1965

The Bowling Club, A Non-Profit Corporation of the State of Utah v. Lamont F. Toronto, Secretary of State of the State of Utah : Brief of Respondent

IN THE SUPREME COURT
OF THE STATE OF UTAH

THE BOWLING CLUB, a non-profit corporation of the State of Utah,
Petitioner and Appellant,

— vs. —

LAMONT F. TORONTO, Secretary of State of the State of Utah,
Respondent.

C
No.

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Clerk

BRIEF OF RESPONDE

Appeal From the Judgment of the
Third District Court for Salt Lake Co
HON. A. H. ELLETT, *Judge*

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE BOWLING CLUB, a non-profit corporation of the State of Utah,
Petitioner and Appellant,

— vs. —

LAMONT F. TORONTO, Secretary of State of the State of Utah,
Respondent.

Case No. 10253

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant, a non-profit corporation organized under the laws of the State of Utah, appeals from a decision of the Secretary of State revoking the charter of the corporation for violations of the Utah Liquor Control Act. The action of the Secretary of State was contested in the District Court, Third Judicial District, by writ of certiorari and upheld.

DISPOSITION IN LOWER COURT

The respondent agrees to the statement of appellant as to the disposition of the instant case in the District Court of the Third Judicial District.

RELIEF SOUGHT ON APPEAL

The respondent submits that the decision of the Secretary of State and its affirmance by the Third Judicial District Court, revoking the appellant's charter, should be upheld by this court.

STATEMENT OF FACTS

The respondent submits the following statement of facts:

The Secretary of State, pursuant to notice, issued an order to show cause why the charter of the Bowling Club, a non-profit private corporation, should not be revoked and the $5,000 bond forfeited to the State of Utah for violation of the Utah State Liquor Control Act (R. 2). At the time of the hearing the only appearance made by the Bowling Club was a motion to quash for failure of proper notice (R. 2). No other objection to the proceedings was raised nor did the Bowling Club examine any of the witnesses who were present or otherwise offer evidence on the issue.

An audiographic record of the proceedings before the Secretary of State is attached to the instant record.

Generally, the evidence discloses that Mr. William N. Brady, an investigator of the Federal Alcohol and Tax Division, on the 7th day of April, 1964, entered the Bowling Club and purchased several alcoholic drinks containing Bourbon and Scotch whisky on a retail basis. Further, he was given a pink guest card which would admit him to the Bowling Club on other occasions. On April 8, Mr. Brady returned to the Bowling Club and purchased another Bourbon and 7-Up for 50c. Thereafter, he purchased five additional drinks from the bartender. On May 25, Mr. Brady returned and purchased five additional drinks containing intoxicating liquor at the bar on the club premises. Later on that day he returned to the club with officer Allen B. Clark of the Salt Lake City Vice Control Division and the wife of Sgt. Johnson of the Salt Lake City Vice Squad. They purchased several drinks of intoxicating liquor, including Scotch and Vodka. The same thing occurred on the 17th of June, 1964, at which time Mr. Brady purchased a half-pint of whisky from the bartender at the Bowling Club.

Subsequently, on the 18th day of June, 1964, a search warrant was obtained from the Honorable A. H. Ellett, District Judge, and at 4:30 p.m., a search of the premises of the Bowling Club was made and 75 bottles more or less of alcoholic beverages were seized. Subsequently, a hearing in the case entitled, "*Utah Liquor Control Commission* v. 75 *Bottles More or Less Seized From the Premises of That Certain Establishment Known as the Bowling Club,*" was had. The findings of fact and con-

clusions of law of that hearing are appended to the record on appeal. The court expressly found that alcoholic beverages were being served on a retail drink-by-drink basis at the Bowling Club, and that alcoholic beverages were being stored on the premises for the purpose of illegal sale in violation of Title 32, U.C.A. 1953. The court ordered the seized alcoholic beverages forfeited. The evidence concerning the purchase of alcoholic drinks on a retail basis and the search of the premises of the Bowling Club was all received by the Secretary of State without objection from anyone representing the Bowling Club. All of the witnesses who appeared and testified did so without being administered any formal oath. All the witnesses, however, indicated that they recognized a duty to tell the truth and intended to tell the truth. No objection was made to the failure of any witnesses to be sworn. Based upon the evidence, the Secretary of State determined that the Bowling Club had violated the provisions of the Utah Liquor Control Act, and ordered the club charter forfeited. The appellant sought certiorari from the District Court which was ultimately denied.

