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Skaggs Drug Centers, Inc. v. Raedel E. Ashley, Et Al. v. Gary Montgomery, Et Al. v. John Doe 1-5, Et Al., Grand Central, Inc., And Gary Montgomery v. A. U. Cooper, Dba Kearns I.G.A. Foodliner, Et Al : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

SKAGGS DRUG CENTERS, INC., a Delaware corporation,
Plaintiff-Appellant,

v.

RAEDEL E. ASHLEY, et al.,
Defendants-Respondents.

GARY MONTGOMERY, et al.,
Plaintiffs-Appellants,

v.

JOHN DOE 1-5, et al.,
Defendants-Respondents,
GRAND CENTRAL, INC., a corporation,
Intervenor,

GARY MONTGOMERY,
Plaintiff-Appellant,

v.

A. B. COOPER, dba KEARNS I.G.A. FOODLINER, et al.,
Defendants-Respondents.

Case No. 12128

BRIEF OF RESPONDENTS

Appeal from a Judgment of the District Court of Salt Lake County, Honorable Leonard W. Elton, Judge

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A. B. COOPER, dba KEARNS I.G.A. FOODLINER, et al.,
Defendants-Respondents.

Case No. 12123

BRIEF OF RESPONDENTS

NATURE OF CASE

These are actions brought to enjoin alleged violations of the "Common Day of Rest Act" (Chapter 25, Laws of Utah, 1970). The action by Skaggs Drug Centers, Inc., against a number of drug stores (No. 192780) seeks damages as well as a permanent injunction against defendants' remaining open on Sunday and selling certain items in alleged violation of the Act. The action by Gary Montgomery and other University of Utah students against various markets (No. 192886) seeks to enjoin the defendants from remaining open on Sundays and selling articles in alleged violation of the Act. The action by Gary Montgomery against several stores (No. 192948) seeks the same relief.

DISPOSITION IN LOWER COURT

Some defendants filed motions to dismiss, others answered and moved for summary judgment. After consolidating the actions for the purpose of determining questions of constitutionality, the trial court requested written memorandums in support of the parties' respective positions. Such memorandums were submitted prior to the date of the hearing, and a stipulation of facts was submitted on the date of the hearing. At a day-long hearing, on the motions, all interested parties were heard. The parties stipulated in open court that the matter was ripe for determination of the constitutional questions. (The stipulation was supposed to have been read into the rec-

ord, but the reporter left the state, and reporter's notes covering the hearing or reporting the stipulation have not been found.)

On May 12, 1970, Judge Elton read from the bench his decision that the Common Day of Rest Act was "in its entirety" in violation of the Utah Constitution. Defendants' various motions for dismissal and for summary judgment were granted and the complaints ordered dismissed (R. 187). Judge Elton died the next day before signing a written order. On May 18, 1970, an order was signed by Judge Faux granting the various motions of defendants and dismissing the actions (R. 190-193).

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the judgment declaring the Common Day of Rest Act to be in violation of the Utah Constitution.

STATEMENT OF FACTS

The material facts, as they relate to questions of constitutionality, are not generally in dispute. By a stipulation of facts entered into between the plaintiffs and most of the defendants in the three actions, the parties agreed that if a party were called as a witness he, or his representative, would testify to the matters stated therein (R. 171). The stipulation relates to facts existing at the time it was filed.

Plaintiff Skaggs Drug Centers, Inc., is a corporation operating large department-type drug stores in Utah and elsewhere. It sells a great variety of items, including prescription and other drugs, and customarily stayed open on Sundays at most of its stores. On Sunday, April 5, 1970, the first Sunday on which the Common Day of Rest Act was in effect, its employees shopped at various drug stores in Salt Lake County. The stores named in the complaint were open for business and sold several items to Skaggs' employees (R. 171-172).

The individual plaintiffs are students at the University of Utah and on April 5, 1970, shopped at stores named in their complaint. The stores were open for business and plaintiffs purchased the articles stated in their complaints. None of the defendants had filed a notice of intent to cease doing business on Saturdays. The defendants are all individuals or corporations operating retail stores of various types in Salt Lake County (R. 172).

Defendants Prescription Pharmacy and Lowes' Pharmacy operate prescription-type drug stores in Salt Lake City, which do not sell the variety of items that many large drug stores do, but carry some items other than prescription-type drugs. The stores have customarily operated seven days a week (one for 24 hours a day) and stayed open on Sundays after the effective date of the Act, selling everything except certain notions and cosmetic-type items. All other items they considered exempt under the Act (R. 173).

Defendant Raedell Ashley, dba Mount Air Pharmacy, operates a drug store engaged in the sale of prescription drugs, as well as proprietary drugs and medicines. In addition she sells health, sick room and medical preparations and supplies, infants' necessities, toiletries, cosmetics, sundries, film, and tobacco products, and operates a newsstand, card rack and soda fountain. The drug store stayed open for business seven days a week until the effective date of the Act, after which it stayed open on Sundays on a limited basis (R. 174).

Defendant Allied Development Company, Inc., operates a suburban-type department store in Murray. The store sells such items as hardware, clothing, paints, seeds and nursery items, sporting goods, hunting and fishing equipment, fencing, home repair and building materials and automotive supplies. Both before and after the effective date of the Act it stayed open for business on Saturdays and Sundays for the sale of all items carried by it. It does over 35% of its weekly business on Saturday and Sunday (R. 174-175).

Defendant Emily A. Beaver, dba Beaver Grocery, operates a small family-type grocery store in Salt Lake City. She has several employees and sells primarily grocery items and some meats. She cannot compete with the large supermarkets generally, thus a good portion of her business has been small sales of last-minute forgotten and emergency items. She customarily operated the store on a seven-day week, 24-hour basis and continued to do so after the effective date of the Act (R. 175).

Defendant Harmon Shopping Center, Inc., operates a retail store in Salt Lake County. Its principal business is groceries, including meats, but it also operates a pharmacy and sells many other items including dry goods, clothing, sporting goods, hardware, cosmetics and the like. For many years it has been open every day including Sundays and holidays for about twelve hours a day. It continued such operation after the effective date of the Act (R. 175-176).

Defendant Miniature Market Enterprises, Inc., operates several small markets in Salt Lake County and has been continuously in operation since 1952. Since 1958 its stores have never closed. They sell grocery items, sandwiches and other food stuffs, consumed in part by its customers on the premises, and sundries and drug items which do not require the services of a pharmacist. After the effective date of the Act its stores remained open for the limited purpose of selling items it deemed to be exempt under the Act (R. 176).

Defendant Blae Hansen, dba Blae's Quality Foods, operates a grocery store in Salt Lake City, which for many years has stayed open every day of the year, approximately 18 hours a day. He sells, in addition to grocery items, sundries and drug items which do not require the services of a pharmacist (R. 176).

Defendant George R. Smith, dba Kwikee Market, operates two small grocery stores in Salt Lake City. In addition to groceries and some meats and produce, he sells sundries and notions, drug items, candy, tobacco,

beverages, and sandwiches which are often consumed on the premises. He has customarily been open on a 7-day week basis for about 16 hours a day. Since the effective date of the Act, he has remained open Sundays for the sale of all items, but has limited sales on Saturdays to items he considered exempt under the Act (R. 177).

Defendant The Southland Corporation, dba 7-Eleven Food Stores, Inc., operates small convenience food stores in Utah and other states. It has about 50 stores in Utah. Convenience stores are small neighborhood grocery and dairy stores characterized by fast 7-day a week service and long daily hours. Convenience stores are entirely different from regular grocery stores both in organization and operation and the needs they serve. The average sale in a convenience store is much less than the average sale at a supermarket. A convenience store is operated to provide convenient daily shopping hours and convenient shopping days, Sunday and holidays, when supermarkets are closed or a customer needs to obtain a few forgotten or emergency items; to provide convenient shopping locations and to provide convenient services such as parking at the door with quick in and out service. Such stores cannot generally operate economically on a six-day week. In Utah they do approximately 25% of their total business on Sunday, much greater than that done by supermarkets on Sunday. Most could not withstand this loss and remain on a profitable operating basis.

