

1970

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

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

BRIEF OF RESPONSE

Appeal from the judgment of the
District Court of Salt Lake County
Honorable Joseph B. ...

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Attorney ...
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TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
STATEMENT OF FACTS	1
RELIEF SOUGHT ON APPEAL	1
ARGUMENT	2
POINT I. APPELLANTS HAVE NO STANDING AND ARE IN NO POSITION TO RAISE THE QUESTION OF THE CONSTITUTIONALITY OF SECTIONS 16-6-13.1 AND 16-6-13.5, U. C. A. 1953 AS AMENDED, OR SECTION 16-6-13.7, U. C. A. 1953	2
POINT II. SEC. 16-6-13.7, UTAH CODE ANNO- TATED (1969) DOES NOT VIOLATE THE RIGHTS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION THAT PEOPLE SHALL BE SAFE FROM UNREASONABLE SEARCHES AND SEIZURES	14
POINT III. §§ 16-6-13.1 AND 16-6-13.5, UTAH CODE ANN. (1969), RELATING TO THE REQUIRE- MENT OF LOCAL CONSENT TO SELL OR DIS- PENSE INTOXICATING LIQUORS ARE NOT UNCONSTITUTIONALLY VAGUE	36
POINT IV. §§ 16-6-13.1 AND 16-6-13.5 UTAH CODE ANN. (1969), IN PROVIDING FOR NO HEAR- INGS DO NOT DENY DUE PROCESS SINCE IN UTAH A LIQUOR LICENSE IS ONLY A PRIVILEGE REGULATED UNDER THE PO- LICE POWER AND NOT "PROPERTY" WITH- IN THE MEANING OF THE DUE PROCESS CLAUSE	41
CONCLUSION	49

TABLE OF CONTENTS—Continued

Page

CASES CITED

Adams v. City of Pocatello, 416 P. 2d 46, 91 Id. 99 (1966)	45
Ashton v. Kentucky, 384 U. S. 195	9, 10, 11
Barlotta v. Jefferson Parish Council, 212 So. 2d 220 (La. App. 1968)	47, 48
Bartemeyer v. State of Iowa, 85 U. S. 129	43
Bowles v. Misle, 64 F. Supp. 835 (1946)	32
Boyd v. United States, 116 U. S. 616, 624, 29 L. Ed. 746, 748, 6 S. Ct. 524	24
Camara v. Municipal Court, 387 U. S. 523 (1967)	15, 25
Camden County Beverage Co. v. Blair, 46 F. 2d 648 (N. J. 1930)	25
Colonnade Catering Corp. v. United States, U. S., 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970)	18, 24, 25
Crowley v. Christensen, 137 U. S. 86 (1870)	38
Darby v. Pence, 17 Id. 697, 107 P. 484 (1910)	48
Delaware Valley Conservation Assn. v. Resor, 392 F. 2d 331	4
Ex Parte Porterfield, 63 Cal. 2d 524, 147 P. 2d 20	6
Financial Aid Corporation v. Wallace, 216 Ind. 114, 23 N. E. 2d 472	13
Fischer v. State, 195 Md. 477, 74 A. 2d 34 (1950)	31
Frank v. Maryland, 359 U. S. 360 (1959)	16
Graccio v. State of Penn., 382 U. S. 401	11
Hannah v. Larche, 363 U. S. 420 (1960)	42
Hornstein v. Illinois Liquor Control Comm., 412 Ill. 365, 106 N. E. 2d 354 (1952)	47, 48

TABLE OF CONTENTS—Continued

	Page
Hurless v. Department of Liquor Control, 136 N. E. 2d 736 (1955)	22
In Re Petersen, 51 Cal. 2d 177, 331 P. 2d 24 (1958)	39
In re Tahiti Bar, Inc., 186 Pa. Super. 214, 142 A. 2d 491 (1958)	47, 48
Jenkins v. McKeithen, 395 U. S. 411 (1969)	42
Jones v. Logan City, 19 Utah 2d 169, 428 P. 2d 160	11
Kaname Takaii v. State Bd. of Equalization, 20 Cal. App. 2d 612, 67 P. 2d 1082 (1937)	47
Kellaher v. Minshull, 119 P. 2d 302, 11 Wash. 2d 380	12
Kent Club v. Toronto, 6 U. 2d 67, 305 P. 2d 870 (1957)	45, 48
Kopper Kettle Restaurant, Inc. v. City of St. Robert, 439 S. W. 2d 1 (Mo. 1969)	47, 48
Kotch v. River Port Pilot Comrs., 330 U. S. 557, 90 L. Ed. 1093	9
Lieberman v. Van De Carr, 199 U. S. 552 (1905)	38
Lewis v. City of Grand Rapids, 356 F. 2d 276 (6th Cir. 1966)	46
Manchester Press Club v. State Liquor Commission, 200 A. 407, 89 N. H. 442 (1938)	31
Mansbach Scrap Iron Co. v. City of Ashland, 235 Ky. 265, 30 S. W. 2d 968 (1930)	34
Massachusetts v. Mellon, 262 U. S. 487	3
Morris v. Public Service Commission, 7 U. 2d 167, 321 P. 2d 644 (1958)	42
Mosher v. Beirne, 377 F. 2d 638	7
Mugler v. State of Kansas, 123 U. S. 623	43

TABLE OF CONTENTS—Continued

	Page
Mumford v. Dept. of Alcoholic Beverage Control, 65 Cal. Rptr. 495 (Cal. App. 1968)	47
Oklahoma Alcoholic Beverage Com. Bd. v. McCulley, 377 P. 2d 568 (Okl. 1963)	31
Oval Bar & Restaurant, Inc. v. Bruckman, 177 Misc. 244, 30 N. Y. S. 2d 394 (1941)	48
Payson St. Neighborhood Club v. Board of Liquor Licenses Com'r. for Baltimore City, 103 A. 2d 847, 204 Md. 278 (1954)	45
People ex rel. Liberman v. Van De Carr, 175 N. Y. 440, 67 N. E. 913	4
People ex rel. Liberman v. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305	4
Perry v. City Council of Salt Lake City, 7 Utah 143, 25 P. 739	39
Peterson v. Petterson, 42 Utah 271, 30 Pac. 231 (1913)	37
Phi Kappa Iota Fraternity, et al. v. Salt Lake City, 116 Utah 536, 212 P. 2d 177	3
Plainos v. State, 131 Tex. Cr. 367, 100 S. W. 2d 367 (1936)	33, 34
Poe v. Ullman, 367 U. S. 497	4
Premier-Pabst Sales Co. v. State Bd. of Equalization, 13 F. Supp. 90 (D. C. Cal. 1935)	47
Randles v. Washington State Liquor Control Board, 33 Wash. 2d 688, 206 P. 2d 1209, 9 A. L. R. 2d 531 (1949)	29
Salt Lake City v. Wheeler, 24 Utah 2d 112, 466 P. 2d 838 (1970)	21, 24
See v. City of Seattle, 387 U. S. 541 (1967)	20

TABLE OF CONTENTS—Continued

	Page
Smith v. Cahoon, 283 U. S. 553	9
Spurbeck v. Statton, 252 Iowa 279, 106 N. W. 2d 660 (1960)	42
State v. Baskowitz, 250 Mo. 82, 156 S. W. 945	14
State v. Briggs, 46 Utah 288, 146 Pacific 261 (1915) ..	36, 37
State v. Hall, 164 Tenn. 548, 51 S. W. 2d 851 (1932)	32
State v. Hill, 168 La. 761, 123 So. 317, 69 A. L. R. 574 ..	14
State ex rel. Johnson v. Alexander, 87 Utah 376, 49 P. 2d 408	3
State v. Kallas, 97 Utah 492, 94 P. 2d 414	2
State v. Nolan, 161 Tenn. 293, 30 S. W. 2d 601 (1930) ..	34
State v. Putzke, 7 Ohio App. 2d 118, 218 N. E. 2d 627 (1966)	34
State of New Jersey v. Zurawski, 89 N. J. Super. 488, 215 A. 2d 564 (1964)	31
Tucker v. State, 244 Md. 488, 224 A. 2d 111 (1966)	34
Turner v. Miami, 160 Fla. 317, 34 So. 2d 551 (1948)	47
United States v. Cardiff, 95 F. Supp. 206 (D. C., 1951)	34
United States v. Rabicoff, 55 F. Supp. 88 (D. C. W. D. Mo., 1944)	34
Usdane v. Bruckman, (Sup.) 30 N. Y. S. 2d 396 (1941)	48
Utah Mfrs. Assn. v. Stewart, etc., et al., 82 Utah 198, 23 P. 2d 229	3, 29, 45
Vagabond Club v. Salt Lake City, 21 Utah 2d 318, 445 P. 2d 691 (1968)	21, 27
Wibmer v. State, 182 Wis. 303, 195 N. W. 936 (1923) ..	33
Winters v. New York, 333 N. Y. 507, 68 S. Ct. 65, 82 L. Ed. 840	10

