

1957

Utah Liquor Control Commission v. Club Feraco et al : Brief of Libelees Upon Cross-Appeal

Utah Supreme Court

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In the Supreme Court of the State of Utah

FILED

MAY 4 - 1957

UTAH LIQUOR CONTROL COM-
MISSION,*Libelant and Appellant and* Clerk, Supreme Court, Utah
Cross-Respondent,

vs.

Case

No. 8649

CLUB FERACO, et al,

Libelees and Respondents and
Cross Appellants.

BRIEF OF LIBELEES UPON CROSS-APPEAL

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	3
POINTS RELIED UPON	5
Points (I) (II)	5
Points (III) (IV) (V) (VI)	6
ARGUMENT:	
Point I. The evidence does not justify a finding that whiskey was illegally sold and if so, the only evidence of illegal use of personal property pertains to one bottle of whiskey, four glasses and one table.....	7
Point II. The Trial Court abused its equity discretion in refusing to set aside its judgment of sale and forfeiture of property because of the acquittal of Mary Hooley and Leonard Feraco of the very crime upon which the seizure of all property was predicated.	11
Point III. Title 32, Chapter 8, Section 17, 1953 Utah Code Annotated, is unconstitutional under the provisions of Article I, Section 7, Utah State Constitution, as permitting denial of due process of law and said title, chapter and section is proscribed by the XIV Amendment of the Constitution of the United States	14
Point IV. The action of the Police Officers in the seizure of property is void and prohibited by Article I, Section 14, Utah State Constitution, as being brutal and unreasonable	19
Point V. Title 32, Chapter 8, Sections 16, 17, 18, 46 and 48, 1953 Utah Code Annotated are void as being ambiguous and vesting judicial function in policemen, proscribed by Article V, Section 1, Utah State Constitution, and that said provisions are contrary to Article 1, Section 24, Utah State Constitution and contrary to the XIVth Amendment of the Constitution of the United States.....	23
Point VI. The seizure in this action should be avoided and declared unlawful by recurrence to fundamental	

	Page
principles to protect individual rights as pre- scribed by Article 1, Section 27, Utah State Con- stitution	27

CASES

Allen vs. Truemon, Judge of 2nd. Jud. District, 100 Utah 36; 100 P.2nd 355	26
District of Columbia vs. Little, 178 F.2nd.13.....	22
People vs. Mayen, 188 Cal. 237; 205 Pac. 435	22
Riggins vs. District Court, 89 Utah 183; 51 P.2nd 645.....	16
State vs. Aime, 62 Utah 476; 220 Pac. 704; 706.....	22
State vs. Alta Club, 232 P.2nd 759	28
Utah Liquor Control Commission vs. Kallas, 94 P.2nd 414..	25
Utah Liquor Control Commission vs. Mandeles, 108 P.2nd. 512	25
Utah Liquor Control Commission vs. McGillis, 89 Utah 183; 65 P.2nd 1136	17

CONSTITUTION

XIV Amendment, U. S. Constitution.....	6, 14, 15, 24, 25
Article 1, Section 5, Utah Constitution	6, 23
Article 1, Section 7, Utah Constitution	6, 14
Article 1, Section 14, Utah Constitution	6, 19
Article 1, Section 24, Utah Constitution	6, 23
Article 1, Section 27, Utah Constitution	6, 27

STATUTES-RULES

Rule 60 (b) 6 U.R.C.P.	5, 12
32-7-1, 1953 Utah Code Annotated	4, 12
32-8-16, 1953 U.C.A.	6, 23, 24
32-8-17, 1953 U.C.A.	4, 6, 13, 14, 15, 23
32-8-18, 1953 U.C.A.	24
32-8-25	26
32-8-46, 1953 U.C.A.	6, 16, 25
32-8-47, 1953 U.C.A.	12, 16, 25
32-8-48	6

TREATISES

Black's Law Dictionary 3rd. Edition 1785	20
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In the Supreme Court of the State of Utah

UTAH LIQUOR CONTROL COM-
MISSION,

*Libelant and Appellant and
Cross-Respondent,*

vs.

