

1970

The Pride Club v. The State of Utah : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE PRIDE CLUB, et al.,

Plaintiffs-Appellants,

vs.

THE STATE OF UTAH, et al.,

Defendants-Respondents.

Case No.
12066

BRIEF OF APPELLANTS

Appeal from Judgment of the
District Court of Salt Lake County, Utah
Honorable Joseph G. Jeppson

PHIL L. HANSEN
Attorney for Plaintiffs-
Appellants
410 Empire Building
Salt Lake City, Utah 84111

VERNON B. ROMNEY
Attorney General and
Attorney for Defendants-
Respondents
236 State Capitol Building
Salt Lake City, Utah 84114

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BRIEF OF APPELLANTS

NATURE OF THE CASE

This is a declaratory judgment action instigated against the State of Utah to have certain sections of the Utah Liquor Control Act of 1969 and the Private Nonprofit Locker Clubs Act of 1969 declared unconstitutional.

DISPOSITION IN LOWER COURT

On March 17, 1970, Honorable Joseph G. Jeppson, Judge, District Court of Salt Lake County, State of Utah, granted defendants' motion for summary judgment and dismissed plaintiffs' complaint.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the summary judgment against them and a determination that §§ 16-6-13.1, 16-6-13.5, and 16-6-13.7 Utah Code Ann. 1969, and all interrelated sections of the Private Nonprofit Locker Clubs Act of 1969 and the Liquor Control Act of 1969, are unconstitutional and, therefore, void.

STATEMENT OF FACTS

Appellants instituted this declaratory judgment action against the respondents to have certain sections of the Utah Liquor Control Act of 1969 and the Private Nonprofit Locker Clubs Act of 1969 declared unconstitutional, and to have the respondents enjoined from enforcing these sections. The respondents contended that these sections were not unconstitutional and moved the court for a summary judgment dismissing the action. Honorable Joseph G. Jeppson, Judge, District Court of Salt Lake County, State of Utah, granted the respondents' motion. Appellants now appeal the summary judgment against them.

ARGUMENT

POINT I

§ 16-6-13.7 UTAH CODE ANN. (1969) VIOLATES THE RIGHTS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION THAT PEOPLE SHALL BE SAFE FROM UNREASONABLE SEARCHES AND SEIZURES.

§ 16-6-13.7 Utah Code Ann. (1969) provides, *inter alia*:

(9) . . . Any member of the council, the commission or any peace officer or investigator or examiner authorized by the commission, the council or the director of the liquor division of the department of public safety, shall, upon presentation of his credentials, be admitted immediately to the clubhouse or club quarters and permitted without hindrance or delay, to inspect completely the entire clubhouse, club quarters, and all books and records of the licensee, at any time during which the same are open for the transaction of business to its members, and each member utilizing, or claiming the right to utilize, a locker as provided in subdivision (18) of this section, shall be deemed to agree and consent to permit any such person to be admitted and to inspect the contents of his locker.

The above statute compels all incorporated private nonprofit liquor locker clubs of Utah to waive the necessity of a search warrant and permit inspections of their premises, all their books and records, and the private

lockers of their members whenever any "member of the council, the commission or any peace officer or investigator or examiner authorized by the commission, the council or the director of the liquor division" decides to make such a search. The practical effect of this system is to leave the occupant subject to the whimsical discretion of the official in the field, and this is precisely the discretion to invade private property that the Fourth Amendment was designed to prevent. *Camara v. Municipal Court*, 387 U. S. 523, 532-33 (1967).

The United States Supreme Court has been very active in striking down legislation that allows such warrantless searches. In *Camara v. Municipal Court*, *supra*, the Court invalidated an ordinance that permitted warrantless searches by department of public health inspectors. The Court emphasized its distaste for such searches because it chose to overrule its earlier decision in *Frank v. Maryland*, 359 U. S. 360 (1959) while being fully aware that it could invalidate this legislation and let *Frank* stand. The *Frank* case upheld a warrantless search by a health inspector because the ordinance required that the inspector "have cause to suspect that a nuisance exists." The ordinance in *Camara*, however, had no such requirement for cause. Justice White, in speaking for the majority, was aware of this and also that both the *Camara* and *Frank* ordinances only allowed "reasonable inspections." (See 387 U. S. at 529, 531, & n. 4.) The Supreme Court, however, chose to overrule *Frank*, even though it was

not necessary to do so, and declared these warrantless inspections unconstitutional.

