

1957

# Utah Liquor Control Commission v. Club Feraco et al : Brief of Appellant Upon Appeal and Reply Brief on Cross-Appeal

Utah Supreme Court

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Frank E. Moss; Peter F. Leary; Bruce S. Jenkins;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

UTAH LIQUOR CONTROL  
COMMISSION,

*Libelant and Appellant and  
Cross-Respondent,*

—vs.—

CLUB FERACO, et al.,

*Libelees and Respondents  
and Cross-Appellants.*

FILED

MAY 29 1957

Clerk, Supreme Court, Utah

Case No. 8649

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BRIEF OF APPELLANT UPON APPEAL  
AND REPLY BRIEF ON CROSS-APPEAL

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BRIEF OF APPELLANT UPON APPEAL  
AND REPLY BRIEF ON CROSS-APPEAL

---

STATEMENT OF FACTS

In the early morning hours of November 2, 1956, Philip Ralph Caldwell, a police officer of Salt Lake City, Utah, was in Club Feraco, a so-called non-profit liquor locker club, located at 923 South State Street in Salt Lake City, Utah (R. 352). While there, Officer Caldwell observed Libelee Mary Lou Hooley, a cocktail waitress

(R. 473), solicit the sale of alcoholic beverages, he saw Leonard Feraco, a bartender (R. 441), pour and prepare said alcoholic drinks and he saw Mary Lou Hooley serve and receive payment for said drinks of alcoholic beverage (R. 352-357). He placed Libelees Hooley and Feraco under arrest (R. 355).

The history of Club Feraco and certain agents of Club Feraco is a history of illegal liquor sales. Officer Caldwell knew this (R. 356, 425, 426, 427). John Wey, a bartender of Club Feraco, and Ross Feraco, a managing officer, had been charged with the illegal sale of liquor and had pled guilty thereto (R. 410, 413). He had been informed that liquor purchases had been made on various occasions (R. 427). An agent of the Alcohol Tax Unit of the United States Government had purchased a series of "drinks" at Club Feraco (R. 390, 450). Mary Lou Hooley, a cocktail waitress of Club Feraco, had been charged with the illegal sale of liquor and had been found guilty thereof (R. 479). He had been informed that certain Ogden Police Officers had purchased drinks at Club Feraco (R. 430, 457-459). He had been told that Club Feraco had a "Retail Liquor Dealers" tax stamp from the Department of Internal Revenue (R. 429, 414-416). Having general knowledge of these and other facts and observing the sale above set forth, Officer Caldwell had "reason to believe" that one of the businesses carried on at the premises at 923 South State Street in Salt Lake City, was in violation of the Utah Liquor Control Act (R. 356, 423-431). Officer Caldwell, after

arresting Hooley and Leonard Feraco, as above set forth, thereupon seized all tangible personal property including 136 bottles of liquor upon the Club premises and reduced said property to his possession according to law (R. 368, 387-88). He forthwith made complaint before Judge J. Patton Neeley, City Judge and Ex-Officio Justice of the Peace of Salt Lake City, Utah, against Mary Lou Hooley and Leonard Feraco and caused them to appear before said court according to law (R. 369, 534, 535).

Officer Caldwell made a "return" and an "amended return" to the District Court of Salt Lake County, Utah, of said property (R. 1, 22). The court issued a "warrant of attachment" to Officer Caldwell directing him to "hold safely said property so seized under [his] control until discharged by due process of law" (R. 12, 37).

November 9, 1956, a "Libel of Information" was filed in the District Court of Salt Lake County and a "Notice of Hearing and Order to Show Cause" was issued, served and posted (R. 51, 89, 118). The "Libel of Information" sought the condemnation and forfeiture of the tangible personal property and alcoholic beverages seized by Officer Caldwell (R. 51). An "answer" was filed by named Libelees, Club Feraco, Ross Feraco, Leonard Feraco and Mary Lou Hooley (R. 83). In said answer Libelees asserted that all tangible personal property seized belonged to Club Feraco (R. 83). Various "claims" were filed by persons claiming ownership in part of the property seized and the claiming parties

were made parties to the action. A total of nine additional claims were filed (R. 67, 80, 82, 87, 120, 131, 132, 141, 278).

The matter being at issue, trial in chief commenced November 23, 1956, and concluded after intermittent hearing on the 28th day of November, 1956 (R. 349-570). Evidence was introduced at the hearing by Libelant as to the illegal sale of liquor above described and as to the nature of the business being carried on at the premises at 923 South State Street, Salt Lake City, Utah. Evidence was introduced by Libelees denying the illegal sale of liquor and purportedly demonstrating the value of certain property seized (R. 468-562). None of the persons who filed "claims" offered evidence to support their claims at that time (R. 349-570). Club Feraco, Ross Feraco, Leonard Feraco and Mary Lou Hooley at the termination of the hearing moved the court to dismiss the "Libel of Information" (R. 468, 569). The matter was taken under advisement (R. 5<sup>70</sup>). November 29, 1956, while the matter was under advisement, a "claim" was filed on behalf of Hemenway and Moser Company, claiming ownership of two cigarette machines and the contents thereof (R. 141). On the 13th day of December, 1956, while the matter was still under advisement, a stipulation prepared by counsel for Hemenway and Moser Company was presented to counsel for Libelant and counsel for Libelees Feraco, Club Feraco, and Hooley (R. 145). The stipulation states in part as follows: "That the above-described property [two cigarette machines and contents] does not in any way belong



to said Club Feraco and was kept or used only in connection with the restaurant and beer vending business conducted on said premises and was not so kept or used in connection with any business that may have been conducted on the premises in violation of the Liquor Control Act of the State of Utah" (R. 145). The court, on the 19th day of December, 1956, based upon the stipulation and by order, released the cigarette machines and their contents to Hemenway and Moser Company (R. 147). The stipulation was signed by counsel for Libelant, Counsel for Libelees Feraco, Hooley and Club Feraco and counsel for Hemenway and Moser Company. It was signed by no other parties (R. 145).

