

1967

# Sidney M. Horman And Theodore Horman v. Liquor Control Commission of Utah And Galaxy Outdoor Advertising, Inc. : Brief of Appellants

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# IN THE SUPREME COURT of the STATE OF UTAH

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SIDNEY M. HORMAN and  
THEODORE HORMAN,  
*Plaintiffs and Appellants,*

vs.

LIQUOR CONTROL COMMISSION  
OF UTAH and GALAXY OUTDOOR  
ADVERTISING, INC.,  
*Defendants and Respondents.*

Case No.  
10833

## BRIEF OF APPELLANTS

Appeal from a Judgment of the District Court of  
Salt Lake County

Honorable D. Frank Wilkins, Judge  
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and F. Burton Howard  
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Clerk, Supreme Court, Utah

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                    *Defendants and Respondents.*

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10933

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**BRIEF OF APPELLANTS**

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**STATEMENT OF THE KIND OF CASE**

This is an action for an extraordinary writ directing defendant, Liquor Control Commission of Utah, to repeal or revoke its Regulation No. 4 authorizing the advertising of light beer on billboards within the State of Utah.

**DISPOSITION OF CASE BY LOWER COURT**

The lower court denied defendant, Liquor Control Commission's Motion for Judgment on the Pleadings wherein it was alleged that plaintiffs had failed to state a claim upon which relief could be granted, whereupon, the defendants answered.

Plaintiffs thereafter filed a Motion for Summary Judgment which the lower court denied, at the same time granting defendants' oral Motion for Summary Judgment made concurrently therewith.

## RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the Judgment of the lower court with instructions to enter a writ requiring defendant, Liquor Control Commission of Utah, to rescind its Regulation No. 4 as not authorized by statute.

## STATEMENT OF FACTS

Plaintiffs are citizens and residents of Salt Lake County and the plaintiff, Theodore Horman, is the father of minor children who are also citizens and residents of Salt Lake County.

Defendant, Liquor Control Commission of Utah, is a governmental agency of the State of Utah, with authority to sue and be sued, with the written consent of the Governor. The Governor of Utah has consented to the bringing of this action.

The defendant Commission is authorized, pursuant to Section 32-1-7 UCA 1953, to make Resolutions, Orders and Regulations not inconsistent with the Utah Liquor Control Act, which Act is an exercise of the police powers of the State of Utah, adopted in part for the protection of the public health, peace and morals of the citizens of the State.

For many years prior to March 22, 1966 the Commission promulgated the following Regulation:

“All advertising of alcoholic beverages, including light beer, on billboards, sign boards, road signs, painted bulletins, electric or illuminated signs, or on or in any other form of exterior advertising is hereby prohibited except as provided in 32-7-27

Utah Code Annotated 1953, and in these regulations. The term 'exterior advertising, is construed to include any advertising, displayed or set outside the premises or at any place within, upon or attached to the premises if the same is visible from the outside, and the regulations herein promulgated are intended to cover all such advertising."

On or about March 22, 1966 defendant Commission repealed this Regulation, and in lieu thereof passed and promulgated the following Regulation:

#### "REGULATION NO. 4.

"A. Alcoholic beverages, excluding light beer, shall not be advertised in any manner which is contrary to Section 32-7-27, Utah Code Annotated, 1953.

"B. Light beer may be advertised in any reasonable manner consistent with the public interest, subject to the following conditions:

"(1) The approval of the commission must first be obtained for every form of advertising display or method which utilizes family pets, family scenes, drinking scenes or which the advertiser has reason to believe would be deemed contrary to the public interest by the commission. In such an event, the advertiser shall submit to the commission a specimen of the proposed advertisement, and the commission will approve or disapprove the same. If approved, no published advertisement shall contain any statement of approval by the commission.

"(2) The commission will not approve any advertising proposal, sign, display, system or method which alludes to minors, or which is inconsistent with good taste or public morals.

“(3) On order of the commission any sign, display or advertisement which the commission shall consider objectionable or contrary to the public interest, shall be removed.”

