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Legal Phases of Professional Regulation

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By Spencer Gordon

Your committee on arrangements has given me the subject of "Legal phases of professional regulation." Although this is rather broad, I assume that you are interested primarily in the regulation of the profession of accountancy. This subject naturally divides itself into what has been done and what is proposed towards such regulation, and the further consideration of the validity or possible invalidity of enactments in that regard.

All of the states, the District of Columbia, Alaska, Hawaii, the Philippines and Porto Rico now have accountancy laws which limit the use of the term "certified public accountant" to accountants upon whom this designation has been conferred by a state board as a result of examination or compliance with other requirements. Some states provide also for the use of the term "public accountant" only by accountants who were in practice before the enactment and who have registered as such.

Some of these statutes provide that the accountant, to be certified or registered, must be a resident of the state in question. Others provide that he must have a place for the regular transaction of business in the state. Some require both residence and a place of business. Some require residence or a place of business. A few require that he be a citizen of the state.

Almost all of these statutes contain provision for the recognition of holders of certificates from other states. In some cases it is provided that the local board may in its discretion waive its examination, or that a certified public accountant from another state shall receive a certificate if the applicant's state grants a similar privilege to a C. P. A. of the local state. In some, it is provided that a C. P. A. from another state may be admitted if the applicant's state has substantially or fully equivalent requirements for the C. P. A. certificate. In a few states a C. P. A. from another state may be admitted without qualification. Some of the states have requirements as to the experience of the C. P. A. from the foreign state, and in some cases it is required that the certificate holder first become a resident of the local state.

These statutes have to do with the use of the designation "certified public accountant" or "public accountant." In only a few

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instances have states as yet prohibited the practice of accountancy by persons not holding the certificate or not registered. A few of the statutes expressly provide that they are not to be construed as prohibiting the practice of accountancy. One statute states that it shall apply only to those holding themselves out as certified public accountants. Some statutes expressly provide that they are not to prevent unlicensed persons from acting as employees of accountants.

There are a few statutes, however, which purport to prohibit the practice of accountancy in the state by persons who have not qualified as certified public accountants or public accountants under the state law. There is, of course, a very substantial difference between a law which permits anyone to act in fact as a public accountant, but prohibits the use of the designation "certified public accountant" or "public accountant" except to those who have met the state's requirements, and a law which prohibits entirely from practice a person who is not a certified public accountant or public accountant within the meaning of the state law.

Most of the statutes in regard to the use of the designation "certified public accountant" are silent as to accountants from another state entering for occasional professional employment. This silence is probably due to the fact that the statutes contain no prohibition of the practice of accountancy, so that the accountant who occasionally enters from another state, but has no office and issues no certificates in the local state, does not come in conflict with the laws restricting the use of the words "certified public accountant" or "public accountant." Some of these statutes expressly state that they do not prohibit temporary engagements within the state. Even the states which prohibit the practice of accountancy except to those who have complied with the requirements of certification or registration have provisions allowing the entry of accountants from other states to fulfill specific engagements. One such statute provides for a temporary certificate to enable the fulfilling of specific engagements, the contracts for which were entered into outside of the state. Another expressly provides that it does not prohibit the entry of accountants from other states in pursuance of engagements originating from without the state. A third does not prohibit temporary engagements incident to practice in the state of domicile, provided the appointment of an agent for service

of process is made five days before commencing work in the state. These statutes, however, appear to have no provision for the non-resident accountant, who is not a C. P. A., entering the state for temporary engagements.

It should be noted, however, that by some of the statutes the non-resident accountant is prohibited from opening an office in the state or from practising continuously therein by the restriction against permanent practice by those who have not been given the state certificate plus the requirement that the certificate can be applied for only by residents. Bills providing for similar legislation are under consideration by other state legislatures. Another discrimination against non-residents is to require that all parties in a firm practising as such in a state secure state certificates.

This represents the present state of the law throughout the states. The question of the validity of these provisions may logically be treated under three headings which are of progressive difficulty:

1. The validity of state laws restricting the use of the words "certified public accountant" or "public accountant."
2. The validity of state laws prohibiting practice within the state except by those who have qualified as certified public accountants or public accountants.
3. The validity of state laws which make residence or citizenship a requirement for qualification as a certified public accountant or public accountant, and restrict practice within the state to persons who are so qualified, or impose other restrictions which apply only to non-residents.

