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HAPHAZARD REGIMENTATION UNDER LICENSING STATUTES

FRANK HANFT* AND J. NATHANIEL HAMRICK**

In the wake of the professions, numbers of trades and crafts are surging forward to obtain for themselves the benefit of licensing statutes. The Supreme Court of North Carolina gave the judicial green light and go signal to this sort of legislation in a recent case¹ pronouncing constitutional a statute providing for the examination and licensing of photographers. It is therefore timely to examine the nature and extent of the activity thus sanctioned.

This article will be concerned with statutes which require those engaging in professions, businesses, trades, and other occupations to obtain permission first from some governmental agency. The permission may take the form of a license, permit, certificate, or like stamp of approval. It may be given by some regular officer or agency of the government, or it may be granted by a body created for the purpose. The special body may be, and frequently is, required by the statute to be drawn from the ranks of those engaged in the regulated calling. As a condition to obtaining the license, requirements must be met which are designed to regulate those entering the calling. The particular statute may authorize the licensing officer or body to impose further regulations on the licensed occupation, or the statute may itself contain additional regulations. Commonly the license or other permission may be revoked for cause.

Revenue licenses, that is, licenses which may be obtained simply by paying license taxes, will not be considered herein. Neither will licenses to participate in some form of governmental bounty, such as licenses to graze animals on public lands; nor licenses to perform acts not amounting to businesses or means of livelihood, such as licenses to hunt, drive cars, marry, etc. This article is concerned only with licensing or other governmental permission as a device to regulate businesses, professions, trades, and such occupations.

The long list of occupations so regulated in North Carolina grows rapidly longer.² Already included in such regulation are lawyers,³

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¹ State v. Lawrence, 213 N. C. 674, 197 S. E. 586 (1938).

² *Statutory Changes in North Carolina Law in 1925* (1925) 3 N. C. L. REV. 129, 147; *A Survey of Statutory Changes in North Carolina in 1937* (1937) 15 N. C. L. REV. 321, 326.

³ N. C. CODE ANN. (Michie, 1935) §§215(10), 1941. The sections cited in this and the next succeeding footnotes do not include the entire statute regulating

public utilities,⁴ liquor wholesalers,⁵ persons engaged in slaughtering,⁶ architects,⁷ auctioneers,⁸ barbers,⁹ threshers,¹⁰ collectors,¹¹ plumbing and heating contractors,¹² building and loan associations,¹³ land and loan associations,¹⁴ credit unions,¹⁵ cosmetologists (beauty operators),¹⁶ engineers and land surveyors,¹⁷ insurance, bonding, investment, dividend, guarantee, registry, title guarantee, debenture, and like companies,¹⁸ insurance agents and adjusters,¹⁹ fidelity and fiduciary companies,²⁰ title insurance companies,²¹ title insurance companies and land mortgage companies issuing collateral loan certificates,²² non-profit life benefit associations,²³ fraternal benefit societies,²⁴ physicians and surgeons,²⁵ dentists,²⁶ mouth hygienists,²⁷ pharmacists,²⁸ optometrists,²⁹ osteopaths,³⁰ chiropractors,³¹ nurses,³² midwives,³³ veterinarians,³⁴ chiropodists (foot healers),³⁵ embalmers,³⁶ pilots,³⁷ pawnbrokers,³⁸ photographers,³⁹ public accountants,⁴⁰ employment agencies,⁴¹ dealers in scrap tobacco,⁴² contractors,⁴³ correspondence and commercial schools,⁴⁴ solicitors for such schools,⁴⁵ tile contractors,⁴⁶ electrical contractors,⁴⁷ dry cleaners,⁴⁸ burial associations,⁴⁹ mattress manufacturers,⁵⁰ and real estate brokers and salesmen.⁵¹ Moreover, municipalities may license such enterprises as pool and billiard rooms,⁵² dance halls,⁵³ and liquor retailing.⁵⁴ Counties may license auctioneers,⁵⁵ and liquor retailers.⁵⁶

The above catalogue of occupations, ranging from the most important professions to the most obscure trades, will suffice to show the extent and diversity of the callings closed in North Carolina to those who are unable to secure official permission. The situation in other

each of the occupations concerned. The object is to specify a section from the statute verifying the existence of regulation through licensing or other governmental permission.

⁴ N. C. CODE ANN. (Michie, 1935) §§1037(d), 2613(1).

⁵ *Id.* §3411(7).

⁶ *Id.* §5000. ⁷ *Id.* §§4768(a), (b).

⁸ *Id.* §5126(b).

⁹ *Id.* §5205.

¹⁰ *Id.* §6055(j).

¹¹ *Id.* §6377.

¹² *Id.* §6476(n).

¹³ *Id.* §6649(8).

¹⁴ *Id.* §6691.

¹⁵ *Id.* §6734.

¹⁶ *Id.* §§6766, 6767.

¹⁷ *Id.* §§6943(c), 6970, 6976, 6978.

¹⁸ *Id.* §7007(10).

¹⁹ *Id.* §7312(o).

²⁰ N. C. CODE ANN. (Michie, Supp. 1937) §5126(a 1).

²¹ *Id.* §5168(1k).

²² *Id.* §5168(eee).

²³ *Id.* §5168(ttt).

