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E.L. Allen v. Lewis V. Trueman and Joseph Holbrook and Calvin G. Roberts and C. G. McCullough : Reply Brief

Utah Supreme Court

Irvine, Skeen, Thurman and Miner; attorneys for plaintiff.

No. 6194

In

The Supreme Court

of the

State of Utah

E. L. ALLEN, Plaintiff,

vs.

LEWIS V. TRUEMAN, Judge of the Second Judicial District of the State of Utah; JOSEPH HOLBROOK, Sheriff of Davis County, Utah; CALVIN G. ROBERTS, Deputy Sheriff of Davis County, State of Utah; David F. Smith, Commissioner of Agriculture of the State of Utah; and C. G. McCULLOUGH, Deputy Inspector of the Utah State Commission of Agriculture,

Defendants.

PLAINTIFF'S REPLY BRIEF

IRVINE, SKEEN, THURMAN & MINER,
Attorneys for Plaintiff

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E. L. ALLEN, Plaintiff,

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LEWIS V. TRUEMAN, Judge of the Second Judicial District of the State of Utah; JOSEPH HOLBROOK, Sheriff of Davis County, Utah; CALVIN G. ROBERTS, Deputy Sheriff of Davis County, State of Utah; David F. Smith, Commissioner of Agriculture of the State of Utah; and C. G. McCULLOUGH, Deputy Inspector of the Utah State Commission of Agriculture,

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PLAINTIFF'S REPLY BRIEF

Because of the fact that the defendants take up the major portion of their brief in arguing on matters that are not before the Court and could not possibly be considered by this Court in this proceeding, and because we feel that it is necessary to point these matters out to the Court to prevent a misunderstanding as to the issues involved and

the relief sought by this proceeding, plaintiff feels it necessary to submit this reply brief.

We will briefly refer to a few of the points of discussion and a few of the instances where defendants have argued entirely beside the point.

On page 2 of defendants' brief, counsel refers to the United States Public Health Ordinance relative to milk, and states that numerous dairies named in the brief have complied with such ordinance. The plaintiff will submit the product he sells for comparison with that sold by other dairies if counsel wishes, but we would like to remind counsel that this proceeding has nothing whatever to do with the quality of any product sold, but merely the question of containers in which milk products are sold, and whether search and seizure should be available to individuals for the recovery of the possession of those containers which the dairies have delivered out of their own possession.

On page 4 of defendants' brief, counsel states that the services of the Bottle Exchange are available to plaintiff. We reply: yes, they are available to plaintiff if, but only if, plaintiff is willing to give everything and receive nothing in return. Counsel then goes on to mention the bottle costs to the milk industry, a large part of which is due to "theft and wrongfull abstraction" etc. If counsel means to infer that plaintiff came into possession of any bottles wrongfully, let him or anyone else so charge and prove in a proper manner rather than to make such inferences in this proceeding in an attempt to becloud the main issues, or in an attempt to raise a prejudice in the minds of the members of this Honorable Court. The possession of bottles which the plaintiff may now have or may have had in the past is no more wrongful than the very Bottle Ex-

change fostered and maintained by the very dairies whom counsel for the defendants represents, but *that is wholly beside the point in this proceeding.*

On page 16 of his brief, counsel states as his first proposition on which he argues in the brief, the question "has the plaintiff any right in law to use the trade-marked bottles of other dairies in the operation of his cream station?" The very reason why plaintiff asks for the writ of prohibition is because the District Court at Farmington was proceeding and threatening to proceed to determine *whether plaintiff had the right to possession — not the right to use,* these bottles, and plaintiff contends that that question being merely and adjudication of a civil right, was improper in a criminal proceeding of search and seizure, and plaintiff asks this Court to prohibit the District Court from proceeding to determine that civil right in a criminal action or quasi-criminal action upon search and seizure. Clearly, the plaintiff could not ask this Court to prohibit the District Court from proceeding to determine that civil question and then either the plaintiff or defendants turn around and ask this Court to determine that same question upon these prohibition proceedings.