TABLE OF CONTENTS—Continued

	Page
Yarbrough v. Montoya, 54 N. M. 91, 214 P. 2d 769 (1950)	46
Yick Wo v. Hopkins, 118 U. S. 356	4, 5, 9
Zap v. United States, 328 U. S. 624 (1946)	30
Zukowski v. State, 167 Md. 549, 175 A. 595	31
ANNOTATIONS CITED	
2 A. L. R. 2d 917	3
12 A. L. R., p. 1435	8
54 A. L. R. 1164	8
92 A. L. R. 400	8
TEXTS CITED	
16 Am. Jur. 2nd, p. 313-14, Sec. 120	14
47 Am. Jur., p. 510, Sec. 13	34
31 C. J. S., sec. 146, p. 329	7
79 C. J. S., Sec. 62, p. 819	32
3 McQuillin, Municipal Corporation, Rev. 2d Ed., Sec- tion 1108, p. 714	4, 44
ARTICLES CITED	
19 Cal. Law Review	6
STATUTES CITED	
§ 16-6-13.1(4) Utah Code Ann. (1969)	27
§ 16-6-13.7 Utah Code Ann. (1969)	27

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THE PRIDE CLUB, et al., <i>Plaintiffs-Appellants,</i>	}	Case No. 12066
vs.		
THE STATE OF UTAH, et al., <i>Defendants-Respondents.</i>		

BRIEF OF RESPONDENTS

NATURE OF THE CASE
DISPOSITION IN THE LOWER COURT
STATEMENT OF FACTS

Appellants' Statement of the Nature of the Case, Disposition in the Lower Court, and Statement of Facts correctly sets forth those matters.

RELIEF SOUGHT ON APPEAL

The Respondents seek affirmance of the summary judgment of the District Court of Salt Lake County in favor of Respondents.

ARGUMENT

POINT I.

APPELLANTS HAVE NO STANDING AND ARE IN NO POSITION TO RAISE THE QUESTION OF THE CONSTITUTIONALITY OF SECTIONS 16-6-13.1 AND 16-6-13.5, U. C. A. 1953 AS AMENDED, OR SECTION 16-6-13.7, U. C. A. 1953.

Under this Point I we are answering appellant's Point III.

(a) The first two numbered sections require consent of the local authority to obtain a license from the Liquor Control Commission to operate a liquor store in a social club. Appellants assert that these sections of the statutes are unconstitutional because they contain no standards, limitations or guide lines for the local authority to follow and thus permits arbitrary and discriminatory action on the part of the local authority.

We must emphasize that this case involves the control and regulation of the sale and consumption of liquor, a business which no one has an inherent right to conduct and one that is subject to strict regulation, and even prohibition, by the state. This factor must not be lost sight of in the proper disposition of this appeal as will be abundantly shown by the authorities which we will cite.

The foregoing heading to this part of the brief could very well be stated in the words of this Court in *State v. Kallas*, 97 Utah 492, 94 P. 2d 414, wherein this Court stated:

This court will not listen to an objection made as to the constitutionality of an act by parties whose rights are not specifically affected. This court is committed to the rule that an attack on the validity of a statute cannot be made by parties whose interests have not been and are not about to be, prejudiced by the operation of the statute. *State ex rel. Johnson v. Alexander*, 87 Utah 376, 49 P. 2d 408; *Utah Mfrs. Assn. v. Stewart, etc., et al.*, 82 Utah 198, 23 P. 2d 229.

There are no allegations that appellants have applied for and been denied the consent of any local authority. They simply say that if and when they do apply it is within the power of a local authority to deny or grant consent arbitrarily and discriminatorily. As will be shown, this is not a sufficient basis for questioning the constitutionality of the statutes here involved.

In *Utah Mfrs. Assn. v. Stewart*, supra, this Court ruled on a challenge to the state liquor laws and stated as follows:

Plaintiff contends the law is unreasonable and discriminatory. If this is true, we do not see how plaintiff can lawfully complain . . . since there is no discrimination against it or other manufacturers who use alcohol.

This case is cited with approval in *Phi Kappa Iota Fraternity, et al. v. Salt Lake City*, 116 Utah 536, 212 P. 2d 177, which holds in effect that one whose interests are not adversely affected by legislation may not raise the question of its constitutionality.

In 2 A. L. R. 2d, p. 917, it is said: "It is settled that the validity of a statute or ordinance is open to attack only

by a person or organization whose rights are injuriously affected thereby."

To same effect, see *Poe v. Ullman*, 367 U. S. 497; *Massachusetts v. Mellon*, 262 U. S. 487; *Delaware Valley Conservation Assn. v. Resor*, 392 F. 2d 331.

3 McQuillin, Sec. 12.126, p. 526:

It is presumed that they (public officers) will properly discharge the duties of their office, and in the absence of proof to the contrary, they will be presumed to have acted in the exercise of their powers in the interest of the public and within the authority granted.

A leading case on the subject under discussion is *People ex rel. Liberman v. Van De Carr*, 175 N. Y. 440, 67 N. E. 913. The decision of the New York court was affirmed in *People ex rel. Liberman v. Van De Carr*, 199 U. S. 552, where defendant was convicted of selling milk without a permit. The ordinance of New York City provided that, "No milk shall be received, held, kept, offered for sale or delivery in the city of New York without a permit in writing from the Board of Health and subject to the conditions thereof." Defendant contended this ordinance violated the Fourteenth Amendment of the Federal Constitution. He appealed to the Supreme Court of the United States contending the language of the ordinance vests arbitrary and absolute power in the Board of Health without declaring any lines or limits for the exercise of its prohibitive action and allows the board to load its permits with conditions the nature of which is not indicated or limited. Defendant relied on *Yick Wo v. Hopkins*,

118 U. S. 356. The Supreme Court sustained the conviction and said :

These cases leave in no doubt the proposition that the *conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised*, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court. *Yick Wo v. Hopkins*, 118 U. S. 356.

We have then an ordinance which, as construed by the highest court of the state, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and repressive manner as to deprive the appellant of his property or liberty without due process of law. In such cases, it is the settled doctrine of this court that no federal right is invaded, and no authority exists for declaring a law unconstitutional duly passed by the legislative authority and approved by the highest court of the state.

The granting of the authority to grant or withhold a permit in such a case involving a state regulated business under the police powers was held by both the New York court and the Supreme Court to carry with it the implied

restriction that it will be exercised lawfully and thus the question of constitutionality was eliminated.

In *Ex Parte Porterfield*, 63 Cal. 2d 524, 147 P. 2d 20, the court says:

In California the presumption that licensing boards or officers will act fairly and impartially in the performance of their lawful duty is in accordance with the federal rule in that regard. A grant of authority to a municipality carries with it the presumption that the council will perform its duty lawfully without discrimination.

The court quotes from 19 Cal. Law Review as follows:

The California case under discussion fortifies previous holdings in this state, and is in accord with the federal rule, that a grant of authority carries the implication that it will be exercised reasonably, fairly and lawfully. See *People ex rel. Liberman v. Van De Carr*, 199 U. S. 522, 26 S. Ct. 144, 50 L. Ed. 305; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 305 S. Ct. 356, 54 L. Ed. 435; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480; *Ex Parte McManus*, 151 Cal. 331, 90 P. 702. The court expressly declares that, "the statute will be construed together with the constitutional provisions against discrimination." *People v. Globe Train and Milling Co.*, 221 Cal. 121, 294 P. at page 5.

But in jurisdictions like California where such enactments are upheld through reading in constitutional limitations a complainant may only have relief under the statute by proving discrimination against himself. In the instant case, the plaintiff sets up no facts proving discrimination, but alleges that since the statute, on its face, did not prevent

unfair action it was invalid . . . The case seems rather to be decided upon the sensible theory that administrative officers are sufficiently limited by reading into their authority constitutional limitations, and in proper cases an adequate remedy against the misuse of discretion is provided by a review of their orders and rules.

Under the preceding authorities, in the absence of evidence of an abuse of discretion, it will not be presumed the ordinance is void, merely because the statutory authority to enact ordinances for "regulation and revenue" does not prescribe limitations of discretion on the part of the council.