In the case of *Bird & Jex Co. vs. Funk*, 96 Utah 450, 85 P.2d 831, the Utah Supreme Court construed the powers of the Utah Liquor Control Commission. Under an identical statute the Court ruled that the Commission did not have the power to allow outdoor advertising of beer on billboards and concluded in its opinion therein:

*“Holding as we do, that billboard and other outdoor display advertising is prohibited by the Act, the Appellants are in no position to question the validity of the other Regulations adopted by the Commission, and for that reason we refrain from passing on them.”* 85 P.2d 837 (Emphasis supplied)

Plaintiffs allege that the advertising of light beer in violation of the statutes of the State of Utah as interpreted by the Utah Supreme Court is damaging to the health, peace and morals of the plaintiffs and of the said minor children and other citizens of this State and that plaintiffs have no other plain, speedy or adequate remedy at law to protect themselves and the minor children aforesaid against the actions of defendant.

## ARGUMENT

### POINT I.

THE POLICE POWER OF THE STATE OF UTAH IS SUFFICIENT TO REGULATE OR PROHIBIT ADVERTISING OF ALCOHOLIC BEVERAGES.

The Utah Liquor Control Commission was established by the Legislature in 1935 and was given power to



manage and control the liquor monopoly on behalf of the State of Utah. There has been considerable litigation over the constitutionality of Utah liquor control acts. However, it seems clear that the police power of the state is sufficient to regulate and prohibit traffic in alcoholic beverages and to regulate or prohibit advertising in connection therewith. See *Riggins vs. District Court of Salt Lake County*, 89 Utah 183, 51 P.2d 645; Annotation 19 A.L.R. 2d 1114. In this regard Section 32-1-2 UCA 1953, provides:

“This Act shall be deemed an exercise of the police powers of the state for the protection of the public health, peace and morals; to prevent the recurrence of abuses associated with saloons; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages; and all provisions of this Act shall be liberally construed for the attainment of these purposes.”

In order to further the avowed purpose of the Liquor Control Act, the Commission, among other things, is granted regulatory powers. Section 32-1-7 provides:

“The Commission may, from time to time, make such resolutions, orders and regulations not inconsistent with this Act, as it may deem necessary for carrying out the provisions thereof and for its efficient administration. . . .”

As a further indication of legislative intention, Section 32-7-26 UCA 1953, provides:

“The advertising of alcoholic beverages by the Commission and any window display thereof in its store are hereby especially prohibited, except that the Commission may provide for appropriate

signs on window or front of building, denoting the fact that it is a state liquor store or package agency and may provide for printed price lists."

Section 32-7-27 continues:

*"The prohibition against advertising alcoholic beverages and against window displays in liquor stores of the Commission shall apply in like manner to all manufacturers and licensees of alcoholic beverages and to package agencies. This provision shall be construed to prohibit the use of any electric or illuminated signs, contrivance or device, signboard, billboard, or other display signs, and to prohibit the display of alcoholic beverages or price lists in windows or show cases visible to passersby, and to prohibit the use of any other means of inducing persons to buy alcoholic beverages or to enter places where alcoholic beverages are sold, provided, that a simple designation of the fact that beer, wine or other liquors are manufactured or sold under authority derived from the Commission may be placed in or upon the window or front of the place of business having such authority; and provided, further, that advertising of light beer shall be permitted under such regulation as the Commission may make."*  
(Emphasis added.)

Under this authorization, the Commission has adopted the regulation which is the subject of dispute herein.

## POINT II.

THE UTAH SUPREME COURT HAS ALREADY RULED THAT UTAH STATUTES PROHIBIT OUTDOOR ADVERTISING OF LIGHT BEER ON BILLBOARDS.

The Utah Supreme Court, in the case of *Bird & Jex Co. vs. Funk*, 96 Utah 450, 85 P.2d 831, considered an action to restrain the Liquor Control Commission from

enforcement of the regulation in question. It was alleged therein that this regulation discriminated against advertisers of beer and that it arrogated to the Commission the right to dictate the kind and type of copy that should be used in beer advertisements. It was contended that the phrase, "advertising of light beer shall be permitted" should bind the Commission to allow and not to prohibit the advertising then in use, including billboards. It was further argued that the Commission could only make and enforce reasonable regulations addressed to the content of such advertising matter and could not prohibit billboard advertising of beer.

The Utah Supreme Court said:

"The question whether or not the powers granted to the Liquor Commission are constitutional is not in dispute here, although appellants intimate that if the rules and regulation promulgated by the Liquor Commission are determined by this Court to be within the powers granted by the legislature to the Commission, then such delegation of powers must of necessity be unconstitutional. The only question to be determined at the moment is . . . does the Liquor Control Commission have the power to prohibit the billboard advertising in the face of the last provision in (32-7-27 UCA 1953)."