In the instant case, the state argued in the lower court that the warrant process could not function effectively in this field and, therefore, warrants should not be required. The same argument was proposed in the *Camara* case and led the Supreme Court to state:

In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment . . . These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.
387 U. S. at 532-33.

In *See v. City of Seattle*, 387 U. S. 541 (1967), the Supreme Court applied the *Camara* rule to laws permitting warrantless searches of private commercial structures. *See* involved an ordinance that allowed the fire chief to enter all buildings and premises, except dwellings, as often as necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause a fire. In holding that this law was just as noxious as the one in *Camara*, the Court said:

The businessman, like the occupant of a residence, has a constitutional right to go about his

business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant. 387 U. S. at 543.

In this regard, the nature of private social clubs in Utah becomes important. Such a club is a nonprofit association of various citizens who have some common interest. In many instances that common interest may be no more than a desire to have a place in which members may entertain their friends or business associates without resort to permitting consumption of intoxicating liquor in the presence of the children in their homes. Clearly, many, if not all, private club members look upon their club as an extension of their living room, family room, or recreation room. How much more private these clubs are than the commercial warehouse involved in the *See* case! If a warrantless search of a commercial warehouse by a fire chief looking for fire hazards is an unreasonable invasion of a person's privacy, how can one seriously argue that a warrantless search of a private club by police officers looking for criminal violations is not? Yet, this is what the state proposes.

Shortly after the United States Supreme Court decided the *Camara* and *See* cases, the Utah Supreme Court decided a case directly in point with this one, and it is controlling here. In *Vagabond Club v. Salt Lake City*, 21 Utah 2d 318, 445 P. 2d 691 (1968), a Salt

Lake City ordinance which allowed the police to do the very same thing that section 16-6-13.7 allows enforcement officers to do was declared unconstitutional because it violated the Fourth and Fourteenth Amendments of the United States Constitution. The relevant provisions of that ordinance were § 20-29-20 and § 20-29-7 which provided:

§ 20-29-20:

Any peace officer shall have the right to enter the club room, meeting rooms, premises and facilities of non-profit clubs for the purpose of determining whether any laws or ordinances are being violated therein and in the case of clubs holding Class "B" or Class "C" licenses, the police department shall make periodic inspections of said premises and report its findings to the Board of Commissioners.

§ 20-29-7:

If the association allows the consumption of beer or liquor on the premises and the entrance to the premises is by key or other device, such a key or device must be supplied to the chief of police.

In this case the Utah Supreme Court held:

In the instant action, the provisions of the ordinance which compel the clubs to provide a key to the police, permit inspections for violations of the law and waive the necessity of a warrant, proscribe the safeguards of the Fourth and Fourteenth Amendments of the Constitution of the United States and are therefore unconstitutional.

It is most enlightening to compare the above unconstitutional ordinances with the instant statute, which provides that any peace officer or otherwise authorized investigator shall be admitted immediately and permitted without hindrance or delay to inspect completely the entire premises, all books and records, and all contents of the members' individual lockers. Indeed, such a search infringes more upon one's privacy and is more unreasonable than the search authorized by the unconstitutional Salt Lake City ordinances.

The respondents tried to distinguish *Vagabond Club v. Salt Lake City* from the instant case because the city ordinances required a key be given the chief of police if a key were the normal means of the members' entrance into the club. However, since this case was argued in the lower court, this court has decided a case that totally emasculates this argument. In *Salt Lake City v. Wheeler, et al.*, No. 11855, March 25, 1970, the police without a warrant made a search of a tavern pursuant to an ordinance which provided that "[t]he police department shall be permitted to and have access to all premises licensed or applying for license under this chapter, and shall make periodic inspections of said premises and report its findings to the board of commissioners." In striking down this ordinance, Justice Henriod, speaking for the majority of this court, said:

Another might answer that what with the restricted number of licenses issued and the comparative ease of obtaining a search warrant

where an establishment may be suspect, what is wrong or onerous about requiring such a warrant? It would seem that enlightened peace officers would prefer such procedure in order to inoculate themselves against possible nuisance litigation.