A state law is valid unless it conflicts with the Constitution of the United States or with the constitution of the state in question. I shall consider these statutes from the viewpoint of the constitution of the United States, because it would be equivalent to writing and reading an encyclopædia for me to attempt an address based on the differing constitutions of forty-eight states.

But when the contention is made that an accountancy law is unconstitutional, the contestant would probably rely on the following provisions of the constitution of the United States:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." (Clause 1, article 4, section 2.)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (14th amendment, section 1.)

In general it may be assumed that the right to practise accountancy is a property right and a privilege or immunity within these provisions, but this right, privilege or immunity must yield to the police power of the state if the police power is exercised upon a reasonable basis. Constitutional questions arising under these sections thus involve questions of degree and are difficult of solution.

I

The state laws restricting the use of the words "certified public accountant" or "public accountant" have now been in effect for a considerable time. They have come before the courts in a number of cases, and I think it can be said with a fair degree of certainty that there is nothing unconstitutional in a statute which creates a state board with power to give reasonable examinations or enforce other reasonable requirements as a result of which persons will be given the right to the designation of "certified public accountant," and prohibiting the use of such designation by all others, or requiring accountants who are already in practice to register as such in order to use the term "public accountant."

II

When we consider, however, the statutes which purport to prohibit entirely the practice of public accountancy by persons who have not met these requirements, we are confronted with a more difficult problem. It would seem reasonable to provide that an accountant may not call himself a "certified public accountant" or even a "public accountant" when he has not in fact been so certified by the state board nor conformed to the requirements for "public accountants," but it is not so clear that the state may deprive of his means of livelihood a man who has not received the state certificate or so qualified.

There have been two decisions where restrictive statutes have been declared in violation of constitutional provisions. In *State* v. *Riedell*, 109 Okla. 35 (1924), a statute which prohibited an uncertified accountant from engaging in practice was held to violate the provisions of the constitutions of the United States and of the state of Oklahoma. The court said:

"Our conclusion, therefore, is that the act, in so far as it prohibits uncertified accountants from holding themselves out as

professional or expert accountants or auditors for compensation or engaging in the practice of that profession, is in conflict with the spirit and express provision of the constitution and void, in this, that it abridges the right of private property and infringes upon the right of contract in matters purely of private concern, bearing no perceptible relation to the general or public welfare, and thereby tends to create a monopoly in the profession of accountancy for the benefit of certified accountants, and denies to uncertified accountants the equal protection of the laws, and the enjoyment of the gains of their own industry. The defendants are not engaged in the exercise of a franchise, but a constitutionally guaranteed right."

In *Frazer* v. *Shelton*, 320 Ill. 253 (1926), a similar Illinois statute was held unconstitutional. The court referred to provisions of the constitution of Illinois similar to those of the federal constitution. The case is illuminating in the precise statement of the court as to how far such a statute may go:

"We do not say that it is beyond the power of the general assembly to enact a statute requiring that no one shall use the term 'certified public accountant' or the term 'public accountant' without having met the requirements of such an act. Such a provision may well be within the power of the legislature on the ground that it is to the public interest that no one shall use a term indicating that he has been examined and certified as an accountant when such is not the fact. . . . Such is a misrepresentation which the legislature may prevent by statute. There is, as we view it, however, a wide difference between acts of such character and one which provides that no one who has not received a certificate as public accountant from the department of registration and education shall be allowed to work at the business or occupation of accountancy for more than one person. Such an act does not spring from a demand for the protection of the public welfare but is an unwarranted regulation of private business and the right of the citizen to pursue the ordinary occupations of life."

These decisions might not necessarily be followed in other states, for a strong argument can be made that the practice of public accountancy does affect the public welfare and is not a private business. There have been decisions of many courts holding that statutes prohibiting the practice of various other professions and occupations by persons not licensed by a state board, after compliance with reasonable tests, are constitutional, on the ground that the right to earn a livelihood may be limited by a statute which is a reasonable exercise of the police power of a state. Such decisions can be found as to architects, barbers, dentists, locomo-

tive engineers, motion picture machine operators, pharmacists, physicians and plumbers. The Oklahoma and Illinois courts distinguished these cases on the ground that the occupations in question affected the public health and safety, but it can be argued forcefully that the same power which permits the state to safeguard the health of the public also will permit the state to safeguard the pocketbooks of the public.