ARGUMENT

POINT I.

THE FAILURE OF WITNESSES TESTIFYING AT THE HEARING BEFORE THE SECRETARY OF STATE TO BE SWORN DOES NOT VITIATE THE PROCEEDINGS.

At the time of the hearing before the Secretary of State, each of the witnesses that were called were ad-

vised that they should tell the truth and indicated that they intended to do so. None of the witnesses were given formal oaths. No one on behalf of the appellant objected to the procedure nor objected to the testimony.

16-6-13, U.C.A. 1953, provides:

> " * * * The secretary of state shall hold a hearing, after notice, for purposes of determining whether a club or association incorporating or operating under this chapter is organized or operating in accordance with the law. Notice shall be sufficient if sent by registered mail to the principal place of business or to any of the officers of such club or association. If it is shown after a hearing that any such club or association (1) was actually organized for pecuniary profit, (2) was used for gambling or other purposes in violation of any law or ordinance inluding, but not limited to, violations of the Liquor Control Act, as amended, (3) has failed to maintain or make available to the secretary of state a record of its membership, or (4) has failed to procure and file with the secretary of state, within the time herein prescribed, and maintained in good standing a bond as herein provided or has failed to file and/or keep on record with the secretary of state a copy of its constitution, bylaws and house rules which must be in conformity with the requirements of this chapter, or has failed to conform to or abide by such constitution and bylaws and house rules, the secretary of state shall revoke the charter of such corporation."

It is obvious that the Secretary of State acts in an administrative capacity and that the hearing is not a formal trial. Even if it were, it is well settled that the failure of a party to object to the failure of a witness to

be administered an oath precludes any claim of error or prejudice. Wigmore, *Evidence,* 3rd Ed., § 1819, notes:

> "This modern practice does not abate the ordinary rule that the failure to make an objection to competency at the proper time is a waiver (*ante,* §§ 18, 486). Hence, if a witness who has not taken the oath is by inadvertence put on the stand, the opponent's *subsequent* discovery and *objection* should not avail! * * *" (Emphasis added)

In *Richards* v. *Hugh,* 51 L.J.Q.B. 361 (Canada 1882), it was ruled that the failure of a party to object because a witness was not sworn was a waiver of any irregularity. In *People* v. *McAdoo,* 184 N.Y. 304, 77 N.E. 260 (1906), a hearing was held before a police commissioner. A witness was not sworn. The New York Court of Appeals ruled that where the party was aware of the failure to swear the witness and failed to object, no claim of error could be sustained. See also *Sears* v. *United States,* 264 Fed. 257 (1st Cir. 1920); *In re DaRoza's Estate,* 82 Cal. App. 2d 550, 186 P. 2d 725 (1947). In the instant case counsel for the appellant were present during the whole hearing, made no objection to the proceedings, and declined to take part in the hearing, apparently relying on the motion to quash. It is apparent, therefore, that no claim of error can be predicated on the failure of the witnesses to be sworn because no objection was made.

Secondly, it should be noted that 16-6-13, U.C.A. 1953, in no way requires that witnesses that may appear should be sworn. It does not purport to make such a requirement mandatory or even permissively empower the Secretary of State to swear witnesses. Administrative pro-

ceedings are generally not required to maintain the same formality as court trials. Davis, *Administrative Law,* § 14.01. The appellant contends 78-24-16, U.C.A. 1953 is applicable. That section provides:

> "Every court, every judge, clerk and deputy clerk of any court, every justice, every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, *has power* to administer oaths or affirmations." (Emphasis added)

It should be noted that that section is permissive, not mandatory. The section does not require that oaths be administered in administrative hearings. The general rule is that in the absence of a mandatory statute a failure to swear witnesses does not invalidate the proceedings. Thus, in 73, C.J.S., *Public Administrative Bodies,* § 127, it is noted:

> "It has been held that, where the administrative body is authorized to administer oaths, all witnesses must be sworn, but the swearing of witnesses may be waived, and, where the statute does not require that the sworn testimony of witnesses be taken, a failure to swear the witnesses does not invalidate the proceeding."