Withal that is said above, we believe and conclude that our own recent decision in *Vagabond Club v. Salt Lake City* is dispositive of the instant case. There the city ordinance required that the proprietor furnish a key to the police department for the purpose of entering and “inspecting” the premises. We concluded that it was offensive to the Fourth Amendment, citing with approval *Camara v. Municipal Court*, and *See v. Seattle*, which struck down similar legislation presuming to permit warrantless “inspections.” The only substantial difference between the *Vagabond* case and this case, is that in the former the proprietor was required to furnish the police with a key to unlock the door at any time from the *outside*, while in the instant case the ordinance requires the proprietor to unlock the door at any time from the *inside*, — all to accomplish the same objective—a look-see of *all* the premises. We are not constrained to overrule the *Vagabond* case.

The same warrantless “look-see” of *all* the premises is the objective of the instant statute and the precedent of *Vagabond* and *Salt Lake City* dictates their unconstitutionality.

Also, in the lower court in the instant case, the respondents tried to cloud the search and seize issue with an extensive discussion of the old “privilege versus

right" semantic problem. (For a criticism of the usefulness of this doctrine see: Van Alstyne, *The Demise of the Privilege-Right Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968)). Basically, the respondents contended that they are granting free citizens the *privilege* of organizing a social club and maintaining rooms for that social club, and that those free citizens must sacrifice the constitutional *right* against an unreasonable search and seizure for that *privilege*. This is exactly the same argument that Salt Lake City proposed and this court rejected in *Vagabond Club v. Salt Lake City*, *supra*, (see Points IV and V of their brief). Of course, one may contract away or waive a constitutional right, but this presupposes a freedom of bargaining. Here the respondents are coercing the appellants to give up their constitutional rights in an all or nothing agreement. This is at best an unconscionable bargain in a contract of adhesion and obviously not a voluntary waiver of a constitutional right.

In support of their contention, the respondents argued that since one could consent to a self-incriminating blood test for the privilege of a driver's license, he could consent to an unreasonable search to obtain liquor privileges. Ignoring the fact that the situation of drinking and driving makes this distinguishable, it is important to note that the cases cited by the state (*State v. Bryan*, 16 Utah 2d 47, 395 P. 2d 539 (1964); *State v. Robinson*, 23 Utah 2d 78, 457 P. 2d 969 (1969)) do not support this point. In *Bryan* the ap-

pellant gave an actual, not implicit, consent at the time the test was given, and *Robinson* was dismissed on procedural grounds. The Utah Supreme Court has not ruled on the constitutionality of "implied consent" to a blood test and the validity of any other courts holding it constitutional is presently in doubt since the foundation of these decisions, *Breithaupt v. Abram*, 352 U. S. 448 (1957), was based on *Wolf v. Colorado*, 338 U. S. 25 (1949), which was overruled in *Mapp v. Ohio*, 367 U. S. 643 (1961).

The respondents also cited several first amendment cases where one could not work at certain jobs without having his absolute freedom of speech limited. We need not point out to the court that the very nature of free expression, unlike search and seizure, requires a judicial balancing process. *E.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372, U. S. 539 (1963). Ever since Justice Holmes first expressed the "clear and present danger" test, we have realized over and over that to allow someone to express his opinions without restraint limits the freedom of choice of others. It is because of this that the courts will not allow certain individuals to advocate overthrow of our government and still accept certain employment privileges from it. The means of analysis used in freedom of expression cases simply has not, and logically should not, be applied when an individual's protection against unreasonable searches and seizures is involved. To grant one individual immunity from an unreasonable search is not going to limit another's immunity. We are not here

concerned with the First Amendment, and no amount of “privilege versus right” verbiage is going to occlude the fact that the respondents here seek to impose a warrantless, unreasonable search upon the private premises of certain, but not all, of its populace. The ordinance at issue in *Salt Lake City v. Wheeler, et al., supra*, required the same type of “consent” for the “privilege” of a tavern license, and this court held that ordinance unconstitutional.

The respondents contend that all they have to do is have something declared a “privilege,” and not a “right,” and then they may legislate away all related constitutional safeguards. The danger of this logic of semantics is horribly obvious. We know that one cannot shout “ ‘fire’ in a crowded theater.” Does this mean that we have a right to some free speech and only a privilege to others? Where does the right end and the privilege begin? Every citizen has a right to associate freely in the premises of his own private club. The respondents would have us believe he does not, for section 16-6-13.7 (9) requires all members to consent to unreasonable searches for the privilege of membership. Is it a privilege to have city fire, police, and garbage services? Why not require that residents consent to all warrantless searches for the privilege of living in a city?