In Utah, the 7-Eleven Stores sell grocery items (in small variety), ice, firewood, beverages, ice cream, can-

dy, confections, tobacco, non-prescription drugs, notions and sundries, packaged meats, magazines, greeting cards and other items. They actively promote and sell picnic food and supplies which constitute a substantial portion of their Sunday business during summer months. Since the effective date of the Act its stores have remained open on Sundays selling items which it deems exempt under the Act (R. 177-179).

Defendant Ward Market is a family-owned corporation operating one market in Salt Lake City. It is operated by the family and several other employees and has stayed open continuously seven days a week, 24 hours a day. It sells groceries, produce and packaged meats and could not survive by closing on either Saturday or Sunday, as it does in excess of 35% of its total weekly business on these two days, and operates on a small profit margin. Since the efective date of the Act it has stayed open on Sundays for the sale of all items and has limited its sale on Saturdays to items it feels are exempt under the Act (R. 179).

Defendant A. B. Cooper, dba Kearns IGA Foodliner, and defendant L. B. Grainger, dba Grainger's IGA Foodliner, each operate independently owned neighborhood markets selling a complete line of grocery items, meats, non-prescription drugs, toiletries, beverages, tobaccos, sundries and the like. These stores are managed by their owners, but employ a number of other persons. They have been open seven days a week approximately 12 hours a day. Increased competition from large

supermarkets has forced neighborhood markets such as these to remain open seven days a week for long hours. They offer a public service distinct from that offered by convenience stores because of their larger line of groceries and related commodities. Since the effective date of the Act they have been open on Sundays, but selling only items they deem to be exempt under the Act (R. 179-180).

Defendant Grand Central Drugs, Inc., operates several large suburban-type department stores and drug stores within the state. The stores have generally stayed open seven days a week, 12 hours a day. They sell prescription and non-prescription drugs and medical supplies, plus a great variety of other items including cosmetics, hardware, tools, automotive supplies, toys, clothing, home decorations, repair items, appliances, electrical and plumbing supplies, household utensils, tobacco, housewares, pet supplies, candies, magazines, cameras and sporting goods, picnic supplies, school supplies, shoes and the like. Some of the stores operate snack bars. Since the effective date of the Act its stores in Utah have been closed on Sundays.

After the effective date of the Act, it caused its employees to make a survey of Salt Lake County and found that almost every item could be purchased on Sunday which could have been purchased on that day prior to the effective date of the Act. Some items were purchased from stores which had filed a notice of intent to remain closed on Saturday. They found that certain types of

outlets which appear to be exempted by the Act were selling goods that other businesses may be prohibited from selling on Sunday. For example there were service stations selling bread, milk, canned goods, hardware items, tools and clothing. Many of these items were sold by them prior to the effective date of the Act. Golf pro shops were selling golf clubs, golf bags and other equipment such as shoes, shirts, pants, socks and other articles of clothing. Shops at ski resorts were selling skis, poles, and other ski equipment plus a large assortment of ski and other clothing. Motels operating gift shops or gift counters and shops operated in Salt Lake International Airport were selling clothing, souvenirs, dishwares, bric-a-brac, toys, jewelry, and the like (R. 180-182).

ARGUMENT

I

THE COMMON DAY OF REST ACT IS DISCRIMINATORY, ARBITRARY AND IN VIOLATION OF THE DUE PROCESS, EQUAL PROTECTION AND UNIFORM OPERATION OF LAW PROVISIONS OF THE UTAH AND UNITED STATES CONSTITUTIONS.

Respondents are fully aware that decisions concerning the wisdom or desirability of Sunday closing generally are for the legislature and not the judiciary. This is essentially true of all legislation and is not an issue requiring lengthy argument, such as that advanced by ap-

pellants. Nonetheless, whether particular legislation is desirable or undesirable, liked or unliked by a majority of the people, it must meet certain constitutional standards before it can be upheld. Otherwise, the courts would have little occasion to consider the validity of any legislative act.

Since the turn of the century, this court has ruled upon the constitutionality of statutes or ordinances designed to make certain persons or businesses cease operations at designated times or days while allowing others to continue to operate. In the three most recent cases, the legislation was invalidated, primarily upon the grounds that it was arbitrary, constituted special legislation, and lacked uniform application.

The earliest of the three cases is *Saville v. Corless*, 46 Utah 495, 151 Pac. 51 (1915), which involved a statute by which certain businesses in cities of over 10,000 population were required to close at 6:00 p.m. Drug stores and stores dealing "exclusively in, or whose major portion of stock consisted of foodstuffs, meats and other provisions of a perishable nature" were regarded as public necessities and exempted. This court held the statute unconstitutional upon three grounds. First, it violated the constitutional right of a person to enjoy, acquire and possess property;[1] second, it was arbitrary and consti-

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[1]The present Act is also invalid on the same basis. In *Golding v. Schubach Optical Co.*, 93 Utah 32, 70 P.2d 871 (1937), this court held that the rights guaranteed by the property provision of Article I, Section 1, Utah Constitution are invaded when one is not at the liberty to contract with others respecting the use to which he may subject his property or use or employ his time.

In *Ritzhold v. Salt Lake City*, 3 Utah 2d 385, 384 P.2d 702 (1956), this

tuted special legislation in that it applied only to cities having certain population and some stores were permitted to remain open and sell items prohibited to others; and third, the businesses required to close could not, by staying open, adversely affect the health, safety or welfare of the public. The court said (p. 52):

> "There are things the sale of which may be restricted, regulated, or even prohibited by the Legislature, and enterprises which may be restricted, regulated and controlled. But such legal interference must rest on the police power of the state to promote or preserve public health, public morals, public safety, public convenience, and general welfare. The act here has no such purpose, and in no sense tends to promote or preserve the public health, morals, peace, order, safety, convenience, comfort or welfare. It is but an arbitrary and an unwarranted interference with a merchant's business. One or a number of merchants may desire to close their stores at 6 o'clock. They may do that. But they, by legislation, cannot compel every other merchant to close at the same hour. They can run their own business, but not their neighbor's. So employees, for motives of their own, may desire all stores to close at a certain hour. But their employers', whose business and property is affected, have a voice in that. They, if they choose, may consent to close. But they cannot, by legislation or otherwise be coerced to do so. An employee may refuse to work for another after 6 o'clock. That is his right. But

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court ruled that an ordinance prohibiting price advertising of eye glasses violated Article I, Section 1, of the Utah Constitution.

The present Act clearly imposes an unreasonable burden on the right of an individual to dispose of his property and engage in a legitimate business enterprise.

> he may not, by legislation or otherwise, prevent his employer from conducting his own business in person, or with other employees who are willing to work for him. That is an unwarranted interference with the rights of others. All this is so self-evident and fundamental as not to admit of argument."

Next, in *Broadbent v. Gibson*, 105 Utah 53, 140 P.2d 939 (1943), the court considered the constitutionality of a statute which generally prohibited businesses from operating on Sunday, but excepted:

> "* * * hotels, boarding houses, baths, restaurants, taverns, livery stables, garages, automotive service stations, golf courses, bowling alleys, ball parks, theatres, bathing resorts, ice stations, newsstands, skating rinks, confectionary stores, for the sale of confections only, tobacco stores, for the sale of tobacco, pharmacies, or the prescription counters of retail drug stores * * * or such industries as are usually kept in continuous operation."

Noting that *general* Sunday closing laws were often upheld as designed to protect society by establishing a compulsory day of rest, the court nevertheless held that the exceptions to general closing were so unreasonable and arbitrary as to unconstitutionally discriminate between persons similarly situated. The court so ruled even after expressly recognizing principles argued by appellants in the present case—that discrimination is the essence of classification and that a court cannot substitute its judgment, as to the wisdom or policy of a law, for that of the legislature. It pointed out that there are generally three types of Sunday closing laws considered

by the courts. The first, and one which has met with the most success, exempts only the sale of certain commodities. The second prevents a particular business from operating on Sunday. The third exempts specified businesses and occupations. The court found that the statute being dealt with was most closely akin to the third type, although designed to make certain commodities available on Sundays.