Mosher v. Beirne, 377 F. 2d 638:

It has also been recognized that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. *People ex rel. Liberman v. Van De Carr*, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305, and that ordinances validly prohibiting the operation of certain businesses without first obtaining municipal permission do not deprive one of his property without due process of law nor deny one the equal protection of the law. *Fincher v. City of St. Louis*, 194 U. S. 361, 24 S. Ct. 673, 48 L. Ed. 1018.

In 31 C. J. S., sec. 146, p. 329, is the following:

It is also presumed as an element of the general rule, that a public officer, in the discharge of his official duties, whether or not an oath has been required, acts fairly, impartially, and in good faith, and in the exercise of a sound judgment and discre-

tion, for the purpose of promoting the public good and protecting the public interest.

In 12 A. L. R., p. 1435, is the following:

It should also be remembered that the fact that a court has laid down one rule in one case, as, for instance, that a municipal ordinance granting arbitrary and uncontrolled discretion to city officers as to the granting of licenses or permits to carry on what is generally regarded as a useful and ordinarily lawful business does not necessarily preclude the reaching of a contrary conclusion as to the validity of a grant of power with respect to the licensing of a business such as dealing in intoxicating liquors, the right to carry on which is generally regarded as a mere privilege, subject to arbitrary control or absolute prohibition.

On page 1447, the note states:

It is also well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but, on the other hand, some situations require the vesting of some discretion in public officials, as for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or *the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare*. Citing the *Liberman* case.

This annotation is continued in 54 A. L. R. 1164 and 92 A. L. R. 400. In the latter it is said, p. 410:

It may be noted that the modern tendency is to be more liberal in permitting grants of discretion to administrative bodies or officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase.

The case of *Yick Wo v. Hopkins*, 118 U. S. 356, cited by appellants is not in point. There the petitioner had been denied a license to engage in the laundry business simply because he was Chinese. There was an actual invasion of of his right to carry on a lawful business. In *Kotch v. River Port Pilot Comrs.*, 330 U. S. 557, 90 L. Ed. 1093, the court said that *Yick Wo* "was denied the right (to conduct his laundry business) solely because he was Chinese."

All that can be said of appellant's position is that at some time in the future some one or more of them may be injured by a discriminatory action by a municipality refusing to give its consent. This is to presume that the municipality will act discriminatorily or arbitrarily, a presumption which the authorities above cited hold may not be indulged in.

None of the appellants before this court has a lawful complaint. None of them has been denied local consent. Under the authorities above cited the duty to exercise a reasonable discretion and sound judgment in determining whether to grant or withhold consent is to be read into the statute as part thereof and consequently no constitutional question arises. One who deems himself discriminated against may have a court determine if such discrimination is a fact and so obtain relief against the body withholding consent. This is what *Yick Wo* did and he obtained relief without striking down the legislative enactment under which the authority purported to act in denying him his right to conduct a laundry business.

The case of *Ashton v. Kentucky*, 384 U. S. 195, cited

by appellants, involved a statute creating the crime of libel. The court held that the law under which the accused was convicted was given such a broad construction and was so vague in providing standards by which a publication should be determined to be a libel as to make it unconstitutional. Here was an attempt to define what would be a crime and punishable as such. The court held the act was too vague for that purpose. This holding has no bearing on the question before this court. No crime is here involved. The appellants attempt to read into a statute regulating a business subject to regulation under the police power a rule of law governing the definition of a crime, something wholly foreign to the question involved. The court also indicated that the court must look more closely to see "lest under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." The court in *Winters v. New York*, 333 N. Y. 507, 68 S. Ct. 65, 82 L. Ed. 840, says :

The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness. There must be ascertainable standards of guilt.

One of the cases cited by the court in *Ashton v. Kentucky*, supra, *Smith v. Cahoon*, 283 U. S. 553, clearly shows the distinction above made. There the court held that "when a statute, valid on its face, requires the issuance of a license or certificate to carry on a business or to follow a vocation one who is within the terms of the statute, but has failed to make the required application, is not at liberty to

complain because of his anticipation of improper or invalid action in administration. This principle, however, is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional rights.

All of the cases cited by the court in *Ashton v. Kentucky* to support its decision, cited on pages 16 and 17 of appellant's brief, involve statutes held to be too vague to justify *criminal* prosecution for a violation.

The case of *Graccio v. State of Penn.*, 382 U. S. 401, involved a statute which permitted the jury to impose costs upon a defendant though found not guilty of the charge on which he was tried. It fixed no standards to govern the jury in determining the amount of the costs to be imposed, but provided for imprisonment of the defendant if he failed to pay the costs imposed. The court said: "Whatever label be given the 1860 act, there is no doubt that it provides the state with a procedure for depriving an acquitted defendant of his liberty and property." This element is not involved in the instant case, first because plaintiffs have no property right that can be involved under the statute in question and, second, because the constitutional safeguards are to be read into said statutes as we have abundantly shown.

The same is true as to the case of *Jones v. Logan City*, 19 Utah 2d 169, 428 P. 2d 160, cited on page 19 of appellant's brief. We emphasize again that in granting or denying the right to engage in the sale and consumption of liquor no property rights are involved. To engage in this business is a privilege which may be granted or withheld. Appel-

lants seem to argue that the whole liquor control act and "where liquor may be stored, served, consumed and sold within the state" are involved in the two statutory provisions under attack. On the contrary, those two sections concern only a social club having a liquor store on its premises. And only whether a permit for such a store is to be granted depends upon the consent of the local authority. It will be presumed that in determining whether to grant or deny consent the local authority will act reasonably and fairly in the interests of the public until the contrary is shown.

(b) Appellants attack Section 16-6-13.7, U. C. A. 1953, as being violative of the Fourth and Fourteenth Amendments of the Federal Constitution that people shall be safe from unreasonable searches and seizures.

The challenged section (which is quoted in appellant's brief, page 3), provides for inspection of the premises and books and records of the licensee at any time during transaction of business by any member of the council, the commission or any peace officer or investigator upon presentation of proper credentials.

In *Kellaher v. Minshull*, 119 P. 2d 302, 11 Wash. 2d 380, the statute governing small loans provided that the supervisor may at any time investigate the loans, and business and examine the books, accounts records and files therein and for that purpose the supervisor and his representatives shall have free access to the offices and places of business, etc. The court held the Federal Fourth Amendment was not involved and as to the state constitution

which provided, "No person shall be disturbed in his private affairs, or his home invaded without authority of law", said:

Constitutional provisions such as those contained in the article and section just quoted are primarily designed to protect individuals in the sanctity of their homes and the privacy of their books and papers and they are not infringed by the enforcement of reasonable rules which have been adopted in the exercise of the police power for the protection of the public health, morals and welfare. 24 R. C. L. 704, Searches and Seizures, Sec. 6; see also 56 C. J. 1160, Searches and Seizures, Sec. 12.

In *Financial Aid Corporation v. Wallace*, 216 Ind. 114, 23 N. E. 2d 472, the court upheld a similar statute which subjected the small loan operator to visitation and examination, the court said:

The appellant claims that this provision amounts to an illegal search and seizure of the appellant's property. Regulatory provisions of this nature have been recognized so long that it would be folly to undertake to strike them down at this time. There is nothing in the act to violate Sec. 11, Article I of the Indiana Constitution. *Sherman v. City of Fort Wayne*, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 318.

It cannot be successfully contended that the act deprives the appellant of its property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

In the *Sherman* case it is said that the federal constitutional provision on searches and seizures is "literally copied into our state constitution."

In 16 Am. Jur. 2nd, p. 313-314, Sec. 120, it is stated:

It is established that one cannot invoke, in order to defeat a law, an apprehension of what might be done under it and which, if done, might not receive judicial approval; to complain of a ruling one must be the victim of it.

In the footnote to this statement is the following:

A defendant who has not been called on to give evidence against himself and whose person or house has not been subjected to any search has not the necessary interest to raise the question whether a statute under which he is being prosecuted violates the Bill of Rights with respect to self-incrimination and unreasonable searches and seizures. *State v. Hill*, 168 La. 761, 123 So. 317, 69 A. L. R. 574; *State v. Baskowitz*, 250 Mo. 82, 156 S. W. 945.

In *State v. Hill*, supra, the court said:

Defendant has not yet been called on to give evidence against himself, nor has any attempt been made to search his person or his house. Hence he has no interest in raising that question in the present case.

In view of the foregoing, we respectfully submit the appellants have no legal basis for their action. They do not have the standing or interest necessary to question the validity of the statutory provisions they attack.

POINT II.

SEC. 16-6-13.7, UTAH CODE ANNOTATED
(1969) DOES NOT VIOLATE THE RIGHTS

GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION THAT PEOPLE SHALL BE SAFE FROM UNREASONABLE SEARCHES AND SEIZURES.