No fancy words can obscure the bald-faced fact that our constitution prohibits unreasonable searches; yet, the instant statute permits them. Therefore, §16-6-13.7 Utah Code Ann. (1969) is unconstitutional

and unenforceable because it is subordinate to and in conflict with the Fourth Amendment of the Federal Constitution, which provides that the inhabitants of this country are to be secure from unreasonable searches and seizures.

POINT II

THE STATUTORY REQUIREMENT OF LOCAL CONSENT RELATING TO THE SALE OR DISPENSING OF INTOXICATING LIQUORS IS UNCONSTITUTIONALLY VAGUE BECAUSE NO STANDARDS, LIMITATIONS, OR GUIDELINES EXIST AS TO HOW OR WHEN SUCH CONSENT IS TO BE GRANTED, DENIED, SUSPENDED, OR REVOKED.

The Utah Private Nonprofit Locker Clubs Act of 1969 contains many restrictions on where intoxicating liquors may be stored, served and sold. One of these requirements is that the local authorities must give their written consent to the proposed use of any particular premises before this becomes legal. The following statutes refer to the necessity of this "local consent:"

§ 16-6-13.1(6) Utah Code Ann. (1969):

Any social club, recreational, athletic, or other kindred association seeking to have a state liquor store located on its premises, shall have a valid license issued by the Utah liquor control com-

mission, file a written application with the commission in the form prescribed, accompanied by . . . the written consent of the local authority as defined in the Utah Liquor Control Act of 1969

§ 16-6-13.5 Utah Code Ann. (1969) :

Subject to the provisions of this chapter and the Utah Liquor Control Act of 1969 and regulations promulgated thereunder, a Utah liquor control commission, with consent of the local authority, as defined in the Utah Liquor Control act of 1969 shall have authority to issue a license to a social club, recreational, athletic, or kindred association, incorporated under the provisions of this chapetr, which maintains or intends to maintain premises upon which liquor is or will be stored, consumed or sold as hereinafter provided, except that no license shall be issued to any club or association which establishes or intends to establish such premises in the immediate proximity of any existing school, church, library, public playground or park.

It appears from the above statute that no club may sell, serve, or allow storage and consumption of liquor on their premises without the consent of the local authorities. The persons who have the authority to give the consent for any particular locality are defined in section 32-1-3 Utah Code Ann. (1969). That, however, is as far as the legislature's guidelines on this requirement extend. There are no provisions of Utah law that prescribe any standards, limitations, or guidelines to be followed by the local authorities in granting, denying, suspending, or revoking their consent. In requiring

this "local consent," the legislature left all such clubs at the mercy of the local authority's whimsical discretion. This discretion remains completely unlimited to this day; and in fact, no communities have even tried to enact ordinances or otherwise notify the populace as to what their local authorities will use as a standard in determining if consent is to be given. The existence of such a vague requirement precludes due process of law and permits discriminatory and unequal treatment of those similarly situated.

A vague local consent ordinance remarkably similar to the instant statute was held unconstitutional in the landmark case of *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). This early expression of the Supreme Court's distaste of vague laws concerned the following San Francisco ordinance:

It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the City and County of San Francisco without having first obtained the consent of the board of supervisors. . . .

This ordinance was used by the local authorities to discriminate against those of Chinese descent who were in the laundry business. Since in *Yick Wo* there was evidence of actual discrimination the Court did not have to decide the case on just the existence of a vague law. However, even at that early date, the Court left no doubt as to its reaction to laws that by their vagueness grant unlimited discretion to administrative officials.

For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. 118 U. S. 370.

Yick Wo clearly demonstrates how easy it is to unfairly administer a law similar to the statutes in question. It is because of this potential for unequal treatment, coupled with the lack of notice, that the Supreme Court since *Yick Wo* has been so harsh on vague statutes. The Court no longer waits for a vague law to be administered unjustly. Time after time it has held such laws unconstitutional, concluding that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U. S. 385, 391 (1925) (cases cited). The Court has considered the effect of vague laws in practically all areas of the law and simply summarized its position by stating: "Vague laws in *any area* suffer constitutional infirmity." *Ashton v. Kentucky*, 384 U. S. 195, 200 (1966) (citing, *International Harvester Co. v. Kentucky*, 234 U. S. 216; *Collins v. Kentucky*, 234 U. S. 634; *United States v. Cohen Grocery Co.*, 255 U. S. 81; *Connally v. General Construction Co.*, 269 U. S. 385; *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Smith v. Cahoon*, 283 U. S. 553; *Champlin Refining Co. v. Commission*, 286 U. S. 210; *Lanzetta v.*

New Jersey, 306 U. S. 451; *Wright v. Georgia*, 373 U. S. 284; *Giaccio v. Pennsylvania*, 382 U. S. 399. Cf. *Scull v. Virginia*, 359 U. S. 344; *Raley v. Ohio*, 360 U. S. 423.) (Emphasis added.).