Thus, in *Dent* v. *West Virginia*, 129 U. S. 114, in which the supreme court of the United States held that a state statute requiring physicians to procure certificates was not unconstitutional, the reasons given appear broad enough to cover public accountancy:

"But there is no arbitrary deprivation of such right (to practise medicine) where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. . . . The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application that they can operate to deprive one of his right to pursue a lawful vocation.

". . . Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his licence, issued by an authority competent to judge in that respect that he possesses the requisite qualifications."

This opinion of the United States supreme court can be paraphrased to apply to the profession of accountancy. Its regulation will tend to secure the people of the state against the consequences of ignorance and incapacity, as well as of deception and fraud. Everyone may have occasion to consult the accountant, but few can judge of his qualifications, so that they must rely upon the assurance given by his licence. It can thus be argued that the accountant subjects himself to reasonable regulation by holding himself out to the public as having professional qualifications, and that there is no logical distinction between the regulation of the physician who deals with physical health and the regulation of the

accountant who deals with financial health. Thus, in *Holsman* v. *Thomas*, 112 Ohio state 397 (1925), the Ohio supreme court held valid an ordinance regulating auctioneers, saying:

"Now, the police power relates not merely to the public health and to public physical safety, but also to public financial safety."

The Oklahoma and Illinois decisions holding that the practice of accountancy can not be regulated seem also to ignore the fact that the regulation of lawyers is not confined to practice before the courts, but extends to the giving of professional advice, in which there is now a decided similarity between the function of the lawyer and accountant. Certainly neither profession has to do with public health—both deal with property. Many states also require dealers in securities to obtain licences upon satisfactory evidence of the good business repute of the applicants and their agents, revocable on evidence of bad repute. The constitutionality of these laws was assailed on the ground that they were an illegal control of private concerns, but the statutes have been sustained by the state courts and by the United States supreme court, and are in effect today as the well known "blue sky laws." The police power of the state which was invoked in these laws was concerned directly with the protection of the property of the people of the state—the blue sky laws had nothing to do with the public health.

I feel, therefore, that the Oklahoma and Illinois decisions do not necessarily settle the question, and that a law restricting the practice of public accountancy to persons who hold the state certificate might in other states and by the United States supreme court be held not to conflict with the federal constitution, on the ground that the practice of public accountancy is one which affects the people of the state generally and may therefore be regulated in a reasonable way in proper exercise of the police power. Such a law could perhaps prohibit the use of the words "certified public accountant" or even "accountant" on the stationery of an uncertified or unlicensed person, or on the door of his office, or the holding out to the public that he is a certified public accountant or even an accountant, or the giving of an opinion in writing certifying as to any accounting matters and purporting to be made by a certified public accountant or by an accountant. But it would be much more difficult to sustain a law which went beyond the restriction of the public practice of accountancy or forbade the private employment of a person

by another person to do bookkeeping, give financial advice or do anything else that is done by accountants. The law must restrict only the public practice of accountancy if the argument that I have suggested in favor of its constitutionality is to apply.

To summarize: laws prohibiting entirely the practice of public accountancy by persons who have not met the statutory requirements have been held unconstitutional by the highest courts of Oklahoma and Illinois. There are no decisions holding such laws constitutional. The question, however, can not be considered settled, as there are several states which have similar restrictive legislation the validity of which has not been tested, and a strong argument can be made that such laws are a valid exercise of the police power if they do not go beyond the regulation of the practice of accountancy in its public aspects.

III

We now come to the question of the validity of state laws which make residence or citizenship a requirement for qualification as a certified public accountant or public accountant, and restrict practice within the state to persons who are so qualified, or impose other restrictions which apply only to non-residents. Can the state give its residents an advantage in the practice of accountancy over non-residents?

Of course, if the Oklahoma and Illinois decisions are correct and a state can not prevent the practice of public accountancy by an uncertified person, then this final question does not arise. Any non-resident accountant who is dissatisfied with the difficulties put in the way of his practice would include among his contentions the broad one that the state had no right to restrict accountancy practice at all either as to residents or non-residents. As this point has been discussed, I shall pass to questions peculiar to the distinction between residents and non-residents.