CLUB FERACO, et al,

*Libelees and Respondents and
Cross Appellants.*

Case

No. 8649

BRIEF OF LIBELEES UPON CROSS-APPEAL

STATEMENT OF FACTS

Libelee is a non-profit Corporation of the State of Utah, Salt Lake City, Utah, and is a locker club with bona fide members and membership for the use of guests and members and was such on November 2, 1956 (Findings of Fact, I.)

In the early morning hours of November 2, 1956, Salt Lake City Policeman Ralph Caldwell, claims to have purchased

whiskey at the club in violation of Title 32, Chapter 7, Section 1, 1953 Utah Code Annotated, and he then and there seized all personal property at the club premises, without a warrant, under the provisions of Title 32, Chapter 8, Section 17, 1953 Utah Code Annotated. (Findings of Fact VI, VII and VIII.)

During the morning and afternoon of November 2, 1956, Chief of Police W. Cleon Skousen ordered and supervised the removal of all personal property from the club premises, such property itemized in the Judgment of the Trial Court dated January 29, 1957. (Findings of Fact X and XI), and in Libellant's Schedule A.

In removing said property, the Police used prisoners of Salt Lake City for some of the labor. (Findings of Fact XX), and some of the property was hauled away in dump trucks (Findings of Fact XX).

In removing said property, the Police and whoever they supervised in the moving were wantonly careless, reckless and destructive. And in the process of said removal real property was also destroyed. (Findings of Fact XV, XVII, XVIII, XIX, XXI).

Trial of the issues was had and the Trial Court found that policeman Caldwell had purchased whiskey on November 2, 1956 and therefore seizure of some items of personal property was legal. These items, designated in the January 29th, 1957, Judgment, were sold at public auction on March 2, 1957 for \$10.00.

The Court, in the same Judgment, ordered certain property returned, which return was procured by execution issued on February 9, 1957.

There are bottles of whiskey, specified in said same Judgment, which have been ordered destroyed. All of the whiskey seized belonged to club members, but the only claim filed for the whiskey was by Club Feraco, claiming it as bailee for its members. (Findings of Fact XV and XXIII).

Libelees take this appeal from the ruling of the Trial Court that any part of said seizure was lawful.

On February 11, 1957, Leonard Feraco and Mary Hooley, two of the Libelees in this action, were tried for the criminal offense of illegally selling whiskey to policeman Caldwell on November 2, 1956, the sale upon which this seizure was based. They were both acquitted of that offense in Case No. 33855, Salt Lake City Court.

Upon the basis of that acquittal Libelees made a motion to dismiss the Judgment of legal seizure, sale and destruction, under the provisions of Rule 60, (b) (6), U.R.C.P., but the Trial Court denied such motion.

STATEMENT OF POINTS RELIED UPON

POINT I.

The evidence does not justify a finding that whiskey was illegally sold and if so, the only evidence of illegal use of personal property pertains to one bottle of whiskey, four glasses and one table.

POINT II.

The Trial Court abused its equity discretion in refusing to set aside its Judgment of sale and forfeiture of property

because of the acquittal of Mary Hooley and Leonard Feraco of the very crime upon which the seizure of all property was predicated.

POINT III.

Title 32, Chapter 8, Section 17, 1953 Utah Code Annotated is unconstitutional under the provisions of Article I, Section 7, Utah State Constitution, as permitting denial of due process of law and said Title, Chapter and Section is proscribed by the XIVth Amendment of the Constitution of the United States.

POINT IV.

The action of the police officers in the seizure of property is void and prohibited by Article I, Section 14, Utah State Constitution, as being brutal and unreasonable.

POINT V.

Title 32, Chapter 8, Sections 16, 17, 18, 46 and 48, 1953 Utah Code Annotated are void as being ambiguous and vesting judicial function in policemen, proscribed by Article V, Section I, Utah State Constitution, and said provisions are contrary to Article I, Section 24, Utah State Constitution, and contrary to the XIVth Amendment of the Constitution of the United States.

POINT VI.

The seizure in this action should be voided and declared unlawful by recurrence to fundamental principles to protect individual rights as prescribed by Article I, Section 27, Utah State Constitution.

ARGUMENT

POINT I.