²⁴ *Id.* §5168(hh).

²⁵ N. C. CODE ANN. (Michie, 1935) §2787(34).

²⁶ *Ibid.*

²⁷ *Id.* §1297-26.

²⁸ *Id.* §5003(a).

²⁹ *Id.* §5268(ww).

³⁰ *Id.* §5212.

³¹ *Id.* §6274.

³² *Id.* §6396.

³³ *Id.* §6500.

³⁴ *Id.* §6649(a).

³⁵ *Id.* §6702.

³⁶ *Id.* §6753(2).

³⁷ *Id.* §6781.

³⁸ *Id.* §7002.

³⁹ *Id.* §§7024(b), 7024(f).

⁴⁰ *Id.* §5780(m 10).

⁴¹ *Id.* §5382(3).

⁴² *Id.* §7312(cc).

⁴³ *Id.* §3411(12).

⁴⁴ *Id.* §1297-25, 3411(13).

⁴⁵ *Id.* §4992.

⁴⁶ *Id.* §5105(1).

⁴⁷ *Id.* §§5170, 5196.

⁴⁸ *Id.* §5259(1).

⁴⁹ *Id.* §6298.

⁵⁰ *Id.* §6397(b).

⁵¹ *Id.* §6613.

⁵² *Id.* §6658.

⁵³ *Id.* §6715.

⁵⁴ *Id.* §6758.

states is similar.⁵⁷ The Federal Government, within the field of its limited powers, likewise is expanding its use of licensing.⁵⁸

Here, then, is a movement establishing a type of legal control over enterprise, which movement is nationwide, continuous, and inclusive. So far as this kind of control relates to professions, such as dentistry, medicine, or law, which hold within their control such vital matters as the health of the people, or their means of access to justice, the establishment of such control may well represent a considered choice of social policy by legislators. When legislators pass licensing laws in such fields it is not hard to believe that the legislators are giving form to their own convictions and to those of the general body of their constituents. So also when legislatures decide that new public utilities should not be set up without the official approval of a commission able to judge whether such utilities are needed, or whether their presence would impair the effectiveness of those already in the field, it is possible to credit the legislators with making a thoughtful choice of a policy designed to further the general welfare in securing to the public an adequate supply of essential service. Similarly, when control by licensing is established over enterprises having a bearing on the public morals, such as pool and dance halls, or on the public safety, such as electrical contracting, that control can be ascribed to a policy formulated by the legislators or the public they represent. But what about control of chiropodists, who in North Carolina may heal no feet unless authorized to do so by a board appointed by the pedic association, that is, the organization of the men already in the field?⁵⁹ What about tile contractors, that is, persons who undertake for profit to lay tile floors and walls? No such "contractors" may lay any such floors or walls without passing an examination and receiving a license from a board composed of men already engaged in that occupation.⁶⁰ What about photographers, who may enter the business only if licensed to do so by a board on which sit five photographers?⁶¹ (It is worth noticing that the newcomer who desires to enter any one of these three fields must pay an initial fee of \$25,⁶² and annual fees thereafter.⁶³) What about other

⁵⁷ Hoyt, *Shaping Judicial Review of Administrative Tribunals* (1937) 16 N. C. L. REV. 1. Note that Wisconsin has set up a commission to examine and license watchmakers.

⁵⁸ Koons, *Growth of Federal Licensing* (1936) 24 GEO. L. J. 293.

⁵⁹ N. C. CODE ANN. (Michie, 1935) §§6765, 6766.

⁶⁰ N. C. CODE ANN. (Michie, Supp. 1937) §§5168(ggg), 5168(jjj).

⁶¹ N. C. CODE ANN. (Michie, 1935) §§7007(2), 7007(10).

⁶² Chiropodists, N. C. CODE ANN. (Michie, 1935) §6766; tile contractors, N. C. CODE ANN. (Michie, Supp. 1937) §5168(jjj); photographers, N. C. CODE ANN. (Michie, 1935) §7007(13).

⁶³ Tile contractors \$50, N. C. CODE ANN. (Michie, Supp. 1937) §5168(kkk); chiropodists not to exceed \$10, N. C. CODE ANN. (Michie, 1935) §6773(a); photographers only \$5, *id.* §7007(19).

occupations such as these? Did the legislators after examination of the needs of society come by themselves to the conclusion that trained and qualified chiropodists are vital to the public interest? Or that tile floors and walls, as distinguished from any other floors and walls, ought in the public interest to be laid only by carefully examined and duly licensed layers? Or that boughten photographs are so closely connected with the general welfare that only licensed persons should be allowed to take photographs for a price, whereas anyone may take them for himself? Did the man on the street put pressure on his representatives in the legislature to protect him from unlicensed chiropodists, tile layers, and photographers? If the answer to each of these questions is in the negative, if control of such occupations as these represents no social policy formulated either by the public or its representatives, then whence has come the force strong enough to bring about the regulation by license of so many ordinary occupations? A chorus of voices supplies the answer. Many of these laws, it is suspected, are procured by men already in these occupations in order to keep others out.⁶⁴ A tart and lucid declaration on this subject was made by the court of the state of Washington as far back as 1906, in connection with a statute licensing plumbers. "We are not permitted to inquire into the motive of the Legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view."⁶⁵ An article appearing in the *American Mercury* tells how the beauty parlor operators secured the passage of licensing legislation in various states. The official organ of the American Cosmeticians' Society is quoted as follows, "'These six laws were obtained as a result of much self-sacrifice and hard work on the part of a small group of women in each of these States. They have behind them some fine organization work, personal enthusiasm that could not be dampened by setbacks and misunderstandings, meetings without number, countless hours of telephoning, *hundreds of personal interviews with legislators, weeks given over to lobbying* [italics ours] in the State capitals, days of anxiety and disappointment, and a generous amount of that necessary thing—coöperation.'"