January 7, 1957, the court issued a "Memorandum Decision" wherein the court found that intoxicating liquors were sold at Club Feraco; that intoxicating liquors were sold in the presence of Officer Caldwell; that Libelees Hooley, Feraco and Club Feraco, and one claimant, Hemenway and Moser Company, had stipulated that the restaurant business conducted on the premises was not connected with the illegal liquor business; that property illegally seized was not subject to forfeiture; that property legally seized was subject to forfeiture (R. 148).

Thereafter, on or about the 22nd day of Jan., 1957, Libelees Hooley, Feraco and Club Feraco, moved the court for the return of certain personal property (R. 167). Their counsel also filed a stipulation purportedly executed by Libelees Feraco, Club Feraco, Hooley, Dohr-

mann Hotel Supply Company, Stevens Rosehill Dairy, Cliff Krantz, Morrison Brothers, Hobart Sales Agency, Ethel M. Doheny and National Cash Register Company. This stipulation provides in part: "That any property that may be ordered returned by the above-entitled court to said Club Feraco premises may be so retained and said claimants hereby forego and relinquish any claim thereto asserted in the above-entitled cause as to any of said items that may be ordered returned" (R. 168).

Hearing was held January 24, 1957, to allow claimants to appear and put on evidence to show cause why the tangible personal property for which they made claim should not be forfeited by the court (R. 571). The record indicates that only the following claimants appeared: Libelees Feraco, Hooley, and Club Feraco; Cliff Krantz; Ethel M. Doheny; and National Cash Register Company (R. 571, 641). In compliance with his memorandum decision, the court made some effort to determine what portion of the property seized was "restaurant" property and what portion of the property seized was "liquor" property (R. 571). Libelant, for the purpose of aiding the court, offered to concede that certain items were used primarily in the so-called "restaurant business;" certain items were used primarily in the illegal liquor business; and certain items were used in both (R. 574). Counsel for Libelant, in his efforts to aid the court, attempted to indicate the physical location of the items in controversy. In doing so, counsel stated to the court that it was done to aid the court, but qualified his doing so by stating:

“... in separating the items as we previously did this morning, that we are not consenting that they were not part and parcel of the illegal business . . .” (R. 631, 639).

During the hearing on the 24th day of January, Libelees Feraco, Club Feraco, Hooley, and Doheny offered no testimony to sustain their statutory burden of showing that “said tangible personal property or some parts thereof were not used for any purpose whatsoever in connection with the operation of the business conducted on the premises where said personal property was seized” (See 32-8-20 Utah Code Annotated, 1953). Libelee Leonard Feraco “filed” an Affidavit with the court and all Libelees rested (R. 215, 572, 636). The court “cautioned” Mr. Bridwell as to the Affidavit, stating “Mr. Bridwell, an affidavit filed is evidence for some purposes. It isn’t regarded as—may I say—first-class evidence in disputed matters because it isn’t subject to cross examination and, for most purposes, affidavits are not received and considered as evidence on the vital issues of a matter in litigation. It is somewhat like hearsay evidence, because it isn’t subject to testing by cross examination. I make that comment for your consideration” (R. 636).

Nothing in the record indicates that the purported Affidavit was ever received in evidence (R. 636). Its reception was objected to by Libelant (R. 636). In effect, other than certain limited testimony offered by Cliff Krantz and certain limited testimony and documents of-

ferred by National Cash Register Company and certain contracts offered by Mrs. Doheny no testimony was offered by Libelees to sustain their admitted burden of proof (R. 639-642).

The court entered its Findings of Fact, Conclusions of Law and Decree on the 29th day of January, 1957. In the decree, the court classified certain property as "restaurant" property and ordered that such property be returned to Libelees. The court classified certain property as "liquor" property and ordered that such property be forfeited and sold. The court, neither in its findings of fact nor in its conclusions of law, specifically differentiated the property classified in the decree and judgment (R. 187-204).

February 1, 1957, Libelant filed with the court a "Motion for a New Trial as to the Return of Certain Tangible Personal Property" alleging (1) newly discovered evidence; (2) insufficiency of evidence to support the judgment to return certain property; and (3) error in law (R. 226). February 5, 1957, Libelant filed a "Motion to Amend and Supplement Findings of Fact and Conclusion of Law and Judgment," alleging the reasons for the motion and setting forth the proposed corrective amendments (R. 237). Both motions were considered by the court on the 5th day of February, 1957 (R. 266). The court, on the 9th day of February, 1957, denied both motions of Libelant (R. 266).

February 17, 1957, counsel for Libelees Hooley,

Feraco and Club Feraco moved the court to set aside the judgment of the court which motion was denied (R. 282, 328).

February 20, 1957, George Bridwell, counsel for Libelees, upon an oral ex-parte application, without notice to Libelant, obtained an order for the sale of the forfeited property from Judge Martin Larson (R. 299). Said order was neither filed with nor issued by the Clerk of Court (R. 327, 328, 329). No minute entry was made of said order (R. 327-329). It was neither sealed nor authenticated, nor was it directed to the person having custody of the property (R. 299). It was improperly posted (R. 305).

