CASE NOTES

ADMINISTRATIVE LAW—LIQUOR LICENSE—MERE PRIVILEGE DOCTRINE OVERTURNED

Appellant filed an application for a retail liquor license in accordance with existing city ordinances. The application was denied for the sole reason that the proposed location of the appellant's store lay outside of the geographical area in which the policy of the governing authority permitted the granting of package store licenses. The appellant then filed a complaint under the Civil Rights Act[1] against the mayor and city council in the federal district court alleging that, by the rejection of his application, he had been deprived of his constitutional rights under the fourteenth amendment. In addition, he also alleged that there were no ascertainable standards by which the qualifications and fitness of applicants could be determined and that no geographical standards had been prescribed by city ordinances. The district court granted the appellee's motion to dismiss, but the court of appeals reversed and remanded[2] on the ground that the fundamental requirements of due process are applicable to the licensing process.

In *Hornsby v. Allen*[3] the court held that licensing consists of the determination of factual issues in the application of legal criteria to them. This constitutes a judicial act which necessitates meeting the standard of due process, and municipal authorities are not freed from meeting the standard by being allowed to exercise uncontrolled discretion on the ground that a liquor license is a privilege and not a right. An applicant should be afforded reasonable opportunity to show that he does or does not meet the prescribed standards.[4]

Georgia has followed the privilege doctrine in regard to licensing for many years. Licenses fall into two categories: those granted for the purpose of collecting revenue and those granted under the police power.[5] The former, such as licenses for meat markets[6] or to sell insurance,[7] are not

1. 42 U.S.C. §1983 (1964): "Every person who ,under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
2. Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967).
3. 326 F.2d 605 (5th Cir. 1964).
4. Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).
5. Peginis v. City of Atlanta, 132 Ga. 302, 63 S.E. 857 (1909).
6. City Council v. Sanders, 164 Ga. 235, 138 S.E. 234 (1927).
7. Riley & Co. v. Wright, 151 Ga. 609, 107 S.E. 857 (1921).

revocable at will while the latter, e.g. liquor licenses,[8] are. Under the code,[9] the sale of intoxicating liquors is a privilege. State court decisions have held that a license to sell liquor confers a mere privilege and is not property within the meaning of the due process and equal protection clauses of the United States Constitution; as merely a privilege, it can be granted, denied or revoked at the discretion of the governing authority without notice or hearing.[10] A writ of mandamus will not lie to compel the issuance of a license, since the petitioner, to be entitled to this relief, must show a clear legal right to the particular act which he seeks to have compelled.[11]

Professor Kenneth C. Davis, commenting on the *Hornsby* decision in his treatise,[12] wrote that a practitioner whose client suffers the disadvantages of the privilege doctrine in state courts should exploit its potentialities in the federal courts. In order to allege an actionable claim in the United States district court[13] under the Civil Rights Act,[14] facts must be affirmatively set forth which show that the plaintiff has been denied a protected right, privilege or immunity, and that the defendant acted under color of a state or local law.[15] A federal cause of action lies if an applicant has been denied a license, or a person has had his license suspended or revoked as a consequence of his having been deprived of a federal right by the purposeful action of a member of a state licensing authority.[16] Such action