The discriminatory classifications of the act as well as the total breadth of the exemptions were considered. The recreational exemptions, it was found, discriminated between persons or firms similarly situated in that confectionaries were permitted to sell soft drinks while grocery stores could not, and ice cream parlors could fit as readily as confectionary stores into the recreational scheme. The court held the statute unconstitutional, noting (p. 946):

> "The exceptions in the Utah Sunday closing statute are so broad that they in effect change the nature of this act from a general closing law, with exceptions, to a law aimed, without sufficient legal reason, at certain classes of businesses with a general exception to other classes which in effect is a grant of a special privilege to the excepted class, while, without legal excuse, denying them to others."

Broadbent appears to have overruled, *sub silentio* the case of *State v. Sopher*, 53 Utah 318, 71 Pac. 482 (1903), the only one by this court in which Sunday closing legislation was upheld. The two cases involved the same statute, although there had been an amendment

making some additions to the businesses exempted. A comparison of the two cases compels a conclusion that the additions did not account for the different result.

In *Sopher* much emphasis was placed upon the need to prevent exploitation of employees and their requirement for one day a week rest. Socio-economic conditions have changed completely, however, since 1903. Labor protection laws, such as the 40-hour, five-day week, and the strength of labor unions make such laws unnecessary and reduce the relevance of the court's 1903 finding (p. 485):

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

The court's most recent Sunday Closing decision is *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P.2d 464 (1948), in which a Salt Lake City ordinance prohibiting Sunday sales generally, but excepting specified commodities, was reclared unconstitutional. Again the court addressed itself not only to the question of whether the statute was discriminatory but whether, in light of its declared objects and purposes and the scope of its exemptions, the ordinance was adapted to accomplish legitimate objects under the police power. The court quoted with approval from *State v. Mason*, 94 Utah 50, 78 P.2d 920 (p. 923):

> "In order to see whether the excluded classes or transactions are on a different basis than those included, we must look at the purpose of the act. The objects and purposes of a law present the touchstone for determining proper and improper classifications."

The court observed that the ordinance was not a general Sunday closing law, but one prohibiting certain activities only, and voiced its inability to conceive how the health, safety, morals, peace or good order of the citizens of Salt Lake City would be promoted by prohibiting "in effect the working of a salesman or saleswoman on Sunday while permitting the employment of common laborers, artisans, stenographers, and laundresses."

Significantly, the court recognized that discrimination is not limited to verbal classifications but may be based upon its practical effects on the operations of various businesses (p. 467):

> "We are not advised that the work of a seller of haberdashery is so much more arduous than that of a ditch digger as to require that the law protect the former and not the latter from the possibility of being employed seven days a week. While the ordinance does not expressly prohibit the carrying on of businesses of a particular type, *we cannot close our eyes to the fact that its necessary effect is to do so.* A clothing, hardware, or jewelry store does not engage in selling any of the excepted products, nor would it be economically feasible for a large grocery or vegetable store to open its doors on Sunday for the sale of milk, tobacco and candy. As thus viewed and as gauged

by the grant of municipal power hereinabove referred to, we find the prohibitions of the ordinance bear no reasonable relationship to the objectives to be accomplished by enactments made pursuant to such grant. Of this ordinance, can it be said that there is 'no fair reason for the law that would not require with equal force its extension to others which it leaves untouched?' " [Emphasis added.]

The need to look beyond verbal classifications to determine a statute's practical effect on business operations was recognized by the Nebraska Supreme Court in *Skag-way Department Stores, Inc. v. City of Omaha*, 140 N.W.2d 28 (Neb., 1966). The court, in invalidating a general Sunday closing law, stated (p. 31):

> "Changes in the economic order have brought new problems. The grocery, the meat market, and the drug store that sold only merchandise which their names implied are fast giving way to the department store, the chain store, and the supermarket. The classification of stores in accordance with commodities sold no longer provides a proper method of classification because the department store, chain store, and supermarket generally include all of the goods formerly sold only in the 'community store.' * * *
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> "We reaffirm our previous holding that Sunday closing laws may be proper subjects of legislation. But their validity is dependent upon reasonable classification for purposes of legislation. A portion of a class may not be legislated against unless there are reasonable distinctions that warrant it to be treated as a class for purposes of legislation. * * * While it is true that our earlier

> cases upheld classifications to which Sunday closing law was applied it was under conditions then existing that avoided unfair discriminations. Because of the economic changes that have come about, particularly in the business retail field, the basis of former classification has disappeared. This poses a complex problem for legislative bodies and requires reconsideration by the courts in view of the changed conditions."

Nebraska has on several other recent occasions invalidated Sunday closing laws because of their discriminatory features. See for example, *Skag-way Department Stores, Inc. v. City of Grand Island,* 176 Neb. 169, 125 N.W.2d 529 (1964), and *Terry Carpenter, Inc. v. Wood,* 177 Neb. 515, 129 N.W.2d 475 (1964).

A county Sunday closing ordinance was struck down by the Washington Supreme Court in *County of Spokane v. Valu-Mart, Inc.,* 69 Wash. 2d 712, 419 P.2d 993 (1966). In holding the ordinances's classifications to be arbitrary and unreasonable, the court noted that legislatures do not have the same plenary power of classification under the police power that they do in some other areas, such as taxation. The ordinance could not be regarded as designed to affect public peace, health, safety, morals or welfare because of the great number of exemptions included in it. By citing *Nebbia v. New York,* 291 U.S. 502, 54 S. Ct. 505, 78 L.Ed. 940 (1934), the individual appellants would have the court treat Sunday closing legislation enacted under the police power as coming within the latter category. The *Valu-Mart* case more properly recognized such legislation as

concerning what appellants denominate "fundamental personal rights."

In *Nation v. Giant Drug Company*, 396 P.2d 431 (Wyo., 1964), a Sunday closing ordinance of the City of Cheyenne was held invalid by the Supreme Court of Wyoming. The court found it difficult to understand the basis of legislative classifications ostensibly enacted for purposes of advancing general welfare aims set forth in the ordinance, "in light of other pursuits which [were] left untouched such as construction works, manufacturing, processing, laundries, dry cleaning establishments, other types of business rendering services, and all types of mechanical and artisan labor."

Applying the rationale of the above cases, and particularly those decided by this court, it is apparent that the Common Day of Rest Act is unconstitutionally discriminatory in many respects. The most obvious discrimination arises from the exemptions provided in Section 5, a hodge-podge consisting of commodity exemptions, institutional exemptions and hybrids. It is permissible to sell goods or render services essential or incidental to operations which are customarily continuous, "such as airlines, railroads, taxi cabs, bus lines, or other transportation facilities." But it is well known (and set forth in the stipulation of facts) that railroad stations, bus terminals and airports have shops selling many items generally carried by other businesses which would have to close and which could not sell them on Sunday.

Also exempted is the sale of "supplies or services

customarily provided by automotive service stations." Many service stations have for years sold grocery items, hardware, tools, sundries, and with the advent of the interstate highway system, even clothing. Moreover, oils, lubricants, polishes, waxes, and many other automotive accessories constitute a significant part of the business of department stores, discount stores and large drug stores. Under the act, service stations presumably could remain open and sell these items while other stores could not.

Among the exemptions to the act is "the sale of goods or rendering of services normally associated with or incidental to the operation of recreation, education or entertainment facilities." While it appears under this exemption that beverages, tobacco, and "confections" may be sold by anyone, theatres, resorts, golf courses, "tourist attractions" and the like may remain open and sell all items normally associated with their operations. This would include a great variety of articles which other stores are prohibited from selling.

Only a few examples of discriminatory results have been cited. Obviously many others could be found, and not necessarily in the merchandising field alone. Section 5(2), for example, exempts "the extraction or processing of natural resources." What reasonable basis is there for excluding manufacturers or processors of natural resources when other manufacturers, except those whose process require continuous operations, are not exempt?

