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Supreme Court of the United States

OCTOBER TERM, 1968

Office-Supreme Court, U.S.
FILED

JAN 23 1969

JOHN F. DAVIS, CLERK

In the Matter of:

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:
DUNBAR-STANLEY STUDIES, INC. :
:
Appellant, :
:
v. :
:
STATE OF ALABAMA :
:
Appellee. :
:
-----X

Docket No. 376

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Place Washington, D. C.

Date January 16, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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J. Edward Thornton, Esq.

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- - -

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 ----- x
4 Dunbar-Stanley Studios, Inc. :
5 Appellant, :
6 v. : No. 376
7 State of Alabama :
8 Appellee. :
9 ----- x

10 Washington, D. C.
11 Thursday, January 16, 1969

12 The above-entitled matter came on for argument at
13 10:10 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 J. EDWARD THORNTON, Esq.
P.O. Box 23
Mobile, Alabama 36601
Counsel for Appellant

WILLIAM H. BURTON, Esq.
Assistant Counsel, Department of Revenue,
and Assistant Attorney General
Counsel for the Appellee

1 P R O C E E D I N G S

2 THE CLERK: Counsel are present.

3 MR. CHIEF JUSTICE WARREN: No. 376, Dunbar-Stanley
4 Studios, Inc., Appellant, versus Alabama.

5 Mr. Thornton, you may proceed.

6 ORAL ARGUMENT OF J. EDWARD THORNTON, ESQ.

7 ON BEHALF OF APPELLANT

8 MR. THORNTON: Mr. Chief Justice, and may it please
9 the court.

10 In the beginning the city of Mobile decided to exclude
11 the taxpayer from its business of selling 59 cent baby pictures
12 in Mobile by imposing a license that was applied exclusively to
13 the taxpayer in the amount of \$50 a day.

14 The taxpayer had been in the State of Alabama for
15 about three years operating in eight cities advertising its
16 existence, but it was not until after this proceeding began that
17 the State of Alabama discovered the taxpayer and assessed a
18 transient photographer's license on the taxpayer, not only for
19 the current year but for as many years back as they could go.

20 This assessment was made in the State Department of
21 Revenue and we appeared in protest of that assessment making
22 substantially the same arguments that we are making in this
23 court today but unsuccessfully.

24 We appealed to the Circuit Court of Montgomery County
25 where we made substantially the same arguments that we are

1 making here today and unsuccessfully. We then appealed to the
2 Supreme Court of Alabama making substantially the same argument
3 and again unsuccessfully.

4 In fact, this sort of gets to a man's ego ultimately.
5 So we are here today on this case where the facts are sub-
6 stantially these: ---

7 Q May I ask you please, what court did you say you
8 filed the suit in?

9 A The assessment was made against us by the State
10 Department of Revenue.

11 Q You mean in Montgomery?

12 A That is correct.

13 We appealed then from that assessment to the Circuit
14 Court of Montgomery County and from there to the Supreme Court
15 of Alabama.

16 The facts are that the taxpayer has been engaged in
17 business of taking baby pictures for some while and it has a
18 good many experts who are very good at posing children and has
19 done quite well at it.

20 They have agreed with the J. C. Penney Company to
21 conduct their operations in and through the J. C. Penney stores.

22 The operation is that the local manager of the Penney
23 stores decides when they would like to have the photographer
24 from taxpayer.

25 The advertising, direct mail and other advertising is

1 furnished to Penney by taxpayer and then the photographer goes
2 in at the given time, has sittings, poses the children, exposes
3 the film, sends the exposed film back to the offices of taxpayer
4 which are in Charlotte, North Carolina, and then moves on. That
5 is, the photographer moves on.

6 The exposed film is developed in North Carolina. The
7 pictures are printed and finished and then forwarded back to the
8 J. C. Penney store, the local store where they are delivered to
9 the customer.

10 Now had the State of Alabama imposed a license on all
11 of these operations; that is, had the State of Alabama imposed
12 a license on all non-resident photographers coming into the
13 state and holding themselves out as photographers, having
14 sittings, posing children, exposing film and then forwarding
15 the film out of state to be developed, printed and finished, and
16 then the finished product to be returned to the State of
17 Alabama, had Alabama had a license in those words, I take it
18 even the Attorney General of Alabama and even the Supreme Court
19 of Alabama would not have contended that that would meet an
20 attack under the Commerce Clause.

21 I take it that if we begin to take variables off one
22 at a time -- for example, instead of saying all non-resident
23 photographers, suppose the legislature had said all photographers
24 who hold themselves out as photographers, take sittings and such,
25 I take it that the Attorney General would not claim that such a

1 license could be imposed on this taxpayer, and on down to the
2 present place where the present license in Alabama which says on
3 transient photographers a license of X dollars.

4 Q Why wouldn't he be here, I wonder, if it applied
5 equally to residence as well as non-residence?

6 A The operation that they would be engaged in is
7 one that is clearly an interstate activity. We start with a
8 non-resident photographer. We expose the film in Alabama. We
9 send the film out.

10 Now if the license included all of those things, this
11 would clearly be attempting or an attempt on the part of the
12 state to license that which it can't license.

13 We have the right to do this under the Federal
14 Constitution. The State of Alabama doesn't give us that right.

15 Q But I understood you to say that if they had
16 imposed this tax on all itinerant photographers, whether they
17 were in or out of the state, that the Attorney General would not
18 be here to defend them.

19 A I doubt very seriously if he would.

20 Q Well, now, just what is the defect in that, if
21 they treat all of that class of photographers alike in a non-
22 discriminatory way?