March 2, 1957, the Sheriff of Salt Lake County sold for the sum of \$10.00 the items declared forfeited to the State of Utah, including cash many times in excess of \$10.00 (R. 305).

March 6, 1957, Counsel for Libelant filed a "Motion to Quash and Declare of No Effect the Purported Order of Sale and the Purported Sale of Certain Personal Property" (R. 336). Filed and issued on the same day was "Petition and Order to Show Cause" (R. 292).

March 7, 1957, Libelees filed a "Notice of Cross Appeal" (R. 298).

March 19, 1957, the court heard arguments to quash the purported sale and motion for order to show cause,

and the matter was taken under advisement (R. 330).  
The matter is still under advisement.

## STATEMENT OF POINTS

### POINT I.

THE CLASSIFICATION BY THE TRIAL JUDGE OF SEIZED PROPERTY AS EITHER "RESTAURANT" OR "LIQUOR" AND HIS ACTION IN ORDERING THAT THE "RESTAURANT" PROPERTY BE RETURNED TO LIBEL-EEES WAS UNSUPPORTED BY THE EVIDENCE AND WAS CONTRARY TO LAW.

### POINT II.

THE COURT ERRED IN FAILING TO GRANT LIBEL-ANT'S MOTION TO AMEND AND SUPPLEMENT THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW TO MODIFY THE JUDGMENT.

### POINT III.

CONSTITUTIONAL QUESTIONS CANNOT BE RAISED FOR FIRST TIME ON APPEAL.

### POINT IV.

ACQUITTAL IN CRIMINAL ACTION HAS NO BEARING ON FORFEITURE OF PROPERTY UNDER LIBEL OF INFORMATION.

## ARGUMENT

### POINT I.

THE CLASSIFICATION BY THE TRIAL JUDGE OF SEIZED PROPERTY AS EITHER "RESTAURANT" OR "LIQUOR" AND HIS ACTION IN ORDERING THAT THE "RESTAURANT" PROPERTY BE RETURNED TO LIBEL-EEES WAS UNSUPPORTED BY THE EVIDENCE AND WAS CONTRARY TO LAW.

(a) The statute establishes a presumption that all tangible personal property on the premises was used in connection with violation of the Utah Liquor Control Act and accordingly gives claimants the burden of proving to the satisfaction of the court that their property was not used for any purpose whatsoever in connection with the operation of the business conducted on the premises where said personal property was seized.

The statute in question, Section 32-8-20, Utah Code Annotated, 1953, sets forth the proper procedure to be followed by the court following seizure, pursuant to Section 32-8-17, Utah Code Annotated, 1953. Section 32-8-20, Utah Code Annotated, 1953, provides in part as follows :

“At the time and place fixed in the notice the person named in the information, or any person claiming any interest in such alcoholic beverages, or tangible personal property, or any part thereof, *may appear and show cause why the same should not be forfeited.* If any person shall so appear he shall become a party defendant in the cause and the court shall make a record thereof. \*\*\* If the court shall find from the evidence presented that violations of this act did occur upon the premise wherein said alcoholic beverages or other tangible personal property so seized by the arresting officer was located, *then he shall also find that all tangible personal property so seized by said arresting officer which was located upon said premises was also used in connection with violation of this act and shall be forfeited as hereafter provided unless* any of the claimants prove to the satisfaction of the court that said tangible personal property or some parts thereof

*were not used for any purpose whatsoever in connection with the operation of the business conducted on the premises where said personal property was seized \*\*\*.' (Italics added.)*

The above statute is simple and direct. Once finding that a violation of the act has occurred in the premises in question, the court has the mandatory duty under this statute to further find that all tangible personal property seized on the premises was used in connection with said violations. The only way a claimant can thereafter save his property from forfeiture is to come to court and prove that his property was not used for any purpose whatsoever in connection with the operation of the *business* conducted on the premises. (Emphasis added.) It can be noted at this point that the statute makes no mention of a claimant being required to show that his property was not connected with liquor. The statute requires a showing that such property was not connected with the business conducted on the premises. The interpretation of the aforementioned statute is so obvious as to make it unnecessary to belabor the point further that once having found the violation, the burden is on the claimant to show that his property falls without the confines of the statute.

(b) The Libelees Feraco and Hooley and other claimants presented no evidence tending to show that any tangible personal property in Club Feraco was not used for any purpose in connection with the operation of the business conducted thereon.

The record of the first hearing at which the trial



judge came up with the conclusions that there were two types of property in Club Feraco, "restaurant" property and "liquor" property, is completely barren of any evidence presented on behalf of these Libelees tending to show even remotely that any property in the club fell outside of the statute. The evidence at said hearing was confined primarily to the question of whether or not there had been an illegal sale of alcoholic beverage at Club Feraco at the time in question. The complete void in the record on this point demanded a forfeiture of all property seized at Club Feraco at the time in question.

In the case of *Hemenway & Moser Company, et al v. Funk*, 100 U. 72, 106 P. 2d 779, it was stated at page 784,

"Proof of the violation of the act in the absence of a contest is sufficient to justify a decision by the court against the property, or in case of a contest to compel the claimant to prove that his property was not so used in violation of the act, or as a part of the business wherein part of the business was a violation of the act; or that a business in violation of the act was not conducted on the premises."

In this case, the court interpreted the provisions of Chapter 43, Par. 168, Laws of Utah, 1935, now Section 32-8-20, Utah Code Annotated, 1953. The court in this case stated that the Liquor Control Act should be liberally construed in order to eliminate the evils of unlicensed and unlawful manufacture, sale and disposition of alcoholic beverages.