The article adds, "In Missouri success was not difficult because the local branches of the American Cosmeticians' Society and the National Hair-dressers' Association combined forces to push the bill through."⁶⁶

⁶⁴ *A Survey of Statutory Changes in North Carolina in 1937* (1937) 15 N. C. L. REV. 321, 330; Patterson, *Administrative Provisions for Licensing of Chiropodists, Chiropodists and Osteopaths* (1921) 7 IOWA L. BULL. 35, 36.

⁶⁵ *State ex rel. Richey v. Smith*, 42 Wash. 237, 248, 84 Pac. 851, 854 (1906). This case, invalidating the licensing statute, was later overruled. *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930).

⁶⁶ Fishbein, *The Cult of Beauty* (Feb. 1926) 7 AMERICAN MERCURY 161, 164.

Newly elected legislators, before their trip to the state capital, if asked whether persons should be obliged to pass examinations and obtain expensive licenses before engaging in the ordinary occupations of life would doubtless answer, "No." But it is by no means so easy to say, "No," to a persistent group of people, all having votes, and representing others who have votes, who want their businesses protected by a licensing law. This is particularly true because the young men and women who, in the future, will be kept from these occupations by the law are not on hand, indeed are not yet identified. Their future as tile layers or beauticians is foreclosed before their aspirations in such directions have begun.

The first and greatest objection to all this is that we are moving rapidly in the direction of regimenting even the most ordinary callings under official control, when it is doubtful whether the legislators or the public desire any such state of affairs. It is doubtful whether even the responsible pressure groups are in favor of a controlled economy; they each merely want certain advantages to be gained for themselves by one particular control statute. But these statutes added together make a large scale trend. We are in danger of moving on to a destination and then discovering that none of us really wanted to go there.

A lesser disadvantage of enacting such miscellaneous control statutes at the instance of diverse pressure groups is the needless variations introduced into laws having a similar objective. A comparison of the licensing statutes for dry cleaners and for photographers will do to illustrate the point. All five members of the board of photographic examiners must be experienced photographers.⁶⁷ Only three members of the dry cleaners commission are to be experienced dry cleaners; the other two must be from the public at large.⁶⁸ Why the difference? The term of office for the photographers is three years,⁶⁹ for the dry cleaners four years.⁷⁰ Why? The photographers are paid seven dollars a day and expenses,⁷¹ the dry cleaners five dollars a day and traveling expenses.⁷² Is a photographer worth more than a dry cleaner? The photographic examiners may appoint legal assistants.⁷³ The dry cleaners commission may employ "such lawyers as may be approved by the attorneys general."⁷⁴ Are dry cleaners poorer judges of legal talent than are photographers? If not, why must their choice of lawyers be approved by the attorneys general, whereas the photographers can hire any lawyers they please? Legislative power is given

⁶⁷ N. C. CODE ANN. (Michie, 1935) §7007(2).

⁶⁸ N. C. CODE ANN. (Michie, Supp. 1937) §5382(2).

⁶⁹ See note 67, *supra*.

⁷⁰ See note 68, *supra*.

⁷¹ N. C. CODE ANN. (Michie, 1935) §7007(4).

⁷² See note 68, *supra*.

⁷³ N. C. CODE ANN. (Michie, 1935) §7007(9).

⁷⁴ See note 68, *supra*.

to the photographers by authorizing them to "adopt and enforce all rules and orders necessary to carry out the provisions of this chapter."⁷⁵ The dry cleaners are authorized to adopt rules and regulations to control the dry cleaning, pressing and dyeing business in five specified particulars, including the enforcement of fire, sanitation, and labor laws, and all other statute laws applicable to the industry, and the prohibition of false or misleading statements, advertisements or guarantees.⁷⁶ The more poorly paid dry cleaners are not trusted to hire their own lawyers, but they are endowed with very broad and important legislative powers. The section authorizing the revocation of photographers' licenses by the board adds the non-committal statement, "Provided, the accused shall not be barred the right of appeal to the superior court."⁷⁷ This enigmatic language may be construed as a back-handed provision for appeal to the superior court. The statute contains no other provision for such appeal. In contrast, if the dry cleaners commission either refuses a license or suspends or revokes a license, right of appeal to the superior court is expressly granted.⁷⁸ Why the diversity in the two statutes on the subject of judicial review? Are persons engaged in dry cleaning better entitled to a safeguarding of their rights than are photographers? The criminal provisions of the dry cleaning statute make it a misdemeanor to engage in the regulated business without a license.⁷⁹ The criminal provisions of the photography statute make it a misdemeanor either to violate any of the provisions of the chapter, or to engage in the regulated business without a license.⁸⁰ Offending dry cleaners are to be punished by a fine of not less than ten dollars nor more than one hundred dollars. Offending photographers are to be fined not less than fifty nor more than two hundred dollars for the first offense. Why is it a much graver, or at least more costly, offense against the state for a photographer to operate without a license than for a dry cleaner to do the same thing? Subsequent offenses by photographers may draw a fine up to two hundred dollars, imprisonment not to exceed thirty days, or both. There is no such provision in the case of dry cleaners. Is a photographer who twice offends so much greater a villain than a dry cleaner who twice offends that the former should face a jail sentence, but not the latter?