23 A This would be an effort to attempt to use a
24 license which would be a license, a non-discriminatory license,
25 on photographers. All photographers shall pay a license. But

1 the application of that license, albeit, a non-discriminatory
2 license, on this interstate activity would in our judgment run
3 afoul of the Commerce Clause.

4 And the State of Alabama has not made that contention.

5 What they have contended is this: They say, "Take this series
6 of events beginning with the non-resident photographer, exposing
7 film in the state, sending it back to North Carolina for
8 developing and then sending the picture back," they don't claim
9 the right to tax all of those activities; that is, both the
10 in-state activities and the out-of-state activities.

11 They don't claim that.

12 They say, "But what we can do is," and this is why we
13 are here today, they say, "We can take this series of events
14 and chop them up in pieces and we can catch the local activities
15 and we can license them." And this is why we are here today,
16 because we say they cannot do that.

17 You see, this is a unitary transaction.

18 Q Yes, I understand that. But I am just trying to
19 get straightened out.

20 Suppose that instead of sending these pictures to
21 North Carolina, they sent them from Montgomery to Mobile and at
22 the same kind of an operation. Would there be anything wrong
23 with that tax?

24 A Well, if the operation was entirely in Alabama,
25 that is, if this was not a non-resident photographer -- of

1 course, this takes one of the issues, that is to say, the
2 developing of the film and keeps that in the State. If that
3 would do, that would give them a little more local activity to
4 in effect hang their hat on.

5 Q Would that be all right?

6 A I would not say so. I would say that if they
7 applied that to a non-resident photographer who is traveling
8 about over the country ---

9 Q No, we are talking about the state. They take
10 the pictures in Montgomery and they process them in Mobile. Do
11 you think there would be anything wrong with this tax as applied
12 to that situation?

13 A On the statement that you have made, the answer
14 is no, I see no objection to it.

15 Q No objection to it.

16 Now, do they apply -- does the State apply this tax
17 to that class of photographers?

18 A I cannot answer that. I do not know. I do not
19 know of any one so operating.

20 Q I see. The record doesn't show that?

21 A No, sir.

22 Q I see.

23 A And I do not know of any other photographers
24 operating as we operate. I do know of one other, Olan Mills
25 operates as we do with certain variations. They are in

1 Chattanooga, Tennessee, is where their headquarters are. Our
2 headquarters are in Charlotte, North Carolina.

3 Q Do you mean there are no photographers in Mobile
4 that specializes in taking baby pictures?

5 A No, I can't say that.

6 Q Well, they are taxed, too, aren't they? Aren't
7 local photographers taxed but taxed differently?

8 A Yes. Well, a local photographer that has an
9 office there and operates at a fixed location is the magic word
10 in Alabama.

11 If a photographer is at a fixed location in Alabama,
12 does pay a license, yes.

13 Q But your point is that the transient is charged
14 more and your second point is that because he is a transient,
15 he can't be charged at all?

16 A That is correct.

17 The reason the transient -- we say that the transient
18 shouldn't be charged at all is because of what the State is
19 attempting to do. They are attempting to take what we conceive
20 to be this unitary transaction and split it up in parts and
21 apply the tax to that part.

22 Now with reference to photographers in the State, you
23 see, the license on a photography shop at a fixed location is a
24 certain amount. In this case, by reason of the fact that the
25 film goes outside the State -- well, I will repeat this or make

1 this statement this way: Our photography operation is at a
2 fixed location, if it is a J. C. Penney store. So we are at
3 a fixed location.

4 Now a prior case in Alabama involving Olan Mills --
5 they had what they called branch operations which was operations
6 at a specific branch in Alabama and they insisted that they had
7 a right to not to be taxed as a transient because that license
8 is \$5 a week.

9 The license at a fixed location is \$25 a year. And
10 so Olan Mills said "You can't charge us a transient license
11 because we are doing business at a fixed location." The Supreme
12 Court of Alabama said as appears in a quotation in our brief on
13 page 27, the statement that by sending the exposed film outside
14 the state, this made the operation a transient operation. And,
15 therefore, the transient license would apply even though the
16 film was exposed at a fixed location.

17 And we say this is where the discriminatory nature of
18 this tax makes it difficult. But, of course, we are really
19 attacking on the more fundamental ground, which is the right of
20 the State to take a unitary transaction, split it up into parts
21 and license part of it. And this is the attack which we are
22 making.

23 Q Excuse me, sir. But your attack is solely the
24 Commerce Clause, isn't it?

25 A That is correct.

1 Q In other words, you are not attacking this is a
2 discriminatory tax on any other ground other than the Commerce
3 Clause?

4 A That is right.

5 We say that as applied here, the assessment that was
6 made against us for operations in Birmingham, had we been --
7 had we taken out a license at a fixed location in Birmingham,
8 for the 2-1/2 years involved in this case, the license would
9 have been \$62.50.

10 As a matter of fact, by reason of charging us \$5 a
11 week for operations at Birmingham, it turned out to be \$110.
12 Now we say this makes it discriminatory and discriminatory
13 against it because of inter-state activity.

14 Q Suppose the tax were exactly the same as the tax
15 on photographers who have a fixed location?

16 A Well, then we would be relegated to our first
17 point which is, that a unitary transaction of this kind cannot
18 be broken up into parts to license part of an inter-state
19 activity.