In a consideration of the issues involved in this appeal we remind the court that the Fourth Amendment applies, by its own terms, only to “*unreasonable*” searches and seizures. This plainly indicates that not all searches and seizures are outlawed. What is reasonable must be decided in the light of each situation and circumstances and the purposes to be accomplished in any particular case.

(a) *The United States Supreme Court cases cited by appellant are not in point.*

It is well to examine the facts involved in the two Supreme Court cases cited by appellants. The first case, *Camara v. Municipal Court*, 387 U. S. 523 (1967), involved an ordinance of San Francisco providing for inspection of apartment houses to be made at least annually for possible violations of the city’s housing codes. The city’s inspector was told by the apartment manager that appellant leased the ground floor and was using it as a residence, which was contrary to the city code. The inspector asked permission to inspect the premises, which request was refused because of lack of a search warrant. The inspector returned again two days later, still without a warrant. He was again refused. Some two weeks later two inspectors returned and informed appellant that he was required by law to permit inspection, citing the city ordinance requiring inspection

upon an inspector's showing proper credentials. Appellant still refused. He was later charged with refusing to permit inspection in violation of the ordinance. The ordinance made violation, disobedience or failure to comply with the provisions of the code a misdemeanor punishable by a fine not exceeding \$500 or by imprisonment not to exceed six months, or both such fine and imprisonment. He was convicted and his conviction was sustained by the District Court of Appeals. The case was then appealed to the United States Supreme Court which overruled the earlier case of *Frank v. Maryland*, 359 U. S. 360 (1959), which validated a similar ordinance dealing with inspections by a health officer with the result that to inspect appellant's premises a search warrant was held necessary and so the conviction was nullified.

However, the Supreme Court in *Camara* did not hold that a search may not be made without a warrant in all cases. It carefully pointed out that public interest in other situations may require that no search warrant be obtained. It said as to that point:

In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interests justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon *whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search*. See *Schmerber v. California*, 384 U. S. 757, 770-771. It has nowhere been urged that fire, health and housing

code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus we do not find the public need argument dispositive. (Emphasis added.)

It is clear from the facts of the case that the procurement of a search warrant could have been obtained without in any manner jeopardizing the objective to be obtained by the search. The Court recognized that there are situations in which the securing of a search warrant would defeat the purpose of the search. The cited case of *Schmerber* involved a liquor law violation. In that case the petitioner was convicted of drunk driving. He was arrested at the hospital where he was receiving treatment for injuries suffered in an accident which occurred while he was driving the automobile involved. A blood sample was taken from him which showed him to be under the influence of alcohol. He refused to consent to the taking of the sample and objected to its introduction in evidence. On the question of the application of the Fourth Amendment prohibiting unreasonable searches and seizures, the Court there said:

The officer, in the present case, might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant threatened 'the destruction of evidence.' *Preston v. United States*, 376 U. S. 364 (1964), 11 L. Ed. 2d 777. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.

It is apparent, therefore, that the *Camara* decision must be confined to its facts and that *it is only authority against warrantless searches or inspections under municipal fire, health and housing codes*. It is not authority insofar as a state's liquor law is concerned. This was expressly declared in the case of *Colonnade Catering Corp. v. United States*, U. S., 90 S. Ct. 774, 25 L. Ed. 2d 60, (1970). In that case federal agents, acting without a warrant, inspected the premises of a licensed New York liquor dealer for possible violations of federal laws, and, upon the dealer's refusal to unlock a storeroom, broke the lock and seized bottles of liquor. The dealer instituted an action to recover the liquor and suppress it as evidence. The applicable statutes gave the Secretary of the Treasury or his delegate broad authority to enter and inspect the premises of retail dealers in liquor. The Court says:

We agree that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand. The general rule laid down in *See v. City of Seattle*, supra, at 545, 18 L. Ed. 2d at 947 — 'that administrative entry, without consent, upon the premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure' — is *therefore not applicable* here. In *See*, we reserved decision on the problems of 'licensing programs' requiring inspection, saying they can be resolved 'on a case by case basis under the general Fourth Amendment standard of reasonableness'. . . .

We deal here with the liquor industry long subject to close supervision and inspection. As re-

spects that industry, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under existing statutes, Congress selected a standard that does not include forcible entry without a warrant. It resolved the issue not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

Since forcible entry was not provided by Congress, only prosecution for failing to permit inspection being provided, the Court in *Colonnade* held the forcible entry without a warrant violated the Fourth Amendment. The inference is clear, however, that if Congress had provided for forcible entry such could have been made without a warrant.

Chief Justice Burger in his dissenting opinion would have allowed the forcible entry absent specific provisions therefore:

The majority, far from finding this search unreasonable and therefore illegal under the Fourth Amendment, holds only that it was not authorized by 26 U. S. C., Secs. 5146(b), 1606(a), and that therefore the liquor must be returned. While these statutes do not in express terms authorize forcible breaking and entering to seize liquor kept in violation of federal law, it is perfectly clear that they do not in express terms declare such seizure illegal, and in my opinion those provisions impliedly authorize exactly the type of official conduct involved here. I am confident that when Congress said that federal liquor agents could search without a warrant and further provided for fines if the owner refused to permit such a search, it also intended to authorize

forcible entry and seizure if that becomes necessary.

The case of *See v. City of Seattle*, 387 U. S. 541 (1967), involved a conviction for refusing to permit a representative of the Seattle Fire Department to enter and inspect appellant's locked commercial warehouse without a warrant based on probable cause to believe a violation of the city ordinance existed therein. Appellant was convicted for refusing entry. The Court there applied to a business building the rule announced in the *Camara* case, *supra*, as to residential premises.

However, as noted from the excerpt from the *Colonnade* case, *supra*, the court eliminates the *See* case as an authority in the instant case. In legislation involving liquor, the state legislature would have the same kind of broad powers as the *Colonnade* case ascribes to Congress. As stated by Chief Justice Burger in his dissent in that case:

"Surely Congress was not unaware that purveyors of liquor do not leave their wares or stores or reserve supplies lying casually about; on the contrary they keep supplies under lock in various ways, including lockers, cabinets, closets, or storerooms; this practice is so universal it can be judicially noticed. Likewise it must be conceded that the legislature was aware of the fact that to require a search warrant after entry was refused would defeat the whole purpose of the inspection as all unlawful acts or conditions existing at the time would be abandoned or erased while the warrant was being obtained. As stated in the *Camara* case, the question, in determining whether the public interest requires a warrantless search, "depends upon whether the

burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.”

Appellants further rely upon the case of *Vagabond Club v. Salt Lake City*, 21 Utah 2d 318, 445 P. 2d 691 (1968). The decision of the majority in this case relies upon the *Camara* and *See* cases as dispositive of the question of the invasion of the Fourth Amendment by an inspection without a warrant. The Court in *Vagabond* applied to a situation involving inspections under the liquor law the rule those two cases applied to a residence and a business establishment without any discussion of the difference between the two kinds of inspections and the public interest to be subserved by such inspections. As we have already shown, the United States Supreme Court in the *Colonnade* cases held the distinction was so substantial that the rule announced in those cases was not applicable to a case involving inspections in connection with the liquor business and upheld the statute providing for inspections without a warrant.

Appellants also cite *Salt Lake City v. Wheeler*, 24 Utah 2d 112, 466 P. 2d 838 (1970), in which case the majority of this Court held the city ordinance which provided that, as to taverns licensed by the city, the “police department shall be permitted to and have access to all premises licensed or applying for licenses under this chapter, and shall make periodic inspections of said premises and report its findings to the board of commissioners”, was unconstitutional. This Court there held the decision in the *Vagabond* case was dispositive of the matter. What we have

said concerning the *Vagabond* case applies equally to the *Wheeler* case.

The Court made a point of the fact that the inspection could be made *at any time* under the ordinance and was not limited to business hours. It concludes that such inspections unlimited as to time seems "to explode any mythical distinction between 'browsing' inspection and 'bruising' search, so far as the Fourth Amendment concepts are concerned." The statute attacked in the instant case specifically limits the inspection to times when the establishment "is open for the transaction of business to its members." In this important particular the instant case differs from the *Wheeler* case.

The Court there asks, "What is wrong or onerous about requiring a warrant", seemingly ignoring the well-known fact that all signs of violations could and probably would be removed during the interim required to secure a warrant. That is the distinguishing fact between inspections under the liquor laws and inspections under the health and fire codes and makes the inspection reasonable. To require a warrant before inspection would emasculate the purpose for issuing the warrant. As to this important element, the Court was silent. To us it is the basic element that must be considered to properly dispose of the issue involving the Fourth Amendment.