Much space could be consumed pointing out additional differences between the two statutes. Sometimes these differences are in mere detail, sometimes in the most important provisions. Many of the differ-

⁷⁵ N. C. CODE ANN. (Michie, 1935) §7007(7).

⁷⁶ N. C. CODE ANN. (Michie, Supp. 1937) §5382(3).

⁷⁷ N. C. CODE ANN. (Michie, 1935) §7007(23)(d).

⁷⁸ See note 76, *supra*.

⁷⁹ N. C. CODE ANN. (Michie, Supp. 1937) §5382(7).

⁸⁰ N. C. CODE ANN. (Michie, 1935) §7007(24).

ences have one similarity; they are without any perceptible explanation. No visible policy accounts for them. Their presence can be ascribed to the circumstance that one industrial group produced one piece of legislation, another group produced the other. Neither group was interested in the legislation of the other, nor in bringing about uniformity, nor in otherwise perfecting the law or its policies.

A similar condition may be found in other North Carolina licensing statutes. The great diversity in the provisions for judicial review in the statutes regulating various enterprises has already been brought to light in an article in this law review.⁸¹ These statutory provisions range from total silence on the subject of judicial review to trial *de novo* in the superior court. There is no justification for the purposeless diversities. It might be argued that many varieties of provisions have value as experiments, but such a mass of differences as now exist are likely to obscure and confuse the results, muddling our experience as badly as the laws under which the experience is gained are muddled. It would be wiser to frame a model form for a statute licensing occupations, and then to deviate from that form in statutes for particular occupations only when special conditions justify such deviations.⁸² Experience could then be centered on perfecting the model form.

A many times more serious lack of uniformity in the law lies in the choice of occupations to be regulated. If the North Carolina citizen goes down the main street of his town and turns into a photographer's shop he is protected by the police power of his state which has, in legal theory at least, been exerted in his behalf by requiring the photographer to secure a license. The same thing holds true if he stops at the dry cleaner's shop. But if he stops at the clothing store or the grocer's he is protected in no such fashion by statewide law. Can it be argued that he has less interest at stake in the grocer's business or the clothier's than he has in the photographer's or the dry cleaner's? That there is less likelihood that he will be imposed upon by the clothier than by the photographer? Or that he cares less about the way the grocery is conducted than he does about the way the dry cleaner's business is operated? Is not the truth exactly the opposite; that the unlicensed clothing and grocery businesses are of far more public concern than the licensed photography and dry cleaning businesses? Although the photographer and dry cleaner have been singled out for regulation on the theory that their trades are matters of public importance, is the truth not rather that licensing was relatively easy to impose here because the public did not care much one way or the other? On the other

⁸¹ See note 57, *supra*.

⁸² Long ago a single code of procedure for various licensing boards, to be incorporated in specific statutes by reference, was suggested. Patterson, *supra* note 64, at 39.

hand the public might be considerably aroused if it were to be confronted with the prospect that no man in the future could open a grocery store without a license from a board manned by men already in the grocery business. Why has not the legislature provided for the licensing of farmers? Certainly farming is of incomparably more importance to the public than dry cleaning. Indeed there is legislation already on the statute books of the state in effect declaring a public interest in the manner in which farm lands are used, and providing elaborate administrative machinery to regulate that use to the end that the soil be conserved.⁸³ Why not secure this objective by requiring all persons in future to stand examination and procure licenses before they may become farmers? If we look to the real motive for the licensing of many ordinary occupations, namely, to keep down competition, the farmers are at least as much entitled to such protection as are beauty culturists, for the farmers have long been suffering from the consequences of overproduction. If we look to the ostensible motive for licensing laws, namely the protection of the public welfare, the licensing of farmers would be far more defensible than the licensing of tile contractors. Bad farming and overproduction on the farm are recognized as acute national problems of concern to the whole people. There is no acute problem from the public standpoint in tile laying. So far as the public is concerned, in many instances there is more reason for licensing where it does not exist than where it does. But in the case of such occupations as farming and storekeeping proposed license laws would bring home vividly to the public the danger it is running of losing its opportunity to engage freely in ordinary occupations. Men who dream of some day opening their own stores, or achieving independence by becoming small farmers of some kind, would be shocked into realization that in the name of the public interest there is being sacrificed one of the greatest of public interests, namely, free choice of the ordinary means of living.