The court imposed the burden on Libelees as set forth Point I (a) *supra*.

(c) At the initial hearing Libelant produced affirmative evidence to the effect that liquor was dispensed uniformly throughout the premises where the property in question was seized.

At R. 438 and 439 the testimony of Ross Feraco, a former manager of Club Feraco, is contained in respect to the dispensing of liquor at the premises in question:

“Q. Now is any other business conducted there?

A. Food.

Q. Food is served there?

A. That's right.

Q. During that time that food was served to these people, do you know whether, on any occasion that you can recall, these people had a drink while they were eating their dinner?

A. If they bring their bottles in there and order their drinks, you bet.

\*\*\*

Q. They were served drinks at the table when eating?

A. Yes.

Q. Now, were people served mixed drinks any place else in the club other than the portion where they were eating?

A. Served anywhere in the club.

Q. Anywhere in the club."

This evidence concerning the connection of the restaurant to the liquor at the first hearing conclusively shows that the imaginary splitting of the premises into two parts is entirely unfounded. There was no contrary evidence. The restaurant area and dancing area are contiguous and not separated (R. 393, 518-521). Ross Feraco testified that mixed drinks were served in all parts of the club whether it be restaurant area, bar area, or dancing area. This evidence shows as utterly ridiculous any attempt to artificially dissect one area of the club from another in regard to forfeiture of property. The statute aforesaid obviously makes the entire business conducted in the club as a whole illegal when the law is violated and accordingly subjects all tangible personal property to forfeiture. Any other interpretation could only lead to confusion and frustration of the law.

The testimony of Libelees showed that Club Feraco was not operated as a commercial enterprise but as a non-profit club with the sole purpose of providing entertainment for members and their guests. In view of this testimony the trial court's classification of a liquor business and a restaurant business being conducted separately under the same roof appears to be even more erroneous (R. 520, 521).

Libelant, after the initial hearing, produced uncontroverted testimony of the illegal sale of alcoholic bev-

erages in Club Feraco (R. 600-632).

(d) The trial judge misinterpreted the stipulation agreeing to release certain items of personal property to Hemenway & Moser Company and read into said stipulation a sweeping admission by the Libelant that restaurant property was not connected with the business being conducted on the premises of Club Feraco, in violation of the Utah Liquor Control Act.

Subsequent to the first hearing on this matter and after all of the evidence had been presented as to the violation and any possible personal property falling without the statute, the Libelant, through its attorney, entered into a stipulation with claimant Hemenway & Moser Company and Libelees Feraco and Hooley to the effect that certain cigarette vending machines and cigarettes within could be released to the said Hemenway & Moser Company (R. 145).

The trial judge seized on certain language contained in the stipulation to solve the question as to the forfeiture of the seized property. The language which was used as the panacea to the problem was as follows (R. 145):

“2. That the above described property does not in any way belong to said Club Feraco and was kept or used only in connection with the restaurant and beer vending business conducted on the premises and was not so kept or used in connection with any business that may have been conducted on the premises in violation of the Liquor Control Act of the State of Utah.”

The trial court, in his opinion interpreted this language as follows that there was no connection between the cafe or restaurant and the bar or liquor business.

It is exceedingly difficult to imagine how the trial court so interpreted the aforesaid stipulation. The purpose of the stipulation was to release certain specific items of property which were not felt to be a part of the business conducted on the premises. From this, the trial court felt that Libelant had stipulated that all property having anything to do with the serving of food was not a part of Club Feraco's business. This reasoning on the part of the trial court also stems from a basic misunderstanding of the provisions of Section 32-8-20, Utah Code Annotated, 1953, that items of property are exempt if they have nothing to do with liquor. It will be remembered that the statute places the burden on the claimant of proving "to the satisfaction of the court that said tangible personal property or some parts thereof were not used for any purpose whatsoever in connection with the operation of the *business* conducted on the premises where said personal property was seized." (Emphasis added.)

The statute requires no connection with the business; it does not require a connection with liquor. Once the violation is found, the entire business as such, is illegal, and all tangible personal property used in such business is subject to forfeiture. A claimant must show no connection with the business and cannot be let off merely showing no connection with liquor.

It will be remembered that Ross Feraco stated that liquor was dispensed in all parts of the club. The trial judge apparently overlooked this testimony when he ruled in his opinion that there was no evidence offered or given to show that the restaurant business was in any way a part of, or connected with, the liquor or bar business.

The trial judge obviously warped and stretched the stipulation as to certain specific items of property to an entire section of the illegal business conducted at Club Feraco.

(e) Parties to the action cannot change the court's duties under the law by stipulation.

The language of the statute regarding the procedure and burden in an in rem action for the forfeiture of property is clear as to the duties of the trial court. The following excerpt from 32-8-20, Utah Code Annotated, 1953, indicates the particular duty of the trial court, after the finding of fact (Finding of Fact VI [R. 188] ) made by the court to the effect that there was a violation of the Utah Liquor Control Act, to-wit:

“\* \* \* If the court shall find from the evidence presented that violation of this act did occur upon the premise wherein said alcoholic beverages or other tangible personal property so seized by the arresting officer was located, *then he shall also find that all tangible personal property* so seized by said arresting officer which was located upon said premises was also used in connection with

violation of this act and *shall be forfeited* as hereafter provided, unless any of the claimants prove to the satisfaction of the court that said tangible personal property or some parts thereof were not used for any purpose whatsoever in connection with the operation of the business conducted on the premises where said personal property was seized.” (Emphasis added.)

