INJUNCTIVE RELIEF AGAINST UNLICENSED PRACTICE OF OCCUPATIONS AND PROFESSIONS

In the past thirty-five years a number of cases have appeared dealing with the problem of enjoining the unlicensed practice of medicine, dentistry, optometry, real estate brokerage and countless other occupations regulated by statute. The class of cases treated in this comment all involve violation of the license requirement, the basic question being the capacity of the plaintiff to maintain the suit.[1]

Three types of plaintiffs have attempted to obtain injunctions: (1) private individuals—the licensed practitioner or the appropriate occupational or professional association; (2) law enforcement officers—the attorney general or local prosecutor; and (3) regulatory agencies—usually the appropriate licensing board or department. The private individuals usually rely on a theory of protecting a valuable property right in the exercise of the license. Enforcement officers contend basically that unlicensed practice is a public nuisance. The licensing agency brings suit in the exercise of an express or implied statutory power to enforce the regulation by injunction. All three approaches have resulted in nearly chaotic contradictions among the various jurisdictions. This comment will consider the bases employed in granting or denying injunctions and the desirability of that remedy. In the conclusion a suggestion is offered which may overcome many of the weaknesses of the present situation.

Is the Injunction Desirable?

Recent legislative regulation of occupations invariably includes the imposition of a criminal penalty for practicing without a license. Such conduct is usually classified as a misdemeanor punishable by a small fine or a short term of imprisonment.[2] Thus the enforcement of a statute which is of little public interest, relatively minor public harm and results in trivial penalties, is added to the already overwhelming burdens of the prosecutor. The greatest weakness of utilizing a traditional criminal sanction as a deterrent probably stems from the circumstance that unlicensed practice frequently results in steady financial gain to the violator. An extreme example of the contempt in which the penalty is held is found in a 1922 Illinois case where 52 unlicensed chiropractors had formed an association to collect dues to pay fines, costs

[1] Decisions dealing with enjoining unauthorized practice of law are not included due to unique ancillary problems connected with the court's inherent contempt power over such conduct. See 27 N.Y.U.L. Rev. 829 (1952).

[2] See for example Cal. Bus. and Prof. Code §2426 (medicine, $100-$600, two-six months); Ill. Ann. Stat. c. 91, §16i (medicine, $100-$500, one year maximum); Mass. Ann. Laws c. 112, §52 (dentistry, $1000 maximum, six month maximum); New York Educ. Law §6513 (medicine, $500 maximum, one year maximum); Ohio Rev. Code §4731.99 (medicine, $50-$500, one-twelve months).

and attorneys' fees incurred in defending the members.[3] Several of the defendants were alleged to have returned to their practice after having served short terms of imprisonment. In other instances defendants operate as corporations or as lessees of department store space. The high competitive spirit which appears to exist on the part of both the licensed and unlicensed practitioner also tends to lessen the influence that fear of punishment presumably exercises in other criminal areas.

Criminal statutes and injunctions have one important common element: they describe conduct which will result in financial or bodily restrictions. The statute is addressed to the group. A commonly worded statute might begin, "No person shall . . ." When a person engages in the described conduct, the slow process of information and jury trial begins, assuming the prosecutor presses the case. On the other hand the injunction is addressed to the defendant personally. "The court orders John Doe . . ." not to act in a certain manner. The original plaintiff will present evidence of violation of the decree to the juryless equity court, thus increasing the chance of prosecuting further violations. The simpler procedure and narrower scope of contempt actions under a decree compared with the possibility of a succession of complete criminal trials appears to enhance the value of the injunctive sanction. Furthermore, punishment for violation of the injunction, treated as a flaunting of the court's authority rather than violation of the statute, could be varied beyond the rigid upper or lower limits set by the usual misdemeanor provision. This allows the court to apply a flexible fine or term of imprisonment, appropriate to the circumstances of the case. The personalization of the proscribed conduct in a decree and the greater chance of prosecution under the decree cause the injunction to appear as a more effective device for enforcing the statute.[4]

Suit By Licensed Practitioner

In the absence of statute, the individual plaintiff has to adapt general principles of equity to the new area of occupational regulation.