Arbitrary classifications with respect to persons who may sell and commodities which may be sold are

not the only areas of discrimination. The act contains an unjustifiable two-edged discrimination against those who elect to remain open on Sunday by closing on Saturday. Persons who "observe Saturday as the sabbath" are not given the same privilege as those who either observe Sunday as the sabbath or desire to remain open on Saturdays. Persons who elect to close on Saturday must cease all business on that day in order to be able to sell on Sunday. On the other hand, those who stay open on Saturday can, if they desire, sell selected items on Sunday. A similar provision was held unconstitutionally discriminatory in *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 129 N.W.2d 475 (1964), where the Nebraska Supreme Court said:

> "L. B. 710 also requires businesses observing Saturday as the sabbath to close and keep closed on Saturday if they wish to open on Sunday. The discrimination appears when we realize that Saturday Sabbatarians are not permitted to sell the excepted articles and commodities while all other businesses covered by the act may sell the excepted goods on Sunday. The discrimination is so obvious it requires no further discussion."

Discrimination and arbitrariness are also apparent in another aspect of the provision. Persons who desire to close on Saturday and remain open on Sunday can do so only if they "neither conduct nor require the conducting by others of any business or labor for profit on Saturday *either by themselves or through firms or corporations under their ownership or control.*" This is not related to the number of outlets, size of businesses, size of stores, or

types of activities or businesses which may be under common ownership or control. To the extent that it requires a person or corporation having multiple or varied businesses to close all or none on Saturday, the provision is discriminatory and has no reasonable relationship to the objects and purposes of the Act. A person operating both a restaurant and a nursery, for example, would have to close them both on Saturday if he wanted to operate the nursery on Sunday. Other restaurants can remain open seven days a week.

The Act violates Article I, Section 24 of the Utah Constitution in an additional and unique way. Under Section 6, it provides:

> "* * * any person or county attorney *may* apply to any court of competent jurisdiction for, and *may* obtain an injunction restraining this violation." [Emphasis added.]

Since this court has held that there can be no unreasonable discrimination in the application or operation of a law, the constitutionality of the Act may depend upon whether it can be uniformly enforced. But by its very nature, enforcement of the present Act cannot be uniform.

Since any person or any county attorney may or may not bring an action to enjoin an alleged violation of the Act, in any given county, the county attorney or private individuals are permitted to discriminate between the businesses that will be subject to suits. Even if the intention of the county attorney or citizens was to close

all businesses operating in violation of the Act by bringing suits for injunction, if in fact some businesses were closed before all were required to, serious discrimination and lack of uniform operation would result.

Additionally, unless all county attorneys or citizens in every county brought suit against the businesses that remained open, making non-exempt sales, there would be discrimination in enforcement as between the various counties and lack of uniform operation, a result condemned by this court in *Broadbent v. Gibson, supra.*

The various suits brought in the present matter, raise another interesting question. Plaintiff Skaggs in its suit sought damages, whereas the individual plaintiffs did not. If the county attorney were to bring action he would have no grounds for damages. Thus there is discrimination provided for in the Act not based on the act of defendants, but upon who happens to be the plaintiff.

All appellants rely heavily upon the 1961 Sunday closing cases[2] decided by the United States Supreme Court. Recognizing these cases as not controlling, they cite them as "highly persuasive, if not authoritative." But they are not as persuasive as appellants contend. The earlier Utah cases, under the doctrine of *stare decisis*, and on the basis of reason, are entitled to far greater consideration. The United States Supreme Court was

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[2]*McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed.2d 393, 81 Sup. Ct. 1101 (1961); *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582, 6 L. Ed. 2d 551, 81 Sup. Ct. 1135 (1961), rehearing denied 368 U.S. 869, 7 L. Ed.2d 69, 82 Sup. Ct. 1; *Braunfeld v. Brown*, 366 U.S. 599, 6 L. Ed.2d 563, 81 Sup. Ct. 1144 (1961); and *Gallagher v. Crown-Kosher Supermarket*, 366 U.S. 617, 6 L. Ed.2d 536, 81 Sup. Ct. 1122 (1961).

deciding only whether the statutes offended any federal constitutional provisions, and was not concerned with state law. Appellants argue that there is basically no difference between the equal protection provision of the federal constitution and the uniform operation of laws provision of the Utah Constitution. The two provisions often are similarly interpreted, but there are areas where different results would be reached. The language "all laws of a general nature shall have uniform operation," is narrower in scope but more specific in meaning than the wording of the 14th Amendment.

Appellants' argument that Utah cases have not expressed any difference between federal and state tests for equality or uniformity has little significance inasmuch as there have been few if any cases in which it has been necessary to raise such an issue. Moreover, this court is just as competent and as free to decide these questions as is the United States Supreme Court.

The cases cited are unpersuasive for another reason. In them the United States Supreme Court (perhaps uncharacteristically) took a hands-off attitude, indicating that such legislation was a matter for the states, not a federal problem. The opinions, including the concurring opinion of Justice Frankfurter, evidence a feeling that the desirability of Sunday closing should be left to state legislatures and their validity to state courts. While some state courts have since placed some reliance on these cases, others have regarded them lightly and refused to close their eyes to obvious discriminations.

Appellants cannot legitimately distinguish the *Broadbent* and *Gronlund* cases, so they have attempted to lessen their effect by focusing on isolated passages and ignoring what the cases held. Actually, despite a more definite approach, the effect of the legislation involved in these two cases and the present Act is very similar. The language in *Broadbent* appearing at page 14, *supra.*, and the language from *Gronlund* at page 16, *supra.*, can with little change be applied equally to the Common Day of Rest Act.

The individual appellants note that to be upheld Sunday closing must prohibit the performance of labor and gainful occupations generally rather than merely retail selling. However, the thrust of the present act is almost entirely at retail selling. The largest employers in the state such as Kennecott Copper, Geneva Steel, the railroads, and government agencies are free to work as they will. Appellants' assertion that a number of cases from other jurisdictions invalidated Sunday Closing legislation only because general closing was not provided for, misses the mark. The legislation in those cases was as general as that involved here, but the courts recognized that the myriad exceptions prevented the legislation from having a general effect. Respondents disagree that "it is of little use to point out the discrimination in permitting a tavern to sell beer while a grocery store next door cannot sell orange juice." Unless a real basis for such discrimination can be demonstrated (and this appellants have not done) the legislation should not be upheld.

II

THE COMMON DAY OF REST ACT IS UNCONSTITUTIONALLY VAGUE, AMBIGUOUS AND INDEFINITE, AND DOES NOT CONTAIN ADEQUATE STANDARDS.

Appellants seem to agree that the Act is vague and indefinite, but argue that since there are no criminal sanctions, as such, we can overlook the fact that the people of ordinary intelligence must guess at the meaning of various provisions of the Act and that there will be wide differences of opinion concerning its application.

It is true that the courts more closely scrutinize criminal statutes with regard to the question of vagueness. But that does not mean that civil statutes (assuming the act is entirely a civil statute) can be so vague and indefinite that the legislature, in effect, delegates its responsibilities to the courts.

On a number of occasions, courts have invalidated Sunday closing laws on the basis of vagueness. For example, in *State v. Hill,* 189 Kan. 403, 369 P.2d 365 (1962) the Kansas Supreme Court upset a statute excepting "the sale of any drugs or medicines, provisions, or other articles of immediate necessity" in the following language (p. 373):

> "While the line of demarcation between the valid exercise of police power and constitutional guarantees is not always well defined, and courts must accord to the legislature a wide range of power to classify and delineate in declaring the public

policy of the state, we cannot consent to the legislative invasion of constitutional guarantees to the extent here evidenced. Although the sale of goods on Sunday constituted an offense under the common law, and it is well settled that not every uncertainty which may exist in the operation or application of a criminal statute renders it void. (*State v. Ashton, supra.*) nonetheless, we are of the opinion the statute here considered (G.S. 1949, 21-955 and 21-956) is so vague, indefinite and uncertain that it fails to inform men of common intelligence what conduct on their part will render them liable to its penalties; that they must guess at its meaning and differ as to its application. * * *"

In *G.I. Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E.2d 764 (1962) the statute excluded "novelties, toys, souvenirs, and articles necessary for making repairs and performing services." The court found the statute unconstitutionally vague, uncertain and indefinite and in violation of the due process clauses of the state and federal constitutions.