The trial court having made the initial finding that there was sale of liquor on the premises of Club Feraco in violation of the Utah Liquor Control Act, *it must also find* that all tangible personal property seized upon said premises was used in connection with the violation and *must be forfeited*. That claimants have the burden of proving that the tangible personal property seized by the officers at Club Feraco was not used *for any purpose whatsoever* in connection with the business conducted on the premises before the court is relieved of its duty.

The claimants have failed to sustain their burden of proof as required in the above statute, therefore the seized property must be forfeited.

The trial court, disregarding the mandatory language of the statute and disregarding its finding of a violation of the Utah Liquor Control Act, stated that counsel had stipulated to the effect that the “restaurant” and “liquor” business conducted at Club Feraco had no connection, and concluded therefore, that “restaurant” property cannot be forfeited for a liquor violation. This is a most distorted conclusion to draw from said stipulation. The stipulation is clearly for the purpose of aid-

ing the court in making what was determined to be an proper release of property of one of the claimants. Its meaning must be confined to the wording thereof, which limits the extent of the stipulation narrowly. To stipulate that another claimant owned certain property and that the property was not used by Club Feraco in its business, is not to stipulate *that all property* seized is of two kinds—"liquor" or "restaurant," nor is it to stipulate, as the trial court believes, that there was no connection as to all the property seized between the "restaurant" and "liquor" business.

The single requirement of the statute, before seized property may be forfeited, following a finding of a violation, as the trial court here found, is that the property be "also used in connection with violation of this act." (32-8-20, U.C.A. 1953) Some evidence on this point is that of Ross Feraco to the effect that mixed drinks were served anywhere in Club Feraco (R. 438, 439). Certainly, the entire record describes a picture of one establishment—Club Feraco—engaged in selling food and drink, and furnishing entertainment for its members, but with no distinction whatever that there were separate "businesses" for "restaurant" purposes and "liquor" purposes.

The trial court erred in using the stipulation of the parties regarding the cigarette vending machines and the contents thereof, as a means of avoiding its statutory duty. The language of the stipulation is clearly restricted to the property listed therein and cannot fairly be taken to express the meaning concluded by the trial court.



However, whether accepting the view of the stipulation taken by the trial court or that expressed in this brief, the sound reasoning of many courts indicates that the parties cannot by stipulation alter the statutory duty of the trial court. In the recent case of *State v. Christensen*, 166 Kan. 152, 199 P. 2d 475, 479 (1948), the court said:

“The authorities overwhelmingly support the conclusion we have felt compelled to reach in this case. The power of public officers and the jurisdiction of courts are to be found in the statutes and may not be conferred by stipulation or otherwise. 14 Am. Jr. 380, § 184; 21 C.J.S., Courts § 35, page 45. Parties to litigation cannot validly stipulate as to what the law is, how a statute is to be construed, or what its effect is (50 Am. Jur. 607, § 5, 92 A.L.R. 664, 669-670) at least as to matters of public concern (50 Am. Jur. 607, § 4; 608, § 5; 92 A.L.R. 666). ‘The proper administration of the criminal law cannot be left merely to the stipulation of parties.’ *Young v. United States*, 315 U.S. 257, . . . Even in civil actions it is held that the parties may not stipulate for a determination in a manner contrary to the statutes. *In re Meredith’s Estate*, 275 Mich. 278, 266 N.W. 351, 104 A.L.R. 348.”

The case of *In re Meredith’s Estate*, 275 Mich. 278, 266 N.W. 351, 355 (1936), which is cited by the *Christensen* case above seems to be a leading authority for this proposition and states as follows:

“Parties cannot by agreement supersede the essential regulations made by law for the investi-

gation of causes, and by stipulation set aside the statutory method prescribed for determining the mental capacity of the testator. *Harris v. Sweetland*, 48 Mich. 110, 11 N.W. 830."

\* \* \* \*

"Parties even to a civil cause may not stipulate for the determination of the same by the trial court in a manner contrary to the statutes or rules of court. *Kohn v. Columbia Nat. Bank*, 165 Ill. 316, 46 N.E. 208.

\* \* \* \*

"Much less is a stipulation valid which changes the method of procedure in proceedings in rem and submits the determination of the mental competency of a testator to one man other than the probate judge."

This principle has been recognized by the United States Supreme Court in the case of *Swift and Company v. Hocking Valley R. Company*, 243 U.S. 281, 289 (1916):

"If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law. . . . 'The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty of the court in this regard.'"

Ordinarily the parties are bound by stipulations of fact which are employed in an evidentiary sense and not as conclusions binding on the courts, however, the courts may discharge stipulations entered into improvidently in order to accomplish justice. See *Malone v. Bianchi*, Mass., 61 N.E. 2d 1 (1945) and further citations listed therein. The intent of the parties in entering into the stipulation should be the controlling criterion for those stipulations that are found to be of binding effect. This concept was recognized in the case of *First-Mechanics Nat. Bank v. Commissioner of Int. Rev.*, 117 F. 2d 127, 131 (1940):

“This is clearly a misinterpretation of the purport of the stipulation. . . . The stipulation was not intended to be nor could it properly be construed as being substantive proof of the fact of mistake as alleged. . . . Consequently, the Board was not precluded thereby from drawing a conclusion to the contrary from the admitted facts. The legal effect of the indisputable facts, appearing of record, was for the Board, and for this court on review, regardless of the stipulation.” (citations omitted)

The overall intent of the parties has been looked to even when the stipulation is obviously inconsistent with the allegations later made. See *State v. Martin*, 23 Mo. 1, 129 S.W. 931, 936 (1910), a state liquor prosecution in which the stipulation that a drink was non-intoxicating was subverted by later testimony which negated the stipulation.