THE EVIDENCE DOES NOT JUSTIFY A FINDING THAT WHISKEY WAS ILLEGALLY SOLD AND IF SO, THE ONLY EVIDENCE OF ILLEGAL USE OF PERSONAL PROPERTY PERTAINS TO ONE BOTTLE OF WHISKEY, FOUR GLASSES AND ONE TABLE.

By construing all of the evidence presented in the light most favorable to Libelant there was no proof of an illegal sale of liquor to policeman Caldwell.

There follows the only testimony concerning the purported illegal sale of whiskey on November 2, 1956, as a result of which the seizure took place:

DIRECT EXAMINATION, POLICEMAN CALDWELL:

Tr. 5, Lines 21, et seq:

"Q. What happened after that?

"A. A waitress came over and asked us what we would like.

"A. We all ordered drinks.

Tr. 6, lines 1, et seq:

"Q. How many drinks did you order?

"A. Four.

"Q. Were four drinks brought to you?

"A. Yes.

"Q. —did you take a bottle to the club with you?

"A. —No.

"Q. —I believe you stated you did take a sip of the drink that was given to you?

"A. Yes. It tasted like whiskey.

"Q. Do you know whether those drinks had been paid for or not?

"A. Yes.

"Q. And do you know how much?

"A. No.

CROSS EXAMINATION, POLICEMAN CALDWELL:

Tr. 19, Lines 6, et seq:

"Q. Who mixed them?

"A. Leonard Feraco.

"Q. Did you see what bottle he took these drinks out of?

"A. No.

"Q. Did you order another round?

"A. No.

Tr. 34, Lines 6, et seq:

"Q. Did you buy any drinks?

"A. No.

"Q. —Paxton (a member) bought some, didn't he?

"A. That's right.

"A. And in your presence there was no police officer bought any drinks there, nor neither of your two informant, is that right?

"A. Will you repeat that?

"Q. Paxton bought them, didn't he?

"A. Yes."

To this point, Libelees urge that it is apparent that policeman Caldwell did not know what had happened, but in his zeal to be a good policeman, he then declared all property seized and the next day turned it over to his Chief, who truly completed a rape of civil liberty based upon the events above testified to.

That testimony will not sustain the burden, even civil, put upon the State to justify such severe and drastic measures of seizure and forfeiture. The State's burden of evidence should be "clear, cogent and convincing," the ordinary burden placed upon one claiming forfeiture.

To explain this so-called illegal sale, we examine the testimony of a member in good standing of the Utah State Bar, Mr. Sumner J. Hatch, who testified he told the waitress to get Paxton, the member, and his friends, two stool-pigeons and policeman Caldwell, a drink out of his bottle (Tr. 137 to 139).

Libelees urge that this Court would set a dangerous precedent if such severe, arbitrary and destructive police measures are held to be justified and are sustained upon evidence that is so flimsy that clearly, policeman Caldwell had to guess whether or not there was an illegal sale of whiskey, or merely a gift of whiskey by a friend, with mixer and ice being paid for, which practice, the Court can take judicial notice of, is common at all of the so-called major clubs in the State.

If this Court finds the evidence does justify the findings of illegal sale, how can it justify seizure of liquor in lockers found to belong to members? The lockers had to be broken up to get the liquor.

Further, Libelees proved the liquor was bailed to Club Feraco.

The above is all supported by testimony found to be true. (Findings of Fact XXIII).

To be fair and avoid specious construction of statutory language, if there was illegal sale of whiskey, what instruments were used?

- (a) Four (4) glasses.
- (b) Two (2) bottles of whiskey (1 scotch, 1 bourbon).
- (c) The table they were set on.
- (d) The booth, which incidentally is a part of the real property.

The whiskey in the lockers could have been saved, according to the tenure of the Trial Court's decision, if each member owning the whiskey, bearing in mind this was found to be a bona fide club for members and guests (Findings of Fact I), had:

- (1) Gone to an Attorney and had him prepare a claim and file it with the Clerk of the District Court, and
- (2) Then become a party defendant in a notorious, what appeared to be "bootleg" case, and
- (3) Sat around waiting to testify in a very lengthy proceeding.