Even in the absence of any such shock as would result from the licensing of such an occupation as farming, there is arising an uneasy suspicion that those on the inside of many fields of endeavor have so effectively barred the doors that great numbers of our youths are finding it increasingly difficult to break in anywhere. This condition contributes to unemployment, and to the sense of futility when increasing numbers of people are obliged to turn to made work afforded by government. Nor is it a satisfactory answer to say that any youth who wants to be a photographer or tile layer can study for the examination, comply with the regulations, and pay the fees. A young man who might otherwise begin in a small way to take pictures or develop films for

⁸³ N. C. CODE ANN. (Michie, Supp. 1937) §7395(34)-(46).

others, and gradually build up a business, is likely to be deterred by the prospect of a stiff examination and fees in excess of the few dollars in sight at the time he otherwise would begin.

But whether licensing restriction of the ordinary occupations is good policy or whether it is bad policy, at least it is time that the choice were being made, and then consistently followed. Licensing legislation has had its trial period; it has demonstrated its value in those professions where special competence is essential to such vital public interests as health; the time has come either to accept it as good policy for ordinary occupations also, or to reject it as such policy. If accepted, it is time to apply it by systematic extension to other occupations on the merits. It is likewise time to frame a standard licensing law, to be deviated from in the case of any particular occupation only when there is reason for the deviation. On the other hand, if such a policy is emphatically not wanted, why should it be adopted piecemeal, one unimportant occupation at a time, simply because no one objects very much to each successive step urged on the legislature by a tight little group with an axe to grind?

Although the legislature is the body which ought to shoulder the job of bringing orderly, well-considered law out of our present haphazard regimentation, there is still the problem of the constitutionality of the licensing statutes already adopted, or which may be adopted if licensing is recognized as a desirable policy to be followed generally in the case of ordinary occupations. This problem, of course, is for the courts.

Licensing statutes may be attacked on the ground that any such regulation of the occupation involved is unconstitutional, or on the ground that although a proper licensing statute would be valid, still the particular statute in question is defective in one or more details. Such deficiencies in detail may be lack of proper notice and hearing in case a license is revoked, lack of statutory standards to guide the licensing board in granting or revoking licenses, and the like. This article is not concerned with invalidity arising from particular flaws in the statute.⁸⁴ Attack on the validity of any licensing regulation at all of the occupation involved commonly centers on the question whether such regulation is within the police power of the state. If not within the police power, the regulation is likely to collide with such constitutional guarantees as the due process clause of the Fourteenth Amendment to the Constitution of the United States, or similar clauses of state constitutions, because under the Fourteenth Amendment the liberty of which the citizen may not be deprived without due process includes liberty to

⁸⁴ For a discussion of this subject see *Legis.* (1925) 25 *COL. L. REV.* 220.

engage in any of the common occupations.⁸⁵ The question thus becomes one of boundary between the police power and the due process limitation. An orthodox view of the police power is that it includes power to protect the public health, safety, morals, and general welfare. Licensing legislation, although it does restrict liberty to enter an occupation, is valid if reasonably calculated to protect the public health, safety, morals, or general welfare. These standards are simple but broad; their application is comprehensible but uncertain. Most of the division of judicial opinion as to whether certain occupations can be licensed or not arises from disagreement on the question whether the licensing involved does or does not further these objectives. Protection of the public welfare, in particular, is a vague standard. It was given somewhat more definite meaning in the classic statement of Mr. Justice Holmes, "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."⁸⁶ General welfare thus conceived does not cover mere small advantages to the public, it includes rather the vital interests of the public.

Quite as one would expect, where businesses⁸⁷ or occupations plainly and extensively affect the public health, safety, morals, or welfare, the requirement of official permission by license or otherwise to engage therein has been held constitutional. Thus it is valid to require those who practice medicine to procure licenses.⁸⁸ This result is entirely

⁸⁵ See *Meyer v. Nebraska*, 262 U. S. 390, 399, 43 Sup. Ct. 625, 626, 67 L. ed. 1042, 1045 (1923).

⁸⁶ *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188, 55 L. ed. 112, 116 (1911).

⁸⁷ It is not proposed in this article to examine the subject of certificates of convenience and necessity required for public utilities and businesses affected with a public interest. Suffice it to say that this category of businesses for which official permission must be secured has long existed, is commonly recognized, and has been frequently and exhaustively discussed. A relatively recent decision discussing the subject is *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 Sup. Ct. 371, 76 L. ed. 747 (1932). The court held unconstitutional the requirement of a license for the business of manufacturing, selling, and distributing ice.

The admission of lawyers to the bar likewise will not be discussed herein. There is no right to practice law; when the practice of law is restricted by statute the question is not whether the police power has been validly exercised to diminish a right. Rather, the practice of law is regarded as a privilege or franchise derived from the statute. *In re Investigation of Conduct of Examination for Admission to Practice Law*, 1 Cal. (2d) 61, 33 P. (2d) 829 (1934); see *In re Carver*, 224 Mass. 169, 112 N. E. 877, 879 (1916). Because this different type of legal viewpoint is involved the subject of admission to the bar is not included in our examination and discussion of the validity of licensing statutes.