Irrespective of the duty of the trial court and the

intent of the parties, it is well recognized that the parties cannot determine the law by stipulation. In a criminal action, *State v. Green*, 167 Wash. 266, 9 P. 2d 62, 63 (1932), it was stated that:

“If we should permit the parties by stipulation or agreement to determine the law, we might establish precedents which would be embarrassing.”

As was declared in *Young v. United States*, 315 U.S. 257, 259 (1941), and quoted in many decisions and annotations:

“The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties.” (citations omitted)

While the instant case is not exclusively a criminal action, it is based upon the enforcement of sanction arising from the illegal sale of liquor, a crime. This is not determinative, however, since the doctrine that the parties cannot determine the law by stipulation is applicable to civil suits as well. In the case of *North Platte Lodge 985, B.P.O.E. v. Board of Equalization*, 125 Neb. 841, 252 N.W. 313, 314 (1934), the court stated the following in considering the question of stipulation against the public interest in a civil suit:

“The decision of these matters will necessarily affect the substantial interest of the general public. This stipulation emphasizes the necessity and importance of adherence in this class of cases to the following commonly accepted principles of procedure, viz: ‘While litigants have the undoubted right to stipulate as to the facts, it is very generally held that it is not competent for them to stipulate as to what the law is so as to bind the court, and that such stipulations will be disregarded. Decisions of questions of law must rest upon the judgment of the court, uninfluenced by stipulations of the parties or counsel . . . as to the existence of a law, as to its validity or invalidity . . . as to the legal conclusion from a given state of facts as to the legal effect of a contract. 60 C.J. 50.”

In other words, “\*\*\* the people of the state are entitled to know what is the law on public questions, rather than what we find it to be upon agreement of parties.” *Ford v. Dilley*, 174 Iowa 243, 250; 156 N.W. Rep. citation, N.W. 513, 517. A similar problem confronted the court in *In re Dardis’ Will*, 135 Wis. 457, 115 N.W. 332, 333 (1909), wherein it was said:

“ . . . the proceeding to probate a will is a proceeding in rem, binding all the world, and in which even public welfare and policy is involved. The view that public interest requires that a valid will be established, independently of the wish of those parties specifically named therein, is evidenced by various statutes in this state . . . a positive duty is imposed both upon the county judge as a public officer . . . to take steps to bring the question of its validity before the proper probate court. . . .

[p. 334] All these steps are imposed by law wholly independent of the control of those privately interested. They evince a clear recognition and declaration by the Legislature that there is a public policy involved in the establishment of every legally executed will. \*\*\*"

\* \* \*

"... courts cannot be compelled to disregard to accommodate the wishes of some or even all parties having pecuniary interest in the property.

\* \* \*

"... the considerations which we have above suggested of the possible interest of unknown parties and of the existence of a public policy to protect them. . . . This conclusion seems to be supported by the great weight of authority." (citations omitted).

\* \* \*

"We conclude that the stipulation in this case could not control the duty which the probate court owed to the public, and perhaps to the testator, to adjudicate as to the legal existence of the propounded document as a will — to establish its status."

For a more recent case see *People v. Levisen*, 404 Ill. 574, 90 N.E. 2d 213, 216 (1950), "It is the province of the court to determine what the legislature meant. . . ."

That a strong public interest is established in the enforcement of the state liquor laws is patent in the statutes and the decisions of this state. Duties are imposed on the courts with a legitimate purpose in mind by the legislature, and that purpose is to safeguard the public

interest in the outcome of the decisions. That these duties should not be disregarded lightly is obvious. Rather than construe a stipulation that flaunts such duties broadly it should be construed strictly and when found in serious conflict with the duty or any public interest it should be disregarded.

There are other principles which declare that the stipulation in the instant case was either invalid ab initio or at least improperly employed by the trial court. It is established beyond reasonable question that the parties cannot bind the court by stipulating as to the conclusions to be drawn from the facts, *Minneapolis Brewing Co. v. Merritt*, 143 F. Supp. 146, 149 (1956) :

“A stipulation of material facts is ordinarily proper, but parties cannot bind the court by stipulation as to the law.” (citations omitted) “Nor can they do so by stipulation as to the legal effect of admitted facts.” (citations omitted)

*Tyan v. KSTP, Inc.*, ..... Minn. ...., 77 N.W. 2d 200, 205 (1956) :

“We are not bound to treat the stipulations entered into as an agreement concerning the legal effect of admitted facts. The stipulations would not be operative in that regard. The court cannot be controlled by agreement of counsel on a subsidiary question of law. . . . This court must decide questions of law here involved, uninfluenced by stipulations of the parties or of counsel.”

*Valdez v. Taylor Automobile Company*, ..... Cal. ...., 278 P. 2d 91, 97 (1954) :

“ . . . It was a stipulation as to the legal effect of the facts—a conclusion of law. And as we shall see it was an erroneous conclusion from the facts and as such is not binding on this court. . . .”

*Ex Parte Higgs*, ..... Okla. ...., 263 P. 2d 752, 761 (1953) :

“ . . . in interpreting a legislative act courts are not compelled to abdicate to the stipulations of the parties.”