Further, all of the liquor behind the bar that was seized was identified as being owned by individual members and guests. (Tr. 120, 137 to 143, 145 to 147, 148 to 150, 152 to 155).

And despite efforts of the County Attorney to prove there was such a thing as a house bottle, that whole precept collapsed.

To affirmatively prove there was no such thing as a house bottle, Libelees proved by the testimony of Charles H. Foote, an employee of the Liquor Commission, that no purchases of whiskey had ever been made by Leonard Feraco, Ross Feraco or Club Feraco (Tr. 113).

If this decision is permitted to stand, the Great Sovereign State of Utah with the help of the glorious Chief of Police of Salt Lake City will indeed have rung a gorgeous knell in the preservation of public health and welfare.

BUT WHAT ABOUT SOVEREIGN DIGNITY?

POINT II.

THE TRIAL COURT ABUSED ITS EQUITY DISCRETION IN REFUSING TO SET ASIDE ITS JUDGMENT OF SALE AND FORFEITURE OF PROPERTY BECAUSE OF THE ACQUITTAL OF MARY HOOLEY AND LEONARD FERACO OF THE VERY CRIME UPON WHICH THE SEIZURE OF ALL PROPERTY WAS PREDICATED.

The Civil Trial of this matter was commenced on November 23, 1956.

Final Judgment was rendered on January 29, 1957.

On February 11, 1957, the criminal charge on the "whiskey sale" of November 2, 1956, was tried in the Salt Lake

City Court, Case No. 33855, prosecuted by the Attorneys for Libellant.

The Jury acquitted the Club Manager and the waitress.

There it stands, approximately \$18,000 worth of property hauled away based upon the commission of a criminal offense that was not committed.

Counsel, being aware of the "form difference" between a criminal action and civil action involving forfeiture, however, avoided his clients who were seeking an explanation and made a motion that the Trial Court set aside its Judgment of forfeiture and sale under the provisions of Rule 60, (b) (6), U.R.C.P., which reads:

"Rule 60.—Relief from Judgment or Order."

"b (6) . . . or it is no longer equitable that the Judgment should have prospective application;"

That motion was argued on March 4, 1957, and denied.

That this case is one in equity cannot be denied, as a part of 32-8-47, 1953 Utah Code Annotated provides: "Such action shall be brought and tried as an action in equity . . . "

Libelees claim that all dictates of equity—the breath, the spirit of decency, justice and expected fairness of intercourse between men and sovereign and citizen demand that the Judgment against Libelees in this matter should have been set aside.

The Libelees, Leonard Feraco and Mary Hooley, sold whiskey to policeman Caldwell on November 2, 1956, in violation of 32-7-1, 1953 Utah Code Annotated. (Libel of Information). They were acquitted on February 11, 1957.

32-8-17, providing for search and seizure without warrant, the statute upon which this seizure was based, specified seizure may be made upon "violation of any provision of this Act."

Clearly, the seizure is predicated upon the commission of a crime and would be void without a crime.

The charged defendants were, in fact, found not to have committed that crime. Yet they stand here guilty.

Counsel does not profess to have attained great scholastic recognition. Yet, he has not had difficulty in discussing difficult precepts of law with lay friends and clients nor with well versed members of the Bar. Nor has he experienced difficulty in the persuasion that law is merely a code of ethics, largely dictated by morality, decency and fair play.

This Court and opposing counsel can tell me and I will agree with the esotericism of dogmatic academics and slavish adherence to form that there is a difference between civil forfeiture and criminal prosecutions. There is a difference in the ends sought and the evils to be guarded against and the burden of proof and etc., etc., and etc.

Talk to me about substance.

Here we have heavy forfeiture and penalty and deprivation of property for an offense against a sovereign that that very same sovereign could not prove took place.

Convince me academically—then try to convince good people not formally schooled in the law but having ordinary conscience and morality.

Let such things happen to enough good people and this

government would be overthrown—if they were not first crushed by sainted police with mailed fist, blackjack and bullets.

Counsel submits that we should perhaps keep our neat and fine distinctions; language preciseness is a useful tool for conveyance of meanings of good and suppression of evil.

Let's keep our legal distinctions nice and neat and intact. There is a difference between crime and civil forfeiture.