If the state can constitutionally restrict only the practice of public accountancy as opposed to private employment, as was suggested under the last heading, it can be argued that the isolated act of a non-resident in entering a state temporarily to make an audit as a result of an outside employment would not be a proper subject of restriction, on the ground that the accountant who has no office in the state, who does not habitually practise in the state and issues no certificates in the state or to residents of

the state, does not hold himself out to the public of the state as being a public accountant. Some state statutes do, however, purport to restrict this sort of practice. I know of no decision on the precise point.

Let us now consider the non-resident accountant who wishes to practise frequently in the state, to open an office in the state, to qualify as a certified public accountant of the state or to be a member of a firm which has an office in the state. Does an accountancy law which discriminates against such a non-resident abridge his privileges and immunities, deprive him of property or deny him the equal protection of the laws? Time does not permit a detailed discussion of the construction that has been given these constitutional provisions. Perhaps the simplest statement that can be made is that the police power of the state may be exercised in a reasonable way without infringing them. The problem, therefore, would be whether or not a requirement of residence in the state bears such a reasonable relation to the protection of the public in the regulation of the practice of public accountancy that inclusion of such a requirement in a statute is a reasonable exercise of the police power. Although there is a decided conflict in the decisions, the United States supreme court case which seems to be the closest would indicate that such a distinction may be made between residents and non-residents. But if all the facts in regard to the practice of accountancy were brought before the court it might well result in a contrary holding, on the ground that there is no reasonable basis for discrimination against non-resident accountants.

The argument in favor of the constitutionality of a law discriminating against non-residents might run somewhat along the following lines:—The examining board can better determine the moral character, standing and ability of residents. A resident accountant can do better work because of his knowledge of local conditions. The disgrace resulting from discovery in a dishonest act would be a more powerful deterrent upon a resident accountant. The board can more effectively control residents. Process can be more readily served upon a resident. Damages can be more readily collected from a resident.

But these arguments, which have been made in regard to other occupations, can be opposed with considerable force when applied to the present practice of accountancy. It may be argued in reply that the board can, in fact, determine the character of and can

control both residents and non-residents, that a knowledge of local conditions such as could not be obtained by a non-resident is seldom necessary to the practice of modern accountancy, that discovery of a dishonest act wherever committed would injure the accountant wherever located, that provision could be made that a non-resident must appoint an agent for service of process, and that whether damages could more readily be collected from a resident or non-resident would be problematical in each case.

Passage of laws discriminating against the non-resident accountant seems to be in opposition to the nationalization of business which is constantly increasing and which has been so ably described by Mr. Peloubet. (See THE JOURNAL OF ACCOUNTANCY, October, 1931.) Consider, for example, the metropolitan area of New York. It would hardly seem in accordance with present realities if a law could impose a barrier between those parts of New Jersey, New York and Connecticut which lie in that area. There is reasonable ground for contending that no purpose can be found for legislation which discriminates between the resident and non-resident accountant, other than the purpose of protecting the local field for the local accountant, and if this could be demonstrated the statute could hardly be sustained under the police power. While involving a discrimination within the state, the decision in *Sayre Borough* v. *Phillips*, 148 Pa. 482 (1892), is interesting in that regard. An ordinance of the borough prohibiting non-residents from peddling was declared invalid, the court saying:

"That the resident dealer and peddler may enjoy a larger trade, the non-resident peddler is shut out. If the borough authorities may lawfully regulate the business of peddling for the benefit of residents, we see no reason why they may not lay their hands in like manner on every department of trade and of professional labor, and protect the village lawyer and doctor as well as the village grocer and peddler. . . .
"The present question is whether, under the pretense of police control, trade may be regulated in the interest of resident dealers by making the same business a lawful one to all who live on one side of a municipal line, and an unlawful one to all who live on the other side. We are very clear in our convictions that this can not be done, . . ."

