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NOTES

LICENSING OF OCCUPATIONS AND PROFESSIONS IN COLORADO

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I. INTRODUCTION

The complexity of modern civilization has added a new dimension to the age old problem and tension between freedom and restraint. Under constitutional government the courts are called upon to resolve tensions that exist between the rights of the individual and the legitimate needs and welfare of society. Legal cases involving freedom of speech, freedom of religion, subversive activity, and criminal due process provide eloquent and vital material on the constitutional rights of man in modern society. The problem of licensing of occupations involves questions of constitutional and administrative law which affect large numbers of persons in their every-day lives. The licensing problem is not likely to arouse as much general interest in the minds of the public at large as are the constitutional issues mentioned above. Nevertheless this problem by its mere quantitative importance deserves one's attention.

A license has been defined as "a permit to do a certain thing; it confers a right to do that which without the license would be unlawful."[1] Three questions present themselves. First, does the legislature have the *power* to license a particular occupation? Second, assuming that the legislature has the power to license an occupation, to what extent can this power be delegated to subordinate licensing officials, and in what manner can it be exercised? Third, what changes in Colorado's licensing statutes should be recommended?

II. THE LEGISLATIVE POWER TO LICENSE

A Wisconsin judge in 1941 expressed alarm at a certain piece of legislation, which, if sustained, would mean that "we have taken a long

[1] Gronert v. People, 95 Colo. 508, 511, 37 P.2d 396, 398 (1934); People v. Raims, 20 Colo. 489, 493, 39 Pac. 341, 342 (1895).

step in becoming a nation of licensees instead of a nation of free men."[2] The legislature cannot license at will, but the purpose of the licensing must be connected in some way to the public's health, safety, welfare, or morals. It must be necessary or desirable in one of these spheres of the public interest.

In Colorado as elsewhere it is obvious that the licensing of the professions is well within the state's licensing power. The activity of a professional man not only affects those with whom he deals directly, but it affects the public as a whole. An unqualified or dishonest lawyer injures not only his clients and specific adversaries, but he also pollutes the stream of justice. A professional man requires special knowledge and skills; the exercise of these attributes can be rightly regulated in the public interest and welfare. The Colorado Supreme Court has declared that there is no absolute property right to engage in such professions as law, medicine, and dentistry.[3] But of course that list is not exclusive and the increase in technology will probably see the list expanded.

In protecting the public health and morals the legislature itself, or a municipality through a grant of power from the legislature, has the right to license such institutions as hospitals, taverns, and even dance halls where only soft drinks are served.[4] It cannot be reasonably maintained that licensing poses a problem of over-regulation in this area, and the legislative power here seems to be certain.

The above situations are clear. It is when one enters the field of semi-skilled trades that the question of whether or not the licensing of an occupation is within the police power becomes more difficult to answer. Of course, one can always *search* for a reason why a certain occupation bears some relationship to the health, safety, welfare, or morals of the public. But the courts demand something more than this—the relationship must be reasonable and real, and not merely a fiction. The North Carolina Supreme Court struck down the licensing of tile contractors in a ringing opinion which declared, "The Act in question here has as its main and controlling purpose, not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business . . . . "[5] Statutes in other states licensing such persons as photographers,[6] and real estate brokers[7] have been declared unconstitutional as bearing no reasonable relationship to the police power.

Interestingly enough, no Colorado case has invalidated the licensing of any occupation as such. The right to license plumbers,[8] pawnbrokers,[9] and barbers[10] impliedly has been upheld. There is no statewide statutory requirement for the licensing of cleaners and dyers, but the act regulating their practices, which is in effect indirect licensing, has been declared constitutional.[11] This would seem to indicate that the Colorado

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[2] State v. Neveau, 237 Wis. 85, 294 N.W. 796 (1940), rehearing denied, 237 Wis. 108, 296 N.W. 622 (1941).
[3] People v. Painless Parker Dentist, 85 Colo. 304, 275 Pac. 928 (1929), cert. denied, 280 U.S. 566 (1929).
[4] Dwyer v. People, 82 Colo. 574, 261 Pac. 858 (1927); Downes v. McClellan, 72 Colo. 204, 210 Pac. 397 (1922).
[5] Roller v. Allen, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957).
[6] State v. Lawrence, 213 N.C. 674, 197 S.E. 586 (1938).
[7] State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940).
[8] People v. Rogers, 74 Colo. 184, 219 Pac. 1076 (1923).
[9] Provident Loan Society v. Denver, 64 Colo. 400, 172 Pac. 10 (1918).
[10] Denver v. Schmid, 98 Colo. 32, 52 P.2d 388 (1935).
[11] People ex rel. Attorney General v. Barksdale, 104 Colo. 1, 87 P.2d 755 (1939).