⁸⁸ *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. ed. 623 (1889); *State v. Call*, 121 N. C. 643, 28 S. E. 517 (1897). In this latter case the question was raised whether the statute created a monopoly within the prohibition of the state constitution. The court decided that no monopoly was created since anyone possessing the specified requirements and passing the examination could obtain a license.

warranted in view of the bearing of such a requirement on the protection of the public health. Likewise valid is licensing regulation of dentists,⁸⁹ and of various types of practitioners who heal without the use of drugs, such as osteopaths and chiropractors.⁹⁰ Optometrists may be licensed,⁹¹ but it has been held that the regulation may not, by the definition of optometry, be extended to the giving of any aid by merchants to customers in selecting glasses. Where a merchant kept a mechanical device to aid customers in selecting lenses, this was said to be an incident to an ordinary business and could not be brought within the police power.⁹² Licensing of embalmers is sustained.⁹³ Difficulties are again encountered when licensing regulation is imposed upon the barbering trade. This regulation is on less firm ground than the licensing of doctors and dentists for two reasons. First, the doctor or dentist deals directly with the public health; his activities are designed to promote it; whereas the barber's primary function is to remove hair, and public health is involved only incidentally. Almost all occupations affect the public health to some extent. Second, a much higher degree of capacity is required for doctors and dentists, and licensing regulations insuring that capacity have a larger scale duty to perform. The acquaintance with public health required for barbering is more elementary, and approaches the field of common knowledge. Although licensing regulation of barbering is near the outer boundary of legitimate exercise of the police power⁹⁴ for the protection of public health, nevertheless it is still within the boundary. Barber licensing is sustained.⁹⁵ But when barber licensing statutes use the pretext of connection with public health to regulate barbering as a whole, some courts draw the line. If barbering may be regulated because it involves public health, then the regulations may not go beyond requirements having to do with health.⁹⁶ Questions on the examination for barbers may not go into such matters as the proper way to cut hair or give a shave. Such questions have nothing to do with public health.⁹⁷ Licensing of beauticians is likewise sustained by reason of relation to the public health.⁹⁸ But here again

⁸⁹ *State v. Hicks*, 143 N. C. 689, 57 S. E. 441 (1907); *Deuglas v. Noble*, 261 U. S. 165, 43 Sup. Ct. 303, 67 L. ed. 590 (1923) *semble*; (1927) 5 N. C. L. REV. 257.

⁹⁰ *State v. Siler*, 169 N. C. 314, 84 S. E. 1015 (1915).

⁹¹ *Price v. State*, 168 Wis. 603, 171 N. W. 77 (1919).

⁹² *Bruhl v. State*, 111 Tex. Cr. App. 233, 13 S. W. (2d) 93 (1929).

⁹³ *Beard v. State Board of Embalmers and Funeral Directors*, 111 Cal. App. 559, 295 Pac. 1052 (1931) *semble*.

⁹⁴ See *Dasch v. Jackson*, 170 Md. 251, 266, 183 Atl. 534, 540 (1936).

⁹⁵ *Cooper v. Rollins*, 152 Ga. 588, 110 S. E. 726 (1922); *State v. Lockey*, 198 N. C. 551, 152 S. E. 693 (1930).

⁹⁶ *Schneider v. Duer*, 170 Md. 326, 184 Atl. 914 (1936); *Banghart v. Walsh*, 339 Ill. 132, 171 N. E. 154 (1930).

⁹⁷ *Timmons v. Morris*, 271 Fed. 721 (W. D. Wash. 1921).

⁹⁸ *State ex rel. Dally v. Woodall*, 225 Ala. 178, 142 So. 838 (1932); *State v. Ross*, 185 S. C. 472, 194 S. E. 439 (1937).

the regulations, according to some courts, may not go beyond what is required to safeguard health. A beauty culture statute was held unconstitutional partly on the ground that the regulations exceeded those necessary for any such purpose. The court pointed out that the provisions of the act were designed primarily to limit the numbers who could enter the field.⁹⁹ Statutes regulating beauty culture commonly include in their scope beautifying processes having little relation to public health. One such statute was held unconstitutional as to a person who curled hair and did nothing else.¹⁰⁰ The connection between public health and plumbing is found sufficient by some courts to support licensing regulation.¹⁰¹ But a plumbing statute may not include drain-layers and oblige them to meet the requirements for plumbers.¹⁰² One court decided that plumbers' licensing is beyond the boundary of the police power. The court found no sufficient connection between such regulation and the public health, but did find visible a purpose to keep out competition.¹⁰³ A statute creating a board of paper-hangers to examine and license persons engaging in that occupation was held to be beyond the police power. So far as the public health was concerned, paper-hanging was held to be no different from such unlicensed occupations as carpentry and bricklaying.¹⁰⁴ Licensing regulation by the commissioner of agriculture of farm produce wholesalers was held to violate the equal protection clause of the Constitution since the regulation applied only to wholesalers of farm produce.¹⁰⁵

The use of the police power to further or protect the public safety presents the same type of problem as the use of that power in aid of the public health. If a doctrine were formulated and literally applied to the effect that any occupation affecting public safety may be regulated by license, then nearly all means of livelihood could be licensed,

⁹⁹ *Hoff v. State*, 197 Atl. 75 (Del. Super. Ct. 1938).

¹⁰⁰ *Baker v. Daly*, 15 F. (2d) 881 (D. Ore. 1926).

¹⁰¹ *Roach v. Durham*, 204 N. C. 587, 169 S. E. 149 (1933); *State v. District Court*, 64 N. D. 399, 253 N. W. 744 (1934); *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930).