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[3] People *ex rel.* Shepardson, Atty. Gen. v. Universal Chiropractor's Ass'n, 302 Ill. 228, 134 N.E. 4 (1922).

[4] For a description of personal experience with the injunction in the Chicago area, see McCurdy, *Use of the Injunction to Destroy Commercialized Prostitution,* 19 Jour. Amer. Inst. Crim. L. 513 (1929). Also see Simpson, *Fifty Years of American Equity,* 50 Harv. L. Rev. 171, 224-228 (1936).

The Kentucky statutes outline the procedure to be followed upon violation of the injunction. "In case of a violation of any injunction granted [to the Kentucky State Board of Dental Examiners] . . . the court . . . may summarily try and punish the offender; and the court's discretion concerning the degree of punishment shall not be subject to the provisions of §432.260 [requiring jury trial for contempt fines in excess of thirty dollars or thirty hours]. The proceedings shall be commenced by filing . . . an affidavit . . . The trial may be had upon the affidavit, but either party may . . . demand . . . oral examination of the witnesses." Ky. Rev. Stat. §313.360(2).

The two traditional grounds for equity jurisdiction which have been resorted to in enjoining unlicensed practice are protection of property and injunction against nuisance.

1. *Property*

When a licensed practitioner is seeking an injunction, injury to property is a common allegation. Such an allegation may serve to avoid possible application of the virtually extinct rule that equity protects only property rights.[5] There are two discernible aspects to the property argument: defendant's interference with the exercise of plaintiff's license, and defendant's interference with plaintiff's profits by criminal conduct which is also competitive.

The courts which protect plaintiff from interference with his license hold that the right to practice is a valuable privilege or franchise granted by the state and therefore entitled to injunctive protection from interference by unlicensed practice.[6] The reasoning behind this conclusion appears to be indefensible. The recent Illinois case of *Burden v. Hoover*[7] illustrates the use of this theory. The court relied upon two prior license cases, one of which[8] involved the constitutional question of whether revocation of the license was deprivation of property without due process of law, and the other[9] the constitutionality of the statutory requirement of a four-year study for chiropractors. In such cases the administrative procedure or the statute is held unconstitutional to protect the individual from abusive exercises of governmental power. When an injunction is granted to the practitioner to protect his license, he is being protected from competition arising from unlicensed practice. A finding that "property" exists in both situations ignores the different context in which the cases arise. The question in the injunction proceeding is whether the grant of the license entitles the holder to restricted competition as an incident of his "property" in the license. The fact that the license holder should be protected from the state does not *ipso facto* mean that he should be protected from an unlicensed practitioner.

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[5] Kenyon v. Chicopee, 320 Mass. 528, 70 N.E. 2d 241, 175 A.L.R. 438 (1936); Hawks v. Yancey, 265 S.W. 233 (Tex. Civ. App. 1924); 32 B.U.L. REV. 419 (1952); 25 MICH. L. REV. 889 (1927).

[6] Burden v. Hoover, 9 Ill. 2d 114, 137 N.E. 2d 59 (1956); Boggs v. Werner, 372 Pa. 312, 94 A. 2d 50 (1953); Ezell v. Ritholtz, 188 S.C. 39, 198 S.E. 419 (1938); McMurdo v. Getter, 298 Mass. 363, 10 N.E. 2d 139 (1937); Rowe v. Standard Drug Co., 132 Ohio St. 629, 9 N.E. 2d 609 (1937); Sloan v. Mitchell, 113 W. Va. 506, 168 S.E. 800 (1933); Taylor v. New System Dental Lab, Inc., 29 Ohio N. P. (n.s.) 45 (1932).

[7] *Supra* note 6.

[8] Smith v. Department of Registration and Education, 412 Ill. 332, 106 N.E. 2d 722 (1952).