Supreme Court has not felt compelled to seek too far for a reason to connect an occupation, in some way, to the safety, health, welfare, or morals of the public. The court has declared that even the public *financial* safety is a legitimate concern of the police power.[11a] That being so, the court would probably uphold the validity of the legislative power to license real estate brokers and salesmen, securities dealers, insurance agents and brokers, and occupations of a similar nature.

Though the court has been liberal in finding that occupations are properly subject to the police power of the state, it has been strict in determining which occupations the legislature or the municipalities have intended to be licensed. Thus it has been held that a municipal ordinance requiring the licensing of insurance *brokers* does not apply to insurance *agents*.[12] Similarly, a licensed engineer will not be allowed to exercise the privileges accorded to architects.[13] It can be seen that a narrow construction applied to the statutory definition of an occupation will cut both ways as it affects the licensee. In one case he cannot be licensed at all and need not be since he falls outside the definition. But neither can one expand his occupational definition to include more than that afforded by the statute.

Another basic principle of licensing occupations is that the requirements imposed treat all persons within the class alike.[14] Likewise arbitrary and discriminatory license fees are invalid.[15] A Denver ordinance, for example, required every coal dealer to put up a $1000 bond or give evidence of financial responsibility sufficient to pay for any damages arising out of the operation of his business. It further required a license fee of $100 for the operation of one office within Denver and for one truck, and $5 for each additional truck. No license would be issued unless the coal dealer maintained an office in Denver. The court struck down the ordinance on the ground that it was discriminatory against coal dealers whose establishments were located outside of Denver. The court further declared that the ordinance had been passed for the sole benefit of Denver coal merchants.[16]

But in applying this rule against non-discrimination, the court has been perfectly willing to give a narrow construction to the class enumerated in the statute or ordinance. Thus a statute requiring money lenders whose interest rates were above 12% to obtain a license was not held to be discriminatory even though the statute did not apply to banks, trust companies, building and loan associations, or title and guarantee associations. These latter groups' interest rates were lower than 12% and they were already subject to governmental supervision.[17] Similarly, a Denver ordinance providing that each gasoline filling station would be required to pay an annual license fee of $25 for one gasoline dispenser plus a $10 license fee for each additional dispenser was upheld as not being discriminatory even though garages which had gasoline dispensers were not required to pay the license fee.[18] It is permissible to recognize a distinction between dispensers at filling stations and those in garages.

[11a] Zeigler v. People, 109 Colo. 252, 124, P.2d 593 (1942); cf. United States Building and Loan Ass'n. v. McClelland, 95 Colo. 292, 36 P.2d 164 (1934).
[12] Bernheimer v. Leadville, 14 Colo. 518, 24 Pac. 332 (1890).
[13] Heron v. Denver, 131 Colo. 561, 283 P.2d 647 (1955).
[14] Houston v. Kirschwing, 117 Colo. 92, 184 P.2d 487 (1947); 33 Am. Jur., Licenses § 30 (1942).
[15] Ibid.
[16] Houston v. Kirschwing, Note 14 supra.
[17] Cavanaugh v. People, 61 Colo. 292, 157 Pac. 200 (1916).
[18] Hollenbeck v. Denver, 97 Colo. 370, 49 P.2d 435 (1935).

The former are essential in a separate and distinct business, while the latter are merely incidental to the primary operation. The classes, therefore, are separate and there is no discrimination when the filling station operator must pay the fee and the garage man need not.