20 Q Do we have two questions before us?

21 If we should decide that this is not a violation of
22 the Commerce Clause because of an improper regulation of Inter-
23 state Commerce or an improper burden on the Interstate Commerce,
24 then if we should decide that, then are you suggesting that we
25 must go on and decide whether this discrimination standing alone

1 makes the tax unconstitutional?

2 A No, sir.

3 Q That is a State question, is that what you are
4 saying?

5 A Largely.

6 We are anxious to have the Court hold that this
7 unitary transaction as I so described it, that the effort on
8 the part of the State to break that into parts and license the
9 local part of it, this should destroy this tax.

10 And if the Court comes to that conclusion, my case is
11 through.

12 I threw the other two in here because I didn't come up
13 here for an academic session. I came here to win a lawsuit.
14 And if I lose it on that ground, I want the Court to know that
15 this case may well also fall afoul -- in fact, I think it does
16 fall afoul of the Opelika case which is the flat license, the
17 flat ungraduated license theory which when applied as an ad-
18 mission to Interstate activity is bad. We say that is No. 2.

19 But, of course, we concede that if we win only on
20 that point, the State can beat us because they will then
21 graduate the license.

22 So, with No. 3, if we win only on the ground as
23 applied to this case, it was discriminatory because of the
24 Interstate activity, and that if instead of our sending the
25 exposed film out of the State, we kept the exposed film in the

1 State, they will get us again there.

2 So, the last two points will arise, we hope, only if
3 Point No. 1 is not reached. But we think Point No. 1 should be
4 reached and we think this completes the case.

5 We have the photography cases set out on pages 15 and
6 16 of our brief. This isn't the first time that a State has
7 tried this -- I don't mean to say tried this sort of thing in a
8 derogatory sense -- but I mean this isn't the first effort that
9 a State has made to tax such activities there.

10 And interestingly enough, Alabama, was one of the
11 culprits there, too, Dozier against Alabama, and there was one
12 against North Carolina.

13 There the local activity which the State sought to
14 impose the license on had to do with frames. One of them was
15 said that if anyone who sells a frame in the State where the
16 picture was developed somewhere else, if you sell a frame,
17 picture frame in there, this is subject to a license.

18 This court held in the North Carolina case that this
19 is what I suggest is the case here. This was a splitting up of
20 a unitary transaction into its parts in an effort to impose a
21 license on one of those parts which could not stand. The
22 Alabama case, Dozier against Alabama is the same case.

23 Now, of course, the Drummer cases, this is the Drummer
24 cases with this difference: In the Drummer cases, the States
25 have sought to license the solicitation of orders in the State

1 out of this series of events. This court has unanimously
2 insofar as I recall held that you cannot split them up into
3 solicitation and put the tax on them where there is this
4 interstate activity throughout.

5 Q It seems to me that the complicating factor here
6 is that this could be regarded as the J. C. Penney operation.
7 J. C. Penney rounds up the children and does the selling and
8 delivers the photographs after they are made as I recall the
9 facts here.

10 A That is correct.

11 Q And in that sense it is different from the
12 typical Drummer case?

13 A That is true.

14 Q And then you have these out-of-state photographers
15 who come in and expose the film and send the film out of state
16 to be developed, and then the photographs are sent back to J. C.
17 Penney so you have a situation here that is a little compli-
18 cated in the intermingling of intra and inter-state aspects,
19 a little more of a mingle than some of the others on our books.

20 A That is true.

21 Of course, response No. 1, this case doesn't involve
22 J. C. Penney as the court is aware. The assessment was made
23 against us. And in the appendix it is pretty clear that the
24 State was very anxious to see to it that no agency was developed
25 between Penney and taxpayer.

1 This is true. There isn't any agency. But this is a
2 slightly different case than the Drummer case as you say where
3 there -- he has no ---

4 Q The tax is not imposed on J. C. Penney but the
5 facts inevitably and inescapably involve J. C. Penney.

6 A Well, maybe your Honor recalls the city case which
7 is before this court and we went off on that point there. We
8 don't think we should have gone off on it. But nevertheless,
9 there they insisted that my suit for declaratory judgment to
10 hold up this \$50 a day license which, of course, this is
11 destructive -- I mean if this stands, we are gone. We can't
12 sell enough 59 cent baby pictures to make that kind of license.

13 But there, after we got to court, they met us by
14 saying, "Well, you are the wrong person."

15 And we said, "No, we are the ones you tried to put in
16 jail. We are the ones that are interested. We are the ones
17 that is going to pay it."

18 This is not a J. C. Penney. It is not quite like a
19 leased section of a department store where there you know the
20 department store will get an overall catch-all license and then
21 they will lease out various parts of the department store.

22 We are not quite that. We come and go. We come and
23 go at Penney's.

24 Q You are not quite, but somewhat?

25 A Somewhat, yes, that is true. But I would like to

1 emphasize one thing. We deliberately do business this way.
2 That is to say, we want a local business where a disgruntled
3 customer or anyone like that has someone to go to. We are not
4 unaware of the fact that there has been criticism of transient
5 photographers just as there has been criticism of transient
6 operators of any kind where a man spends his money and he can't
7 protect himself.

8 So we are very proud of our product. We think we have
9 a very good baby picture. But we want the customer to know that
10 he has someone with this sort of reputation that J. C. Penney
11 has, that he can come to see about us and we deliberately en-
12 courage that because we think that is good.

13 Q Does your case rest particularly on the fact or
14 or your claim rest particularly on the fact that they cannot
15 license you to do business. Suppose they were simply taxing,
16 imposing a tax on the part of the activity done in Alabama,
17 would your argument be the same or are you claiming that here
18 they are actually licensing Interstate Commerce by putting the
19 tax on the whole thing?

