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Utah Supreme Court

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No. 6225

In

The Supreme Court of the State of Utah

WHITNEY PARRY,
Plaintiff and Appellant,

vs.

J. H. CROSBY, as Justice of the Peace of Kanab Precinct, Kane County, State of Utah, GEORGE A. SWAPP, as Sheriff of Kane County, State of Utah, and DAVID L. PUGH, as County Attorney of Kane County, State of Utah,

Defendants and Respondents.

Appeal From the Sixth Judicial District Court,
Kane County, Utah.
Honorable Henry D. Hayes, Judge.

RESPONDENTS' BRIEF

JOSEPH CHEZ, Attorney General,
DAVID L. PUGH, County Attorney, Kane County,
S. D. HUFFAKER, Assistant Attorney General,
Attorneys for Defendants and Respondents.

FILED
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In

The Supreme Court of the State of Utah

WHITNEY PARRY,
Plaintiff and Appellant,

vs.

J. H. CROSBY, as Justice of the Peace of Kanab Precinct, Kane County, State of Utah, GEORGE A. SWAPP, as Sheriff of Kane County, State of Utah, and DAVID L. PUGH, as County Attorney of Kane County, State of Utah,
Defendants and Respondents.

RESPONDENTS' BRIEF

By these proceedings, appellant seeks to restrain three public officials of Kane County from enforcing our laws relating to slot machines. The controversy grew out of the following facts:

The Sheriff of Kane County, Utah, seized four slot machines at what is known as the Parry Lodge in the town of Kanab. He took possession of the machines and delivered them to the respondent,

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Justice of the Peace. The Justice issued a citation order, which was served upon the appellant, directing him to appear at a certain time and place and show cause why the machines should not be destroyed. Before the time set for hearing the citation order, appellant appeared at the District Court of Kane County and secured a temporary restraining order, which was served upon the respondents, directing them to appear at a time fixed to show cause why the temporary order should not be made permanent. A hearing was had in the District Court, and after the matter had been submitted, the District Judge refused to make the restraining order permanent, and this appeal is taken to reverse the District Court.

In his complaint for a restraining order, appellant alleges that the respondents as public officials, without due process, or any process whatsoever, took from his possession four devices, containing more than $600. In its findings, the District Court found that these four devices were slot machines, one being a five cent machine, one a ten cent machine, one a twenty-five cent machine and one a fifty cent machine. (Ab. 12).

Before taking possession of these machines, the Sheriff signed an affidavit before the Justice of the Peace to the effect that, "he has reason to believe and does believe that the said Whitney Parry, has in his place of business, certain slot machines, which are being operated contrary to law." The Justice of the Peace thereupon issued what is described as a writ of attachment, whereby he commanded the Sheriff or Constable to attach, save and keep any and all slot machines which may be found at appellant's place of business. The evidence is not clear as to whether or not the affidavit above mentioned, or the writ of attachment

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were served upon the appellant, but for the reasons as hereinafter stated, we feel that it is immaterial whether or not these instruments were served on appellant or even executed or filed.

On Page 7 of appellant's brief he states his contention in the following words:

> "Was the proceeding in the Justice's Court sufficient to give that court jurisdiction to seize or to order destruction of the so-called slot machines and the forfeiture of the money contained in them to Kane County?"

He claims that the proceedings preliminary to the taking of said machines were in personam and not in rem.

It is true that the affidavit and writ of attachment above mentioned were entitled, "The State of Utah, Plaintiff v. Whitney Parry, Defendant." Appellant contends that it should have been entitled, "State of Utah, Plaintiff, v. Four Slot Machines, Defendant." It will be noted also that the writ of attachment did not direct the arrest of Whitney Parry, but ordered the Sheriff to attach the slot machines. (Ab. 11). After taking the machines, the Sheriff made his return stating in effect that he had taken the four slot machines, and was holding them to be disposed of by order of the court. (Ab. 12). The citation issued by the Justice, and served upon Mr. Parry directs that he appear and show cause why the slot machines should not be destroyed. It is our contention, as hereinafter set out, that it was not necessary in order to lawfully take possession of these slot machines for the Sheriff to make an affidavit or to get a writ of attachment, and it is therefore immaterial whether such proceedings be in personam or in rem, or at all.