But, don't abandon and defile the principles of Equity.

It is not equitable that the judgment of seizure, forfeiture and sale have prospective application, even conceding constitutionality, condoning brutality and finding Libelees guilty on every civil charge.

POINT III.

TITLE 32, CHAPTER 8, SECTION 17, 1953 UTAH CODE ANNOTATED IS UNCONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE I, SECTION 7, UTAH STATE CONSTITUTION, AS PERMITTING DENIAL OF DUE PROCESS OF LAW AND SAID TITLE, CHAPTER AND SECTION IS PROSCRIBED BY THE XIV AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Article I, Section 7, Utah State Constitution:

"NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW."

Amendment XIV, Constitution of the United States:

" . . . NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW."

The right to conduct a lawful business in a lawful manner is, of course, one of the fundamental principles to be protected under both Constitutions.

The Statute offending these guarantees is as follows:

"32-8-17. SEARCH WITHOUT WARRANT. When a violation of any provisions of this Act shall occur in the presence of any . . . police officer . . . it shall be the duty of such officer without warrant to arrest the offender . . . and if such arresting officer has reason to believe that one of the businesses conducted in the premises . . . was in violation . . . of this Act he shall seize all tangible personal property in said premises . . ."

The above section is the one involved in this action. There was arrest and seizure of all of the property without a warrant. Club Feraco, to uselessly delineate the obvious, was effectively and instantaneously put out of business by policemen Caldwell and Skousen. Examination of a list of the property seized, Libelants' Exhibit A, should demonstrate the degree of the closing of the business.

It was total.

Libelees ask where is the due process guaranteed by Federal and State Constitutions?

This is exactly tantamount to saying that the victim may be killed and then a trial shall be held posthumously.

All business, legal or illegal, is thus permitted to be violently stopped as a matter of discretion, and upon the judgment of a policeman.

The evil of such a Statute should be adequately demonstrated in this case, assuming full validity to the Trial Court's judgment.

Part of the business was decreed to be legal, yet its operation was forcefully and summarily suspended by policemen and convicted criminals.

The inherent evil of such provision is further demonstrated by the fact that this Statute gives the power to policemen to do what this Honorable Court has adjudged that a State District Court cannot do, to-wit: prevent the operation and conduct of a lawful business.

"32-8-47. ABATEMENT. An action to enjoin any nuisance defined in this Act may be brought . . . and the Court . . . shall forthwith . . . restrain the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial . . . "

Libelant, in this action, sought to have Club Feraco declared a nuisance under the provisions of the above Code Section and under 32-8-46. (See Paragraph 4 of the Libel of Information.)

This Court, in the case of *Riggins vs. District Court*, 89 Utah 183; 51 P.2nd, 645, held that the Court could not restrain or enjoin any lawful use of premises prior to the conclusion of the trial.

The same result was held by this Court in *Utah Liquor Control Commission vs. McGillis*, 89 Utah 183; 65 P.2nd 1136.

If the Trial Court's decision is permitted to stand, there must of necessity, therefore, be announced as a rule of law that in the State of Utah a Court of competent jurisdiction may not prevent the operation of a lawful business, but if it is suspended before trial it must be closed by a policeman.

That is a dangerous rule.

It is a precedent that could foster viciousness and if it didn't creat viciousness it would certainly protect it.

How many further steps would need be condoned, on such principle, before we were in the sewer of a police State?

Not many.

Due process would result if after hearing, probable cause was established and unlawful conduct were enjoined until trial of all of the issues.

No process results when a policeman says I think the whole business is illegal so I'll close it. If he is wrong, so what? You have a civil action against a policeman who may earn \$4,000.00 per year. But in any event, the subsequent civil action given wouldn't substitute for due process at the inception.

You don't kill the accused and give him a posthumous hearing and call it due process.

Counsel will agree that such a Statute might be reasonable if it could be shown that such great harm would result to the public that there was immediate necessity for summary action

and that any resulting harm done to the business closed would pale when compared to the damage that would result by merely determining what was lawful or unlawful and then stopping the unlawful part.