20 A Well, yes, sir.

21 Q When there is only one part of it taxable in
22 Alabama?

23 A Well, we say the one part is not taxable. But
24 that is correct. We are saying that the licensing of us to
25 expose film ---

1 Q What about a railroad that does Interstate
2 business and they can tax the track in the state and other parts?

3 A Well, of course, an Ad velorem tax I -- that
4 would be something else. Gross receipts tax, I am not sure
5 about those. Certainly net income tax, I am not sure about
6 those. But here it is a license and it is a license on the
7 doing of this kind of business.

8 Q In the Interstate business, that is your claim?

9 A That is correct.

10 Q And putting up a bar to their doing an Inter-
11 state business unless they pay a tax?

12 A That is correct.

13 Q Or part of that business in Alabama?

14 A That is correct.

15 Q Which would bar you?

16 A That is correct.

17 Q Did I understand you to say that you are not
18 making an equal protection clause argument at all?

19 A That is correct, we are not.

20 Q So you don't rely on the distinction between
21 itinerant photographers and fixed location photographers?

22 A No, except insofar ---

23 Q I understand. You are saying it is discriminatory

24 ---

25 A --- as applied in this case.

1 The only discriminatory feature we are raising is the
2 discriminatory application in this case.

3 Q But you don't say that it is discriminatory
4 against itinerant photographers except that it discriminates
5 against those who are in Interstate Commerce?

6 A Well, it discriminates against those who send
7 exposed film in the state out of the state. Yes, sir, but that
8 is the only part but the objection is the Commerce Clause. You
9 see, this is discriminatory against Interstate Commerce; insofar
10 as I know that has never been recognized.

11 Q Why aren't you making an equal protection? You
12 didn't raise that in the court below at all?

13 A No, but we are interested in the Commerce Clause.
14 This is the point under which we developed the case and the
15 discriminatory aspect of it is by reason of the Commerce Clause.

16 Q But let us assume, did you say that the Clause,
17 that the law does not discriminate against itinerant photog-
18 raphers? Let us assume there is an itinerant photographer who
19 is solely based in Alabama. Assume you were.

20 Would you say that you had a valid equal protection
21 argument against this tax because it taxes fixed location
22 photographers less than it taxes itinerant photographers?

23 A No. I would not. I say that Alabama can make
24 a difference between itinerant and fixed location photographers.
25 We raise no point on that.

1 Q Well, then, why would you say that -- aren't you
2 really then crowded back to your very first point? That that
3 is really a license on Interstate Commerce because it isn't
4 discriminatory without reason anyway, is it?

5 A Well, this is, of course, the point we want most
6 of all. But if I may, on page 27 in the brief, the reason they
7 held, the Supreme Court of Alabama held, the reason they held
8 that we were subject to a transient or an itinerant license
9 was because it says this, "True, in the branch operation," --
10 this had to do with Olan Mills case, page 27 -- "there is a fixed
11 location. But it sends its films back to Chattanooga to be
12 processed and the pictures are ultimately made in Chattanooga."

13 Now on this basis, you see, it was because this
14 Interstate activity that the transient \$5 a week license is
15 imposed rather than the \$25 a year license. Now we say this is
16 a direct discrimination against Interstate activity.

17 Now as to the equal protection clause, as to the state
18 making a difference between itinerant photographers and the
19 resident photographers, we make no point on that.

20 Have I made myself reasonably clear?

21 I will reserve the remaining time for rebuttal.

22 MR. CHIEF JUSTICE WARREN: Mr. Burton?

23 ORAL ARGUMENT OF WILLIAM H. BURTON, ESQ.

24 ON BEHALF OF APPELLEE

25 MR. BURTON: Gentlemen, in the first instance here,

1 it seems that the appellant rather accuses the State of Alabama
2 and the city of Mobile of entering into some kind of evil
3 conspiracy to put this company out of business.

4 But actually, the tax levied by the State has nothing
5 whatsoever to do with the tax levied by the city. They are two
6 separate and distinct entities and there is no evidence in the
7 record that there was any kind of collusion or conspiracy here
8 between the State and the city.

9 If it is any feel where there is a confusion, and it
10 is in this field of Interstate Commerce and as I read the cases,
11 if there is one universal principle that applies to all cases,
12 it is that each case stands on its own shoes or on its own facts.

13 Now in this particular case, not in this case but in
14 similar cases where the State has assessed this license tax
15 against photographers operating for Olan Mills, the Supreme
16 Court of Alabama on not one but on three occasions has held that
17 this tax is directed at the photographer and the individual
18 photographer.

19 That is, the person who comes in and takes the picture.
20 And we disagree with counsel for the appellant that the court
21 has said it is wrong sending the film out of the State. If
22 that were true, I wouldn't be here arguing the case. But what
23 the Supreme Court of Alabama has held in defining the charac-
24 teristics of this tax and its authoritative meaning is that it
25 is directed at the individual photographer and on his activities

1 in the State more or less of conducting the sitting and taking
2 the picture.

3 If you read the license, it says -- actually this
4 license is levied under Title 51. That is a Revenue Code of
5 the State, Section 569.

6 Now the first part of the statute relates to fixed
7 locations or photograph galleries. Then there is a last sen-
8 tence there which levies a separate and distinct license on
9 transient or travelling photographers.

10 Actually, it reads as follows: "For each transient
11 or travelling photographer, \$5 a week."

12 Now in the case of Graves versus Alabama, that was a
13 case involving one of Olan Mills' photographers. And it was
14 a criminal case brought in the Circuit Court.