III. DELEGATION OF LEGISLATIVE POWER

To some the doctrine against the delegation of legislative power seems outworn. It has been said that it is little more than a judicial corollary of laissez-faire which is no longer suited to the needs of the positive conception of government.[19] Harold Laski wrote that he would see the delegation extended rather than grudgingly conceded.[20] In 1916 Elihu Root, then president of the American Bar Association, asserted that "the old doctrine of prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."[21] Root proved to be too pessimistic in his prognostication. The prohibition against delegation continues to be a well respected judicial concept which remains firmly entrenched in our law.

It might be argued that state courts merely pay "lip service" to the doctrine, but then go on to hold that the particular legislation in question does not involve delegation, or if it does, it is not of such a kind that violates the essence of the doctrine. It is, of course, true that most contested legislation has been upheld. But such a fact should not lead one to the erroneous conclusion that the non-delegation doctrine is dying. It continues to assert its vigor.

The doctrine is fairly easy to describe; its interpretation and application in a particular fact situation is often difficult. The prohibition against the delegation of legislative power is a corollary of the separation of powers into legislative, executive, and judicial functions. To use Mr. Justice Holmes's terms, the distinctions and functions of each branch of the government cannot be divided into "watertight compartments."[22] A certain blending is inevitable. But still each branch must do its own job and not encroach upon the functions of the other branches nor abdicate its roles to the others. The legislative is to legislate, that is, to declare the policies and make the law. The executive is to execute. Here arises the age old problem—where to draw the distinction and the line between what is legislating and what is administering. The administrative body must only act within the authority delegated to it by the legislature under standards clearly fixed by law; it has no discretion to declare what the law is.[23]

One of Colorado's earliest cases on the delegation problem was *Colorado and Southern Railway v. State Railroad Commission*.[24] There the court held that the authority granted to the commission to prescribe reasonable time schedules for the operation of trains and to prevent unreasonable discrimination between communities with respect to railroad service was not an invalid delegation of legislative power. Other Colorado cases have upheld the power of the Industrial Commission to determine "prevailing standards of working hours and conditions in

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19 Davis, Administrative Law, p. 58 (1951).
20 Report on Ministers' Powers, Cmd. 4060, p. 137 (1936) quoted in Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev. 359, 375 (1947).
21 41 A.B.A.R. 355, 368-369 (1916).
22 Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (dissenting opinion).
23 Union Pacific v. Oil and Gas Conservation Comm., 131 Colo. 528, 284 P.2d 242 (1955).
24 54 Colo. 64, 129 Pac. 506 (1912).

the printing industry" in order that those contracting with the state for printing should observe them,[25] the right of the Industrial Commission to set minimum prices for the cleaning and dyeing trade,[26] and the right of certain administrative bodies to determine and prescribe reorganized boundaries for school districts.[27] Colorado's Industrial Recovery Act [28] was declared unconstitutional upon the basis of the *Schechter* case,[29] and the Melon Inspection Act[30] was struck down as involving improper delegation, the court saying, "It cannot be said that the work of inspecting melons is of such a technical nature or so intricate that it cannot be prescribed by definite rules, specifications, classifications and standards."[31]

When it comes to the licensing problem as such, the Colorado Supreme Court has insisted upon definite standards. In *Prouty v. Heron*,[32] the plaintiff had been licensed to practice engineering in 1921. He thereafter left the state and returned in 1945. At that time he applied for a registration card as a professional engineer. He was given a card which stated that he was qualified to practice *civil* engineering. Plaintiff protested the limitation and requested a license without the *civil* engineering classification, but his request was refused. The statute[33] which regulated the licensing of engineers did not define any of the branches of engineering which it enumerated. There were no standards in the act which could be applied in determining the distinctions to be drawn between them. The statute on that count alone would have been objectionable, but there were other flaws as well. A professional engineer had to have completed an *approved* engineering curriculum of four or more years, or have been graduated from a *school or college approved by the Board* as of satisfactory standing. An applicant had to have an additional four or more years of experience in engineering work *of a character satisfactory to the Board* and in *its discretion* the Board might give credit not in excess of one year for satisfactory graduate study in engineering. The