In *Hurless v. Department of Liquor Control*, 136 N. E. 2d 736 (1965), the statute, G. C. Sec. 6064-63, authorized an inspection or search of the licensed

premises without a search warrant. As to this statute the Court says: "The necessity of legislation such as is embodied in G. C. Sec. 6064-63 to the proper enforcement of the Liquor Control Act is self-evident. Such a provision restricted to the premises of permit holders manifestly does not contemplate an unreasonable search or seizure." The Supreme Court of Ohio affirmed this decision 164 Ohio St. 492, 132 N. E. 2d 107 (1956).

We wish to emphasize the all important proposition that the Fourth Amendment is directed only against *unreasonable* search and seizure. What is unreasonable in one situation may not be in another. As stated in the *Colonnade* case, "In *See*, we reserved decisions on the problems of 'licensing programs' requiring inspection, saying they can be resolved on a case-by-case basis under the general Fourth Amendment standard of reasonableness." In this connection we quote what is said and relied upon in the *Colonnade* case:

The government, emphasizing that the Fourth Amendment bars only 'unreasonable searches and seizures', relies heavily on the long history of the regulation of the liquor industry during pre-Fourth Amendment days, first in England and later in the American colonies. It is pointed out, for example, that in 1660 the precursor of modern day liquor legislation was enacted in England which allowed commissioners to enter, on demand, brewing houses at all times for inspection. Massachusetts had a similar law in 1692. And in 1791, the year in which the Fourth Amendment was ratified, Congress imposed an excise tax on imported distilled spirits and on liquor distilled here, under which law federal

officers had broad powers to inspect distilling premises and the premises of importers without a warrant. From these and later laws and regulations governing the liquor industry, it is argued that Congress has been most solicitous in protecting the revenue against various types of fraud and to that end has repeatedly granted federal agents power to make warrantless searches and seizures of articles under the liquor laws.

The Court recognized the special treatment of inspection laws of this kind in *Boyd v. United States*, 116 U. S. 616, 624, 29 L. Ed. 746, 748, 6 S. Ct. 524 . . . in the case of excisable or dutiable articles, the government has an inherent interest in them for the payment of the duties thereon, and until such duties are paid has a right to pursue and drag them from concealment . . .

As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable' and they are not embraced within the prohibition of the amendment.

We respectfully submit in view of the foregoing that while the writer of the opinion in the *Wheeler* case stated the *Colonnade* case was no comfort to the city in that case, the *Colonnade* case is actually dispositive of the issue now before the court and upholds the constitutionality of Section 16-6-13.7.

(b) *With no provision for criminal prosecution for refusing entry on request, the statute here involved is valid.*

There is another important aspect to be considered.

The Appellants quote only a subdivision of Section 16-6-13.7 and failed to quote the first part of the section which begins as follows :

Each applicant for a license under the provisions of this chapter by accepting a license issued hereunder, or claiming the right under this chapter to store or permit the consumption of liquor on its premises, agrees and consents to abide by the following conditions and requirements.

Then follow 19 different conditions and requirements, including the seventh quoted in appellants' brief. Further, unlike the laws involved in the *Camara*, *See* and *Colonnade* cases, there is no penalty fixed for refusing entry. The last sentence of the section provides :

Failure on the part of the licensee, club officers, managing agent, members or employees to adhere to the above conditions shall constitute grounds for the suspension or revocation of any license issued under this chapter.

Section 16-6-13.11 provides that before a license may be revoked or suspended for a period of more than 30 days a public hearing shall be held.

These provisions in the statute, in question thus distinguish the instant case from the *Camara*, *See*, *Vagabond* and *Wheeler* cases and bring it within the principle of the case of *Camden County Beverage Co. v. Blair*, 46 F. 2d 648 (N. J., 1930). In that case the act involved gave authority to the commission, in case of violation of the conditions of the permit to manufacture beer, ale or wine, to hold a hearing and if the permittee has been guilty of violating any

laws to revoke the permit. Such a hearing was pending when the permittee brought an action to suppress all evidence obtained by an alleged illegal search and seizure in either the pending proceeding or any other proceeding. The Court says :

In my opinion, the complainant is not, under the present proceedings now pending against it, entitled to invoke the provisions of the Fourth and Fifth Amendments, to interfere with the investigations being made by government officers for the purpose of ascertaining whether the complainant is entitled to confidence, and to continue to exercise the right to manufacture its product under government permission. *None of the cases which I have been able to find extends the protection of these amendments to cases of this character.*

There the regulations of the Prohibition Department gave the administrator and other officers authority to inspect the premises of the permit holder at any and all times not inconsistent with the conduct of the business. The Court points out that search warrants are not available in a civil proceeding but are confined to cases of public prosecutions instituted and pursued for the suppression of crime or the detection and punishment of criminals.

Under Sec. 16-6-13.7 and Sec. 16-6-13.11 the only proceedings that can be taken against a club that refuses entry upon request is a hearing before the Liquor Control Commission to determine whether the license of the club should be revoked or suspended for failure to adhere to this condition of the license. Inspections conducted to determine whether grounds exist for revoking or suspending the license do not come within the Fourth Amendment.

(c) *Engaging in the storage and consumption of liquor is a privilege and requires the licensee to observe the conditions imposed by law for the obtaining of the license and waives the right to demand a search warrant.*

By applying for and obtaining the license the licensee agrees to permit entry upon its premises as provided in sub-section 7 quoted in appellants' brief. This, in effect, waives his right to require a search warrant. The procurement of a license by a nonprofit corporation to permit its members to store and drink liquor on its premises is not a right but a privilege that may be granted or withheld by the state. (See also Point IV (b), *infra*.) Section 16-6-13.1(4) provides: "(4) The so-called 'locker system' for the storage and serving of intoxicating liquors shall be legal in this state only when operated by a nonprofit corporation in compliance with the terms and provisions of this chapter and the provisions of the Utah Liquor Control Act of 1969, and the regulations of the commission adopted thereunder." The privilege thus granted is not, as counsel states in his brief, "the privilege of organizing a social club and maintaining rooms for that social club", but is the privilege to store and consume liquor on the club's or corporation's premises. Without this privilege being granted, there is no right granted to the corporation to permit the storage and consumption of liquor on its premises by its members.

As stated by Justice Ellett in his dissenting opinion in *State v. Salt Lake City*, the *Vagabond* case:

If the establishment desires to have liquor

consumed by its members and guests, it must comply with the law which grants the privilege. One requirement is that peace officers have the right to enter the clubrooms and meeting rooms for the purpose of determining whether any laws or ordinances are being violated. The officer is not entering to make a search. No search is contemplated by the ordinance or by the statute. He simply enters to see what everybody else in there sees; whether the law is being violated."

He further states the *See* case is not in point, as we have already demonstrated, and continues:

The case with which we are here concerned does not involve a person who is accused of crime for denying entrance by an inspector into private property which he owns and has a right to own without license or leave. Rather, we are here considering the question of whether one who seeks the right to operate a club where liquor is to be consumed can enjoy that right without complying with the statutory conditions precedent thereto.

It is not a matter of bargaining with the state, surrendering a constitutional right by the licensee in order to secure a license. It is rather a consent to compliance by the licensee with the state's requirements in order to obtain a right to which it otherwise would not be entitled. The club can organize as a nonprofit corporation, and choose its members and carry on all the social or other activities which such an organization desires. But it may not, without complying with the requirements of the law, engage in the consumption and storage of liquor, for the state has assumed complete jurisdiction over the traffic in liquor, something it has unquestioned authority to do.

This Court has held in *Utah Mfrs. Assn. v. Stewart*, 82 Utah 198, 23 P. 2d 229 (1933), "There is no common law right on the part of any person to sell intoxicating liquor. The right to sell liquor is not one of the privileges or immunities of citizens of the United States which the states are forbidden to abridge." The Court quotes from 19 R. C. L. 14, " 'However partial it may seem, the state can exercise a monopoly of any business that is inherently dangerous to society and for that reason may lawfully be prohibited by it on the grounds of public policy, without violating any constitutional inhibitions, because no person possesses an inherent right to engage in any employment, the pursuit of which is necessarily detrimental to the public.' "

In *Randles v. Washington State Liquor Control Board*, 33 Wash. 2d 688, 206 P. 2d 1209, 9 A. L. R. 2d 531 (1949), the Court said:

There is no natural or constitutional right to sell liquor or engage in the business of selling or dispensing intoxicating liquor. The state under its police power may prohibit entirely the carrying on of such business and may regulate it in such manner as may be deemed advisable. The times when, the places where, and the persons to whom it may be sold may be determined by the state. The privilege of dispensing intoxicating liquor may be given to some and denied to others. In considering the claims of discrimination and the distinction between a lawful business which a citizen has the right to engage in and one in which he may engage only as a matter of grace of the state must be constantly in mind. There is such a vast field of au-

thority on the subject that we shall content ourselves with citing a few of the cases decided by this court and leading cases decided by the United States Supreme Court. Then follows several citations.