The Missouri Supreme Court in *Harvey v. Priest*, 366 S.W.2d 324 (1963), overruled a prior decision in which it had rejected a claim that the Sunday closing act was void for vagueness. The court said (p. 328):

> "In the light of the history and background of these sections, and taking judicial notice of the matters hereinabove mentioned, upon what we deem to be an objective reappraisal of our views as formally expressed, we have concluded, and accordingly hold that the presence of the phrase 'or other articles of immediate necessity' renders

> the statutory scheme of Sunday closing (as embodied within the two sections here under scrutiny) so vague and indefinite that it cannot be ascertained with any reasonable degree of certainty what sales are permitted, and what sales are interdicted, thus making the statute incapable of rational enforcement and hence void."

Admittedly, the foregoing cases involved statutes having specific criminal penalties. However, the test applied in each, differs little from that applied by this court in determining whether a civil statute is unconstitutionally vague. Thus in *Kent v. Toronto*, 6 Utah 2d 67, 305 P.2d 870 (1957) the contention had been made that a statute providing for the chartering of social clubs and seting up regulations for the storage and consumption of liquor was invalid on the ground of vagueness. The language in that case was quite specific, except that the act in several instances referred to such things as "reasonable" initiation fees, "reasonable" regulations, and "strict" regulations. Rejecting the claim of vagueness, the court applied the following test (p. 874):

> "If the statute is so designed that persons of ordinary intelligence, who would be law abiding, can tell what their conduct must be to conform to its requirements and is susceptible of uniform interpretation and application by those charged with responsibility of enforcing it, it is invulnerable to an attack of vagueness."

The court did point out that it was important to note that this was not a criminal statute, but it did not dilute the test to be applied. Moreover, in *Toronto v.*

Sheffield, 118 Utah 460, 222 P.2d 594 (1950) this court held unconstitutional a statute which barred actions for recovery of real estate sold for delinquent taxes after four years. In a concurring opinion Justice Wolfe stated (p. 600):

> "I believe as does Mr. Justice Latimer that (the statute) is inoperative because the act is indefinite, uncertain, inconsistent, muddled and confused and does not lend itself to intelligible or workable interpretation within the bounds of construction."
>
> "In the enactment of a statute reasonable precision is required. Certainty need not be absolute and the court should not invalidate legislative acts because they are inaccurately drawn or because the expressions used are awkward, clumsy or wanting in precision. However, if uncertainty and vagueness cannot be removed, or if removed, the legislative intent is still unascertainable, then the act should be declared void and inoperative.
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> * * *
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> 'In the enactment of statutes reasonable precision is required. Indeed one of the prime requisites of any statute is certainty, and legislative enactments may be declared by the courts to be inoperative and void for uncertainty in the meaning thereof. This power may be exercised where the statute is so incomplete, or so irreconcilably conflicting, or so vague and indefinite, that the statute cannot be executed and the court is unable, by the application of known and accepted rules of construction, to determine what the legislature intended, with any reasonable degree of certainty. * * *' "

The case of *Henry v. Rocky Mountain Packing Corp.*, 113 Utah 415, 196 P.2d 487 (1948), on rehearing 113 Utah 444, 202 P.2d 727 (1949), has no bearing on this issue. The court merely held on petition for rehearing that penal statutes are to be more strictly construed than non-penal statutes. (In this regard it is interesting to note that the Common Day of Rest Act appears in the Penal Code in Laws of Utah, 1970.)

The individual appellants cite several earlier decisions of this court for the propositions (1) that it is the duty of the court to give effect to the intent of the legislature; (2) a statute should not be stricken down or applied contrary to its literal meaning, except where it is so vague that the meaning of the legislature cannot be ascertained. The propositions are conceeded but they do not assist appellants here. First, it is clear that statutes other than criminal may be invalidated on the basis of vagueness;[3] second, respondents would defy anyone to explain to this court what the legislature meant by much of Section 5 of the Act. Section 5(1), for example, exempts:

> "The sale of goods or rendering of services necessary to the maintenance of health, safety or life, such as, by way of example, and not by way of limitation, medical or hospital goods or services or prescription medicine."

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[3]See two recent decisions of this court where non-criminal statutes were invalidated on the basis of vagueness; *Great Salt Lake Authority v. Island Ranching Company*, 18 Utah 2d 276, 421 P.2d 504 (1966), and *Jones v. Logan City Corporation*, 19 Utah 2d 169, 428 P.2d 160 (1967).

Using dictionary definitions of "health," "safety," and "life," an untold number of commodities or services could, under varying circumstances, be held necessary for their maintenance and thus exempt. If the Act is upheld, this exemption alone could keep the courts busy for many years determining whether a business violated the Act and was subject to injunction. Since the injunction presumably would proscribe only the sale of the contested items, it is conceivable that thousands of items in each store could be litigated, and since the examples are not "by way of limitation," there is no basis for application of the rule of *ejusdem generis.*

One commodity almost everyone would consider necessary for the maintenance of health and life is food. Is the sale of groceries exempt under the Act? The Governor of the state suggested that they would be. The Attorney General, in his opinion to the Governor, held that they would not. In their brief the individual appellants point out just how unclear the meaning of the legislature is and underscore the tremendous burden that will be placed on the courts in determining what items or activities are or are not exempt.[4]

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[4]At page 19 of individual appellants' brief they state:
"The examples for each kind of exception are listed only by way of example and not by way of limitation. Thus, any service or commodity that fits the type of exemption indicated will be exempt, whether or not its is specifically included. This feature of the Act promotes fairness in that the Legislature has made no attempt to determine definitively all the conceivable varieties, products or services that may be, for example, 'essential to travel by persons within or through the State,' (§5(3)) or 'normally associated with or indental to the operation of recreational, educational or entertainment facilities.' (§5(4))."

The exemption for the sale of goods or rendering of services essential to travel by persons within or through the state raises an interesting question pertinent to both the discrimination and vagueness questions. At the present day,

Subsections (3) and (4) of Section 5, and to a lesser extent Subsection (2), raise two distinct questions. First, what stores are permitted to operate, and second, what goods may be sold on the "common day of rest." In these subsections, exemptions are provided for the sale of certain kinds of goods. Taken alone, this exemption might mean that any store could sell the exempt goods. However, in each of these subsections the "sale of goods" exemption is qualified by a phrase such as "essential", "incidental", or "normally associated with". These qualifiers may impose a meaning upon the subsections that the exempted goods are only those sold in the exempted facilities and operations. Thus, may hardware stores sell newspapers, periodicals and the like or do recreational educational or entertainment facilities have the exclusive right to sell these goods on Sunday? And under the same subsection, are "beverages, tobacco products and confections" some of the examples of goods normally associated with or incidental to the operation of recreational, educational or entertainment facilities or are they in a separate category? The punctuation would appear to indicate that the latter construction is correct.

In addition, is "maintaining of theatres, resorts, golf courses" and the like an example of such services or a separate category. The thrust of these ambiguities falls most heavily on organizations which are not spe-

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untold numbers of people are traveling on trips and vacations by camper truck or trailer, cooking and eating their meals in their mobile accommodations. May grocery stores stay open for the purpose of selling groceries to these persons, even though they might not be able to do so generally?

cifically exempted, but which sell goods conceivably permitted by the statute.

The second problem relates to the kinds of goods that may be sold. Appellants say that the act is strictly one providing for commodity exemptions. But this is far from clear, and ambiguity pervades all the exemptions. For example, Subsection (3) exempts "sales of motor fuels and supplies or services customarily provided by automotive service stations." Does this allow the sale only of items normally associated with the maintenance and operation of automobiles or of all items service stations have been accustomed to carrying in the past? If the latter, may all stores stay open to carry these items or service stations only?