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25 Smith-Brooks Printing Co. v. Young, 103 Colo. 199, 204, 85 P.2d 39, 41 (1938).
26 People ex rel. Attorney General v. Barksdale, supra.
27 Hazlet v. Gaunt, 126 Colo. 385, 250 P.2d 188 (1952).
28 Colo. Laws 1st Reg. Sess. 1935, c. 89.
29 In re Interrogatories of the Governor, 97 Colo. 528, 51 P.2d 695 (1935). See also A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
30 Colo. Laws 1st Reg. Sess. 1925, c. 95, amended by Colo. Laws 1st Reg. Sess. 1927, c. 101.
31 People v. Stanley, 90 Colo. 315, 318, 9 P.2d 288, 289 (1932).
32 127 Colo. 168, 255 P.2d 755 (1953).
33 Colo. Laws 1st Reg. Sess. 1951, c. 161.

court rightly declared that there had been an unwarranted delegation of authority to the Board.[34] *Prouty* is the only Colorado case in which a licensing statute has been invalidated by application of the non-delegation doctrine.

In *Chenoweth v. State Board of Medical Examiners*[35] the State Board of Medical Examiners attempted to revoke a physician's license claiming that he had violated a section of the statute that prohibited advertising relative to any of the sexual organs. In a four-three decision the court held the revocation was void on the ground of statutory uncertainty. In *Spears Hospital v. State Board of Health*[36] the State Board issued a "temporary provisional license" which contained five conditions: namely, that Spears Hospital would not receive maternity cases, that surgery would not be performed, that drugs and medicines would not be administered, that no contagious or infectious cases would be admitted or treated, and finally that the name "hospital" would not be used in describing the institution. The court declared that the Board had usurped the function of the legislature and set up its own law in attempting to issue, and later in attempting to revoke, a "temporary provisional license." Nothing in the statute[37] or in the rules and regulations of the Board authorized such a procedure. It certainly could not be justified on the grounds of legitimate administrative discretion.

In *State Board of Dental Examiners v. Savelle,*[38] however, the court said the power to revoke a license includes within it the power to suspend, and thus the court corrected a mistaken assumption by the State Board that it either must acquit a dentist charged with unprofessional conduct or revoke his license. The court remanded the case in order that the Board might consider the advisability of suspension rather than outright revocation. This case also contained a rather uncertain dictum which appeared to recognize a distinction between unprofessional conduct and unethical conduct, implying that the latter was outside the regulatory reach of the statute.[39] It is seen, then, that even in the field of health, where the courts have traditionally been more liberal in upholding administrative discretion, the Colorado Supreme Court has allowed only the most obvious interpretation of the statutory authority conferred upon the licensing officials.

Municipal bodies cannot enact licensing ordinances which prohibit what already has been authorized by the state,[40] but a municipality in the exercise of its police powers can exact requirements in addition to those imposed by the state.[41]

In summarizing the court's constitutional attitude toward the licensing of professions and occupations, it is evident that it has been generally liberal in finding justification for the *existence* of the power to license. On the other hand the court has been very careful to see that the *exercise* of that power is well within the statutory authorization, and if the legislature has not been careful to provide canalized standards, the statute will be invalidated.

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34 Prouty v. Heron, 127 Colo. 168, 255 P.2d 755 (1953).
35 57 Colo. 74, 141 Pac. 132 (1914).
36 122 Colo. 147, 220 P.2d 872 (1950).
37 Colo. Stat. Ann. c. 78, § 133-138 (1935).
38 90 Colo. 177, 8 P.2d 693 (1932).
39 Id. at 186.
40 Ray v. Denver, 109 Colo. 74, 121 P.2d 886 (1942).
41 Provident Loan Society v. Denver, 64 Colo. 400, 172 P. 10 (1918).

The present engineer's licensing statute[42] would appear to have corrected the deficiencies noted in the *Prouty* case by providing definitive standards. On the other hand, for example, the licensing statute[43] for children's boarding homes and placement agencies would very likely be declared unconstitutional if tested in the courts. There is nothing in this latter statute to suggest by what standards the Board of Standards of Child Care is to determine that a foster boarding home is "suitable"[44] or that a placement agency is "competent and has adequate facilities."[45] The board is also authorized to suspend or revoke any license issued in the event that "minimum standards" are not maintained.[46] It can be cogently argued that there is no reason why the legislature cannot delineate the standards by which the State Board of Standards for Child Care is to be governed in the issuance of licenses to children's boarding homes and placement agencies. Certainly the subject of foster children and

[42] Colo Rev. Stat. § 51-1-12 (1953).
[43] Colo. Rev. Stat. § 22-12-1 to § 22-12-7 (1953).
[44] Colo. Rev. Stat. § 22-12-2 (1953).
[45] Colo. Rev. Stat. § 22-12-4 (1953).
[46] Ibid.

their welfare admits little justification for the delegation of wide discretionary power to a non-legislative body.