In *Zap v. United States*, 328 U. S. 624 (1946), the petitioner entered into contracts with the United States to do certain work. The contract provided that petitioner's accounts and records shall be open at all times to the government. In his absence the government representatives examined his records and found a check for \$4,000 which should have been for \$2,500. He sought to suppress this check under the Fourth Amendment. The Court says:

But these rights (under the Fourth and Fifth Amendments) may be waived. When petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.

One of the conditions to which an applicant for a license to operate as a liquor locker club must agree is that it consent to inspection by peace officers and others during business hours to inspect the entire clubhouse, club quarters and all books and records of the licensee. The members also agree to the inspection of their lockers. This, in effect, is a waiver of the right to require a search warrant to make an inspection. If the club desires a license as a liquor locker club, it must give this consent. It isn't a matter of two parties bargaining. The club is not entitled, as a matter of right, to a license. The state has specified the conditions

under which the privilege of operating a liquor locker club will be granted, and, having accepted the privilege, the club agrees to the terms under which the privilege is granted. This is precisely the same situation as is involved in the *Zap* case. There, too, the contractor had no alternative but to consent to an inspection if he desired to do business with the government.

In *Manchester Press Club v. State Liquor Commission*, 200 A. 407, 89 N. H. 442 (1938), the statute provided that any member of the commission may at any time enter any place of business where liquor is sold or manufactured. The Court says :

The contention that the regulation is invalid on the ground that it violates the protection of the federal and state constitutions from unreasonable search, confuses between rights and privileges. No one may sell intoxicating liquor against the state's consent, and if consent is granted, it may be on such terms and conditions as the state attaches thereto. Acceptance of the license is an acceptance of the requirements to be observed by the licensee. The requirements impose the obligation to observe them, since the obligation is one voluntarily assumed in return for the privilege.

To the same effect, see *State of New Jersey v. Zurawski*, 89 N. J. Super. 488, 215 A. 2d 564 (1964); *Zukowski v. State*, 167 Md. 549, 175 A. 595; *Oklahoma Alcoholic Beverage Com. Bd. v. McCulley*, 877 P. 2d 568 (Okl., 1963); *Fischer v. State*, 195 Md. 477, 74 A. 2d 34 (1950).

(d) *Under licensing statutes covering a business regulated by law the right under the Fourth Amendment to*

a search warrant is waived by accepting the license.

In 79 C. J. S., Sec. 62, p. 819, is the following:

The constitutional immunity (searches and seizures) is sometimes waived by a person when he engages in a business which is regulated by law, the acceptance of a license to engage in such business being a necessary acceptance of the statutory conditions and an implied waiver of the constitutional immunity to that extent.

The following authorities are cited which support the text:

Bowles v. Misle, 64 F. Supp. 835 (1946), in which the Court says:

The immunities of the Fourth and Fifth Amendments are not absolute but are rather subject to waiver and he who enters into, or continues in, a business subject to official regulation voluntarily submits his business records and papers to such visitorial examination as the law contemplates, and in that measure waives his constitutional immunities of privacy in respect of his papers and against compulsory testimony.

State v. Hall, 164 Tenn. 548, 51 S. W. 2d 851 (1932). The statute required as a condition to taking wild animals and birds that the hunter permit the state game warden or his deputy to inspect and count the animals, wild birds, wild fowl and fish to ascertain whether the requirements of the act were being faithfully complied with. The Court says:

The constitution does not prohibit searches in general, but only those that are unreasonable . . .

No one has an absolute property right in game or fish while in a state of nature, and the right to take them may be restricted or prohibited, and, when granted or exercised, it is a privilege.

This being true, we see no reason why the state may not annex to this privilege any condition and limitation it sees fit. If the sportsman is unwilling to avail himself of the privilege accorded him, upon the terms and provisions prescribed, he may decline the invitation, but he cannot enjoy the benefits of this act without submitting to its burdens and restrictions.

The Court quotes with approval the above excerpt from *Corpus Juris* and cites several cases from other jurisdictions in support of its position. One is *Wibmer v. State*, 182 Wis. 303, 195 N. W. 936 (1923), in which it was held that the acceptance of a license to sell nonintoxicating liquors under statute is an acceptance of the statutory conditions as to inspection of the premises by police or prohibition officers of the premises upon which the nonintoxicating liquors are kept. Says the Court:

The acceptance of the license is necessarily an acceptance of the accompanying statutory conditions and as to the premises is an implied waiver of the search and seizure provisions of the constitution.

In *Plainos v. State*, 131 Tex. Cr. 367, 100 S. W. 2d 367 (1936), the Court says:

In the absence of the power to make reasonable and proper inspections of the premises of the licensee, the object and purpose of the Liquor Control Act would be emasculated . . .

Appellant applied for and accepted his license subject to the requirement that he submit to inspections of his licensed premises by the duly authorized agents of the Liquor Control Board. Hence, appellant was in the attitude of consenting to the search without the issuance of a search warrant.

To the same effect, see *Plainos v. State*, 132 Tex. Cr. 110, 102 S. W. 2d 217 (1937); *United States v. Cardiff*, 95 F. Supp. 206 (D. C., 1951); *United States v. Rabicoff*, 55 F. Supp. 88 (D. C. W. D. Mo., 1944); *State v. Putzke*, 7 Ohio App. 2d 118, 218 N. E. 2d 627 (1966); *Tucker v. State*, 244 Md. 488, 224 A. 2d 111 (1966).

In 47 Am. Jur., p. 510, Sec. 13, is the following:

The use of a search warrant to prevent and detect crime is a valid exercise of the police power of the state. The constitutional provisions have no application to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals and welfare. Therefore, the inspection of a place of business during business hours, in the enforcement of reasonable regulations in the exercise of the police power, is not a violation of the guaranty against searches and seizures.

In *Mansbach Scrap Iron Co. v. City of Ashland*, 235 Ky. 265, 30 S. W. 2d 968 (1930), an ordinance was upheld as constitutional which required junk dealers to consent to inspection and search of premises as a prerequisite to obtaining a license to engage in such business.

The case of *State v. Nolan*, 161 Tenn. 293, 30 S. W. 2d 601 (1930), involved a law regulating barber shops. The

Court held the law was not violative of the constitutional provision against unreasonable searches and seizures saying:

No search or seizure in a sense protected against by the Constitution is provided for. Inspection of a place of business *during business hours*, in the enforcement of reasonable regulations in the exercise of the police power is not a violation of this constitutional right. (Emphasis added.)

As to "licensing programs", we repeat what the Court said in the *Colonnade* case: "In *See*, we reserved decisions on the problems of 'licensing programs' requiring inspections saying they can be resolved on a case by case basis under the general Fourth Amendment standard of reasonableness", *clearly indicating the rule announced in the See case did not apply to situations involving licensing.*

We respectfully submit that it is apparent the decision of the majority in the *Vagabond* and *Wheeler* cases did not fully consider the legal propositions to which we have referred and which must be considered in properly disposing of the instant case. The *Camara* and *See* cases, upon which the majority relied as dispositive of the *Vagabond* and *Wheeler* cases, are not in point.

To permit an inspection of the premises only by a warrant based on probable cause to believe that the law has been violated would completely frustrate what appears to be the main purpose of the law, to prevent illegal activity in the first place. Private locker clubs must allow law enforcement officers to be present whenever the club is open

for the transaction of business to prevent violations of the liquor laws from occurring since such violations would clearly be much less likely to occur when an officer is present.

The Fourth Amendment is not violated by the statute in question as is abundantly shown by the authorities we have cited.

POINT III.

§§ 16-6-13.1 AND 16-6-13.5, UTAH CODE ANN. (1969), RELATING TO THE REQUIREMENT OF LOCAL CONSENT TO SELL OR DISPENSE INTOXICATING LIQUORS ARE NOT UNCONSTITUTIONALLY VAGUE.

(a) *Local police regulation matters are properly left to the localities.*

Appellant argues that the "local consent" requirements in Sections 16-6-13.1(6), 13.5, Utah Code Annotated (1969), violate Utah Constitution, Article I, Section 24, which requires that ". . . all laws of a general nature shall have uniform operation." Appellants claim that there is a violation of Article I, Sec. 24 because there can be de facto prohibition in any city or county of the state that does not give consent for the licensing of private nonprofit liquor clubs. (See Point II of appellant's brief.)