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However, if the court should feel that such proceedings are necessary and that they should be in rem, then we submit that the proceedings adopted by the respondents were in rem. Surely, they were not in personam. The affidavit signed by the Sheriff simply stated that he had reason to believe and did believe that four slot machines were being operated at the Lodge contrary to law. Nobody was accused of any criminal act. The writ did not demand the arrest of anybody, but ordered that the machines be taken. The nature of pleadings is determined largely by the relief sought, and in construing a pleading as to whether or not it is in rem or in personam, the court should be guided by the purpose sought to be accomplished, which in the instant case was to take possession of the machines and to destroy them. It will be seen, therefore, that the said proceedings were in effect an action to seize and destroy gambling devices.

We call the Court's attention to

> Section 103-25-1, Revised Statutes of Utah, **1933,**

which among other things relates to slot machines, and insofar as material here, provides that:

> ". . . It shall be the duty of all sheriffs, constables, police and other peace officers whenever it shall come to the knowledge of such officer that any person has in his possession any cards, tables, checks, balls, wheels, slot machines or gambling devices of any nature or kind whatsoever used or kept for the purpose of playing for money, or for tokens redeemable in money, at any of the games mentioned in this chapter, or that any cards, tables, checks, balls, wheels, slot machines or gambling devices used or

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kept for the purposes aforesaid may be found in any place, to seize and take such cards, tables, checks, balls, wheels, slot machines or other gambling devices, and convey the same before a magistrate of the county in which such devices shall be found; and it shall be the duty of such magistrate to inquire of such witnesses as he shall summon or as may appear before him in that behalf touching the nature of such gambling devices, and, if such magistrate shall determine that the same are used or kept for the purpose of being used at any game or games of chance described in this chapter, it shall be his duty to destroy the same."

Section 103-25-6 of the same Chapter provides that:

"Every prosecuting attorney, sheriff, constable and police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe to be offenders against the provisions of this chapter, and every such officer refusing or neglecting so to do is guilty of a misdemeanor."

Section 103-25-7 of the same Chapter provides that:

"Every person who keeps or operates, either as owner, agent or employee, or allows to be kept, used, operated or conducted, in his place of business or elsewhere the device or instrument commonly known as a 'slot machine,' or any other similar device or instrument for gambling

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or exhibiting bawdy pictures is guilty of a misdemeanor."

It will be seen that Section 103-25-1 above quoted prescribes the procedure relating to the seizure and destruction of slot machines. It will also be noted that no court proceedings are necessary before a Sheriff is authorized to seize a slot machine, if it comes to his knowledge that any person has in his possession a slot machine used or kept for the purpose of playing for money or tokens redeemable in money. It is the duty of such officer to seize the same, and take it before the Justice of the Peace. It is the duty, then, of the Justice of the Peace as outlined in the statute above quoted to make inquiry of such witnesses as he may summon, or as may appear before him, and if he finds that the slot machine is used or kept for the purpose of being used at any game of chance as described in this Chapter, it then becomes his duty to destroy the same.

In the instant case, the appellant claims to be the owner of the slot machines in question and was given notice to appear at a time and place and show cause why the machines should not be destroyed. In view of the statute above quoted, it will be seen that it was not necessary for the Sheriff to go before a Justice of the Peace and make an affidavit and procure a writ of attachment before seizing these gambling devices. It was necessary, however, that the Justice of the Peace before destroying the machines have a hearing to determine whether they were used for gambling purposes, or kept for such use. If the procedure outlined in Section 103-25-1, supra, is constitutional, then, there is nothing, as we view it, to appellant's contention that the machines were taken without due

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process, because the record clearly shows that these public officials complied with said section.

In reading the cases hereinafter cited and referred to, the Court will see that statutes of this nature, relating to slot machines, have been held constitutional insofar as the due process is concerned, even when they afford no opportunity whatsoever for a hearing as to their lawful or unlawful use. On the other hand, our books abound with decisions upholding the right to destroy gambling devices under statutes like or similar to our Utah law. A discussion of the question under consideration is found in

> Volume 24, American Jurisprudence, under the title of "Summary Destruction," at Page 436.

Numerous cases in the footnotes are cited upholding the text.

We also call the Court's attention to the recent case of

> State of South Carolina, ex rel. John M. Daniel, v. A. R. Kizer, et al, 81 A.L.R., Page 722.

This is one of the latest cases on the subject and together with the annotation at Page 730 of the Volume, seems to cover fully the question under consideration.