[9] People v. Love, 298 Ill. 304, 131 N.E. 809, 16 A.L.R. 703 (1921). The same reliance on constitutional litigation is found in Sloan v. Mitchell, *supra* note 6.

Granting the injunction to 'protect the plaintiff's license' is also based on reasoning analogous to that found in cases involving competing utilities or carriers where the nonfranchised utilities were enjoined by the franchised plaintiff merely upon a showing that the market had been invaded.[10] This "analogy" would seem to arise from carelessly adopting precedent, since it ignores a fundamental distinction between utility franchises and occupational licenses.

Both licensing schemes are based on the exercise of the inherent police power—the power of the legislature to protect public health, safety and welfare, even at the expense of absolute economic freedom. The aspect of the police power which validates the utility's exclusive franchise is the desire of the legislature to ensure the supply of goods and services to the public at reasonable rates in economic areas where there is a high cost of entering the field and where undesirable private natural monopoly may arise. On the other hand, the aspect of the police power used to validate occupational regulation is the need for immediate protection of public health or welfare from unskilled practitioners.[11] Regulation of the healing arts protects the public from immediate bodily harm. Regulation of real estate brokers and attorneys protects the public from mishandling of important commercial and social matters. Regulation of watch-repairing and photography has been struck down as unconstitutional, there being no relationship between public health, safety and welfare and the regulated occupations.[12] The public interest that is furthered in occupational regulation is not the guaranty of goods and services at reasonable rates but rather protection from unskilled persons who could cause substantial harm. If this distinction is recognized and applied to the issue of who can sue, it follows that a *public right* is invaded by unlicensed practice and private persons therefore have no standing to sue.[13]

Most of the courts which deny an injunction to the individual plaintiff employ this reasoning.[14] In discussing the rights of private persons

[10] Frost v. Corporation Commission, 278 U.S. 515 (1929); New York, N.H. & H.R. Co. v. Deister, 253 Mass. 178, 148 N.E. 590 (1925); Davis & Banker, Inc. v. Nickell, 126 Wash. 421, 218 Pac. 198 (1923); Farmers' and Merchants' Cooperative Tel. Co. v. Boswell Tel. Co., 187 Ind. 371, 119 N.E. 513 (1918); 94 A.L.R. 775 (1934).

[11] See Silverman, Bennett and Lechliter, *Control by Licensing over Entry into the Market,* 8 LAW & CONTEMP. PROB. 234 (1941) where the state cases are collected and analyzed.

[12] State *ex rel.* Whetsel v. Wood, 207 Okla. 193, 248 P. 2d 612, 34 A.L.R. 2d 1321 (1952) (watchmaking); State v. Ballance, 229 N.C. 764, 51 S.E. 2d 731, 7 A.L.R. 2d 407 (1949) (photography).

[13] Ezell v. Ritholtz, *supra* note 6, is contrary to this conclusion. The court stated, "But since we have held that the purpose of this *action* is the protection of the property rights of optometrists, it is manifest that the State is not a proper party." 188 S.C. at 52, 198 S.E. at 424 (emphasis added).

[14] Delaware Optometric Ass'n. v. Sherwood, 122 A. 2d 424 (Del. Ch. 1956); Contracting Plumbers Ass'n. v. St. Louis, 249 S.W. 2d 502 (Mo. Ct. App. 1952);

under the statute the language of the New Hampshire court in *Board of Registration v. Scott Jewelry Co.*[15] is typical:

> . . . the legislature in some degree suppressed competition. That is, it deprived incompetents of the right to practice. But in so doing, it did not deprive them of property unconstitutionally, because the motive of the regulation was the public health and well-being. The legislative purpose was not at all to benefit competent practitioners but solely to benefit the public who resort to optometrists for services. It was not the profession that required protection but the people.[16]

Although the court notes that reduced competition does arise from the regulatory scheme, this by-product will not serve as a primary foundation for suit by a licensed practitioner. The result achieved by the court in *Burden v. Hoover*[17] indicates the anomaly of finding such statutes constitutionally valid in terms of public health and enforcing the statutes in terms of freedom from competition.

