was no interference with the freedom of the press herein because the Utah statute imposes no direct restraint or prohibition on Union's publication was effectively dealt with by the Supreme Court of Maine in the case of *United Interchange, Inc. of Mass. v. Harding*, in these words:

"The press can be deprived of its liberty as quickly by previous restraints which destroy its sources of revenue as by rigid censorship. If by an artificial licensing device the business of petitioners can be curtailed or terminated, we see no obstacle for further encroachment on freedom of the press by restrictive legislative device aimed at specific media or even at the whole industry."

Surely the statute in question here destroys Union's sources of revenue because of the impracticality of its agents becoming real estate brokers and of furnishing the personal character references required by our laws of real estate brokers. Respondent's brief concedes that "the regulation of Union's activities may have some slight effect on appellant's sources of revenue." (Page 13). It is difficult to see how respondents can contend that the effect on Union's publication and circulation of its periodicals is so remote and obscure as to be of no consequence when they fail to even discuss the limitation

they would impose on Union's agent with respect to passing written examinations in fields unrelated to their activity and furnishing evidence from residents as to personal knowledge of their agent's good moral character when such agents almost invariably are non-residents.

Respondents acknowledge that the Maine case cited above is directly in point and contrary to their position in this case.

Although 16 C.J.S. 1123, Constitutional Law, Sec. 213(8)c makes the broad statement that freedom of speech and press impose no restraints on governmental regulation of commercial activities such as commercial advertising, all of the cases cited for such statement and by respondents here deal with (1) the power of a municipality to regulate business on their streets without violating freedom of speech or press or (2) power to tax such business activities. As stated in the case of *Pittsford v. City of Los Angeles*, (122 P2 525) the issue there was "the right to distribute commercial advertising matters upon public streets and thorough-fares." No such question is involved in this case.

It is true that municipalities may constitutionally prohibit commercial activities carried upon highways, streets, or on sidewalks without violating the freedom of speech or press guaranteed by the Constitution be-

cause streets, sidewalks, and highways are public property, and no one has a vested right to do business there. This court in the case of *Slater v. Salt Lake City*, 206 P. 2(d) 153, carefully pointed out that the ordinance in question did not prohibit the sale of magazines in other portions of the city than on certain specified streets which constitute the congested business district of the city in question. In this case, however, the respondents contend that Union may not properly enter into the contracts anywhere in the State of Utah without obtaining a real estate brokers license. On the contrary, in the case of *Pittsford v. City of Los Angeles*, cited by respondents, it is stated:

“The conduct of strictly commercial activities may, under certain circumstances, involve the exercise of free speech and a free press and under such circumstances prohibition of certain commercial practices might conceivably be held to abridge these constitutional rights. . . . It does not follow that where an ordinance regulating or prohibiting the transaction of business upon the public streets may be said to bear a reasonable relation to the public welfare, such an ordinance may be set aside upon the ground that it encroaches upon liberty of speech and press. Such liberties in connection with commercial activities may ordinarily be exercised in some other manner than upon the public streets.”

In the case at bar, Union's agents were not distributing any commercial or mixed commercial and political matter upon the public street as was the party sought to be enjoined in the case of *Valentine v. Christensen*, (New York) 62 S. St. 920, 316 U.S. 52, 86 L. Ed. 1262. Appellant takes no exception to that case.

Appellant does not contend that the activities of Union are beyond the power of a municipality or a state to tax. The case of *Reuben H. Donnelly Corp v. City of Bellevue* (Ky.) 140 SW 2d 1024, which held that a city may constitutionally levy a tax upon circulation of commercial advertising without violating freedom of the press has no application to this case. In short, the issue here is whether Union must obtain a real estate broker's license in order to negotiate advertising contracts anywhere in the State of Utah and not whether such activities may be prohibited on public thoroughfares or are immune from taxation.

## CONCLUSION

The activities of Union do not come within the provisions of our real estate licensing statutes. Such statutes if applied to plaintiff's assignor are unconstitutional as being in violation of the commerce clause, the due process and equal protection clause, and freedom of press of

the Federal Constitution. The order of dismissal based on said statutes was in error and should be vacated and the case remanded to the District Court of Salt Lake County for further proceedings to determine the merits, if any, of respondents' defenses based on fraud and other affirmative defenses.

Respectfully submitted,

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