The absence of standards or guidelines to prevent arbitrary and discriminatory treatment has been the precise reason for the Supreme Court to conclude a statute unconstitutionally vague. In *Giaccio v. State of Pennsylvania*, 382 U. S. 401 (1966), a state statute authorized juries to impose at their discretion, and without standards or guidelines, the cost of criminal prosecution of the defendant. The Court's opinion in holding this statute unconstitutional is set out at length below:

We agree with the trial court and the dissenting judges in the appellate courts below that the 1860 Act is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs. . . . Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague. It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide with-

out any legally fixed standards, what is prohibited and what is not in each particular case. See, e.g., *Lanzetta v. State of New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888; *Baggett v. Bullitt*, 377 U. S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377. This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him. The Act, without imposing a single condition, limitation or contingency on a jury which has acquitted a defendant simply says the jurors "shall determine, by their verdict, whether * * * the defendant shall pay the costs" whereupon the trial judge is told he "shall forthwith pass sentence to that effect, and order him [defendant] to be committed to the jail of the county" there to remain until he either pays or gives security for the costs. Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement.

The total absence of guidelines that made the statute in *Giaccio* unconstitutionally vague is just as obvious in the Utah statutes. The Utah Legislature stated absolutely no standards, nor did it place any conditions or limitations of any kind on the power of the local authorities to grant their consent to one applicant and withhold

it from another. It was precisely this kind of unlimited discretion that was held unconstitutional in *Giaccio*.

This Court has also held laws which give unguided discretion to some administrative unit invalid. This type of law has usually been treated in Utah as an unlawful delegation of power, which is often just another way of saying that due process is denied. When a statute or ordinance grants the power to some administrative unit to determine its action by the facts found, it grants a "quasi-judicial" power (*State Tax Comm'n of Utah v. Katsis*, 90 Utah 406, 413, 62 P. 2d 120 (1936)); and whenever power of a judicial character is exercised, the requirements of due process must be enforced.

In *Jones v. Logan City*, 19 Utah 2d 169, 428 P. 2d 160 (1967), this Court struck down an ordinance that imposed upon an administrative unit "quasi-judicial" functions without standards or guidelines to govern it. In that case the law in question permitted the local board of condemnation to declare what a public nuisance was without any restrictions or limitations on the board's discretion. Aware that to uphold such an ordinance would deny due process, this court stated:

Ordinance No. 120 above referred to, which grants to the Board of Condemnation the right to determine whether any building constitutes a menace to public health or public safety does not provide standards on which the Board can base its finding as to what is or what is not a menace to public health or public safety. It would appear that the ordinance imposes upon

the Board of Condemnation quasi-judicial functions without standards or guidelines to govern the Board in its determination. [*People ex rel. Gamber v. Sholem*, 294 Ill. 204, 128 N. E. 377, 378; *State v. Keller*, 108 Neb. 742, 189 N. W. 374, 25 A. L. R. 115; *Rowland v. State ex rel. Martin*, 129 Fla. 662, 176 So. 545, 114 A. L. R. 443 and annotations p. 446.] We are of the opinion that the ordinance attempts to make an unlawful delegation of power to the City's Board of Condemnation. We are of the opinion that by reason of the delegation of powers by the City Commission the ordinance above referred to is invalid. [*State Tax Commission of Utah v. Katsis*, 90 Utah 406, 62 P. 2d 120, 107 A. L. R. 1477.]