¹⁰² *Scully v. Hallihan*, 365 Ill. 185, 6 N. E. (2d) 176 (1936).

¹⁰³ *Replogle v. Little Rock*, 166 Ark. 617, 267 S. W. 353 (1924).

¹⁰⁴ *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534 (1936). The framers of the statute hopefully worded the board's authority in part as follows: to "adopt such rules and regulations for the examinations of paper-hangers as herein defined, and for the carrying on of the business of paper-hanging in such manner as to protect and promote the public health, safety and general welfare," etc. Thus the very things the board was to do were the things which the law says may be done under the police power. This strategy did not work.

¹⁰⁵ *State v. Chisesi*, 187 La. 675, 175 So. 453 (1937). Accord: *Valentine v. Berrien Circuit Judge*, 124 Mich. 664, 83 N. W. 594 (1900). *Contra*: *State v. Wagener*, 77 Minn. 483, 80 N. W. 633 (1899). Licensing of milk-gathering stations has been upheld. *People v. Perretta*, 253 N. Y. 305, 171 N. E. 72 (1930). A city may validly require a license or permit to sell milk, *State v. Kirkpatrick*, 179 N. C. 747, 103 S. E. 65 (1920), operate a restaurant, *State v. Snipes*, 161 N. C. 242, 76 S. E. 243 (1912), or operate a meat market, *McIntyre v. Murphy*, 177 N. C. 300, 98 S. E. 820 (1919).

for almost any occupation which one person engages in may endanger others. Even snow-shovelers could be licensed, for poor snow shoveling may leave behind slippery spots. However, there are some occupations which are especially connected with public safety, and which require special competence to insure that safety. One such occupation is the practice of architecture. Licensing regulation of this profession is valid.¹⁰⁶ Also constitutional is the licensing of electricians,¹⁰⁷ electrical contractors,¹⁰⁸ general contractors,¹⁰⁹ and operators of stationary steam boilers.¹¹⁰ Licensing of dry cleaners by the fire marshal has been sustained,¹¹¹ but it should be remembered that regulation in the interest of public safety directed to keeping down fire hazard may be supported without justifying regulation aimed at securing the proper pressing of clothes. Examinations and licenses for motion picture operators may be required, again to reduce fire hazard.¹¹² Locomotive engineers may be subjected to state examinations and be required to secure licenses as a safety measure.¹¹³ However, the court of Illinois balked at sustaining a statute aimed at securing the better education of practitioners of horseshoeing, and providing examinations for them. The court was unable to find any reasonable relationship between this legislation and the proper objectives of the police power.¹¹⁴ This decision is sound on both law and policy, and yet it is easy to see a relationship between proper horseshoeing and public safety in the horse and buggy days when this case was decided. The decision re-illustrates the important point that some small and ordinary connection between an occupation and the public safety does not justify licensing regulation, unless we are to support such regulation of practically all occupations.

Licensing in the interest of the public morals has long been recognized as a legitimate exercise of the police power. Enterprises having a tendency to endanger public morals may be licensed.¹¹⁵

¹⁰⁶ *State Board of Examiners for Architects and Engineers v. Rogers*, 167 Tenn. 374, 69 S. W. (2d) 1093 (1934). Architecture is also related to the public health.

¹⁰⁷ *Becker v. Pickersgill*, 150 N. J. L. 51, 143 Atl. 859 (1928).

¹⁰⁸ *Milwaukee v. Rissling*, 184 Wis. 517, 199 N. W. 61 (1924) *semble*. *Contra*: *Southeastern Electric Co. v. Atlanta*, 179 Ga. 514, 176 S. E. 400 (1934).

¹⁰⁹ *Hunt v. Douglas Lumber Co.*, 41 Ariz. 276, 17 P. (2d) 815 (1933). The statute contained provisions designed to insure honesty on the part of the contractors. These provisions are of more dubious validity, but the court approved them as regulations for the prevention of fraud. For an expression of doubt as to the validity of the North Carolina statute regulating contractors as the statute then existed see (1926) 26 Col. L. Rev. 472, 474.

¹¹⁰ *Bradford v. Houston*, 4 S. W. (2d) 592 (Tex. Civ. App. 1928).

¹¹¹ *Ex parte Weisberg*, 215 Cal. 624, 12 P. (2d) 446 (1932).

¹¹² *State ex rel. Ebert v. Loden*, 117 Md. 373, 83 Atl. 564 (1912).

¹¹³ *McDonald v. State*, 81 Ala. 279, 2 So. 829 (1886).

¹¹⁴ *Bessette v. People*, 193 Ill. 334, 62 N. E. 215 (1901).