See *Wilson* v. *Township Committee,* 123 N.J.L. 474, 9 A. 2d 771; *Amen* v. *City of Rahway,* 117 N.J.L. 589, 190 Atl. 506. In *Duffard* v. *City of Corpus Christi,* 332 S.W. 2d 447 (Tex. 1960), an action was brought attacking street paving assessments. Texas law required a public hearing before the City Council. Oaths were not given

the witnesses. The court stated on appeal attacking the proceedings:

> "Appellants attack the proceedings before the City Council on account of alleged irregularities therein, because the witnesses were not sworn, because the Council permitted leading questions, because witnesses gave testimony based upon conclusions and hearsay, and because the expert witnesses who testified as to the enhancement of the value of property abutting on the improved street were not in fact experts. These contentions must be overruled. The rules as to the examination of witnesses are relaxed in administrative proceedings, and where the statute does not require that sworn testimony be taken, a failure to swear the witnesses does not invalidate the proceedings. 73 C.J.S. Public Administrative Bodies and Procedure § 127, p. 450; State ex rel. Townsend v. City of Mission, Tex. Civ. App., 329 S.W. 2d 98."

See also 3 Am. Jur., *Arbitration and Award,* § 109; *Newcomb* v. *Wood,* 97 U.S. 581.

Consequently, since nothing makes the requirement of an oath mandatory, and since appellant did not object or participate in the proceedings before the Secretary, there is no merit to the contention that the failure to administer an oath to the witnesses vitiated the proceedings. Especially is this true where a certified copy of a court judgment and findings was received which action showed the appellant had been judicially determined to have violated the Liquor Control Act.

Respondent submits the following additiona
case as being relevant to the issues raised
of the appeal on the instant matter. In
State v. Christensen, 119 Utah 361, 227 P.2d
760 (1951), the contention was made that the
Juvenile Court for the Fourth Judicial Distr
had committed prejudicial error in taking
testimony in a preceeding to commit a
fourteen year old boy to the State Industria
School on the grounds of delinquency when it
failed to administer oaths to witnesses. In
rejecting the contention, the court stated:

> "Under the broad discretion
> covering the juvenile courts
> of this state in regard to the
> manner and form on procedure
> to be followed in conducting
> hearings to inquire into the
> alleged delinquency of children,
> the court may, if it deems it
> advisable, allow children to
> testify without being sworn."

This insertion is to be made for page eight(
of the Respondents brief.

POINT II.

THE PROVISIONS OF 16-6-13, U.C.A. 1953, ET SEQ., RELATING TO THE POWER OF THE SECRETARY OF STATE TO FORFEIT THE CHARTER OF A NON-PROFIT CORPORATION WAS NOT REPEALED BY THE ENACTMENT OF 32-8-7, U.C.A. 1953, ALLOWING A COURT TO REVOKE A CORPORATE CHARTER ON CONVICTION FOR VIOLATING THE LIQUOR CONTROL ACT.

The appellant contends that the provisions of 16-6-13 and 13.1, U.C.A. 1953, which allow the Secretary of State to forfeit the charter of non-profit liquor locker clubs and forfeit the bond required to be posted under 16-6-13.1, U.C.A. 1953, were impliedly repealed when the Legislature enacted 32-8-7, U.C.A. 1953. Chapter 8 of Title 32 is part of the Liquor Control Act and provides penalties for the violation of the Act. In 1959 the Legislature amended Section 32-8-7, U.C.A. 1953, and it now reads:

> "Every person who violates any of the provisions of section 32-7-1 and 32-7-7 shall be imprisoned for not less than three months nor more than six months or fined in an amount not to exceed $1000 or both. Every corporation which violates any of the provisions of section 32-7-1 and 32-7-7 shall be fined in an amount not to exceed $2500 or have its charter revoked by a court of record or both."

It should be noted that this provision covers both profit corporations and non-profit corporations, but provides for *criminal penalties.* Nowhere does the section say the bonding provisions of 16-6-13.1 are repealed or

that the Secretary of State's authority under 16-6-13 and 13.1, which was provided for in 1955 (Laws of Utah 1955, Ch. 25 § 1) is repealed. There is nothing inconsistent about giving the Secretary of State administrative authority to revoke a charter and giving a court authority to revoke a charter on criminal conviction. The Secretary might have access to more information than a court. Further, the court's power to revoke is based upon a conviction, whereas the Secretary may revoke without a conviction and does not have to depend on whether or not a sheriff or county attorney may press the matter. However, a more obvious reason for not finding an implied repeal exists. In 1963 the Legislature amended the Non-Profit Corporation Act by enacting the Model Non-Profit Corporation Act. The sections (16-6-1—12, U.C.A. 1953) immediately preceding 16-6-13 were expressly repealed, whereas nothing was done about repealing 16-6-13, et seq. Certainly, if the Legislature had intended these provisions to be no longer applicable, they would, at that time, have cleared the books of any reference to them. In fact, the Legislature did just the opposite and expressly said that 16-6-13, et seq., were not repealed. Thus, 16-6-111, U.C.A. 1953, enacted in 1963, provides:

> "Sections 16-6-13, 16-6-13.1, 16-6-13.2, 16-6-13.3, 16-6-14 and 16-6-15, Utah Code Annotated 1953, pertaining to certain types of nonprofit corporations, shall in no way be deemed repealed in whole or in part by the provisions of this act and all references in said sections to corporations "incorporating," "incorporated" or "to be incorporated" under or pursuant to "this chapter" shall be

> deemed to include such types of non-profit corporations organized under this act or otherwise governed by the provisions of this act."

Certainly, therefore, the Legislature could not have intended that 16-6-13, et seq., would be repealed by 32-8-7, U.C.A. 1953, and obviously felt the former sections were still in effect.

The Legislature is presumed to intend to achieve a consistent body of law. Sutherland, *Statutory Construction,* § 2012, and subsequent legislation is not presumed to repeal prior legislation without an express intent. Sutherland, op. cit., §§ 2012 and 2014.

This court has consistently refused to find an implied repeal of an existing statute unless the later enacted statute is absolutely irreconcilable with the former. *Glenn* v. *Ferrell,* 5 Utah 2d 439, 304 P. 2d 380; *State Tax Comm.* v. *Board of Commissioners,* 1 Utah 2d 60, 261 P. 2d 961; *Thompson* v. *Harris,* 106 Utah 32, 144 P. 2d 761. In *McCoy* v *Severson,* 118 Utah 502, 222 P. 2d 1058 (1950), this court observed:

> "It is a rule of statutory construction that where there are two or more statutes dealing with the same subject matter they will be construed so as to maintain the integrity of both. Repeal by implication is not effected unless the terms of the later enacted law are irreconcilable with the former.

In *Union Pac. R. R. Co.* v. *Public Service Comm.,* 103 Utah 186, 134 P. 2d 469 (1943), this court noted:

> "* * * Whether there has been a repeal by implication is primarily a question of legislative in-

> tent, and it cannot be adjudged that there has been such a repeal unless the legislative intent clearly appears. People v. McAllister, 10 Utah 357, 37 P. 578; State v. Carmen, 44 Utah 353, 140 P. 670; University of Utah v. Richards, 20 Utah 457, 59 P. 96, 77 Am. St. Rep. 928; 59 C. J. 904 et seq."

No intention to repeal 16-6-13, et seq., is found merely because a court on conviction is also authorized to revoke a charter. The Legislature obviously intended both authorities to exercise the power. One power is exercised in a criminal case, the other in a civil proceeding. This is not inconsistency but consistency among the sovereign bodies.

It is submitted, therefore, that the contention that the provisions of 16-6-13, et seq., have been impliedly repealed is without merit.

POINT III.

THE OPERATION OF THE UTAH LIQUOR CONTROL ACT IN CONJUNCTION WITH THE PROVISIONS OF SECTIONS 16-6-13 AND 16-6-13.1, UTAH CODE ANNOTATED 1953, DOES NOT RESULT IN A VIOLATION OF ARTICLE I, SECTION 9, OF THE UTAH CONSTITUTION.

The appellant contends that since Section 32-8-7, Utah Code Annotated 1953, provides for a fine of $1,000 against any individual violating the illegal sale provisions of the Liquor Control Act and since the same provision subject a corporation to a fine of $2,500, these pen-

alties, when coupled with the provisions of 16-6-13 and 16-6-13.1 providing for forfeiture of a $5,000 bond on violation of the Liquor Control Act, result in the imposition of an excessive fine in violation of Article I, Section 9, of the Utah Constitution.

In the instant case it should be noted that there is no evidence of any criminal conviction or punishment as having yet been imposed. The appellant in its brief states that there was a case filed against the corporation which is still pending and for which a preliminary hearing has been scheduled for March 6, 1965. Consequently, there is no basis to contend an excessive fine is in any way involved in the instant case, since no fine has in fact been imposed. Secondly, it should be noted that the corporation is a distinct and separate entity from the individuals who might be otherwise charged with violating the Liquor Control Act. Therefore, in determining whether any fine is excessive, it would not be proper to add the individual fines to the corporate fines. There is no showing that any individual has been charged with violating the Liquor Control Act or is otherwise subject to a fine for conduct arising out of the same incidents as formed the basis for the revocation of the corporate charter.