The second aspect of the property approach is based on a theory of unfair business practice. The licensed practitioner seeks an injunction to protect his business, as distinguished from the abstract protection of the license. The basis for the suit arises from conduct of the defendant which is dual in nature: successfully competitive and criminal. Although such a case is not generally included within fair trade statutes,[18] equity has apparently recognized the need for protecting certain business interests from attacks that are beyond the statute. Two Michigan cases, among others, have granted injunctions to unlicensed, unregulated businesses preventing their competititors from conducting illegal lotteries which caused a decrease in plaintiff's business.[19] These cases were used as authority by the Michigan court in *Seifert v. Buhl Optical Co.*[20] in granting an injunction to a licensed optometrist. The theory was that

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Missouri Veterinary Medical Ass'n. v. Glisan, 230 S.W. 2d 169 (Mo. Ct. App. 1950); Lipman v. Forman, 138 N.J. Eq. 556, 49 A. 2d 236 (1946); State *ex rel.* Rice v. Cozad, 70 S.D. 193 16 N.W. 2d 484 (1944); New Hampshire Board of Registration v. Scott Jewelry Co., 90 N.H. 368, 9 A. 2d 513 (1939); Silver v. Lansburgh & Bro., 27 F. Supp. 682 (dictum), aff'd 111 F. 2d (1939); Mosig v. Jersey Chiropodists, Inc., 122 N.J. Eq. 382, 194 Atl. 248 (1947); Georgia State Board v. Friedman's Jewelers, Inc., 183 Ga. 669, 189 S.E. 238 (1936); Drummond v. Rowe, 155 Va. 725, 156 S.E. 442 (1931); Merz v. Murchison, 11 Ohio C. C. R. (n.s.) 458 (1908).

[15] *Supra* note 14.

[16] *Id.* at 376, 9 A. 2d at 518.

[17] *Supra* note 6.

[18] Glover v. Malluska, 238 Mich. 216, 213 N.W. 107, 52 A.L.R. 77 (1927).

[19] Sproat-Temple Theatre Corp. v. Colonial Theatre Enterprises, Inc., 276 Mich. 127, 267 N.W. 602 (1936); Glover v. Malluska, *supra* note 18; Featherstone v. Independent Service Station Ass'n., 10 S.W. 2d 124 (Tex. Civ. App. 1928). *Contra,* Cook v. Normac Corp., 176 Md. 394, 4 A. 2d 747 (1939).

[20] 276 Mich. 692, 268 N.W. 784 (1936). The report of the case does not indicate the losses suffered. The Michigan Society of Optometrists was also a

the defendant, violating the law against practicing optometry without a license, was competitively damaging the plaintiff's business. In such a case it is immaterial whether unlicensed trade or a lottery is the crime involved.

A serious limitation on this approach is the problem of proving the connection between the defendant's criminal activity and the loss of business by the plaintiff. The Michigan court expressly recognized this limitation in *United-Detroit Theatre Corporation v. Colonial Theatre Enterprises, Inc.*,[21] where a trial court decree enjoining the defendant from conducting a lottery was dissolved. The court held:

> The record fails to show that the theatres were in the same vicinity, thereby creating competition, nor do we find any proof that the lottery scheme affected the business of plaintiff's theatres. The restraining order of a court may not be exercised to enjoin the commission of a crime *in the absence of a showing of damage* to persons or property rights. (Emphasis added.)[22]

It is clear that mere proof of a dollar loss by the plaintiff and a dollar gain to the defendant does not alone show successful competition stemming from the crime.[23] If defendant's clients would have gone to the plaintiff had the defendant not existed or if the plaintiff's clients left him to go to the defendant specifically, rather than leaving him merely to go to someone else, the case is clear. The urban practioner has a difficult task in proving that his losses, if any, are attributable to the defendant. If he is able to show this causal connection an injunction should not be denied.