Again, on page 12, counsel states "so . . . . the first question to be determined . . . is whether or not plaintiff . . . acquires any interest whatsoever in and to the trade-marked bottles . . . ." Counsel either does not see the point, or does not care to meet the issue squarely, or is attempting to drag a herring across the trail, or lay a smoke-screen in an attempt to obscure the real issues upon which this proceeding is based.

The plaintiff would welcome litigation in a proper plenary suit upon the question as to whether

under the practice of dairies in the Salt Lake area, the mode of acquiring possession of these bottles does or does not give an interest in this property to the plaintiff. We would further welcome litigation upon the question as to whether plaintiff's products are inferior or superior, or whether plaintiff has been, by the use of such bottles, misleading the public. As a matter of fact, plaintiff is proud of the products he sells, and defendants know that they have no basis for any charge of fraud, misbranding or misleading the public with respect to such products.

On pages 14 and 15, counsel attempts to incite sympathy by pointing out the hardship that would come to various dairies if they were compelled to resort to replevin. The various dairies can't afford the maintenance of a proper action in replevin where they would have to put up a bond before they could repossess personal property, so they want the State to assume that burden for them, and the only way the State can do so is to make it a criminal proceeding. Even so, they are willing to go to that length to get the State to assume their burden rather than to apply the remedy they have in their own hands and under their own control, viz., making the customers contract for the return of these bottles and making them responsible for them if they don't return the bottles, which, in spite of the suggestion of Justice Thurman in the Clover Leaf Dairy v. Van Gerven case, they have wholly refused to do, counsel's statements on page 5 of his brief to the contrary notwithstanding.

The majority of counsel's brief is used up in arguing that plaintiff has no interest in these bottles, that he has no right to use and no right to refill them, and may not have complied with inspection standards or have as high quality milk as other

dairies, and might be guilty of unfair competition in the use of brands; might even be classed as a felon or malefactor, as counsel infers on page 25 of his brief. All of this might be interesting if true, and plaintiff is willing to meet such charges whenever he may be called upon properly to do so, but we must remind counsel that all of this is immaterial in this proceeding and does not even necessitate the denial which plaintiff could easily substantiate.

We must repeat again and point out to counsel the main question at issue in this case, viz. *the right to use the criminal authorities of the State and the criminal procedure of search and seizure for the maintenance of a mere private right, i.e. the recovery of the mere possession of a limited species of personal property.*

The plaintiff and any other citizen similarly situated should have the right to try all of the questions posed by counsel in his brief, in a proper civil action where he would not be classed as a felon and malefactor at the outset, and where other individuals who would claim the right to possession of property before trial, would be compelled to put up a bond to guarantee that plaintiff would not be compelled to seek redress from the State — a disinterested party — if property is wrongfully taken before such hearing is had.

Even the cases cited by counsel that do have some bearing upon the question at issue in this case — the question of search and seizure or the constitutionality of this statute — do not refer to cases where search and seizure was involved.

The case of Pacific Coast Dairy v. Police Court, cited on page 26 of counsel's brief, had reference to a statute making it incumbent on a person

finding or receiving a container with a registered brand, to make diligent effort to find the owner. No question of search and seizure for the recovery of that property was involved, and the case cannot be in point either upon the proceeding here, nor as changing the rule set forth in the cases cited in plaintiff's original brief, and we respectfully refer the Court to the cases in plaintiff's original brief, none of which have been answered in any way by the defendants.

Counsel even compares the milk industry to a public utility on the closing page of his brief. We do not believe that the State has yet gone so far as to either prosecute or defend in its own name actions involving civil rights of any public utility with respect to its personal property. We believe that even a public utility must resort to the civil courts in an action of replevin if it wishes to recover personal property claimed by it from the possession of third parties and in such an action even a public utility would be compelled to put up a bond if it claimed recovery of possession of such personal property prior to a civil trial and prior to a judgment on the merits.

Plaintiff respectfully submits that the writ of prohibition should be made permanent.

IRVINE, SKEEN, THURMAN & MINER,
Attorneys for Plaintiff