The delegatiion of power to local authorities to allow or prevent the otherwise legal use of any particular premises must be held an unlawful delegation of power for the same reason that the ordinance in *Jones* was held unlawful. In *Jones* there were no standards to guide the board of condemnation in its determination of nuisances and here there are no standards to guide the local authorities in their determination of consent. In this instance the local officials are granted a quasi-judicial function, for the legislature obviously intended that they assess the facts and determine their action by the facts. To assume otherwise would be to assume the legislature intended that local authority grant, deny, suspend, or revoke an uninformed and capricious consent. Therefore, local consent is not a mere ministerial function, and there must be legislative guidelines which meet constitutional standards. *State Tax Comm'n of*

Utah v. Katsis, supra. In granting to executive officials the power to exercise their discretion over the property rights of others, due process demands that this discretion be limited. The statutes in question confer a pronounced power on the local authorities to grant, deny, suspend, or revoke property rights to others. This delegation of power is unlimited and, therefore, unconstitutional. These statutes must be held invalid and unenforceable.

Finally, Utah Const. art. I, § 24 demands that: "all laws of a general nature shall have uniform operation." This provision, in addition to the requirement of the Fourteenth Amendment of the United States Constitution, is a safeguard against any laws in Utah that permit discriminatory application. *Abrahamsen v. Board of Review of Industrial Comm'n*, 3 Utah 2d 289, 283 P. 2d 213 (1955); *State v. Mason*, 94 Utah 501, 78 P. 2d 920 (1938).

In the instant case, the legislature has passed a general law to regulate where liquor may be stored, served, consumed, and sold within the state. Yet, all of these determinations are dependent upon the unlimited discretion of each of the 231 local authorities within the State of Utah. The legislature provided no means to insure any uniform operation of these laws of a general nature.

The practical effect of granting this power to local officials without any guidelines or standards is to let the personal whims of these officials determine the law's

application. It is easy to assume that this grant of power could result in left-handed prohibition in certain communities simply because the local authorities choose not to give their consent to anybody. "In the beginning" of these 1969 liquor laws, this actually happened in Utah County which even now is limited to but one such consent having been given to the Alpine Country Club. Where like results are not evidenced, the fact remains that what one official in one community will look for, another in a different community will not. There is nothing to prevent one official from using totally arbitrary and invidious reasons for granting, denying, suspending, or revoking consent, or to prevent *inconsistent*, arbitrary, and invidious discrimination.

If the legislature intended to have prohibition or local option, it would have so provided. As it is, the power it vested in the local authorities not only results in a form of local option, but also precludes the uniform application of the Private Nonprofit Locker Clubs Act of 1969. Therefore, these statutes are also in violation of Utah Const. art: I, § 24, as well as in violation of U. S. Const. amends. V and XIV.

POINT III

§ § 16-6-13.1 AND 16-6-13.5 UTAH CODE ANN.
(1969) DENY DUE PROCESS OF LAW IN
THAT NO HEARINGS ARE PROVIDED FOR
IN THE GRANTING, DENYING, SUSPEND-
ING, OR REVOKING OF LOCAL CONSENT;

NOR ARE ANY HEARINGS PROVIDED FOR THE GRANTING OR DENYING OF A LICENSE BY THE UTAH STATE LIQUOR CONTROL COMMISSION.

§§ 16-6-13.5 and 16-6-13.1 Utah Code Ann. (1969) (quoted in Point II of this brief) authorize three crucial administrative determinations as to whether a private club will obtain and keep a state liquor license. § 16-6-13.5 authorizes the Utah State Liquor Control Commission to license these clubs with several conditions, and one of the conditions, as set forth in both §§ 16-6-13.5 and 16-6-13.1 Utah Code Ann. (1969), is that the club have the consent of the local authorities to operate in the local area. Reading §§ 16-6-13.1 and 16-6-13.5 Utah Code Ann. (1969) together, it becomes clear that three distinct administrative proceedings may take place that substantially affect the property rights of the clubs and their members. These proceedings are: first, the granting or denying of local consent; second, the granting or denying of a license; and third, the suspension or revocation of local consent. All three of these administrative determinations take place without any kind of a hearing. Here we have governmental agencies making binding determinations as to the property rights of others without even the most basic of procedural safeguards. This practice denies due process of law.

The most definitive statement on the requirements of due process in administrative procedure is the United States Supreme Court case of *Hannah v. Larche*, 363 U. S. 420 (1960). The often-quoted rule for determin-

ing when due process procedures are necessary is found on page 442 of the majority's opinion:

Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedure be used.

If an administrative body acts other than as a fact finder, *i.e.*, if it finds facts and makes a determination based on them, its action takes on a quasi-judicial nature and the necessity of procedural safeguards attaches.