This Court heard and rejected a similar claim in *State v. Briggs*, 46 Utah 288, 146 Pacific 261 (1915). Briggs was convicted for making an unlawful sale of in-

toxicating liquor. One of the bases for the appeal was that the statute under which Briggs had been convicted was unconstitutional because the local option provision violated Utah Constitution, Article I, Sec. 24. The Court in *Briggs* found no violation of Article I, Sec. 24. In doing so it relied primarily on *Peterson v. Petterson*, 42 Utah 271, 30 Pac. 231 (1913). The Court in *Peterson* found that Sec. 20, Compiled Laws of Utah (1907) was not in violation of the constitutional requirement that "all laws of a general nature shall have a uniform application."

(b) *There is a strong presumption that local officials will exercise their discretion within constitutional bounds.*

In considering the validity of the act it must also be kept in mind that there is a strong presumption in favor of the constitutionality of statutes and in favor of the constitutionality of the enforcement. This Court has repeatedly held that enactments of the constituted legislative authority are presumed to be valid and constitutional. This presumption will prevail in the absence of a strong showing of constitutional infirmity. See *State v. Briggs*, (supra).

Appellants urge that the challenged provisions are unconstitutional because no standards are prescribed for the granting of local consent. In the language of the appellants, clubs are left "at the mercy of the local authority's whimsical discretion." (Brief of Appellants, p. 15.) It is further stated that: "The existence of such a vague requirement precludes due process of law and permits discriminatory and unequal treatment of those similarly situated." *Id.*

In so arguing, appellants ignore the clear rules of construction that presumes that officials administering an act will proceed in a manner which will not be unconstitutional and that statutes, when differing interpretations are possible, should be given the interpretation that will uphold constitutionality. There is nothing in the statute which "precludes" due process of law. Indeed, the presumption is that the local authority will act in a constitutional manner by guaranteeing due process and equal protection when deciding to grant, deny, or revoke local consent. (See, e.g., *Lieberman v. Van De Carr*, 199 U. S. 552 (1905) and *Crowley v. Christensen*, 137 U. S. 86 (1870).)

The fact that the delegation of authority to grant or deny local consent was not accompanied by substantive and procedural standards is irrelevant to the inquiry. The presumption of procedural fairness has been noted and this is the only alleged defect.

Each city and county should have some control over the location of locker clubs within its jurisdiction. The numerous areas of local concern are the location of clubs with respect to zoning laws and schools, churches, parks, other clubs, residential areas, etc., compliance with local health and sanitation codes, and compliance with fire regulations. The local authority is likely to have the most accurate and recent records of arrests and misconduct of the persons applying for consent. Inasmuch as the needs and circumstances vary from one community to the next, it would be virtually impossible for the legislature to adopt standards for each locality within the state.

The Utah Supreme Court as early as 1891 ruled on the standards presumed with a delegation of authority. In *Perry v. City Council of Salt Lake City*, 7 Utah 143, 25 P. 739. This court considered an application for mandamus by one who was denied a liquor license by the city council. After discussing the various community interests concerning the location of liquor establishments, the court discussed the nature of the delegation to the city council.

“The charter confers the power to regulate the traffic upon the city, without expressly requiring it to be exercised by ordinance. But it is said that the councilmen may act from mere whims, caprice, partiality, or prejudice unless the regulation is by ordinance. *The court should assume that public officers will act from proper motives until the contrary appears.* It is also claimed that the court must presume that the council acted arbitrarily or without sufficient reason in refusing the license, because no reason appears upon its record. *The court will not assume that the council refused the license arbitrarily, and without sufficient reason, without some proof. Being public officers, and acting under the sanction of an oath, the court will assume that they acted lawfully until the contrary appears.* (25 P. at 741, emphasis added.)

The doctrine of presumption of legal and constitutional conduct in the absence of absolutely definitive standards was more recently enunciated by the California Supreme Court in *In Re Petersen*, 51 Cal. 2d 177, 331 P. 2d 24 (1958). Petersen was arrested for violating the police code of the city of San Francisco by parking his taxicab in a taxi zone reserved for another cab company. In his petition

for habeas corpus, Petersen alleged that the statute which allows for exclusive stands at the discretion of the chief of police and the adjacent property owner is unconstitutional. Specifically, it was urged that:

“(3) The provision which grants the chief of police discretion to designate exclusive stands fails to prescribe any standards to guide him in that respect.” 331 P. 2d at 27.

There were no express standards for the chief of police to follow in designating taxicab stands. The court discussed the presumption and requirements when express standards are not provided.

“The absence of express standards in such situations does not mean that the licensing agency may act arbitrarily or oppressively; it is *presumed that the agency will duly perform its public duty*, but an abuse may be shown and relief obtained in the courts . . .

“Moreover, standards for administrative action can sometimes be found by implication. In *Rescue Army v. Municipal Court*, 28 Cal. 2d 460, 471, 171 P. 2d 8, where an ordinance requiring a permit was involved, we held that sufficient standards were inherent in the reasons which must have led to the adoption of the ordinance.” (331 P. 2d at 29.)

Appellant contends that 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.” (Appellants’ brief, Point

III, p. 26.) There is not even an allegation, aside from a total lack of evidence that any party to this action has had any license revoked by reason of the local consent being revoked. Furthermore, there is nothing in the applicable statutes which gives local authorities the power to revoke consent once given. Also, there is no proof of any such position being taken by the Liquor Commission and their counsel is advised by them that no such position has ever been taken by them. This points up the importance and wisdom of the legal principles involving standing set forth under Point I above. This Court should refuse to base its decision on a hypothetical set of facts. To do otherwise is to invite needless challenges to every legislative enactment to avoid fanciful injuries which are highly speculative at best.

In the present case it is clear that there are implied standards for the granting and denial of local consent. Whether expressly stated in the delegating statute or not, the requirements of fairness and equal treatment are impliedly placed on actions by the local authority. In the absence of any allegation and proof of violation of these standards, appellants' case must fail.

POINT IV.

§§ 16-6-13.1 AND 16-6-13.5 UTAH CODE ANN. (1969), IN PROVIDING FOR NO HEARINGS DO NOT DENY DUE PROCESS SINCE IN UTAH A LIQUOR LICENSE IS ONLY A PRIVILEGE REGULATED UNDER THE POLICE POWER AND NOT "PROPERTY" WITHIN

THE MEANING OF THE DUE PROCESS CLAUSE.

Appellants contend that the provisions in §§ 16-6-13.1 and 16-6-13.5 violate due process because no hearings are provided for in granting, denying, suspending or revoking local consent or in granting or denying a license by the Utah State Liquor Control Commission. In support of that contention, however, they refer to cases which are inapplicable to the present controversy. *Hannah v. Larche*, 363 U. S. 420 (1960), held that hearings were not necessary in determinations by the Commission on Civil Rights because it was only a fact finding body. *Jenkins v. McKeithen*, 395 U. S. 411 (1969), decided that hearings were necessary when the Louisiana Labor-Management Commission publicly branded individuals as guilty of criminal violations. *Morris v. Public Service Commission*, 7 U. 2d 167, 321 P. 2d 644 (1958), involved the revocation of a certificate of convenience and necessity to operate a common carrier.

Neither the factual situations of these cases nor the rules stated therein are analogous to the situation presented here involving liquor licenses, which have always been strictly regulated under the state's police power because of the potential danger to public health, safety and morals involved in the sale of intoxicating liquors.

(a) *Due process does not mandate hearings under all circumstances.*

In *Spurbeck v. Statton*, 252 Iowa 279, 106 N. W. 2d 660 (1960), a case involving revocation of a drivers' license, the court said:

The second major challenge to the validity of the act is that it provides for a denial of due process of law, because the license is suspended without notice or hearing. The exercise of the authority provided for must be sustained, if at all, as an exercise of the police power of the state. In *Steinberg-Baum & Co. v. Countryman*, *supra*, page 931 of 247 Iowa, page 19 of 77 N. W. 2d, we said: "The United States Supreme Court has frequently pointed out 'the police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguards of the public interest.' " . . . *The concept of due process of law does not necessarily and under all circumstances require notice and hearing before official action is taken. Wall v. King*, 1 Cir., 206 F. 2d 878, 883; *Yakus v. U. S.*, 321 U. S. 414, 442, 64 S. Ct. 660, 676, 88 L. Ed. 834. (Emphasis added.)

