

1957

Utah Liquor Control Commission v. Club Feraco et al : Reply Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

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UTAH LIQUOR CONTROL COMMISSION,
LIBELANT AND APPELLANT*Libelant and Appellant
and Cross-Respondent*

vs.

CLUB FERACO, et al,

*Libelees and Respondents
and Cross-Appellants.*

Clerk, Supreme Court, Utah

Case
No. 8649

REPLY BRIEF OF RESPONDENTS

GEORGE E. BRIDWELL

Attorney for Respondents

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REPLY BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Respondents adopt their statement of facts as set forth in their Brief upon Cross-Appeal.

Respondents feel that their Brief on Cross-Appeal is adequate to present their views in opposition to the Brief of Appellants in all regards and upon all matters, except two.

Those two matters will, therefore be denominated Respondents' Points I and II.

POINT I.

Appellant, the Utah Liquor Control Commission, has a questionable right of appeal upon the law, but it may not disturb the order and judgment of return of certain property made by the Trial Court, the right of Appeal being only to have the Liquor Control Law interpreted for it for future conduct.

POINT II.

Respondents raised and argued constitutional questions asserted by them in the Trial of the case below.

ARGUMENT

POINT I.

APPELLANT, THE UTAH LIQUOR CONTROL COMMISSION, HAS A QUESTIONABLE RIGHT OF APPEAL UPON THE LAW, BUT IT MAY NOT DISTURB THE ORDER AND JUDGMENT OF RETURN OF CERTAIN PROPERTY MADE BY THE TRIAL COURT, THE RIGHT OF APPEAL BEING ONLY TO HAVE THE LIQUOR CONTROL LAW INTERPRETED FOR IT FOR FUTURE CONDUCT.

Title 32, Chapter 8, Section 45, 1953 Utah Code Annotated, provides:

"Practice and precedence—Except as provided in this Act, the practice and procedure in all proceedings hereunder shall be governed by the Code of Criminal Procedure."

Title 77, Chapter 39, Section 4, provides:

"Appeal by State, in what cases—An appeal may be taken by the State:

- (1) For a Judgment of dismissal in favor of the defendant upon a motion to quash the information on indictment.
- (2) For an order arresting Judgment.
- (3) For an order made after Judgment affecting the substantial rights of the State.
- (4) For an order of the Court directing the Jury to find for the defendant."

Obviously, the above statute gives the Libelant no right of Appeal whatever in the case at bar.

However, 32-8-50 provides:

"Right of Appeal in State.—In all cases arising under this Act the Commission shall have the right of appeal as to questions of law."

The right to appeal as to questions of law, being statutory and exclusive, therefore simply and concisely answers Appellants' Points I and II.

This Court, under Article VIII, Section 9, Utah State Constitution, may not review facts, and Appellant is therefore required to make all arguments of evidence in the light most favorable to Respondents.

There is ample testimony in the record to sustain the Trial Court's finding that the restaurant business was not connected with any illegality. If Appellant's contention is true that once a finding of illegality is made that the Court then MUST find all property on the premises shall be forfeit, the statute to that extent would be unconstitutional as denial of due process and in violation of separation of power.

In any event, the judgment of return of property must stand, and it cannot be reversed and ordered back as Appellant prays in its conclusion, as this matter of review is only for the purpose of law clarification for future purposes.

Any other construction would be in violation of Article I, Section 12, Utah State Constitution, as constituting the placing of Libelees in double jeopardy, which is also proscribed by 77-1-10, 1953 *Utah Code Annotated*.

In the case of *State vs. Gray*, (1941), 710 *Okla. Crim. Repts.* 309, 111 *P. 2nd* 514, it was held that the State could bring appeal only to settle questions of law, but it could not affect the defendant, as the judgment of acquittal was final and jurisdiction of both the person and subject matter was exhausted.

This particular point of law is thoroughly annotated, commencing at 113 *ALR* 636, *supplemented by* 157 *ALR*, 1066.

Respondent wishes to point out that the cases are in conflict and this proposition has never been decided in Utah.

Respondent respectfully urges that Utah should align

itself with what has been denominated the "weight of authority" by the editors of ALR (157 ALR 1066) and hold that this appeal is ineffectual, except for an interpretation of the law, as being offensive to the constitutional prohibition of double jeopardy.

It is an exceedingly unfair and reprehensible exercise of great State powers to exonerate Libelees of charges made and allow them to receive back certain furniture and fixtures, not noxious in themselves, and then at a date more than a year later tell them that their trial, originally, on its merits, was meaningless and they must go through the whole trial again; or that the Trial Judge made certain errors, and now, more than a year later, they must forfeit and relinquish all of their property.

Such possibility is offensive to the conscience and morality of a free people, a fortiori here, since the claimed offense upon which this seizure took place resulted in acquittal of the accused for that self same offense, upon prosecution by the same sovereign—The State of Utah.

POINT II.

RESPONDENTS RAISED AND ARGUED CONSTITUTIONAL QUESTIONS ASSERTED BY THEM IN THE TRIAL OF THE CASE BELOW.

Counsel for Libelees is shocked at the baldly false assertion Appellant makes that constitutional issues raised by Libelees in their Brief on Cross-Appeal were not raised in the Court below.

Counsel for Libelees strongly urged the Trial Court to void the entire seizure because of those constitutional objections.

Those arguments were not reported.

Those objections were not made in Respondents' pleadings below because they were not required to be made.

Respondents appeared and became defendants as is provided by 32-8-20.

Libelees' pleading denominated answer to Libel of Information was meant and accepted and intended to be a formal claim for property, only, as were the rest of Libelees' affidavits, all of said Libelees being represented by George E. Bridwell on this appeal.

Further, it is elemental that where it is claimed a law is void upon which the prosecution is had, it being the basis of prosecution, that a reviewing Court will consider its constitutionality, even though such question was not formally raised. *Supra, State vs. Pugh*, 31 *Ariz.* 317, 252 *Pac.* 1018; *Schwartz vs. People*, 46 *Colo.* 239, 104 *P.* 92; *State vs. Diamond*, 27 *N.M.* 477, 202 *P.* 922; *People vs. Rodriguez, (Calif.)*, 136 *Pac. 2nd.* 626, stating that where constitutional rights have been invaded and opportunity arises on appeal to undo the wrong, failure to object below does not preclude proper relief; *Shier vs. People*, 116 *Colo.* 353, 181 *P. 2nd.* 366; *State vs. Christensen*, 166 *Kan.* 152, 199 *P. 2nd.* 475, holding that in matters of public concern where it appears on the record that statutes are involved, determinative in character, appellate Court must take cognizance of them, even though not raised by either party; *Lowry vs. State (Okla.)*, 197 *P. 2nd.* 637.

Respondents flatly state that the Salt Lake County Attorney, by saying Counsel for Libelees did not raise nor argue constitutional objections below, are either unintentionally in error, or are committing unabashed falsehood.

Respondents characterize the statement as unintentional, but if it is not admitted to be unintentional, this case, if necessary, should be remanded for the taking of testimony of the Trial Judge, and several Salt Lake Attorneys who were present, in open Court, when Counsel of Libelees raised and argued at length the constitutional matters involved.

CONCLUSION

The appeal of the Utah State Liquor Commission should be dismissed and Libelees should receive the rulings and relief requested in their Brief on Cross-Appeal.

Respectfully submitted,

GEORGE E. BRIDWELL

Attorney for Respondents