The Court continued:

"Where the legislature delegates to an administrative agency power to make rules and regulations, such delegation must be accompanied by a declared policy outlining the field within which such rules and regulations may be adopted. . . . From this it must necessarily follow that all rules

and regulations adopted by an administrative board or agency must be in furtherance of and follow out the declared policies of the legislative enactment. If the regulations or rules are in excess of the declared purposes of the statute, they are invalid."

\* \* \*

"What are the declared policies of the legislature with respect to the rules and regulations of the Liquor Commission here in dispute? The declared general purposes of the Liquor Control Act, under which the Liquor Commission derives its authority, are 'for the protection of the public health, peace and morals; to prevent the recurrence of abuses associated with saloons; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages. . . .' *The declared policy with respect to advertisement of alcoholic beverages is stated in (32-7-27, UCA 1953) as prohibiting the use of any means of inducing persons to buy any of such beverages or entering places where they are sold.*" (Emphasis added.)

\* \* \*

"In determining the meaning of the provision, we must take particular note of the section wherein it stands as well as the general tenor of the act. The Liquor Act defines 'alcoholic beverage' to include light beer so that when that phrase is used, light beer is included. Therefore, when Section (32-7-27 UCA 1953), refers to alcoholic beverages and prohibits advertising of them, advertising of light beer is included in that prohibition."

\* \* \*

"(Section 32-7-27) may be divided in four parts, two prohibitions and two provisos as follows:

“(1) A specific prohibition against billboard signs and other displays;

“(2) A general prohibition of all other advertising and all “means of inducing persons to buy alcoholic beverages or to enter places where alcoholic beverages are sold”;

“(3) A proviso permitting a sign on the window or front of authorized premises and limiting it to a simple designation of the fact that beer or other beverage is sold or manufactured; and

“(4) The proviso ‘that advertising of light beer shall be permitted under such regulation as the Commission may make.’

“The first proviso effects the specific prohibition against billboard and display advertising while the second proviso is carved out of the general prohibition against all other advertising.

“It seems obvious that the legislature intention was clearly to limit to a narrow field the advertising of alcoholic beverages, including light beer, and the whole purpose of the act is to reduce solicitation of such beverages to an actual minimum whether by advertisements or otherwise. Surely the office of the proviso is not to set aside and declare for naught the specific prohibition against billboard and other sign advertising. The prohibition is definite, specific and all comprehensive. There can be no doubt but that the legislature, at least in the first part of the section, intended to prohibit all billboard advertising of light beer and other alcoholic beverages. If the second proviso be construed to mean what appellant contends for, it would make for naught that part of the section. The prohibition would no longer stand as to light beer. Such construction would give to the proviso the effect of setting aside the specific prohibition against billboard

advertising of light beer. . . . No such intent can be found elsewhere in the statute. . . ." 85 P.2d 835

The Court stated that the previously cited regulation of the Commission was in effect a prohibition of billboard and sign advertising of alcoholic beverages and constituted "but a re-assertion of the specific provision of (32-7-27) which effectively prohibits such advertising. The judgment of the District Court holding that billboard and other outdoor display advertising of beer was prohibited by the act was affirmed when the Court concluded:

*"Holding as we do, that billboard and other outdoor display advertising is prohibited by the Act, the Appellants are in no position to question the validity of the other Regulations adopted by the Commission, and for that reason we refrain from passing of them."* 85 P.2d 837 (Emphasis added)

Accordingly, plaintiffs submit that light beer may not be advertised on billboards in the State of Utah by virtue of the Utah statutes themselves, and that, therefore, the Utah Liquor Control Commission may not promulgate regulations allowing such advertising.

### POINT III.

THERE IS NO DISCRIMINATION IN A PROHIBITION OF OUTDOOR ADVERTISING WHILE AT THE SAME TIME ALLOWING RADIO AND TELEVISION ADVERTISING.

It has been suggested, however, that to allow radio or television advertising of light beer and at the same time to prohibit billboard advertising thereof is to discriminate against advertising media. It has also been suggested that the regulation of liquor advertising is

violative of the interstate commerce clause of the United States Constitution. It seems appropriate to deal briefly with both of these objections.

The question of discrimination against advertising media was raised in the *Bird & Jex* case previously referred to. The Utah Supreme Court assumed therein that the act was constitutional and did not specifically speak to the question of discrimination. However, regulations controlling the advertising of various types of alcoholic beverages or various kinds of advertising thereof have generally been upheld.