See also *Hahn v. National Casualty Company*, 64 Idaho 684, 136 P. 2d 739, 741 (1943) ; *Ex Parte Day*, 127 Tex. Criminal Rpts. 367, 76 S.W. 2d 1060, 1065 (1934). The stipulation in the instant case was one which, as interpreted by the trial court, established the ultimate facts of the case in regards to certain property, i.e., was the property connected with the illegal liquor business conducted on the premises.

In the case of *Platt v. United States*, 163 F. 2d 165, 168 (1947), the Federal court had this to say about this type of stipulation:

“It is doubtful if the statement by appellant’s attorney in respect to this matter can be construed as a stipulation as to a finding of fact, but, in any event, parties may not stipulate the findings of fact upon which conclusions of law and the judgment of the court are to be based. Parties may by stipulation establish evidentiary facts to obviate the necessity of offering proof, but based thereon the court must itself find the ultimate facts upon which the conclusions of law and the judgments are based.”

Under the facts as deduced at the trial, the stipulation,



as interpreted by the trial court, is contrary to both the facts and the law. To conclude that all the property used in the "restaurant" business could have no connection with the liquor business is absurd. This same anamoly was confronted in the case of *People v. Shifrin*, 198 Misc.

348, 101 N.Y.S. 2d 613, 616 (1950) :

"The defendant's contention that the place of business is a farmers' market and therefore exempt from the prohibitions of the statute has no presuasive force. . . . It is the type of business conducted which governs and the stipulation cannot change the fact or the law; neither can the parties by stipulation make ineffective the operation of the statute where in fact a violation exists." (citations omitted).

In the instant case, only three of the claimants in the action were parties to the stipulation. It is well settled law that a stipulation cannot bind those not a party to it. In *Arnett v. Throop*, 75 Idaho 331, 272 P. 2d 308, 310 (1954), it was recognized that:

"A valid stipulation binds the parties thereto, but parties to an action cannot by stipulation affect third parties' rights and persons not parties to the stipulations." (citations omitted)

For a federal case in accord see *Kneeland v. Luce*, 141 U.S. 437 (1891). In the case of *In re Dardis' Will*, 135 Wis. 457, 115 N.W. 332, (1908), the court held that the fact that all the parties in interest did not sign the stipulation was a valid reason not to enforce the stipulation.

Especially is this so in an in rem action where the rights to property are settled as to the whole world; a few cannot stipulate away the rights of others who might have an interest in the property. This is the effect of the trial court interpretation of the stipulation in the instant case.

Since this question is one apparently of first impression in this state, the appellant has attempted to present the law to the court for consideration. It appears to be without question that the actions of the trial court in respect to the stipulation made therein was improper. Since the conclusion establishes a rather dangerous precedent of authorizing public officials by direct action of the courts by liberal interpretation to stipulate away the rights of the public as established by legislation, the result warrants serious consideration. Additional support for the conclusions requested herein may be found in an extensive annotation on the subject in 92 A.L.R. 663.

## POINT II.

THE COURT ERRED IN FAILING TO GRANT LIBELANT'S MOTION TO AMEND AND SUPPLEMENT THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW TO MODIFY THE JUDGMENT.

The court made numerous findings on immaterial matters for which there is insufficient support in the record. It failed to make certain pertinent findings for which there is ample support in the record.

(a) The court made numerous findings on immaterial matters which, even if material, find insufficient

support in the record. Such “findings” encumber the record, confuse the issue, and offer no valid basis for any conclusion of law. Examples of such are Findings of Fact Number X and XI which deal with purported conversations of Mr. Bridwell and the county attorney, and Mr. Bridwell and the chief of police (R. 189). Additional examples are Findings XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, which have to do with alleged damage to the seized property (R. 190-192). Another example is that part of Finding XXVI, which recites a request by Libellee Club Feraco addressed to the Bureau of Internal Revenue for cancellation of a federal alcohol tax stamp (Retail Dealers Tax Stamp) after the date of the alleged offense (R. 193).

(b) The court failed to make certain pertinent findings for which there is ample support in the record. The court failed to find that during the period Club Feraco had a retail liquor dealers tax stamp that it allowed persons to have, hold, store and posses liquor on the premises of Club Feraco. (Proposed Amendment Number 20 a and b [R. 239, 240] ). The court failed to find that no evidence was introduced by Club Feraco, nor any other claimant that the tangible personal property, nor any parts thereof were *not* used for any purpose whatsoever in connection with the operation of the business conducted on the premises of Club Feraco (R. 187-204). Nor did it find that evidence was introduced that there was no connection with the tangible personal property and the business conducted on the premises, which

finding would certainly be necessary to sustain its order to return property (R. 187-204). The court erred in making conclusions IV and V (R. 193, 194). The conclusions are neither material nor relevant, nor do they have adequate foundation in fact. They, in fact, are conclusions manufactured out of the whole cloth and have no bearing on the issues in this case.

The court erred in failing to modify its judgment in at least three particulars: It erred in directing the Sheriff of Salt Lake County to sell the forfeited property; it erred in directing the Sheriff of Salt Lake County to destroy the seized alcoholic beverages; it erred in directing that each party bear its own costs (R. 195-204).

The officer directed to sell the forfeited property, had neither possession nor control of the forfeited property. He is not authorized by statute to sell said property. The court issued its warrant of attachment to Officer Philip Ralph Caldwell, commanding him to hold safely the property so seized in his possession "until discharged by law." 32-8-24, Utah Code Annotated, 1953, provides as follows:

"If the property, except alcoholic beverage so seized, can be used for lawful purposes and in the discretion of the court the public interest would be served by selling instead of destroying the same, the court shall direct *the officer* to sell such property at public auction \* \* \*" (Emphasis added.)