Although some justices believe the scope of procedural safeguards in administrative actions should be much broader than in *Hannah*, (see the dissenting opinions of Justices Black and Douglas in *Hannah v. Larche*, *supra*, and their concurring opinions in *Jenkins v. McKeithen*, *infra*) the Court recently reaffirmed this rule while declaring the practices of the Louisiana Labor-Management Commission of Inquiry in violation of due process. *Jenkins v. McKeithen*, 395 U. S. 411 (1969). In *Jenkins*, the state statute authorized an administrative agency to do more than just gather facts to aid legislation. Rather, it allowed the agency to make its own determination of guilt and "brand individuals" in the eyes of the public. 395 U. S. at 427-28. Since the act

that provided the agency with this power also limited the right of cross-examination and the presentation of evidence in one's own behalf, the Court concluded that due process was violated, and the statute was unconstitutional. 395 U. S. at 428-32.

A case very analogous to the present one was decided by this court in *Morris v. Public Service Comm'n*, 7 Utah 2d 167, 321 P. 2d 644 (1958). In that case, Appellant Watson had a certificate of convenience and necessity to operate as a common carrier, and he wanted to have it transferred to Appellant Morris by the usual procedure of having the Utah State Public Service Commission issue Morris a new certificate and revoke his old one. The commission had a hearing at which both appellants were present for the sole purpose of deciding whether or not they should grant Morris the operating rights of Watson. After the hearing the commission not only denied the application to Morris, but it revoked Watson's existing certificate. This court, in overturning both decisions, concluded that Watson had never had notice or a proper hearing to determine the revocation of this property right and, therefore, he was denied due process of law.

The legislature has recognized the value of a liquor license and that procedural safeguards are just as important to this property right as they are in the type of property right involved in *Morris*. § 16-6-13.11 Utah Code Ann. (1969) requires a public hearing before the liquor control commission may revoke, refuse to renew,

or suspend for more than thirty days any license that it issues. The legislature, however, overlooked the fact that since no hearings were required for the granting of local consent, this procedural safeguard could be circumvented. The local authorities have interpreted §§ 16-6-13.1 and 16-6-13.5 Utah Code Ann. (1969) to mean that they may whimsically revoke their consent, as well as grant it, and the liquor control commission considers any revocation of local consent conclusive grounds for license revocation. What good is the public hearing provided by § 16-6-13.11 Utah Code Ann. (1969) if the only issue involved has been conclusively decided by a subordinate agency without a hearing?

The legislature also overlooked the necessity of a hearing for the liquor control commission's determination of whether or not to grant a license. The property value of a liquor license is no less when it is being granted than it is when it is being revoked. To be logically consistent, the legislature should have required a hearing whenever a determination of a club's license application is to be made. Of course, to satisfy the requirements of due process, a hearing must be held.

When a statute or ordinance grants the power to some administrative unit to determine its action by the facts found by that administrative unit, that statute or ordinance grants a "quasi-judicial" power. *State Tax Comm'n of Utah v. Katsis*, 90 Utah 406, 413, 62 P. 2d 120 (1936). This is the same power expressed in *Hannah v. Larche*, *supra*, as the power of a governmental

agency to "adjudicate or make binding determinations which directly affect the legal rights of others."

When local officials consent to a certain club's application for a liquor license, or revoke such consent, and when the liquor control commission decides to grant or deny a license to any particular club, a binding determination of a judicial nature is made. When an agency has this quasi-judicial function the most basic of procedural safeguards must be required. An applicant must be able to present his own case and confront the witnesses against him.

§§ 16-6-13.1 and 16-6-13.5 Utah Code Ann. (1969) permit administrators to sit behind closed doors and make these crucial determinations without the individual most affected by their decision even being able to know their reasons, let alone present his case. This is not due process of law.

CONCLUSION

For the foregoing reasons it is respectfully contended that the summary judgment against appellants be reversed and §§ 16-6-13.1, 16-6-13.5, and 16-6-13.7 Utah Code Ann. (1969) and all other interrelated sec-

tions of the Private Nonprofit Locker Clubs Act of 1969 and the Liquor Control Act of 1969 be declared unconstitutional, void, and unenforceable.

Respectfully submitted,

PHIL L. HANSEN

Attorney for Plaintiffs-Appellants

410 Empire Building

Salt Lake City, Utah 84111