In our case no such emergency can be shown, but on the contrary to further point up brutality, why wasn't a warrant obtained? Skousen and his men had reason to believe that an illegal business was being conducted at Club Feraco for 19 months before they summarily and without warrant closed it. (See Findings of Fact No. V.)

It is this Court's duty to hand down a decision that strengthens that fundamental precept that everybody shall have his day in Court before he is condemned and punished.

Due process does not contemplate immediate condemnation and punishment with belated opportunity to show that a policeman was wrong in boarding up a business that a Court could not touch.

In our case and under the Statute complained of the police are the investigators, the Judge and the Jury all in one fell swoop and counsel is satisfied that this pleases Mr. Skousen as it did Genghis Khan, Julius Caesar and Benito Mussolini.

To this point, however, Mr. Skousen has not got the backing of Stare Decisis.

Counsel feels he should not impose upon this Court by lengthy citation of cases defining what is or isn't "due process," as he realizes that such determination hinges upon facts, the law itself being clear. These facts abundantly show that the subject Statute effectively denies any determination of rights

before having the full fury of punishment visited—by a policeman.

POINT IV.

THE ACTION OF THE POLICE OFFICERS IN THE SEIZURE OF PROPERTY IS VOID AND PROHIBITED BY ARTICLE I, SECTION 14, UTAH STATE CONSTITUTION, AS BEING BRUTAL AND UNREASONABLE.

Article I, Section 14, Utah State Constitution:

"UNREASONABLE SEARCHES FORBIDDEN—ISSUANCE OF WARRANT.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . . "

The place from which this seizure was made was a private, bona fide place for use of members and guests of members, (Findings of Facts No. 1), and it is submitted that the following Conclusion of Law entered by the Trial Court in support of its Judgment should not be announced to be the law of the land:

"CONCLUSION OF LAW #III."

"Seizure of said items referred to in Paragraph I, above, was valid and lawful, and abuse of authority and excess of force used in removing all of said items from said premises and the WANTON and RECKLESS DESTRUCTION of

items of personal property and the WANTON and RECKLESS DESTRUCTION of wiring and a portion of the building itself (real property) does not vitiate or abrogate legality of seizure, without warrant, of property from a private building.” (Emphasis supplied.)

Counsel acknowledges that Utah is among the majority of States that adheres to the principle that illegally obtained evidence is admissible in evidence, and he wishes to point out to this Court that no objection was made or is now being made to any evidence illegally obtained.

The sole point being Libelees’ contention that:

(1) The seizure was unreasonable, as being done in an unreasonable manner, and

(2) Therefore Judgment of propriety in seizure should be reversed.

To this point, then, the first thing to be determined is:

WAS THIS SEIZURE UNREASONABLE?

Definition of unreasonable, Black’s Law Dictionary, 3rd Edition 1785: “Beyond the rules of reason or moderation; immoderate or exorbitant.”

(1) The Club, through its Attorney, asked Chief of Police Skousen to leave all of the property on the premises of Club Feraco and Skousen could retain the key until trial of the case. Counsel promised Skousen no effort would be made to resume business until after trial. Skousen refused and removal was made. (Findings of Fact XI).

(2) Some of the property was moved out in gravel trucks. (Exhibit 31-D.)

(3) Locked liquor lockers were reduced to kindling wood, or less. (Page 3, Memorandum Ruling and Decision.)

(4) Tables and seats covered with leather, fastened to the walls or floors were torn out and cracked, splitting wood and tearing upholstery in many places. (Page 3, Memorandum Ruling and Decision.)

(5) Real property was wantonly and recklessly destroyed. (Memorandum Ruling and Findings of Fact.)

(6) Prisoner labor was used.

“THE SCENE LEFT THERE BY THE OFFICERS WAS MORE SUGGESTIVE OF A VISIT BY THE ‘REDS’ THAN BY THE ‘RED, WHITE AND BLUE.’ ”

Counsel respectfully suggests that it is just that type of mentality and approach to human dignity here reflected that was responsible for the slaughter of 7,000,000 Jews in Europe during the reign of Adolf Hitler.

There may be objection to such language, but counsel suggests there was a time when the meanest peasant could rest in his decrepit tenement, with a shaky roof and be subject to the rain and hail and wind but the King and all his forces dared not cross his threshold.