In Subsection (4), goods and services "normally associated with or incidental to the operation of recreational, educational or entertainment facilities" are exempted. Here the problem of what may be sold is even more difficult. The phrase "normally associated" couples two imprecise words, and the problems inherent in the indefiniteness of the phrase are compounded by the broadness of the classification of goods it attempts to modify. Books, for example, would appear to be as "normally associated" with educational facilities as newspapers and periodicals. Thus, may bookstores remain open? Nurseries and greenhouses sell goods associated with what many people regard as their chief recreation. Should such facilities be allowed to remain open or should the exemption be more narrowly in-

terpreted along the lines of the Attorney General's opinion?[5]

Under the same subsection "confections" are exempted. A confection, under many dictionary definitions, is anything confected, and it appears that this is a separate exemption, not necessarily an item normally associated with or incidental to the operation of recreational, educational or entertainment facilities. Countless examples could be cited of questions raised by ambiguities in the Act. But this does not seem necessary. Anyone reading the Act and trying to relate his daily activities to it could undoubtedly come up with more questions. It is not just a matter of the legislature failing to put everything in nice, neat pigeon holes. The act is so laden with ambiguities, indefiniteness and unanswered questions that it is almost impossible to frame the questions.

Vagueness in the Act was purposely devised. This appellants admit. The framers knew that an act without exemptions would not be considered, but any degree of specificity in setting out the exemptions would subject the Act to greater risk of being held arbitrary and discriminatory. Thus, they couched the exemptions in very vague and general language and then tried to minimize the objection of vagueness by not providing express criminal penalties. Respondents submit that despite their attempted subtlety, the framers did not

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[5]In his second opinion, given after the Act was passed, the Attorney General applied, in effect, the rule of *ejusdem generis* and held that the sale of groceries would not be exempt.

accomplish their goals. The exemptions are still replete with arbitrary and unreasonable categorization of both commodity and institutional exemptions and the Act is so vague and ambiguous it cannot be upheld even without criminal penalties.

III

THE COMMON DAY OF REST ACT REFLECTS SPECIAL RELIGIOUS PURPOSES IN ITS PASSAGE AND THUS VIOLATES CONTITUTIONAL PROVISIONS PROHIBITING THE ESTABLISHMENT OF RELIGION AND GUARANTYING RELIGIOUS FREEDOM.

As pointed out by appellant Skaggs in its brief, the first Sunday closing laws had their origin in religious beliefs and for many years were sustained on religious grounds. This is no longer true. The highest courts of the United States and many of the states have made it clear that such laws, to be upheld, must be based on a legitimate exercise of the police power. In determining whether a Sunday closing law violates the constitutional prohibition against laws providing for religious freedom or prohibiting the establishment of religion, the decisive factor is whether the law aids religion or restricts freedom of religion under the guise of setting aside a day of rest and recreation. *McGowen v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 Sup. Ct. 1101 (1961).

In justifying the Common Day of Rest Act, its framers initially avoided religious matters, specifying that its purpose was to provide a common day of diversion and relaxation on a day that had "come to have special significance." After first purposing the Act on a secular basis, the framers then proceeded directly to draw religious motives into its enactment by providing that as an alternate, Saturday could be selected to meet the statutory requirements of closure. In its provision for this alternate day, the Act is substantially, if not wholly, grounded upon religious beliefs. This is a direct "aid to religion" as it takes particular notice of certain religious customs and makes special allowance for them. (Section 1 of the Act).

> "* * * the legislature recognizes that some citizens of the state observe Saturdays as the sabbath and should not be unjustly affected by a common day of rest act * * * it is deemed reasonable to eliminate the risk of such injustice by excepting from the general operation of such an act those who do not engage in their daily labors on Saturday."

The fact that the Act gives special treatment to Saturday, on religious grounds, strongly suggests that the actual reasons for Sunday being selected as the "common day of rest" are also religious in nature.

There are many other groups and persons in this state entitled to equal treatment under the law who have religious tenets calling for observance of their "sabbath" on days other than Saturday or Sunday. Such groups and persons are unfairly and unconstitutionally affected by the Act, as are those who, because

of their religious beliefs or lack of them, observe no special day. The restrictive option of selection of either Saturday or Sunday is unequal in its treatment of such groups and individuals as it does not allow for further exemption, exception or option based on the same logic as the law's own Saturday exemption provision. This discrimination violates not only the freedom and establishment of religion clauses of the United States and Utah constitutions but also those providing for equal protection and due process. Obviously, it is just as unfair and unconstitutional to fail to consider or interfere with religious groups or persons who observe their sabbath on days other than Saturday or Sunday as those who observe Sunday. The right of man to worship as his own individual conscience allows without dictation or interference from the state, is fundamental and is a right available to all. Had the Act limited itself to the establishment of one common day of rest, it might not have involved the issue of religion. However, the expressed religious motives in the Saturday exemption illustrate an attempt by the Act to foster religious beliefs in an unconstitutional manner.

Individual appellants suggest that since the dissenting and specially concurring judges in *Sherbert v. Verner,* 374 U.S. 398, 6 L.Ed.2d 1398, 83 Sup. Ct. 1790 (1936) felt that *Braunfeld v. Brown, supra,* had been overruled by that decision, a Sabbaterian exemption is required. The opinions do not hold or suggest that at all, but only suggest that in *Braunfeld* the court should have invalidated the Sunday closing legislation.

In any event, Utah's constitutional provisions on religious liberty and religious toleration are probably stronger than any other state's. See Article I, Section 4, and Article III, Section 1, Utah's Constitution. The Act must be tested under these constitutional provisions, not only the First Amendment of the United States Constitution.

IV

THE COMMON DAY OF REST VIOLATES CONSTITUTIONAL PROHIBITIONS AGAINST SPECIAL LEGISLATION, CONSTITUTES AN UNCONSTITUTIONAL EXERCISE OF THE POLICE POWER, AND IS NOT DESIGNED TO ACCOMPLISH ITS STATED PURPOSES.

Under Article VI, Section 26, of the Utah Constitution, the legislature is prohibited from enacting any private or special laws:

* * *

> "16. Granting to an individual, association or corporation any privilege, immunity or franchise."

Section 26 further provides that:

> "In all cases where a general law can be applicable, no special law shall be enacted."

Closely allied to the question of whether legislation is discriminatory under equal protection or uniform operation provisions is the question of whether it also

discriminates because it constitutes special legislation. Thus, in *Justice v. Standard Gilsonite Company,* 12 Utah 2d 357, 366 P.2d 974 (1961), this court invalidated legislation on the grounds that it violated not only Sections 2 and 24 of Article I, but also Section 26 of Article VI of the Utah Constitution. The legislation in that matter imposed a penalty upon employers who failed to pay wages to separated employees within twenty-four hours from demand, but exempted, inter alia, banks and mercantile houses. The court concluded that there was no reasonable basis for excluding banks and mercantile houses from the penalty provisions, and that the Act therefore constituted class legislation.

In *Backman v. Salt Lake County,* 13 Utah 2d 412, 375 P.2d 756 (1962), this court rejected several claims of unconstitutionality, but held that Civic Auditorium and Sports Arena Act of 1961 unconstitutional on the basis that it constitutted special legislation, violating the requirement that where a general law can be applicable no special law shall be enacted. The holding of the court was based upon the ground that the act provided for a commission to operate auditoriums only in counties having over 250,000 population.

See also *Openshaw v. Halfin,* 24 Utah 420, 68 Pac. 138 (1902), *Brubaker v. Bennett,* 19 Utah 401, 57 Pac. 170 (1899).

The courts of many other states have held statutes creating special privileges or disabilities invalid under the special legislation prohibitions of their own consti-

tutions. In *Stanton v. Mattson,* 175 Neb. 767, 123 N.W. 2d 844 (1963), the court stated the test as follows (p. 848):

> "If [parties] are clearly within the general scope and reason of the act, so that the provisions exempting them from its operation arbitrarily permit them to act in contravention of its terms and purpose which are forbidden to the public at large, there can be no doubt that the statute must fail."

Additional cases so holding are *Cleland v. Anderson,* 66 Neb. 252, 92 N.W.306 (1902); *Louisville & N.R.R. Company v. Faulkner,* 307 S.W.2d 196 (Ky., 1957); and *Harvey v. Board of Chosen Freeholders,* 30 N.J. 381, 153 A.2d 10 (1959). The courts have also held that the constitutional prohibition against special legislation imposes a standard additional to the more general requirement of equal protection of the law. See, e.g., *Sarner v. Union T.W.P.,* 151 A.2d 208, 55 N.J. Super. 528 (1959).