Although this result does not satisfy the usual rule that the basis for equity jurisdiction must exist independent of the criminal statute, the plaintiff is entitled to conduct his practice and make his business decisions without continuous damaging interference from criminal offenders. It would seem that in determining the question of an adequate legal remedy the court should ignore the criminal sanction. Such sanctions provide a public remedy, unavailable to the private plaintiff.

2. *Nuisance*

Major discussion of the adaptability of nuisance doctrines to unlicensed practice cases will be developed in dealing with suit by public officials. Assuming for present purposes that a nuisance does exist, can the licensed practitioner enjoin it?[24] The traditional distinction between public and private nuisance is that if the harm inflicted on a private

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plaintiff, thus weakening the authority of the *Sproat-Temple* and *Glover* cases, *supra* note 19.

[21] 280 Mich. 425, 273 N.W. 756 (1937); Eckdahl v. Hurwitz, 56 Wyo. 19, 103 P. 2d 161 (1940).

[22] *Id.* at 430, 273 N.W. at 758.

[23] Moon v. Clark, 192 Ga. 47, 14 S.E. 2d 481 (1941).

[24] Little discussion is found in the cases since the practitioner is either granted the injunction to protect 'property', or denied standing to sue generally.

person is materially different in degree or in kind from the harm inflicted on the public, the individual as well as the state may enjoin the nuisance.[25] This is a particularization of the basic premise that one must be injured, harmed or damaged beyond mere trivia before a justiciable dispute arises—before one has "standing to sue."

To satisfy the requirement of special harm, the only injury the licensed practitioner might suffer, over and above the public harm arising from the defendant's incompetence, is a competitive financial loss.[26] To qualify for an injunction on a nuisance theory, the private plaintiff should have to show the same causal connection between defendant's practice and his financial losses as is required under the property theory discussed above. The nuisance approach therefore merely adds to the woes of the private plaintiff by requiring the demonstration of a nuisance. Once he has shown his particular special injury, he has already established a case for an injunction to protect his business from criminal competition. The nuisance approach may however be useful in a jurisdiction which does not accept the Michigan view of enjoining criminal competition.[27]

3. *Statute*

Several states have enacted legislation specifically dealing with the injunctive weapon against unlicensed practice. Most of these statutes permit prosecuting officials to maintain the suit. However, California,[28] Indiana,[29] and Virginia[30] are among the states which also allow private individuals to maintain the action.

The validity of the statute in affording injunctive relief is considered later in dealing with suit by public officials. But it is pertinent to note here a serious policy consideration which arises when the power to maintain the suit is granted to the individual. Under the statute, a showing of personal damage is apparently not required.[31] The result may well be non-uniform enforcement. The motive of the licensed practitioner in bringing suit and incurring expense is likely to be personal rather than a desire to protect the public interest. Where a showing of private damage is required, as in the unfair business practice theory discussed earlier, enforcement of a public right may be just as sporadic but

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The nuisance approach by the private practitioner was discredited somewhat in Ezell v. Ritholtz, *supra* note 6.

[25] For example, see Poulos v. Dover Boiler Fabricators, 5 N.J. 580, 76 A. 2d 808 (1950). Also see McCLINTOCK, PRINCIPLES OF EQUITY (2d ed. 1948) §165; 4 POMEROY EQUITY JURISPRUDENCE §1349; PROSSER, LAW OF TORTS, §71 (1955).

[26] Missouri Veterinary Medical Ass'n. v. Glisan, *supra* note 14.

[27] Cook v. Normac Corp., *supra* note 19.

[28] CAL. BUS. AND PROF. CODE §1705.5 allows ten or more licensed dentists to bring the suit. This was held not to include suit by the local medical society in Complete Service Bureau v. San Diego County Medical Society, 43 Cal. 2d 201, 272 P. 2d 497 (1954).

[29] BURN'S IND. ANN. STAT. §63-1311.