Give such mentality *Stare Decisis* and then watch — pounding boots, uniforms, obsequence or else, and citizens dragged into the night by the hair of their head.

It's such a comfort to know such things can't happen here.

But be fair about it—it has happened, and if this Court says that those hurt can't complain because they can sue the policemen then that makes a hollow mockery of the XIVth Amendment and the Constitution of Utah.

I am sure that the survivors of any one of those 7,000,000 Jews wantonly slain probably had a cause of action for wrongful death.

The case of *District of Columbia vs. Little*, 178 F 2nd 13, stands squarely for the proposition that a health officer may not search a house without a warrant, despite statute, unless there is an emergency which would justify immediate action.

This Court can sustain the position of Libelees in setting this proceeding aside by authority of the above case, it being clear there was ample time to obtain warrant and proceed under judicial supervision.

However, the facts at Bar give this Court opportunity to re-affirm that in America, policemen are servants and protectors, not masters and sovereigns and administrators of life and death by largesse or caprice.

This language appears in the case of *State vs. Aime*, 62 Utah 476; 220 Pac. 704; at page 706, the Court quoting with approval from *People vs. Mayen*, 188 Cal. 237; 205 Pac. 435: "There might be some reason, or grounds of public policy for the State to refuse to the use of evidence thus wrongfully seized, on the grounds that its admission encourages and condones the lawless acts of over-zealous officers . . . "

It is most strongly urged that this Court has a positive

duty to all of its citizens, living and yet unborn to unequivocally rule that wantonness and destructiveness by policemen will not be tolerated. It is against our public policy.

A judicial precedent that police brutality and maliciousness, exceeding the seriousness of the claimed law violation, abrogates legality is sorely required in American jurisprudence. A fortiori in this case, because of acquittal of the very offense upon which all of this wanton and reckless action is based.

Counsel concedes that Utah public policy is strongly opposed to spirituous beverage, but decency demands that what might be considered indigenous intolerance should not preponderate to condone sanctimony and brute destruction.

Humanity and reason demand that this Court by strong, positive and unequivocal language write a decision that will be a red flag to all present and future would-be martinets and self aggrandizing fools.

To do otherwise would prostitute the concepts of our Bill of Rights.

POINT V.

TITLE 32, CHAPTER 8, SECTIONS 16, 17, 18, 46 AND 48, 1953 UTAH CODE ANNOTATED ARE VOID AS BEING AMBIGUOUS AND VESTING JUDICIAL FUNCTION IN POLICEMEN, PROSCRIBED BY ARTICLE V, SECTION I, UTAH STATE CONSTITUTION, AND THAT SAID PROVISIONS ARE CONTRARY TO ARTICLE I, SECTION 24, UTAH STATE CONSTITUTION, AND CON-

TRARY TO THE XIVth AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

These punitive liquor statutes give to a policeman, who could be an ignorant and suspicious bigot rather more noted for physical courage and strength than a sensitive regard for rights and feelings of people, wide discretion and unchanneled judgment as to procedure in case of liquor law violations.

Such men were called the "Brown Shirts" in Hitler's Germany.

These statutes should be stricken because their ambiguity and unchanneled mandates, of necessity, require the exercise of judicial function by a policeman.

To sustain this position one need only examine the statutes to see what unrestrained latitude is given:

If there is a real or supposed violation of the liquor law, any Inspector, Sheriff, Deputy Sheriff, Mayor, City Judge, Justice of the Peace, Constable, Marshall, Peace Officer, District, City or Town Attorney, or a Clerk of a Court (32-8-25) and all other officers and employees of the State and employees of any subdivision or agency of the State (32-8-26) are specifically authorized and duty bound to:

(a) Appear before a magistrate and by written oath give information and the Judge may then issue a warrant and direct seizure (32-8-16) or he may,

(b) Seize all tangible personal property of a building where a violation occurs in his presence, IF HE BELIEVES one of the businesses is illegal, (32-8-17), or he may,

(c) Seize any liquor which IN HIS OPINION is had or kept in violation of law, without a warrant, (32-8-18), or he may

(d) Apply to a Court for a temporary injunction against illegal use of premises and procure trial to abate it as a nuisance (32-8-46 and 32-8-47).