The officer referred to throughout the Liquor Con-

trol Act is the seizing officer to which the court issues its warrant to hold said property safely. This is further born out by the language in the same section, wherein the statute provides “whenever it shall be finally decided that any alcoholic beverages or other property so seized are not liable to forfeiture, the court by whom such final decision shall be rendered shall issue a written order to the officer having the same in custody or to some other peace office, to restore said alcoholic beverages \* \* \*.” The distinction between the officer holding the property and other peace officers is clearly distinguishable in this section. The case of *Woolum v. Commonwealth*, 295 S.W. 1029, decided by the Court of Appeals of Kentucky, June 24, 1927, is a case wherein the Sheriff was authorized by statute to conduct forfeiture sales. The court ordered the Chief of Police to sell a forfeited automobile. The court therein states at 1030:

“In adjudging a forfeiture of appellants car, the lower court directed that it be advertised and sold by the chief of police of Harland. This was error, as section 2554a12, Kentucky Statutes, provides that all such sales shall be made by the Sheriff.”

We submit that the court was in error in directing the sheriff to sell the forfeited property. The seizing officer and only the seizing officer was entitled to carry out such sale. We submit that the same reasoning applies in relationship to the destruction of seized alcoholic beverages, and that the court was in error in directing an officer not authorized by statute to do so.

### POINT III.

#### CONSTITUTIONAL QUESTIONS CANNOT BE RAISED FOR FIRST TIME ON APPEAL.

Points III, IV, V and VI of Libelees and Respondents and Cross Appellants brief improperly attempt to place before this court questions of constitutionality never raised in the trial court. Timely assertions of Libelee's intention to question the statutes in the Liquor Control Act, under which the proceeding was conducted, were never made, nor were any protective rights of person and property guaranteed by the Utah and Federal Constitutions interposed in defense at any stage of the proceeding. The failure of Libelees to raise such questions at the earliest opportunity, constitutes a complete waiver thereof. It is too late, at this stage, the final chapter of the case, to complain, although we are forced to admit that opposing counsel has indeed complained in superlatives.

The law is clearly and succinctly stated in *Willoughby v. Willoughby*, 178 Kan. 62, 283 P. 2d 428, at 432, as follows:

“Defendant raises for the first time on this appeal the question of the constitutionality of section 60-1518. By his cross-petition, he sought affirmative relief under this statute. At no time did he question the constitutionality of the statute in the court below, either in his pleadings or on his motion for new trial. But on the contrary, on his theory of the case the issues were narrowed and tried solely upon the rights of the parties under the mentioned statute. It is the general

rule that when a litigant desires to question the constitutionality of a statute involved in a case, he should do so at the earliest opportunity, or it will be considered waived. *Owen v. Mutual Benefit Health & Accident Ass'n*, 171 Kan. 457, 233 P. 2d 706. A constitutional right may be forfeited in civil as well as criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *Yakus v. United States*, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834. A party may waive his right to question the constitutionality of a statute by proceeding under it. 11 Am. Jur. 772; see, also, 16 C.J.S., Constitutional Law, § 96, p. 225; *Missionary Baptist State Convention v. Wimberly Chapel Baptist Church*, 170 Kan. 684, 228 P. 2d 540; *Stelling v. Kansas City*, 85 Kan. 397, 116 P. 511. Inasmuch as defendant predicated his defense and asked affirmative relief under the mentioned statute, and at no time questioned its constitutionality in the trial court, either by pleading or motion for new trial, it does not lie within his mouth at this late date to question the same on appellate review. Accordingly, the question is not before this court."

Even assuming constitutional questions may be raised initially in the Supreme Court, the Liquor Control Act has passed the scrutiny of the Utah Supreme Court on the question of its validity on numerous occasions.

See *Riggins v. District Court of Salt Lake County*, 89 Utah 183, 51 P. 2d 645; *Hemenway & Moser Company v. Funk*, 100 Utah 72, 106 P. 2d 779; *Utah Mfrs.' Ass'n. v. Stewart*, 82 Utah 198, 23 P. 2d 229, and *State v. Kallas*, 97 Utah 492, 94 P. 2d 414.

#### POINT IV.

### ACQUITTAL IN CRIMINAL ACTION HAS NO BEARING ON FORFEITURE OF PROPERTY UNDER LIBEL OF INFORMATION.

Counsel for Libelees, Respondents and Cross Appellants states in Point II of his brief: "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."

Counsel's argument was answered by the Supreme Court of the State of Utah in the year 1918, in the case of *State v. Certain Intoxicating Liquors, et al.*, 177 P. 235, 236, wherein the court stated:

"The acquittal of the defendant in the municipal court of Ogden City had no bearing on the issues involved in this action. This proceeding was directed wholly against the liquors in the interests of the public, not for the purpose of subjecting the defendant Laucirica to any penalties, nor was he placed in jeopardy before the court by becoming a party to the action. Therefore the impaneling of a jury because of the defendant's appearance and voluntarily becoming a party to the action, on the ground of his claiming an interest in the liquors and pleading an acquittal in a former proceeding in another tribunal in which he had been prosecuted criminally, would have rendered these proceedings farcical."

See also extensive Annotation in 27 ALR 2d 1137, 1142.



## CONCLUSION

It is respectfully submitted that the Judgment of the District Court of Salt Lake County, State of Utah, as to the return of certain items of personal property to Club Feraco should be reversed and that Libelees, Respondents and Cross Appellants Appeal should be dismissed.

Respectfully submitted,

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Received ..... copies of the foregoing brief this.....  
day of....., 1957.

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