The Connecticut court has upheld a regulation prohibiting any retailer from having any exterior sign or other advertising matter bearing the name or trademark of a manufacturer of alcoholic beverages. See *Amarone v. Brennan*, 126 Connecticut 451, 11 A.2d 850. A Virginia regulation prohibiting unlicensed dealers from advertising intoxicating liquors but not prohibiting licensed dealers from so advertising was upheld as constitutional in *Commonwealth v. Anheuser Bush, Inc.*; 181 Va. 678, 26 SE2d 94. A Montana regulation prohibiting the advertisement of liquors on sign boards or billboards, but allowing signs advertising beer or malt liquor to be placed on a brewery or premises where beer was lawfully stored was upheld in *Fletcher v. Paige*, 220 P. 484, 19 A.L.R.2d 1108.

It seems generally accepted that the manufacture and sale of intoxicating liquors, where permitted, is a lawful business which is fully entitled to protection but that nevertheless it can be regarded as dangerous to

public health, safety and morals and is, therefore, subject to strict regulation by the states under their police power. This regulation has been held generally to include the prohibition or regulation of advertising. See 30 Am Jur. Intoxicating Liquors, Sec. 69; Annotation, 19 ALR2d 1114.

It is also clear that by virtue of the Wilson Act, 27 USC, Sec. 121, no serious claim of interference with interstate commerce can be raised. This act provides that all intoxicating liquors transported into any state shall, upon arrival, be subject to the operation of the police power of that state and shall not be exempted by reason of the interstate commerce clause. Several courts construing this act have reasoned that the state's power to prevent the sales of intoxicating liquor carries with it the power to prevent the solicitation of sales, which is the same as advertising. See *Advertiser Co. v. State*, 193 Ala. 418, 69 Southern 501; *State ex. rel. West v. State Capital Co.*, 24 Okl. 252, 103 Pac. 1021; *Cf. State v. Packer Corp.*, 77 Utah 500, 297 Pac. 1013.

The United States Supreme Court has spoken relative to alleged discrimination against outdoor advertising as compared to other advertising media. In the case of *Packer Corp. v. Utah*, 285 US. 105, 52 C. Ct. 273, 67 L.Ed. 643, that Court had before it the validity of a Utah Statute prohibiting billboard advertising of cigarettes. It was contended by the appellant that the Utah law was discriminatory, imposed an unreasonable classification and violated the commerce clause as well as the 14th Amendment of the Federal Constitution.



Mr. Justice Brandeis, speaking for a unanimous court, upheld the Utah legislation. He stated: "There is a difference which justifies the classification between display advertising and that in periodicals or newspapers. . . ."

In quoting from the lower court's decision he continued:

"Billboards, street car signs, and placards and such are in a class by themselves. They are wholly intrastate. . . . Advertisements of this sort are constantly before the eyes of observers on the streets. . . . Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. . . . These distinctions clearly place this kind of advertising in a position to be classified so that regulations or prohibitions may be imposed upon all within the class.' "

The Supreme Court of the United States has also included liquor among the special category of articles which are subject to exceptional control by the legislatures of the various states and has sustained controls and regulations "which would have been repugnant to the great guarantees of the constitution but for the enlarged right possessed by the government to regulate liquor." *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311, 37 S. Ct. 180, 61 L.Ed. 326.

Therefore, it is reasonable to conclude that the prohibition of billboard advertising should be upheld by the courts as constitutional.

#### POINT IV.

PLAINTIFFS HAVE STANDING TO CHALLENGE ACTIONS OF THE UTAH LIQUOR CONTROL COMMISSION WHICH ARE NOT IN ACCORDANCE WITH LAW.

Plaintiffs filed below their Petition seeking an extraordinary writ under Rule 65B, URCP, to prevent the Liquor Control Commission of Utah from acting in direct contravention of what Plaintiffs believe to be the holding of the Utah Supreme Court in *Bird & Jex Co. v. Funk*, 96 Utah 450, 85 P.2d 831. With respect to the right to seek such an extraordinary writ it must be noted that there is a difference between proceedings to enforce a purely private right and proceedings wherein it is sought to compel performance of a public duty.