The prohibition against special legislation has been applied by this court in connection with closing statutes. In *Saville v. Corless, supra.,* it said (p. 52):

> "We also think the act special legislation. It only applies to cities of 10,000 population or over. Business houses or commercial establishments in other cities and towns may keep open at all hours of the day or night and sell anything not otherwise forbidden by law. The act further exempts drugstores and commercial houses dealing exclusively in, or whose major portion of stock consists of, foodstuffs, meats, and provisions of a perishable nature. Under the act, such establishments

or houses can keep open and sell anything after six o'clock * * * Clearly that is special legislation, and the granting of privileges forbidden by the Constitution."

The present Act's stated purpose (Section 1) is: "* * * to promote weekly rest from the routine of daily affairs * * * [while] permit[ing] conduct of certain labor and the sale of certain goods and services which are vital to the maintenance of basic functions of the community or which are necessary to the existence of facilities for diversion, recreation or relaxation."

In reviewing many of the numerous institutional and commodity exemptions, however, it is difficult to conceive of their relationship to the avowed purpose. The Act, for example, excludes all activities of every governmental agency regardless of how vital to maintenance of the basic functions of the community or how necessary to the pursuit of recreation and relaxation. It exempts all sales or services essential or even incidental to operations which are "customarily" continuous without regard to the necessity for such continuous operations. It exempts extraction or processing of natural resources whether or not continuous operation is required. This exclusion affects a substantial portion of the state's labor force with no logical basis; there is no reason why employees of many enterprises engaged in the extraction and processing of natural resources cannot stop and give their employees Sunday off as easily as many other industries. Clearly this exclusion has been made for the benefit of a special class, whose opposition to the Act would otherwise have made its passage impossible.

In addition to the exemptions specifically granting preferential status to certain businesses, there are other exemptions which have the obvious effect of precluding feasible operation of some businesses while permitting the operation of others. This court in *Gronlund v. Salt Lake City, supra.,* made it known that it could not close its eyes to the necessary effect of such exemption provisions.

A distinct, but somewhat related, objection to the Act is that it constitutes an unconstitutional exercise of the police power. A state, like any branch of government, has limited powers, and acts which go beyond the scope of its powers are ineffectual. It has long been recognized that the police power of the state is limited to measures which promote the public health, morals, safety and the like. When a state attempts to adopt arbitrary measures, having no relationship to these police power objectives, they are void under the Federal and state constitutions. The basic case expounding this doctrine is *Mugler v. Kansas,* 123 U.S. 623, 8 Sup. Ct. 273 31 L.Ed. 205 (1887), by which prior decisions declining to interfere with state measures allegedly exceeding the police power were overruled. In its decision, the United States Supreme Court stated (p. 661):

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a strong duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to

> protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

This court has frequently followed the holding of *Mugler v. Kansas.* It has been cited by the court so often that the proposition is beyond challenge. See for example, *Sol Block & Griff v. Schwartz,* 27 Utah 387, 76 Pac. 22 (1904) and *State v. Certain Intoxicating Liquors,* 51 Utah 569, 172 Pac. 1050 (1918). The principle was, in fact, applied by the court to invalidate closing legislation in the Utah cases cited above.[6]

In *Gronlund v. Salt Lake City, supra.,* the court said (p. 466):

> "The authority of a state to enact Sunday closing laws is generally referable to the police power of the state * * *
>
> "Such being the case, the narrower question confronts us: Is the ordinance of Salt Lake City adapted to accomplish the objects or some of them for the accomplishment of which the power is granted, or is it rather an arbitrary exercise of the assumed grant of power and hence not within the intendment of the legislative grant of power and therefore violative of constitutional guarantees against unreasonable discrimination?"

In answering the question and holding the ordinance invalid, the court stated (p. 467):

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[6]*Saville v. Corless,* 46 Utah 495, 151 Pac. 51 (1915); *Broadbent v. Gibson,* 105 Utah 53, 140 P.2d 939 (1943); and *Gronlund v. Salt Lake City,* 113 Utah 284, 194 P.2d 464 (1948).

> "* * * we find the prohibitions of the ordinance bear no reasonable relationship to the objectives to be accomplished by enactments made pursuant to such grant. Of this ordinance, it can be said that 'there is no fair reason for the law that would not require with equal force its extension to others which it leaves untouched.' "

Another class specifically granted special privileges are those enterprises associated with recreation, such as shops at resorts, ski lodges, golf courses and the like. While it may be argued that one of the main purposes of the Act is to promote rest and recreation, as stated by this court in *Gronlund v .Salt Lake City, supra.,* (p. 468):

> "* * * even considering the desirability of promoting recreational activity on Sunday, no fair reason suggests itself as to why their sale should be permitted on Sunday while the sale of other commodities is prohibited. Neither sporting equipment nor nursery products are such from the standpoint of the buyer or seller that they cannot be purchased on a weekday, though it is the intention of the buyer to use the equipment and plant the tree or flowers on a Sunday. Neither is likely to deteriorate over Saturday night or be depleted during Sunday. Boxing gloves and baseball bats are at least as staple as butter and bananas."

As suggested by this court in *Gronlund,* cases dealing with the police power present an additional question. Justice Straup in *State v. Salt Lake Tribune Publishing,* 68 Utah 187, 249 Pac. 474 (1926), cited the following rule: (p. 478-479):

> "In order that a statute or ordinance may be sus-

> tained as an exercise of the police power, the courts must be able to see (1) that the enactment has for its object the prevention of some offense or manifest evil for the preservation of the public health, safety, morals, or general welfare, and (2) that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some appreciable and appropriate manner tend towards the accomplishment of the object for which the power is exercised."

The Common Day of Rest must be held invalid under both tests. The avowed purpose of the Act is to provide a common day of rest for the citizens of the state. The legislature expressly recognized the importance of effecting its purpose when it stated (Section 1):

> "The legislature finds that the number of such persons or persons (sic) who would close their businesses on Saturday in order to be open on Sunday is small enough in this state that this exception does not impair the purposes of a uniform day of rest."

This, respondents suggest, proved to be an erroneous assumption. But the purpose of the Act was even more impaired by its numerous and indefinite exceptions. The breadth of these exceptions eliminate any possibility that the Act would operate to promote the public health, morals or safety or in accomplishing its stated purpose. It contains so many exceptions that it is effectively (and designedly) directed at a particular class of business, not only entirely lawful, but essential to the state. Most employees in the state are not affected

by the Act, and even those who are can be denied the common day of rest, merely by their employer staying closed on Saturday.

Considering the Act as a whole it is clear that the legislature acted on the theory that its powers are plenary—an assumption clearly untenable. As stated in *Lochner v. New York,* 198 U.S. 45, 25 Sup. Ct. 539, 49 L. Ed. 934 (1905), and cited with approval in *State v. Salt Lake Tribune Publishing Company, supra.* (p. 479):

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation and not from their proclaimed purpose * * *"

V

IN ATTEMPTING TO DECLARE SOMETHING TO BE A NUISANCE WHICH IS NOT ONE IN FACT, THE LEGISLATURE ACTED ARBITRARILY AND BEYOND ITS POWERS.

In an apparent effort to minimize constitutional objections to the Act, the legislature provided that any violation thereof should not be deemed a crime "but is declared to be a public nuisance" (Section 6). In doing so, it violated other constitutional prohibitions. This is but a specific example of the more general requirement that legislation must come within the police power. The rule is generally stated in 66 C.J.S., Nuisances, §7(d) as follows:

> "The power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably. It does not lie within the power of the legislature to declare any or every act a nuisance. It cannot make anything, not in its nature a nuisance, a nuisance by mere declaration that it is so: * * *"

Decisions from many jurisdictions support the above rule. In *Smith v .Costello,* 77 Ida. 205, 290 P.2d 742 (1955), the legislature passed an act providing that "any dog running at large in territory inhabited by deer, is hereby declared to be a public nuisance and may be killed at such time by any game conservation officer * * *." The Idaho Supreme Court, in holding the statute unconstitutional, noted that a dog was not a nuisance per se and that territory inhabited by deer might be construed to be any place in the state where deer was found. It stated (p. 744):

> "Governmental regulations promulgated under police power must be consistent with the due

process of law provision and subordinate thereto. Police regulations cannot arbitrarily and without any sufficient reason authorize the killing or wounding of animals belonging to another. *The legislature cannot declare something to be a nuisance which is not one in fact or per se; and to declare that a dog running at large in territory inhabited by deer is a public nuisance, without more, is arbitrary, unreasonable and unconstitutional regulation.*" [Emphasis added.]