We also refer the Court to

24 American Jurisprudence at Page 438, where under the heading of "Injunctions," the author says:

> "Equity will not interfere with the police in the enforcement of criminal statutes or

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extend its help for the purpose of aiding one to commit a crime, and equity will refuse an injunction when the evident purpose thereof is to prevent police interference in the conduct of an unlawful business. Accordingly, owners of a gambling device have no standing in equity to ask for an injunction against the enforcement of a statute providing for the seizure and destruction of such a device. The owners of slot machines have an adequate remedy at law by action of claim and delivery which will preclude injunctive relief against the enforcement of a statute providing for the seizure and destruction of such machines if used as gambling devices."

Numerous cases are referred to in support of the text.

In his brief, counsel for appellant lays great stress on a recent decision of this Court. In re Utah Liquor Control Commission v. Wooras, 97 Utah P. 351; 93 P. (2d) 455. In this case the Commission sought to have destroyed certain property, presumably furniture and fixtures, in a place of business upon the theory that the owner or proprietor had permitted liquor to be sold in violation of our laws. The Court held that the Commission had failed to follow the procedure as outlined by our statute with reference to the destruction of such property in connection with the violation of our liquor laws, and in view of such failure held that the property may not be destroyed. Undoubtedly, the right to destroy such property is purely statutory and the statutory procedure must be substantially complied with.

In the case at bar, however, the respondents not only followed the procedure strictly as outlined

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for the destruction of gambling devices, but took extra precautionary measures by signing an affidavit before the Justice of the Peace and procuring a writ from him, and in addition thereto fixed a time whereby appellant could appear before the court and show cause why the property in question should not be destroyed.

Furthermore, there is a vast difference between statutes relating to the destruction of property under our liquor laws and those relating to the destruction of slot machines, and there is also a vast difference between a gambling device such as a slot machine and the furniture, fixtures, etc. of a business enterprize.

The remarks of Justice Pratt in his concurring opinion in the Wooras case seem pertinent to the questions under consideration in this case. He said:

> "If the property seized has but one use and that an illegal one, no one may claim it, as no one has the property right in an illegal thing . . . under such circumstances the invalidity of the seizure is immaterial. If any of the property seized in this case is of that class, then it should not be returned." (P. 366, Utah Report).

In the instant case, we have a Lodge with a tap-room in connection therewith. These four slot machines were in the tap-room. It was stipulated that a public official, if present, would testify that a day or two prior to the seizure of these machines, he saw them being played in the regular way at the place of business of appellant. It is alleged in the complaint that these machines were owned by the appellant and his brother, a co-partnership, and

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that at the time of seizure they had in them a sum in excess of $600.

Under such circumstances, it would seem that something smaller than a hair must be split to convince anyone that these machines were not used or kept for the purpose of gambling. If the machines had been owned by some person not connected with the business of the Lodge, a plausible excuse might be given that the large sum of money had been accumulating for some time until the owner of the machines could remove it, but where the operators of the Lodge were the owners, it is inconceivable that they would leave such a large sum of money in the machines if they were kept there for any other purpose than that of gambling. The evidence shows that a motion picture concern from California was occupying all of the rooms at the Lodge at the time, and it is quite evident that the machines were installed for their special benefit, thus we can account for the large sums of money. Appellant contends that inasmuch as the Lodge was being used entirely by these California people, it was in the nature of a private home, and hence, our law relating to the destruction of gambling devices is not applicable. We feel, however, that the Stars of Hollywood, when they come here, are amenable to our laws, and also that they are entitled to the equal protection thereof. Furthermore, we know of no law that exempts gambling, even in a private home.

If for no other reason, the petition for a restraining order was rightfully denied on the grounds that the appellant had a plain, speedy and adequate remedy at law. He could have raised the issues before the Justice Court, and if not satisfied with the decision, could have appealed to the District Court and thence, to this Court, or he could

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have brought an action in claim and delivery as suggested in some of the cases cited above.

In conclusion, it is our contention that:

I.

The respondents in their attempt to destroy these slot machines complied strictly with our law relating thereto, and that such laws are not in conflict with the constitutional provisions relating to due process.

II.

The evidence and the natural inferences to be drawn therefrom appear conclusive that the four mechanical devices mentioned in appellant's complaint are four old time slot machines, sometimes referred to as "one-arm bandits," and that they were used and kept for the purpose of gambling.

III.

The injunctive relief sought should be denied because the appellant has a plain, speedy and adequate remedy at law.

Most respectfully,

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County Attorney, Kane County,

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