The defendant commission claims that Plaintiffs may have insufficient interest in the actions of the Liquor Control Commission to challenge its orders. In this regard 2 Am. Jur. 2d, *Administrative Law*, Sec. 575 provides:

*"But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy. . . ."* (Emphasis added)

A further statement regarding plaintiffs' right to bring this action is found in the same authority.

"Where the object is to enforce a public duty not due the government as such, any private citizen may sue."

See 35 Am. Jur. Mandamus Sec. 319.

"The rule established by the preponderance of authority is that where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the

relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.  
 . . .”

See 35 Am. Jur. Mandamus, Sec. 320, p. 73. See also *Union Pacific Railroad Co. v. Hall*, 91 U.S. 343, 23 L.Ed. 428; *Crockett v. Board of Education*, 58 Utah 303, 199 Pac. 158.

The *Crockett* case, *supra*, involved an action commenced in District Court against the Board of Education of Carbon County to compel the publication of an annual statement of receipts and disbursements as was provided by law. The plaintiff was a resident taxpayer and citizen of Carbon County. The defendant, Board of Education, in that case argued that the plaintiff was without legal capacity to sue in that “the plaintiff has no such personal interest in the matter of the publication of a statement as would entitle him to maintain the action against the defendants.”

The defense raised in that case was substantially that presented to the court by the defendant, Liquor Control Commission in the present action. In 1917 the law provided that a Writ of Mandamus could be issued “. . . to compel the performance of an action which the law specially enjoins as a duty resulting from an office, trust, or station.” This law is for all practical purposes similar to Rule 65B(b)(3), Utah Rules of Civil Procedure. But Section 7392 of the laws of Utah, 1917, also provided that the writ would be issued upon the application of the party beneficially interested. *This requirement is not present*

*in the current law.* However, even with the requirement of a beneficial interest, the Utah Supreme Court, in response to the Carbon County Board of Education's allegation that the plaintiff had no beneficial or special interest in the publication of the statement, stated:

"As to just when, within the meaning of the statute, a party is beneficially interested in the performance of an official duty on the part of a public officer, is not always a matter of easy determination. . . . In the present case it is shown that the plaintiff is a citizen and a resident taxpayer of Carbon County School District. As such we are not prepared to say that within the meaning of our statute, he is not a party beneficially interested in having a statement prepared and published in the manner in which the law expressly and clearly enjoins. True it is, plaintiff seeks the performance of a duty that does not concern himself alone, but one that inures to the benefit of all citizens and taxpayers of the district alike; yet at the same time he himself as a citizen and taxpayer necessarily has sufficient interest and the right to maintain the action . . . (citing cases). "It follows from what has been said that the plaintiff in this action has the legal right to sue. . . ."

The *Crockett* case, together with Rule 65B, Utah Rules of Civil Procedure, was cited by the 1964 Utah Supreme Court in *Archer v. State Land Board*, 15 Utah 2d 321, 392 P.2d 622, as authority for the proposition that district courts have "authority to issue writs in the nature of mandamus where it is made to appear that the administrative board or officer has a clear statutory duty to perform a certain act and it or he refuses to do so." 392 P.2d 622, 623.

In the instant matter it appears from the complaint that plaintiffs are residents of the county and that plaintiff, Theodore Horman, is the father of minor children who are also citizens and residents of Salt Lake County. The purpose of the Liquor Control Act as found by the Utah Supreme Court and as set forth in Sec. 32-1-2, UCA 1953, is "the protection of the public health, peace and morals; to prevent the recurrence of abuses associated with saloons; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages."

If the actions of defendant, Liquor Control Commission of Utah, violate the Liquor Control Act of the state as has been interpreted by the Utah Supreme Court and if plaintiff is a citizen of this state and the father of minor children, it appears that he clearly has a beneficial interest in the enforcement of the Act designed to safeguard and protect the morals of the citizens of this state.

### CONCLUSION

To deny relief in the present case is to deny all citizens of the state of Utah the right to the compelling process of the courts where defendant appears to be clearly derelict in its official duties.

It has been said that the purpose of Mandate is that of compelling action where law enjoins it and the person or tribunal refuses to act in accordance therewith. See *Hoffman v. Lewis*, 31 Utah 179, 87 Pac. 167. All citizens have the right to see that the laws of the state are properly enforced. If the courts are closed to citizens in cases

like the present one, it is difficult to conceive how the interests of the public generally are to be safeguarded. It is submitted that the right sought to be defined and protected in the present case is one of which this court should take jurisdiction.

Respectfully submitted,

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