[30] VA. CODE §54.200.01.

the enforcement is merely an off-shoot of the valid assertion of a private right. The purpose of these statutes, at least ostensibly and constitutionally, is the protection of the public, and uneven, privately motivated application of injunctions is therefore difficult to justify.

Suit by Prosecuting Officials

Unless specifically authorized by statute, injunctions obtained by the attorney general or other prosecuting officers are usually based on inherent equitable power to enjoin a nuisance. There is no longer any doubt that nuisance has been expanded beyond its earlier limitation of misuse of realty by the defendant.[32] One of the many influences behind this expansion was probably the statutory device, commonly employed in gambling, prostitution and prohibition statutes, of declaring a violation to be a public nuisance, thus affording injunctive relief to the local prosecutor.[33] These legislative determinations of nuisance have probably served to liberalize the court's attitude toward finding nuisances in the absence of statutory declarations.[34]

The right to jury trial provides some limitation on legislative power to grant the prosecutor injunctive relief based on a declaration of nuisance for each and every crime.[35] The yet undefined limit on the transfer of criminal enforcement to equity courts may perhaps be found by analogizing the proscribed conduct with traditional concepts of crime and nuisance.[36] It is significant in this regard that bawdyhouses and gambling establishments involve misuse of realty in a persistent and pernicious

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[31] No decision squarely on this point has been discovered, however the statutes do not require a showing of personal damage by the private person.

[32] Simpson, *Fifty Years of American Equity, supra* note 4.

[33] See for example Ill. Ann. Stat. c. 100½ (prostitution); Ohio Rev. Code §2915.02 (gambling); Tex. Pen. Code §652(a) (gambling).

[34] In referring to a statute to determine the necessary elements of a nuisance, the cases generally range from the view expressed in Dean v. State, 151 Ga. 371, 106 S.E. 792 (1921) that the nuisance must be demonstrated independent of the statutory standard, to the holding in New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798 (1924) that "the declaration that the establishment is unlawful . . . is the same as to say that the establishment shall be deemed a nuisance." Also see 40 A.L.R. 1145 (1924). Where specific conduct is brought within the control of the state for the first time by statute, the Louisiana view seems the more practical, by allowing the equity court to cooperate with the executive in enforcing regulatory mandates of the legislature.

In People *ex rel.* Bennett, Atty. Gen. v. Laman, 277 N.Y. 368, 14 N.E. 2d 439 (1938), the court noted that while statutes controlling chiropractors did not include injunctive relief, other statutes regulating occupations or distribution of certain goods did provide for injunctive relief. The attorney general was granted an injunction in the Laman case.

[35] See Stevens, *A Plea for the Extension of Equitable Principles and Remedies,* 41 Cornell L.Q. 351 (1956).

[36] Simpson, *Fifty Years of American Equity,* 50 Harv. L. Rev. 171, 226 (1936); 1953 Wisc. L. Rev. 163; 57 Yale L.J. 1023 (1948).

manner, thus bringing such activity within the general framework of nuisance.

Several courts have justified equity jurisdiction on the premise that the occupational statutes are not basically *criminal,* but *regulatory* in nature, even though violation is made a misdemeanor.[37] The statute is viewed as primarily directed at controlling a specified field which is peculiarly related to public health and well-being. Accordingly, the criminal penalty is regarded as an adjunct which has been employed as persuasion for the purpose of ensuring the functioning of economic or health regulations. Therefore, the maxim "equity will not enjoin crime" is not considered applicable.

In unlicensed practice cases, the misuse of realty approach was one of the points mentioned by the Nebraska court in the earlier case of *State v. Maltby*[38] in supporting the denial of an injunction to the State. While misuse of realty does not appear to be a requirement in later cases, virtually all courts would appear to require proof of more than one past violation before the prosecutor could obtain an injunction. The defendant's actions must be of a continuing nature before grounds for a decree arise. Otherwise the criminal remedy will probably be held adequate and resort to the injunction found unnecessary.[39]

In addition to the probable requirement of continued violation, some question has arisen over the extent of the violation of the statute. The primary point of divergence is the question of the incompetence of the defendant.