15 In that case, when it got to the Supreme Court of
16 Alabama, the court held that the license was directed at the
17 photographer as the statute says. "Each travelling or transient
18 photographer, \$5 a week."

19 Q Do your courts characterize this license tax
20 as a privileged tax? Isn't it a license deemed to amount to
21 giving a personal privilege to do business?

22 A Your Honor ---

23 Q It is not for inspection. It is just for the
24 privilege of doing business in Alabama, isn't it?

25 A It is a license tax. It is not a permit fee,

1 strictly speaking a license. It doesn't give anybody the right
2 to do anything.

3 Q But without it you can't do business in Alabama?

4 A Right.

5 Q So it is for the privilege of doing business in
6 Alabama?

7 A It is for the privilege of doing this business in
8 the State of Alabama, that is true.

9 Q When you state this business, what does that
10 contemplate?

11 A Well, this business is to do business as a
12 transient or travelling photographer.

13 Q What business is the transient?

14 A Our court has defined that in this Graves case,
15 Graves versus Alabama.

16 Q As being?

17 A As being a photographer who goes about the State
18 from county to county where he has no fixed location.

19 Q And does what?

20 A And takes pictures and conducts sittings.

21 Q It stops with that?

22 A Yes, sir.

23 Q You say this doesn't implicate the development of
24 the pictures and all the rest of it?

25 A No, sir.

1 What our court has said that this license is directed
2 at is the photographer taking the picture, conducting the
3 sitting, and, gentlemen, that requires a person with skill.
4 It is an odd in itself.

5 I have always looked on a photographer as somebody
6 who takes a picture. The proofreaders and the film developers
7 in North Carolina or Tennessee, that is not what this license
8 hits. It hits the photographer, the individual photographer.

9 Now this assessment was made against Olan Mills, the
10 company.

11 Q Why make the difference between the transient
12 and the fixed photographer? They both do the exact same thing,
13 right?

14 A No, sir. We say that there is quite a distinction
15 between the two. We say that the license on a fixed location or
16 a photograph gallery is another class and that this license
17 was ---

18 Q Why?

19 A Sets up ---

20 Q Did I understand you correctly to say a moment
21 ago that a photographer has great expertise in taking the
22 picture. That is what you are licensing. That is what you
23 said a minute ago.

24 A Yes, sir. That is true.

25 Q Well, is there a difference between the expert

1 photographer taking a picture in a fixed location and an expert
2 photographer taking a picture in the exact same location but
3 moving on?

4 A I would say, no, sir, not in the operation of
5 the camera and taking the picture. I would say it would all be
6 the same recognizing ---

7 Q Well, why do you charge the itinerant more if it
8 is the same action?

9 A That depends on whether the itinerant or the
10 transient is charged more, if he stays one week, it is only \$5.
11 But if a person ---

12 Q Why is it that the itinerant who works 52 weeks
13 is charged more than the stationary man who works 52 weeks?

14 A Well, we say they are in different classes or
15 sub-classes and that the State ---

16 Q Yes, your law puts them in different classes but
17 what about the -- has your court ever explained or gone into
18 the basis for the different classifications, why the different
19 class?

20 A I believe, your Honor, in this Graves case they
21 touched on that. I don't know how deeply. I don't recall that
22 part of the case, but I believe that they did touch on that and
23 in the Graves case they did point out that this transient
24 photographer license, it applies to those who come from without
25 and within the state alike.

1 In other words, a photographer has a fixed location in
2 Montgomery and it has been so applied, and he sends photographers
3 out in Monroe County or Mobile County, Jefferson or some other
4 county in Alabama, then his photographers, where they don't have
5 a fixed place of business, they pay this license or are supposed
6 to.

7 Q Suppose in your State taxation system, a photog-
8 rapher -- suppose there is a large photographer's business and
9 he has half a dozen people in there who take the pictures. Do
10 you charge him one or a half a dozen licenses?

11 A In that case, your Honor, the license would be
12 on the photograph gallery. It would be only one license, that
13 is true.

14 Q Well, I thought you told us a little while ago
15 that this was a personal thing that was directed against the
16 person who takes the pictures and if that is true, why wouldn't
17 you charge him six license fees instead of one if you had six
18 people taking pictures?

19 A Your Honor, our reasoning there is that they are
20 two separate and distinct licenses.

21 Q What are two separate and distinct licenses?

22 A Well, we say that the photographer who has a
23 fixed place of business is in a different class from the
24 travelling photographer that goes from county to county. That
25 is a different, you might say, operation and it is a different

1 class or sub-class which this court has said that the Congress
2 and the State Legislature can, for the purpose of taxation,
3 set up classes and even sub-classes.

4 Q What is the State's interest in separating these
5 two that you just mentioned for purposes of taxation? There
6 must be some reason for the classification, musn't there be?

7 A Your Honor, I might say this along that line in
8 explanation: In the case of the fixed location, if you have
9 five places of business in one city, you would have to pay five
10 different licenses. Under the general provisions of the Revenue
11 Code relating to licenses and more particular, Title 51,
12 Section 831A, if you have got ten places of business, fixed
13 location places of business, then you would pay ten licenses.

14 Actually, the travelling photographer can take for
15 a week on \$5 to operate throughout every city in the county.
16 Whereas, the photographer with the fixed location would have
17 to pay a license for each separate place of business.