It should be noted that in *State* v. *Franklin,* 63 Utah 442, 226 Pac. 674 (1924), this court indicated that the penalty provisions in the nuisance section for violating the Liquor Control Act were not necessarily the same thing as a fine but rather were a statutory penalty in the nature of a tax. Consequentlly, it would appear that the provision of 16-6-13 and 13.1, relating to the forfeiture of

a corporate bond, are not fines to be considered in determining whether or not an excessive fine has been imposed. Supporting this proposition is the decision of this court in *Disabled American Veterans* v. *Toronto,* 12 U. 2d 213, 364 P. 2d 830 (1961). In that case the petitioner contended that since the corporation was fined $1,000 upon its plea of guilty for violation of the liquor law, the Secretary of State should not have ordered the forfeiture of its bond. The court stated:

> "* * * We find no merit to such argument. The bond was given for the express purpose of ensuring compliance with the laws of the State of Utah and was subject to forfeiture upon a revocation of the charter of a corporation for a violation of such laws. The action of a court in fining appellant upon a finding of guilt for a liquor law violation can in no way affect appellant's liability under its bond given to the Secretary of State as a condition to being allowed to maintain premises upon which liquor could be stored or consumed."

It seems obvious that in the absence of a showing that, in fact, any fine has been imposed, the appellant is in no position to complain of a constitutional violation. Even so, it is obvious that a $2,500 fine coupled with a bond forfeiture is not excessive. In 24B C.J.S., *Criminal Law,* 1978, it is stated:

> "The courts are reluctant to say that the legislature has exceeded its power in authorizing excessive fines, and as a general rule will not do so except in a very clear case, and, therefore, the widest latitude should be given to the discretion and judgment of the legislature in determining the

amount necessary to accomplish the object and purpose it has in view.

"In determining whether a fine authorized by statute is excessive in the constitutional sense, due regard must be had to the object designed to be accomplished, to the importance and magnitude of the public interest sought to be protected, to the circumstances and the nature of the act for which it is imposed, and in some instances to the ability of accused to pay, although the mere fact that in a particular case accused is unable to pay the fine required to be assessed does not render the statute unconstitutional.

"In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."

See specifically *Ex parte Brady,* 70 Ark. 376, 68 S.W. 34 and *Fletcher* v. *Commonwealth,* 106 Va. 840, 56 S.E. 149, where both courts determined that the imposition of fines for each sale in violation of the state liquor control act was not unconstitutional as being an excessive fine. With the instant legislation the Legislature is endeavoring to control the sale, distribution and use of liquor and in an effort to do so, it has imposed strong measures. However, these penalties, when weighed in light of the Constitution and the penalties fixed for other crimes made punishable by both the state and federal governments, make it manifest that it is not excessive. In *State* v.

Franklin, supra, this court quoted with approval the decision of *State* v. *Gilbert,* 126 Minn. 95, 147 N.W. 953, in which the court there observed that the forfeiture and sale of personal property used in maintenance of a liquor nuisance was not in violation of the constitution as being an excessive fine or unusual punishment. It is apparent, therefore, that there is no merit for the contention that the constitutional provision against excessive fines is violated in the instant case.

As to the contentions and assertions of appellant that other clubs are violating the State Liquor Control Act, it may be noted that a particular number of prosecutions have been undertaken. Further, there is no showing that in any particular case the Secretary of State is discriminating in his application of the law. It may be that the present State Liquor Act is unworkable from an enforcement standpoint, but this is a matter for the Legislature and not a matter for this court to declare by judicial fiat that it is henceforth permissible to violate the law.

CONCLUSION

The issues raised on appeal in the instant case afford the appellant no basis for the contention that the forfeiture of its charter was not proper. The record was well documented to support the conclusion that the State Liquor Control Act was violated by the appellant in an open, notorious and flagrant manner. Appellant did not participate in the proceedings before the Secretary of State and, therefore, is foreclosed of complaining of any

irregularity that may have occurred. Even so, it is obvious that the complaint registered by the appellant affords no basis for relief. The contentions of the appellant, when analyzed against the facts and law, make it manifest that this court should affirm the judgment of the trial court and the Secretary of State.

Respectfully submitted,

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