There it is—any one of maybe 10,000 persons in this State can, under the statutes and with impunity, seize a bottle of whiskey, destroy real and personal property, as in the case at bar, or procure the levelling of a \$1,000.00 fine and cancellation of lease.

The choice can be exercised any way that person chooses to do it. Counsel defies opposing Counsel to show this Court any attempted guide in the selection of what to do.

It should be clear that these statutes create not only a possibility of unequal enforcement of laws, prevented by Article I, Section 24, Utah Constitution and the XIVth Amendment of the U. S. Constitution, but in fact unequal enforcement has resulted:

(a) McGillis, 65 P. 2nd. 1136, was permitted to operate a legal business pending trial of charges of illegal conduct, and so was Riggins, 51 P. 2d 645, and Kallas, 94 P. 2nd. 414. But Club Feraco, though its manager and waitress were adjudged not guilty of the illegal conduct charged, had their doors closed and their property destroyed.

(b) Mandeles, 108 P. 2nd. 512, only had a bottle of whiskey seized. But Club Feraco was reduced to a shambles by policemen and prisoners.

(c) Recent seizures at two local bottle clubs, de hors the record, were confined to a few bottles of whiskey.

So it would seem severity of action can be determined by largesse, whim, caprice, favor, partiality, hatred or just plain enjoyment of the exercise of great power.

There are no standards and no restraints according to present state of Utah law, except: "Sue me, but don't tell me I can't be just as brutal or just as gentle as it may please me to be, as I can seize all of your property or a little of your property or none of your property."

And the terrifying thing is that such may be done by any employee of this State, as 32-8-25 very clearly states that they "are vested with the powers of peace officers and powers necessary to enforce the provisions of this Act."

It is, again, either terrifying or interesting to note that this Court in the case of *Allen vs. Truemon, Judge of Second Judicial District*, 100 Utah 36; 100 P. 2nd 355, ruled that a statute authorizing the issuance of a search warrant on an affidavit of information and belief was void under Article I, Section 25 of our Constitution and yet, if this Court does not agree with *Libelees* in this case it will give a ruling that a seizure and search without a warrant is not void even though the policeman need only have REASON TO BELIEVE that one of the businesses being conducted is illegal.

Such a ruling would be exactly the same as a rule of case law, in the Reporter System Headnotes saying:

"A policeman cannot justify a magistrate in issuing a warrant for seizure of personal property upon his

information and belief alone, and in such cases his only recourse is to seize the personal property without a warrant."

Counsel urges that these statutes are void as ambiguous, and being a total and carte blanche delegation of judicial power to 10,000, or more, State employees who may administer them and have administered them in unequal degree for identical offenses, and upon claimed offenses that may turn out to be no offenses, as in the case at bar.

POINT VI.

THE SEIZURE IN THIS ACTION SHOULD BE VOIDED AND DECLARED UNLAWFUL BY RECURRENCE TO FUNDAMENTAL PRINCIPLES TO PROTECT INDIVIDUAL RIGHTS AS PRESCRIBED BY ARTICLE I, SECTION 27, UTAH STATE CONSTITUTION.

Article I, Section 27: "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

This section should be applied with positive and equal vigor to local despots as well as to usurping foreign potentates with totalitarian ideology.

CONCLUSION

Public policy demands a rule of law that states police brutality and excess of authority abrogates legality of such

action for every purpose when the abuse is so great as to be more dangerous to individual rights and liberty than is the evil against which such brutality was levelled.

Also, must Utah be saddled with such a prolix and all-encompassing and brutal and ambiguous and unworkable liquor law, leaving so much to police decision and judgment as to manner, means, method and punishment?

Chief Justice McDonough's language in *State vs. Alta Club*, 232 P. 2nd, 759, suggests that this Act is "fraught with difficult problems of application," to which we say amen.

In view of what has now happened under this Act, this Court should correct the police notion that there may be unrestrained force, brutality and destruction as long as it pertains to spirits of alcohol, and this even if the accused be acquitted.

Respectfully submitted,

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Received two copies hereof this day of May, 1957.

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Attorneys for Libelant