18 Q Let us see if there is any class distinctions
19 here. Suppose the photographer does business in six counties,
20 takes pictures in six counties, he develops the pictures in
21 those six counties. Now suppose there is another photographer
22 who takes the pictures in six different counties, but he does
23 not develop them in any of those counties, but sends them off
24 to be finished.

25 Could you charge him a license, this last one, which

1 would bar him from doing that business, if he didn't pay the
2 license or the whole thing?

3 A Your Honor, in that case, if they have no fixed
4 place of business, I think you would charge them both this \$5
5 license just the same whether they develop the film in the
6 county or whether they send it out. You would charge him this
7 same license of \$5 a week.

8 Q Well, I gathered from this case up to date --
9 maybe it is wrong -- that in the main what they are complaining
10 about is this: They send a representative to Penney's. He
11 takes pictures with the understanding that those will be sent
12 out of the state, developed and brought back and they complain
13 that on that business you are charging them a license which
14 would forbid them to do business without it and you could
15 prosecute them for it, could you not?

16 A Your Honor, you could prosecute or penalize a
17 person for not paying any tax, whether it is in Oklahoma,
18 Alabama or anywhere else. Every one of these statutes ---

19 Q Yes, but it is quite different if you are taxing
20 him, if it can be shown that what your tax is is a tax directly
21 on Interstate Commerce which says you have got to pay this much
22 tax to do business in the state in Interstate Commerce.

23 How are you doing that?

24 A Your Honor, we say that we are not.

25 Q Why?

1 A Because of the fact that this tax is not an
2 entrance fee.

3 Q Not a what?

4 A It is not a license, strictly speaking.

5 Q It is something to keep them from doing business
6 in the state in Interstate Commerce if they don't pay it, isn't
7 it?

8 A Your Honor, they are supposed to pay the tax.
9 But it wouldn't keep them out.

10 Q Wouldn't keep them out? But wouldn't they be
11 prosecuted for it?

12 A Yes, but that would be not for paying the tax.
13 It wouldn't be a ---

14 Q It would be for not paying a tax on doing
15 business in Interstate Commerce. That is what I understand is
16 that charge.

17 A But the same person located within the state
18 would also be ---

19 Q Well, that is a different question.

20 A Yes.

21 Q Can you tax Interstate Commerce at all? Can you
22 put a tax on it?

23 A No, sir.

24 Q You can't engage in Interstate Commerce?

25 A I agree wholeheartedly ---

1 Q I can't quite understand, that is what I am
2 trying to find out, why it wouldn't be doing business in
3 Interstate Commerce. They went to Penney's, took the picture,
4 and then it off to be developed and then sent back, why wouldn't
5 that all be a part of the Interstate Commerce transaction or
6 can you divide it up contrary to their argument into segments
7 and force them to pay the license to do that business?

8 A Your Honor, it has been held by this court and
9 I think you have written some of the opinions that I have read
10 that where you can realistically separate activities and localize
11 them, that you can validly tax that.

12 Q That is right.

13 A And that is exactly our contention in this case,
14 and another point right there, this court in United Gas Pipeline
15 versus City of Mobile held that it was the prerogative -- I
16 won't say prerogative -- but the right of the State courts to
17 define the meaning of a tax and tell what the characteristics
18 of a tax are.

19 In that case, this court sent that case back to
20 Alabama for the State courts to define the meaning of the tax.
21 And Mr. Justice Douglas there said that the case shouldn't have
22 been sent back. He said the license tax in that case was valid
23 at the time. It didn't need to go back.

24 Mr. Justice Harlan in that case he says that it
25 doesn't make any difference whether it was an entrance fee or

1 not. He did think that resolved the constitutional question
2 involved. But this court ---

3 Q Well, which one had the most people with it?

4 A Well the majority sent it back, your Honor. The
5 majority of the court sent that case back to Alabama.

6 Q What was the citation?

7 A Your Honor, I have it right here. That is United
8 Gas Pipeline versus Ideal Cement Company, 369 U.S. 134.

9 Q Thank you.

10 A Now there is also a case by the Supreme Court of
11 Alabama. When the case was sent back, the Supreme Court of
12 Alabama actually defined the characteristics of the tax and it
13 held that that tax was a local tax although United Gas Pipeline
14 Company was engaged in transporting gas in Interstate Commerce.
15 That was their business in selling it.

16 But they held that this license levied by the city of
17 Mobile on the selling of natural gas in Mobile was a local
18 license. And you could realistically separate that activity
19 from United's Interstate activity.

20 That is exactly our argument in this case.

21 Also, another case that we rely strongly on is the
22 Caskey Baking case whereby a license was levied on bakeries.
23 I believe those selling bread to people, retailers, licensed
24 retailers in the State of Virginia. And the bread was baked in
25 West Virginia and transported over the state line.

1 It is more or less one of the Peddler cases.

2 But this court held that the license tax directed
3 atthat local activity of selling the bread and delivering it
4 off of the trucks was sufficient for the license tax to validly
5 attach.

6 Another point in the Graves decision, the Supreme
7 Court of Alabama has held that inherently this tax does not
8 discriminate because it applies equally to all transient photog-
9 raphers whether they come within or without the state.

10 Clearly this type of operation, counsel for the
11 appellant relies mainly on the Drummer cases and I suppose the
12 leading case in that line is the Nippert versus Richmond. But
13 there the license was levied on solicitations and the orders
14 were sent to Washington. I believe Nippert represented a
15 Washington garment manufacturing company.

16 The court held that the solicitations were clearly
17 an Interstate Commerce and that the license could not be validly
18 levied in that case.