There remains to consider the contention that the beer licenses are property and cannot be taken away from the licensee without notice and hearing. With this contention we cannot agree. Clearly the original Constitution did not deprive the states of their police power, which they might exercise for the protection of the public health, welfare, and morals. *Bartemeyer v. State of Iowa*, 85 U. S. 129, 18 Wall. 129, 21 L. Ed. 929. The sale of nonintoxicating beer may be regulated by the state under its police power. No restraints were imposed upon the police power by the adoption of the Fourteenth Amendment. *Mugler v. State of Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205. Consequently, when the Eighteenth Amendment to the Constitution was repealed by the Twenty-first Amendment, the constitutional law, except as to importations of liquor into

a state in violations of its laws, reverted to its condition prior to the adoption of the Eighteenth Amendment. The police power of the states was unimpaired. Under that power, these licenses could be revoked.

In 3 McQuillin, Municipal Corporation, Rev. 2d Ed., Section 1108, p. 714, the distinguished author said:

* * * A license to carry on a business which affects health, safety, morals or the public welfare may be revoked by virtue of the police power. * * *

Before revocation, in the absence of statutory or charter requirement, there is no necessity for notice or an opportunity to be heard, since the revocation of a license is an administrative act. (*Abeln v. City of Shakopee*, 224 Minn. 262, 28 N. W. 2d 642 (1947).)

In Utah it is definitely established that the regulation of liquor is an exercise of the police power and the reasonableness of the legislation is for the Legislature, not the courts, to determine.

When legislative action is within the scope of the police power, fairly debatable questions as to the reasonableness, wisdom, or propriety are not for the courts but for the Legislature. *Standard Oil Co. v. Marysville*, 279 U. S. 582, 49 S. Ct. 430, 73 L. Ed. 856 . . . That the prohibition or regulation of the manufacture, transportation, sale, and use of alcohol and other intoxicating liquors is an exercise of the police power of the state admits of no doubt. (*Utah Manufacturers Ass'n. v. Stewart*, 82 U. 198, 23 P. 2d 229 (1933).)

See, also, *Adams v. City of Pocatello*, 416 P. 2d 46, 91 Id. 99 (1966); *Payson St. Neighborhood Club v. Board of Liquor Licenses Com'r. for Baltimore City*, 103 A. 2d 847, 204 Md. 278 (1954).

(b) *A liquor license is only a "privilege" and not a "right" within the meaning of the due process clause and hence hearings are not required.*

Among those activities regulated under the police power, the sale of liquor is unique and the courts have allowed in this area even greater latitude with regard to traditional due process requirements because of its inherent danger to society. Most states declare that a license to sell liquor is a privilege granted by the states and not "property" within the meaning of the due process clause. (See also Point II (c), *supra*.) In Utah, the license to sell liquor has always been regarded as a privilege. In *Utah Mfrs'. Assn. v. Stewart*, 82 U. 198, 23 P. 2d 229 (1933), this court said, in rejecting the contention that the liquor laws created an unconstitutional monopoly.

It is equally well established that the sale of intoxicating liquors is peculiarly, on account of the evil effects resulting from their use, subject to legislative control and regulation . . . As we have before seen, the contract or property right of no citizen is affected by such measure . . . [W]hen the state bestows a *privilege* which is not a common, natural right, such as the right to engage in the liquor traffic, it may create a monopoly, and yet no right of the individual be violated. (*Id.*, 82 U. 198, 208.)

In the case of *Kent Club v. Toronto*, 6 U. 2d 67, 305 P. 2d

870 (1957), this court rejected the contention that the liquor law impaired the obligations of contract with similar "privilege" language, declaring:

"They indeed have the same constitutional rights of property and contract as all other citizens, but they have no constitutional right to store and serve liquor on their premises. If they desire to continue to enjoy this *privilege*, they must so conduct their affairs as to comply with the legal regulations pertaining thereto."

In *Yarbrough v. Montoya*, 54 N. M. 91, 214 P. 2d 769 (1950), the court upheld a denial of a liquor license by an administrative agency even though no formal hearing was had. Citing from an earlier case, the court said:

Such license is a *privilege* and not *property within the meaning of the due process* and contract clauses of the constitutions of the State and the nation, and in them licensees have no vested property rights. (*Id.*, 214 P. 2d 769, 771.)

A recent federal case from the 6th Circuit is in point. In *Lewis v. City of Grand Rapids*, 356 F. 2d 276 (6th Cir. 1966), the court held:

We hold only that neither the Fifth nor Fourteenth Amendment to the United States Constitution required that the Grand Rapids City Commission hold a full "due process" hearing to consider plaintiff Lewis' request for the transfer to him of a license then owned by another.

* * *

Michigan's view that the character of the liquor business permits greater latitude in the means of its regulation than in the controls applied to other

activities was paralleled by the United States Supreme Court in *Crowley v. Christensen*, 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620 (1890). The court there said,

“There is no inherent right in a citizen to thus sell intoxicating liquors by retail . . .”

* * *

The only inescapable rule of *Crowley* is that the denial of a hearing, in itself, would not violate the Fourteenth Amendment . . .

Indeed the District Judge here recognized the rules we speak of when he said,

“We recognize the Michigan Supreme Court and the courts of other states have held consistently that the due process clause of the United States Constitution does not apply to matters concerning liquor licenses.” 222 F. Supp. 384. Such observation conforms to the great weight of authority. Anno. 35 A. L. R. 2d 1067. (*Id.*, pp. 285, 286.)

Other cases that stand for the proposition that liquor licenses do not merit “property” status under the due process clause include *Kopper Kettle Restaurant, Inc. v. City of St. Robert*, 439 S. W. 2d 1 (Mo. 1969); *Barlotta v. Jefferson Parish Council*, 212 So. 2d 220 (La. App. 1968); *In re Tahiti Bar, Inc.*, 186 Pa. Super. 214, 142 A. 2d 491 (1958); *Mumford v. Dept. of Alcoholic Beverage Control*, 65 Cal. Rptr. 495 (Cal. App. 1968); *Hornstein v. Illinois Liquor Control Comm.*, 412 Ill. 365, 106 N. E. 2d 354 (1952); *Turner v. Miami*, 160 Fla. 317, 34 So. 2d 551 (1948); *Premier-Pabst Sales Co. v. State Bd. of Equalization*, 13 F. Supp. 90 (D. C. Cal. 1935); *Kaname Takaii v.*

State Bd. of Equalization, 20 Cal. App. 2d 612, 67 P. 2d 1082 (1937); *Darby v. Pence*, 17 Id. 697, 107 P. 484 (1910); *Oval Bar & Restaurant, Inc. v. Bruckman*, 177 Misc. 244, 30 N. Y. S. 2d 394 (1941). *Barlotta, Kopper Kettle, Tahiti Bar, Hornstein, Darby, Oval Bar*, *supra*, dealt specifically with the lack of hearing provisions.

In light of the above authorities, appellants' contention that "procedural safeguards are just as important to this property right [*liquor license*] as they are in the type of property right involved in *Morris*," is untenable. (Appellants' brief, Point III, p. 25.) The authorities consistently distinguish between the manufacture, storage and sale of liquor and other businesses. *Kent Club v. Toronto*, *supra*; *Lewis v. City of Grand Rapids*, *supra*. Even the fact that a hearing is provided in one instance does not evidence a legislative recognition of a property right. The court in *Lewis*, *supra*, for example, noted that a hearing was required for revoking but not for the initial granting or denying of a license. Certainly no property right was recognized by the court there. In such a situation involving liquor, the providing for a hearing is "merely a matter of courtesy," *Urdane v. Bruckman*, (Sup.) 30 N. Y. S. 2d 396 (1941).

Accordingly, the receiving or maintaining a license to sell liquor is not a property right within the meaning of the due process clause. It is merely a privilege granted by the state pursuant to its police power. The potential dangers to

the public health, safety and morals inherent in the sale and consumption of liquor and the necessities of the situation justify the procedures here enacted by the Legislature for the protection of the people of Utah. The sections in question do not violate due process.

CONCLUSION

The appellants have no standing before the Court to challenge the statutes in question, because their rights have not been impaired nor threatened. The federal rights of appellants under the Fourth Amendment, made applicable through the Fourteenth Amendment, have not been abridged because their acceptance of a license under the liquor statutes constitutes a waiver of their right to insist upon a search warrant. Further, the nature of the search provided is reasonable under the police power of the state to regulate liquor distribution and consumption; and the sanctions imposed for refusing entry are not criminal, but civil in nature. The requirement of local consent properly leaves such matters to local officials whose acts are presumed to be reasonably exercised within constitutional limits. Appellants have failed to allege or prove that their rights have in any way been violated or threatened.

The absence of hearing procedures does not violate constitutional due process standards because a liquor license granted by the state affords only a privilege and not a property right within the meaning of the due process clause. Each challenged statute is severable from the other in any

event and if any are found invalid, that would not require the entire Act to be declared invalid.

Respectfully submitted,

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