A statute upon which there has been no litigation is that dealing with weather control.[47] Here in a nutshell the problem of the delegation of legislative power comes into focus. A licensed person or corporation who engages in weather control or cloud modification operations must have "financial responsibility adequate to meet obligations reasonably likely to be attached to or result from weather control activities," and must have the "skill and experience reasonably necessary to the accomplishment of weather control without actionable injury to property or person."[48] What is financial responsibility? A $1000 bond deposited with the weather control commission? Assets worth $1,000,000? What standards are to govern what a "reasonably likely" result from weather activities is to be? What criteria are to be used in ascertaining whether an applicant has the skill and experience "reasonably necessary"? More uncanalized delegation of power can hardly be imagined.

But to what extent *can* the legislature intelligently prescribe standards within which the licensing authority can operate? Broad open-end qualifications such as exist in the weather control statute force the commission to legislate even if it does not desire to do so. It is easy to see why new developments will cause the non-delegation problem to grow rather than to lessen. But perhaps one helpful principle can be gleaned from the decisions of the Colorado court. In the exercise of delegated powers, doubts should be resolved against the one exercising that power, and in favor of the licensee. This is, of course, a general principle of free government wherein that government is to exist for the benefit of the citizen.

IV. CHANGES IN COLORADO LICENSING STATUTES

It is beyond the scope of this note to engage in a discussion of the procedural aspects of licensing in Colorado. A brief comment, however, will perhaps be helpful. A cursory glance at a handful of Colorado's statutes on licensing will reveal a senseless lack of uniformity. The licensing statute governing accountants specifically provides for a court review of the board's action in revoking a license. In the event the board is reversed, all costs are to be paid by it.[49] But the statute on architects is silent about a judicial review, though it has not been denied there can be one.[50] It takes a unanimous vote to revoke an architect's license,[51] but only a majority vote to revoke one belonging to an engineer.[52] An architect can be fined no more than $200 for practicing without a license,[53] but an unlicensed accountant may have to pay up to $500 and spend a year in jail.[54] Why should the State Board of Barber Examiners receive $16 per day for each of its members in addition to traveling ex-

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[47] Colo. Rev. Stat. § 150-1-1 to § 150-1-14 (1953).
[48] Colo. Rev. Stat. § 150-1-8 (1953).
[49] Colo. Rev. Stat. § 2-1-18(5) (1953).
[50] See Linder v. Copeland, 320 P.2d 972 (Colo., 1958). The Colorado Supreme Court in affirming a Denver District Court decision which ordered the issuance of a license to an architect whose application had been denied twenty-four hours after being received, severely condemned the arbitrary and capricious action of the State Board of Examiners of Architects.
[51] Colo. Rev. Stat. § 10-1-17 (1953).
[52] Colo. Rev. Stat. § 51-1-19 (1953).
[53] Colo. Rev. Stat. § 10-1-15 (1953).
[54] Colo. Rev. Stat. § 2-1-17 (1953).

penses,[55] while members of the State Board of Accountancy receive "no more" than $10 per day and traveling expenses,[56] and while members of the State Board of Registration for Professional Engineers receive no compensation, but only traveling, incidental, and clerical expenses?[57] The examples in the disparity in the various licensing statutes could be multiplied considerably.

Colorado has not yet adopted a uniform procedure act for the creation and procedure of licensing boards and commissions. There appears to be no reason why it should not do so. Legislation of this kind, coupled with the supreme court's insistence upon proper standards within which licensing authorities are to operate, should go far in reducing substantive confusion and procedural uncertainty that potentially exists in many of our present licensing statutes.

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[55] Colo. Rev. Stat. § 15-1-4 (1953).
[56] Colo. Rev. Stat. § 2-1-1 (1953).
[57] Colo. Rev. Stat. § 51-1-5 (1953).