19 Q Mr. Burton, I am afraid that case illustrates
20 the fact that you make a mistake in relying on something that
21 I have written in this field.

22 A Well, your Honor, I want to point out one thing.
23 In that case it was brought out that before you could secure the
24 license in that case, that you had to get a permit from the
25 Department of Public Safety. And that is not so in this case.

1 And along the line of your questioning there, whether
2 it was more or less an entrance fee, this license if you go up
3 to the probate judge's office and you put the money down, you
4 can get -- everybody is entitled to buy this license. I don't
5 care whether you are in the business or not.

6 This is in no respect an entrance fee, really a permit
7 or license. In fact, the probate judge will welcome you with
8 open arms if you come up with the money and he will issue the
9 license.

10 Q I thought you had said it was a license fee.

11 A Sir?

12 Q I thought you said it was a license fee. Am I
13 wrong? I understnad you now that it is not a license fee, but
14 I thought you had said it was.

15 A It is a license tax, your Honor. I have used
16 that word and it is used rather loosely. But this is a license.
17 It is a tax. And the Alabama court has held that it is on the
18 doing of business. It is not a right to do business. If you
19 don't pay this license, in other words, you can come in to the
20 State of Alabama and you can do business and your contracts are
21 valid, it doesn't keep you out of the state.

22 Q But it does put you in jail?

23 A Well,

24 Q But it does put you in jail.

25 A Your Honor ---

1 Q That might put you out of business, pretty
2 effectively.

3 A That is pretty effective, yes. But I will say
4 this. We have provisions in our sales tax and use tax and
5 income taxes that have the same provisions. Oklahoma does.
6 Colorado or any of the Federal tax laws -- I mean if you don't
7 pay any tax.

8 Q Of course your statutes say that before any person
9 shall become engaged in any business, they shall pay the judge
10 probate a fee or the tax which is required. Doesn't it? And
11 your statutes also say that every license is a personal privilege
12 to transact business.

13 That is what ---

14 A The statute does say that, your Honor. That is
15 very true. There is no disputing that. That is down in black
16 and white. But as a matter of application, actually,

17 Q You mean you just don't catch some people?

18 A Well I tell you it is not the duty of the state
19 or the Federal Government.

20 Q Yes, but no lawyer advising his client would
21 advise to go and do business without getting the license and
22 paying the tax.

23 A Well I would think that that would be pretty bad
24 advice.

25 Q As I recall it the NAACP pay a \$10 license.

1 A Well, your Honor, I don't know what the license
2 was.

3 Q \$10 as I remember it. I think the fine was
4 \$100,000.

5 A Yes. I don't know exactly what license. I don't
6 believe that came within the scope of these business licenses.
7 These are purely business or occupational taxes.

8 Q I was thinking that is what that was.

9 A It could be. I am not familiar with the case,
10 your Honor.

11 Q But it indicated a little danger of not paying a
12 license tax.

13 A Yes.

14 But actually this wouldn't cause your contracts to be
15 void or anything. You could do business in the state, and I
16 will say that as a matter of application the criminal provisions
17 are not used very often by the Department of Revenue.

18 Q Weren't they in that Olan-Mills case? The
19 Olan-Mills case was a criminal case, wasn't it?

20 A No, sir. Leon Graves versus the State of
21 Alabama was a criminal case. And Leon Graves was an agent or
22 photographer for Olan Mills.

23 Q But you said they don't usually do it. And
24 against that I have an example of when they actually did it.

25 A It is true that in the Leon Graves case they did

1 invoke the penal statutes; yes, sir, they did. But in present
2 times they very seldom bring a -- and it is really frowned on.
3 They try to bring several actions to recover these licenses.

4 Thank you, gentlemen.

5 MR. CHIEF JUSTICE WARREN: Mr. Thornton, you may
6 proceed.

7 REBUTTAL ARGUMENT OF J. EDWARD THORNTON, ESQ.

8 ON BEHALF OF APPELLANT

9 MR. THORNTON: I just have a word.

10 I think the facts in the Graves case may be of some
11 importance. Olan Mills at that time was engaged in a two-stage
12 operation. It had solicitors who went through the states
13 soliciting orders. It had a photographer who followed.

14 When the photographer came through, they arrested him
15 for not having a transient photographers license. Question No. 1
16 was, is the mere exposure of film engaging in the business of
17 photography?

18 And the Supreme Court of Alabama held it was, it being
19 so essential a part of the photography business that a license
20 on photography generally would apply to the mere exposure of
21 film.

22 Now it is that holding that comes over into these
23 cases here where they say, "Well now, we have already held that
24 the license is only on." That is not quite true. It was true
25 in the Graves case because that is all that Graves did.

1 But they have now come along and said that is all you
2 have to do in order to be subjected to the license. This is true
3 but it is true in a sort of a back-handed fashion.

4 But, nevertheless, it does show that the license is
5 on the mere exposure of film. And we are taking the position
6 that when that is connected with the entire transaction which
7 goes across the State line ---

8 Q Well, let me ask you. If I understood Mr. Burton
9 correctly, if you had a photographer based in Montgomery and he
10 sent photographers around the six adjoining counties but all
11 of the work was done in the State of Alabama, nevertheless under
12 this statute as to the activities of those photographers who
13 went around to the six counties the license fee would be \$5 a
14 week; the \$25 a week would be reserved for what was under the
15 fixed location.

16 Do you agree with that?

17 A I believe that would be a correct construction
18 of it.

19 Q Now suppose in that very situation all that
20 happened or rather instead of developing everything in the
21 State of Alabama, of the pictures taken by those photographers
22 who went around to the six counties, this photographer sent that
23 part of the business out of state.