Several courts have limited the injunction to cases involving incompetent practitioners, holding a competent, unlicensed practitioner not to be a nuisance.[40] The incompetent, untrained practitioner, especially in the medical field, is clearly inflicting immediate harm on the public health. Difficulty of proving the current requirements of the board, and comparing them with the defendant's qualifications is a major disadvantage to this approach. Nevertheless, the prosecutor should not be denied an injunction where lack of the requisite qualifications is proven.

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[37] Dean v. State *ex rel.* Board of Examiners, 233 Ind. 25, 116 N.E. 2d 503 (1954); State *ex rel.* Board of Examiners v. Cole, 215 Ind. 562, 20 N.E. 2d 972 (1939); State v. Fray, 214 Iowa 53, 241 N.W. 663 (1932); Board of Medical Examiners v. Blair, 57 Utah 516, 196 Pac. 221 (1921).

[38] 108 Neb. 578, 188 N.W. 175 (1922).

[39] For example, Hudkins v. Arkansas State Board of Optometry, 208 Ark. 577, 187 S.W. 2d 538 (1945); People *ex rel.* Bennett, Atty. Gen. v. Laman, *supra* note 34.

[40] Arkansas State Board of Architects v. Clark, 291 S.W. 2d 262 (Ark. Sup. Ct. 1956); State *ex rel.* McCulloh, Atty. Gen. v. Polhemus, 51 N.M. 282, 183 P. 2d 153 (1947); Estep v. State *ex rel.* Caro, Dist. Atty., 156 Fla. 433, 23 So. 2d 482 (1945); State *ex rel.* Marron, Dist. Atty. v. Compere, 44 N.M. 414, 103 P. 2d 273 (1940); People *ex rel.* Bennett, Atty. Gen. v. Laman, *supra* note 34; People *ex rel.* Chiropractic League v. Steele, 4 Cal. App. 2d 206, 40 P. 2d 959 (1935); State *ex rel.* LaPrade, Atty. Gen. v. Smith, 43 Ariz. 131, 29 P. 2d 718 (1934); People

Several cases hold that mere lack of a license alone constitutes a nuisance.[41] To reach this conclusion, the courts have determined that failure to comply with the statute is a nuisance *per se* and no direct proof of public harm is needed. Although there is no immediate public injury incident to the work of a skilled practitioner, the denial of an injunction on that ground would tacitly imply that the defendant himself can decide whether or not he needs a license. The legislature, by enacting the regulatory plan, has decided that practice without the approval of the licensing agency *is* detrimental to the public interest. Where the statutes have further declared unlicensed practice alone to be a nuisance and enjoinable, the courts have found the provision valid and have issued injunctions accordingly.[42] In dealing with statutes which neither declare a nuisance to exist upon mere violation, nor give the prosecutor power to maintain the suit, the court should be ready to accept a legislative determination of 'harmful to the public interest' and issue an injunction upon a showing of continuous violation. To say that injunctions will be granted against incompetent practitioners but not against competent practitioners is the same as saying that there are good and bad invasions of the public interest. In order to further the enforcement of legislation, the courts should employ the same standard of 'public interest' in resolving an injunction case as is used in determining constitutionality of the legislative enactment.

Suit by Licensing Agency

In several instances, the licensing board has attempted to maintain the suit. A basic difficulty initially arises from the rule that an agency of the state has only such power as is delegated to it.[43] Where there is no express grant to the board of the power to enforce the statute by injunction, a problem of statutory interpretation arises. The Montana court in *Montana State Board of Examiners in Photography v. Keller*[44] held that the board only had authority to issue or revoke licenses and could not assume the prosecutor's functions of preventing or prosecuting

ex rel. Shepardson, Atty. Gen. v. Universal Chiropractors Assn., *supra* note 3; Dean v. State, 151 Ga. 371, 106 S.E. 792 (1921); State v. Johnson, 26 N.M. 20, 188 Pac. 1109 (1920).