The difficulty of reconciling the decisions of the federal courts will appear from the statement of a few of them. Statutes have been held constitutional in the following cases:—Where resident

property owners were given the right to stop improvements and assessments by filing protest, with no similar right to non-resident property owners. Where personal service was required on resident owners of land, and service by publication only on non-residents. Where resident and non-resident decedents were taxed at different rates. Where the statute of limitations was longer in the case of a resident. Where residents were given greater dower rights than non-residents. Where the use of a state highway by non-resident automobilists was declared equivalent to the appointment of the registrar of motor vehicles as agent for service of process. Where a court was authorized to dismiss in its discretion a suit brought by a non-resident against a foreign corporation but was not authorized so to dismiss a suit brought by a resident against a foreign corporation. Where a non-resident was required to give bond for costs not required of a resident.

On the other hand, the following statutes have been declared unconstitutional:—Where a lower scale of licence fees was provided for resident traders than for non-residents. Where residents were given priority in distribution of assets of foreign corporations. Where a higher privilege tax was imposed on companies having their chief office outside the state. Where it was provided that no one might be licensed as a peddler who had not resided in the state for one year. Where residents only were permitted to be appointed trustees by deed. Where non-residents were denied the right to obtain licences as stationary engineers. Where a higher licence tax was imposed on non-resident bakeries than on resident bakeries.

The case which probably would be most strongly relied upon in any argument in favor of the constitutionality of an accountancy law discriminating against non-residents is *La Tourette* v. *McMaster*, 248 U. S. 465, decided in 1919, where a law limiting to residents of South Carolina the right to engage in the insurance brokerage business was held constitutional in a proceeding brought by a non-resident who contended that the law as applied to him was unconstitutional, the court saying:

"'It is important for the protection of the interests of the people of the state that the business should be in the hands of competent and trustworthy persons.' And we may say that this result can be more confidently and completely secured through resident brokers, they being immediately under the inspection of the commissioner of insurance."

The close analogy between this case and a case limiting to residents the right to practise public accountancy will readily be observed. On the other hand, in *Hess* v. *Pawloski*, 274 U. S. 352, as recently as 1927 there appeared the following statement by Mr. Justice Butler:

"But a state may not withhold from non-resident individuals the right of doing business therein."

My own feeling is that if there came to the United States supreme court a case involving a discrimination by state law against non-resident accountants, the court's decision would depend upon the showing in regard to the present practice of accountancy and the reasonableness of the particular statute as to that particular profession. There is always a presumption that a law is constitutional, and a strong fact presentation showing the unreasonableness of the statute in question would have to be made in order to overcome this presumption. The present attitude of the supreme court in that regard is stated in *O'Gorman and Young* v. *Hartford Ins. Co.*, 282 U. S. 251, decided in 1931, and sustaining a state law forbidding any insurer licensed in the state to allow a commission in excess of a reasonable amount. The court there said:

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy."

Thus an accountant wishing to obtain a decision that a statute discriminating against non-residents is unconstitutional should attempt to show that the restriction of the right to practise accountancy to residents only or discriminating against non-residents is not a reasonable way to deal with the evils of dishonest, careless or incompetent accountancy. A basis for such a showing might be found in records of accounting societies, articles on the subject by eminent accountants and testimony given in court as to the present practices in the accounting profession. Those wishing to maintain the constitutionality of such a law and to re-

inforce the presumption of constitutionality which always exists could use the same sort of evidence to the extent that it would be helpful to them. I think that the delivery of Mr. Peloubet's address is an important step in the creation of a literature on this subject, and I hope that other accountants will be alert to gather material and will express and publish their views.

As I have stated, the views expressed in this paper have been concerned with the provisions of the federal constitution. In any case which may arise the provisions of the constitution of the state in question should be studied with great care. The Illinois decision which I have discussed turned in part upon the violation of provisions of the Illinois constitution prohibiting the granting of special privileges.

I hope you will not be too much disappointed by the apparent inconclusiveness of this paper. I can not tell you whether or not an untested law is constitutional. That is only known when the court of last resort has spoken; and many times there are five judges on one side and four on the other. How can anyone predict who will be the infallible five? All that we can do in difficult questions of this sort is to indicate trends, to suggest arguments that may be made on either side, to collect the decisions which seem most analogous, and to make suggestions as to the method of showing the courts what are the true facts in regard to the present practice of accountancy. I can only hope that this paper will constitute some contribution to the solution of the problems.