24 Would you be making the same argument that then this
25 would be discriminatory against Interstate Commerce?

1 A Well now on the \$25 license in Montgomery on the
2 \$5 license ---

3 Q On the \$5 license.

4 A That is this case.

5 Q I see.

6 A But here, you see, the point is that we were
7 taking pictures at a fixed location at Penney's.

8 Q Yes, but I gather then, if you are right, then
9 all that the photographer who now does all of his work in
10 Alabama would have to do to escape that \$5 a week tax would be
11 to send the developing work out of Alabama to be done, wouldn't
12 it?

13 A Well, the going out of the state is what makes
14 the photography at a fixed location a transient operation. If
15 it is already a transient operation, I don't believe whether he
16 develops it in the state or out of the state makes any difference.

17 Q Yes, but I was trying to get what your view would
18 be of the position where everything is now done in the state
19 and all photographer does it to change his practice to send the
20 developing work out of the state, your position then would be
21 that what may be a proper tax now would become an unconstitu-
22 tional tax to the extent of the \$5 a week charge.

23 Well, that is this case, isn't it?

24 A Well, no, no, the reason we got the \$5 a week --
25 the reason we became a transient -- repeating myself a little

1 bit -- we expose film at a fixed location. Now that should be
2 \$25 a year if a license is on it. Of course, we would contest
3 that license. We are contesting the license because we say we
4 are in Interstate Commerce.

5 Q I see.

6 A But if the license had a fixed location with
7 charges, it would be \$25 a year. But by reason of the fact that
8 we send it outside ---

9 Q The only reason they put you in the transient
10 class is because you send your pictures outside the state?

11 A That is correct. That is exactly right. And
12 that is my last point.

13 We get to that after we get to -- and I don't ever
14 want you to get there. I don't want you ever to get to that
15 point because you see they can cure that so easily, we will
16 be back in court. We want the first point.

17 Q How can they cure it?

18 A What is that?

19 Q How can it be cured? You say they can cure that
20 so easily.

21 A Well, they will just amend the license and say
22 that regardless of where the film is developed, the license
23 will be \$5 a week.

24 Q For whom?

25 A For transient photographers.

1 Q Well, how do they prove you are a transient?

2 A The reason they prove we were a transient here
3 was because we sent it outside.

4 Q Well, that is it. How could they ever prove
5 that you were a transient if they amended the ordinance like
6 that?

7 A Well, my point is that they might cure that by
8 eliminating the discriminatory nature of the tax because of the
9 Interstate activity. This they could cure.

10 Q Well, you see you would still object to the \$25
11 a year?

12 A Oh, yes. Yes.

13 Q And that is the point you would like us to --
14 they can't tax you at all?

15 A That is correct.

16 Q Now, let us suppose that I am a manufacturing
17 -- steel products, selling them all over the country, and I
18 decide to establish an office, a sales office, in Alabama,
19 Montgomery. I establish an office and put several employees in
20 there and the state says, "Look, if you are going to establish
21 a local office here, you have got to get a license."

22 And yet every order that is taken is sent out of the
23 state, is filled from out of the state. Would you say Alabama
24 could not make them take out a license to set up a local office?

25 A No, I would not say that. I would say they

1 probably couldn't acquire a license for a local office.

2 Q Why can't Alabama do that to you insofar as you
3 take pictures at a fixed location in Alabama?

4 A Well, maybe they can.

5 Q Because that really disposes of your first point?
6 Doesn't it?

7 A No, my last point.

8 Q I think it disposes of your first point.

9 A Well, then if it does I don't want to make that
10 concession. And I didn't understand your question. I am sorry.

11 Q Well, Mr. Thornton, there is a little more to the
12 facts of this case than just the mere exposure of films, isn't
13 here? Don't we have in this case that Penney gives extensive
14 advertising to the fact that these people will be there at a
15 certain time and will have a fixed location in the city to
16 transact this business and it does transact business in this
17 particular place?

18 A Yes, sir.

19 Q Well, doesn't that bear somewhat on whether it
20 is a local thing that is being taxed or not or whether it could
21 be taxed as a local activity?

22 A Well, admittedly, the more local activities we
23 engage in, the more the state has to catch on to.

24 Q Yes.

25 A But we think in this case -- you see this license

1 isn't at Penney. If they go at Penney that is a different
2 proposition as to Penney's activities, with reference to
3 advertising and coming into the state and so forth.

4 But here where our coming into the state is purely
5 transient, we come in and out merely exposing film, we say
6 there that the isolating this part of it and attempting to tax
7 that as a local activity is actually a tax on the entire trans-
8 action. We say that is an attempt by the state to license in
9 Interstate activity which they can't do.

10 So the \$25 license should not apply, if I am keeping
11 myself straight.

12 Q Your first point and your last point are incon-
13 sistent. I mean they are mutually exclusive, aren't they?

14 A I hadn't thought so.

15 Q No?

16 A I hadn't thought so.

17 Q Because your last point starts out on the propo-
18 sition that we are taking photographs at a fixed location?

19 A Yes.

20 Q And the only reason you make an itinerant out
21 of it is because we send the photographs out of state?

22 A That is correct.

23 Q But if you say you are taking photographs in a
24 fixed location, it seems to me they ought to be able to put the
25 \$25 charge on you.

1 A I am backing off on that completely. I hope
2 that is stricken from the record.

3 (Whereupon, at 11:07 a.m. the above-entitled oral
4 argument was concluded.)

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