In *City of Ft. Worth v. McDonald,* 293 S.W.2d 256 (Civ. App. Tex., 1956), the Ft. Worth City Council had passed an ordinance finding that pinball machines encouraged idleness, loafing, vagrancy, and gambling and declaring them to be nuisances per se. The court holding the ordinance to be unconstitutional stated (p. 258):

> "It is no better argument that the city has power by charter and statute to define and prevent a nuisance. It is axiomatic that no legislative body may 'by an arbitrary standard, declare that to be a nuisance which is not so in fact.' "

Another case is *First Avenue Coal & Lumber Co. v. Johnson,* 54 So. 598 (Ala., 1911), wherein the Alabama Supreme Court stated (p. 599):

> "The Legislature, therefore, cannot, by its mere ipse dixit, make that a nuisance which is not in fact or in truth a nuisance, or akin thereto. That which has none of the elements or characteristics of a nuisance, that has no capacity or tendency to injure the public health, public morals, the public safety, or the public interest, cannot be made a

nuisance by the legislature, under the guise of a police legislation declaring it such."

In *State v. Smith*, 47 S.W.2d 642 (Ct. Civ. App. Tex., 1932), the legislature had passed an act making it unlawful to plant cotton on land on which cotton had been planted the year before or to plant more than 30% of his land in cotton. The purpose of the act was to prevent soil erosion and the spreading of certain cotton diseases. Violation of the act was declared to be a public nuisance and subject to injunction by the county attorneys of the state. The court holding the act unconstitutional stated (p. 644-645):

> "Our courts, both federal and state, uniformly hold that the Legislature cannot, in the guise of a police regulation, declare that to be a nuisance which in fact is not a nuisance * * *
>
> "No contention is made that the growing of cotton is inherently wrong or that it in any way affects the health or morals of the state * * *
>
> "Another principle involved in the exercise of the police power which it is hardly necessary to state, is that a mere legislative declaration that a business or occupation, harmless and innocuous in itself, is inimical to the public interest, either as a whole or as to some feature of its conduct, cannot make it so, unless by reason of surrounding conditions the declaration can be said to accord with the fact as based upon common observation and human experience."

See also *Shepard v. Giebel*, 110 S.W.2d 166 (Tex., 1937).

Looking at the definitions of "public nuisance", it is obvious that, even by the broadest standards, a violation of the Common Day of Rest Act could not be declared a "public nuisance." A good definition is given in *Commonwealth v. South Covington N.C. St. Ry. Co.,* 205 S.W. 581, 181 Ky. 459:

> "A 'common or public nuisance' is the doing of or the failure to do something that injuriously affects the safety, health, or morals, of the public, or works some substantial annoyance, inconvenience, or injury to the public."

In *People on Complaint of Green v. Willis,* 17 N.Y.S.2d 784, public nuisance was defined as follows (p. 788):

> "The fundamental and commonly recognized attributes of a 'public nuisance' are the same, whether at common law or by statutory regulation, 'public nuisances' being founded on wrongs that arise from unreasonable, unwarrantable or unlawful conduct working an obstruction or injury to the public and producing material annoyance, inconvenience and discomfort."

Under the definition in 76-43-3 Utah Code Annotated 1953, a public nuisance:

> "* * * consists in unlawfully doing any act, or omitting to perform any duty, which act or omission either: (1) annoys, injures or endangers the comfort, repose, health or safety of three or more persons; or (2) offends public decency; or * * * (4) in any way renders three or more persons insecure in life or the use of property."

Since the operation of a lawful business on Sunday does not in any manner come under the definition of public nuisances, as set forth above, particularly when some stores, merely by remaining closed on Saturday, can remain open on Sundays and all stores can remain open for the sale of certain items, it is beyond the power of the Utah Legislature to declare that a violation of the Act is a public nuisance. Inasmuch as this provision of the Act is inseparable from the Act itself, the whole Act must fall as being unconstitutional.

VI

THE COMMON DAY OF REST ACT VIOLATES ARTICLE VI, SECTION 23 OF THE UTAH CONSTITUTION REQUIRING A BILL TO HAVE ONLY ONE SUBJECT, CLEARLY EXPRESSED IN ITS TITLE.

The title of the Common Day of Rest Act (Chapter 25, Laws of Utah, 1970) is as follows:

> "An Act Relating to the Establishment of Sunday as a Day of Rest; Providing for a General Prohibition Against the Performance of Labor or Selling on Sunday, For Exemptions from Such Prohibition, and for Definitions and Penalties; and Repealing Sections 76-55-1, 76-55-2 and 76-55-4, Utah Code Annotated 1953."

By reason of its title the Act contravenes Article VI, Section 23, Utah Constitution, which provides:

> "Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title."

The purpose of Section 23 is clearly explained in the early Utah case of *In re Monk,* 16 Utah 100, 50 Pac. 810 (1897) (p. 811):

> "That decision [*Ritchie v. Richards*, 47 Pac. 670] recognized the Constitutional provision limiting bills to one subject and requiring it to be clearly expressed, in the title, as a wholesome and salutory law, that should receive a reasonable interpretation and be rigidly enforced, that legislators and the public may be informed of the purpose of pending bills, and that surreptitious, incongruous, and inconsiderate laws may be prevented."

In *Saville v. Corles, supra.,* this court held that the legislature could not fix the closing hours of mercantile houses in the body of an act where its title indicated that it was for the purpose of regulating working hours of employees. Such unexpressed dual purpose, the court concluded, violated Section 23, and was therefore unconstitutional.

In *Pass v. Kanell,* 98 Utah 511, 100 P.2d 972 (1940), this court held that in comparing the title of an act, "The Registration of Motor Vehicles", with its subject matter, it was demonstrated that the act violated Section 23, in that it contained a subject not described in the title, which imposed responsibilities upon individuals engaged in renting motor vehicles.

And in *Carter v. State Tax Commission,* 98 Utah 96, 96 P.2d 727 (1939), the court found a statute to be a violation of Section 23, when an examination of its title disclosed nothing indicative of a revenue measure to equalize gasoline tax.

The title of the present Act limits the day of rest to Sunday, a "uniform day". However, the body of the Act then provides that those who desire may have the option of taking their "common" day of rest on Saturday and remain open and operating on Sunday. Thus, the Act does not deal with a single subject, that is—Sunday as the common or uniform day of rest. It in fact provides an election of either Saturday or Sunday for such purpose. It does not provide for general prohibition against the performance of labor or selling on Sunday. Consequently it is in direct contravention of Article VI, Section 23.

CONCLUSION

As respondents have demonstrated, the Common Day of Rest Act must be held invalid for a variety of reasons.

The Act unreasonably discriminates between persons similarly situated and cannot be applied uniformly as required by the Utah Constitution. There is no valid basis for its unequal treatment of Utah's citizens and businesses, the Act being at least as arbitrary as those struck down by this court in the *Broadbent* and *Gronlund* cases.

The attempt by the legislature to regulate without regulating has resulted in an act the meaning of which cannot be ascertained, and which is therefore void for vagueness.

In one respect, the act is clear: it patently provides a classification based upon purely religious grounds, i.e., it includes an exception for the benefit of people of a particular religious persuasion. This violates the establishment clauses of the Utah and United States Constitutions.

The classifications contained in the Act are not only vague and ambiguous, and lack uniformity, but the protected groups are obvious beneficiaries of special legislation purportedly based upon the police power. The Act is not written in such manner as to forward, let alone accomplish its stated purposes. Moreover, the bill includes a number of subjects which are not clearly expressed in the title.

The trial court was correct in holding that the Common Day of Rest Act is invalid in its entirety and in dismissing the actions. The judgment should be affirmed.

Respectfully submitted,

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