8. Lewis v. City of Smyrna, 214 Ga. 323, 104 S.E.2d 571 (1958); Richmond County v. Glanton, 209 Ga. 773, 76 S.E.2d 65 (1953); Highnote v. Jones, 198 Ga. 56, 31 S.E.2d 13 (1944); Phillips v. Head, 188 Ga. 511, 4 S.E.2d 240 (1939).
9. GA. CODE ANN. §58-1068 (1965 Rev.).
10. *See, e.g.*, Kicklighter v. City of Jessup, 219 Ga. 744, 135 S.E.2d 890 (1964); City of East Point v. Weathers, 218 Ga. 133, 126 S.E.2d 675 (1962); Weathers v. Stith, 217 Ga. 39, 120 S.E.2d 616 (1961); Whitehead v. Cranford, 210 Ga. 257, 78 S.E.2d 797 (1953); Highnote v. Jones, 198 Ga. 56, 31 S.E.2d 13 (1944); McKown v. City of Atlanta, 184 Ga. 221, 190 S.E. 571 (1937); Harbin v. Holcomb, 181 Ga. 800, 184 S.E. 603 (1936); Melton v. City of Moultrie, 114 Ga. 462, 40 S.E. 302 (1901); Ison v. City of Griffin, 98 Ga. 623, 25 S.E. 611 (1896); Hudon v. North Atlanta, 108 Ga. App. 370, 133 S.E.2d 58 (1963); Collier v. State, 54 Ga. App. 346, 187 S.E. 843 (1936); Ebling v. City of Rome, 54 Ga. App. 608, 188 S.E. 727 (1936).
11. Weathers v. Stith, 217 Ga. 39, 120 S.E.2d 616 (1961); Murphy v. Withers, 204 Ga. 60, 48 S.E.2d 721 (1948); Ward v. Drennon, 201 Ga. 605, 40 S.E.2d 549 (1946); Harmon v. James, 200 Ga. 742, 38 S.E.2d 401 (1946); Phillips v. Head, 188 Ga. 511, 4 S.E.2d 240 (1939); McKown v. City of Atlanta, 184 Ga. 221, 190 S.E.2d 571 (1937); Hodges v. Kennedy, 184 Ga. 400, 191 S.E. 377 (1937); Harbin v. Holcomb, 181 Ga. 800, 184 S.E. 603 (1936); City of Atlanta v. Blackman Health Resort, 153 Ga. 499, 113 S.E. 545 (1922); Cassidy v. Wiley, 141 Ga. 331, 80 S.E. 1046 (1914); Adkins v. Bennett, 138 Ga. 118, 74 S.E. 838 (1912).
12. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §7.19 (1958, Supp. 1965).
13. 28 U.S.C. §1343 (3) (1962): "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."
14. 42 U.S.C. §1983 (1964).
15. Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Lee v. Hodges, 321 F.2d 480 (4th Cir. 1963); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963); Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962); Sigue v. Texas Gas Transmission Corp., 235 F.Supp. 155 (W.D. La. 1964).
16. Hornsby v. Allen 326 F.2d 605 (5th Cir. 1964); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947); Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946); Rose Chalet Functions Corp. v. Evans, 264 F.Supp. 790 (D. Mass. 1967).

lies even if there is no proof of scienter, that is, that defendant knew or had reason to know that his conduct infringed a federal right.[17]

"The federal courts can not determine whether an applicant is entitled to a license, but they can insure that the constitutional principles of due process and equal protection are followed."[18] If there are no ascertainable standards established by the governing authority by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under such system.[19]

For all intent and purposes, the privilege doctrine, as espoused by Georgia law and state court decisions, is a dead letter. May it rest in peace.

JAY C. MINER

CONSTITUTIONAL LAW—CIVIL RIGHTS—SCHOOLS CAN REGULATE STUDENTS' PERSONAL APPEARANCE

The plaintiff filed suit in federal district court on behalf of his minor son against the Orleans Parish School Board, its superintendent and the principal of the high school where his son was to begin his sophomore year.[1] The school suspended the boy because his hair was too long; the plaintiff requests damages for public embarrassment due to the suspension and for the issuance of a preliminary injunction. The case is based on the Civil Rights Act[2] and the rights guaranteed by the first, eighth, nineteenth and fourteenth amendments of the United States Constitution.

The court held that the school order requiring the student to cut his hair did not infringe upon his constitutional rights buttressed by the Civil Rights Act. The school order did not violate his right, by virtue of the first amendment, to freedom of expression because long hair symbolizes nothing and symbolic expression protected by the first amendment must symbolize a specific viewpoint or idea. Secondly, long hair is a type of expression manifested through conduct and is therefore subject to reasonable state regulation. Assuming that the ninth amendment purports to protect "fundamental rights" not mentioned in the Bill of Rights, the plaintiff cannot base his suit on the ninth amendment because the right to free choice of grooming is not a "fundamental right." The court also refused to accept the contention that the school order was cruel and unusual punishment prohibited by the eighth amendment.

17. Monroe v. Pape, 365 U.S. 167 (1961); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Rose Chalet Functions Corp. v. Evans, 264 F.Supp. 790 (D. Mass. 1967).
18. 1 GA. BAR JOURNAL 550, 552 (1965); *cf.* Crews v. Undercofler, 249 F. Supp. 13 (N.D. Ga. 1966).
19. Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).
1. Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967).
2. Civil Rights Act, 16 Stat. 144 (1870).