[41] Boggs v. Werner, *supra* note 6; Commonwealth *ex rel.* Atty. Gen. v. Pollitt, 258 Ky. 489, 80 S.W. 2d 543 (1935); Kentucky Board of Dental Examiners v. Payne, 213 Ky. 382, 281 S.W. 188 (1926). Marketing milk without a license was enjoined as a nuisance in State *ex rel.* Peterson v. Martin, 180 Ore. 459, 176 P. 2d 636 (1947), the court suggesting that a finding that the milk was of inferior quality was not necessary in order to issue an injunction.

[42] The leading cases are State v. Fray, *supra* note 37 and Board of Medical Examiners v. Blair, *supra* note 37.

[43] Mathews v. Lawrence, 212 N.C. 537, 193 S.E. 730 (1937); Bentley v. State Board of Medical Examiners, 152 Ga. 836, 111 S.E. 379 (1922). Sears Roebuck & Co. v. State Board of Optometry, 213 Miss. 710, 57 So. 2d 762 (1952), without discussing this point, granted an injunction to the Board in the absence

violations. A more broadly worded Kentucky statute was interpreted to include the power of the board to maintain an injunction suit.[45]

Those statutes which expressly provide for enforcement in equity usually give the board authority to obtain an injunction when it is shown that the defendant is violating the statute. These statutes have been interpreted to mean that the defendant must be a habitual violator, or be threatening to continue violating the statute before an injunction will issue.[46] The Indiana statute is at the other extreme in providing that proof of one violation on a specific day will suffice.[47] The court has held the statute valid and described the provision as analogous to a presumption of future violative conduct.[48]

Suit by the party which also has the power to issue, suspend or revoke the license has several important advantages. Endowed with the authority to implement the act generally, the board probably has a better grasp of the total situation in the state regarding its particular profession and would thereby develop a more consistent enforcement policy. This policy would underly the decision to bring suit rather than the possible petty motives which would actuate the private practitioner. If the board utilizes its own attorneys, time and effort would be saved by having counsel available who are more familiar with the organization and implementation of the regulatory program. The prosecutor or attorney general is relieved of the burden of maintaining the suit. The defendant will not be harassed by the private practitioner in court and the private practitioner need not expend either the time or money necessary to bring his own suit. Above all, improved administration of the regulations would result from granting power to the board to execute the statute in all respects.

CONCLUSION

The injunction is a valuable remedy to prevent violations of occupational regulation. While it has the effect of restricting competition economically, the basic purpose of the regulation is to protect the public interest by guaranteeing competent practitioners. The licensed practitioner therefore should have no standing to enforce this public right. Where the licensed practitioner can demonstrate actual financial loss arising from an unfair business practice, a suit ought to be entertained. From

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of any apparent statutory authority giving the Board power to maintain the suit.

[44] 120 Mont. 364, 185 P. 2d 503 (1947).

[45] The duties of the Board included the ". . . duty to carry out and enforce the provisions of this act . . ." CARROLL'S KY. STAT. §2636-1, now included in KY. REV. STAT. c. 313.

[46] Hudkins v. State Board of Optometry, 208 Ark. 577, 187 S.W. 2d 538 (1945).

[47] *Supra* note 29.

[48] State *ex rel.* Bowers [Sec'y of the Board] v. Moser, 222 Ind. 354, 53 N.E. 2d 893 (1944).

the view of protecting the public interest, merely placing the burden on the over-worked prosecutor and arming him with the traditional sanctions available for misdemeanors saps the statute of much strength. It is doubtful that increasing the harshness of the sanction would appreciably increase the deterrent effect. Nor could such a step overcome the more fundamental problem arising from the practical limitations on the efficiency of the prosecutor and the criminal remedy. The licensing board, usually empowered to execute the bulk of the staute, should be granted the power to maintain suits in equity in order to provide not only more even-handed, consistent enforcement of the statute, but also to base the injunctive remedy upon sounder policy.

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