¹¹⁵ *Pool halls*: *State ex rel. Sayles v. Superior Ct.*, 120 Wash. 183, 206 Pac. 966 (1922); *cf. Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. ed. 1229 (1912). *Dance halls*: *Chung Mee Restaurant Co. v. Healy*, 36 N. H. 483, 171

Regulation of the type under discussion has been visited on many occupations in the name of the general welfare. One such occupation is accounting.¹¹⁶ Statutes requiring certificates of authority before anyone is permitted to hold himself out as a certified public accountant are plainly valid.¹¹⁷ No one is obliged to meet the requirements except those who, in substance, want to be certified as having done so.¹¹⁸ But when all public accountants are required to obtain certificates or licenses, the statutes have been held unconstitutional. They are not within the police power to protect the general welfare.¹¹⁹ The Wisconsin court, however, upheld a statute requiring that certificates of authority be secured from the state board of accountancy by all persons holding themselves out to the public as skilled in accountancy.¹²⁰ This, said the court, is a valid exercise of the police power in the interest of public welfare. The court pointed to the greatly enlarged field of accountancy in connection with tax laws, security issue laws, social security legislation, public utility rate regulation, and the like. In distinguishing the Wisconsin statute from those elsewhere held invalid, the court called attention to the fact that the Wisconsin law expressly excepted bookkeepers. The position taken by the Wisconsin court is commendable. The profession of accounting has a special relation to the public welfare by reason, among other things, of its effect on the operation of highly important legislation having to do with the general welfare. But it is hard to see any reason why the ordinary occupation of keeping books for several employers should be subjected to licensing. The police power has been held to extend to licensing regulation of real estate brokers.¹²¹ The Kentucky court, however, declared unconstitutional a statute providing such regulation. The court found particularly obnoxious a requirement that the real estate brokers be of good moral

Atl. 263 (1934); *Bungalow Amusement Co. v. Seattle*, 148 Wash. 485, 269 Pac. 1043 (1928). The court in the latter case adds that the regulation could extend to the point of prohibition. The liquor traffic also can be regulated to the point of prohibition. *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989 (1877); *Eberle v. People*, 232 U. S. 700, 34 Sup. Ct. 464, 58 L. ed. 803 (1914). The court in the latter case said, 232 U. S. at 706, 34 Sup. Ct. at 466, 58 L. ed. at 806 that the sale of intoxicating liquors could be prohibited absolutely, or sale by merchants could be prohibited while sale by licensed druggists was permitted.

¹¹⁶ For a discussion of this type of regulation of accounting see (1937) 21 MARQ. L. REV. 93.

¹¹⁷ *Henry v. State*, 97 Tex. Cr. Rep. 67, 260 S. W. 190 (1924).

¹¹⁸ Legis. (1926) 26 COL. L. REV. 472, n. 6 calls attention to statutes providing for certified shorthand reporters and registered nurses.

¹¹⁹ *Frazer v. Shelton*, 320 Ill. 253, 150 N. E. 696 (1926); *State ex rel. Short v. Reidell*, 109 Okl. 35, 233 Pac. 684 (1924); *Campbell v. McIntyre*, 165 Tenn. 47, 52 S. W. (2d) 162 (1932).

¹²⁰ *Wangerin v. Wis. State Board of Accountancy*, 223 Wis. 179, 270 N. W. 57 (1936); cf. *State ex rel. McCullough v. Scott*, 182 N. C. 865, 880, 109 S. E. 789, 797, 798 (1921).

¹²¹ *State ex rel. Davis v. Rose*, 97 Fla. 710, 122 So. 225 (1929); *Camp v. State*, 171 Ga. 25, 154 S. E. 436 (1930).

character. The business of real estate brokers, according to the court, was no more likely to be injurious to the public welfare than any other business. If this statute were supported, the state could require proof of good character in order to engage in any business.¹²² Licensing regulation of abstracters of title has been sustained.¹²³ Statutes providing for the licensing of those who sell securities have been properly upheld,¹²⁴ since there is here a more than ordinary danger of fraud. Employment agencies also may be regulated in this fashion.¹²⁵ Experience has demonstrated that here also there is unusual likelihood of imposition. Licensing of itinerant vendors of drugs while not licensing drug stores has been sustained.¹²⁶ Pawnbrokers,¹²⁷ secondhand dealers,¹²⁸ and auctioneers¹²⁹ may be licensed. Even the licensing of coal dealers has been sustained, partly on the ground of opportunity for fraud in the weighing, since the purchasers had no opportunity to weigh the coal.¹³⁰ But under the guise of regulating sweat shops a city may not license all clothing stores.¹³¹

This review of some of the decisions on the question of the validity of statutes or ordinances providing for regulation of occupations by licensing makes it apparent that where the occupation has no special relationship to public health, safety, morals, or welfare the courts have a well-established basis for invalidating the regulation. Courts can, if they choose, preserve from such control the ordinary callings. Where the licensing is statewide and is to be done by a commission or agency composed of men already in the business to be licensed, the courts may

¹²² *Rawles v. Jenkins*, 212 Ky. 287, 279 S. W. 350 (1926). This case was cited with approval in *State v. Warren*, 211 N. C. 75, 78, 189 S. E. 108, 110 (1937), which invalidated a North Carolina statute providing for the licensing of real estate brokers on the ground that the act was limited to certain counties.

¹²³ *State ex rel. Freeman v. Abstracters Board of Examiners*, 99 Mont. 564, 45 P. (2d) 668 (1935).

¹²⁴ *State v. Agey*, 171 N. C. 831, 88 S. E. 726 (1916); *State ex rel. Smith v. Fidelity and Deposit Co. of Baltimore, Md.*, 191 N. C. 643, 132 S. E. 792 (1926); *Halsey, Stuart & Co. v. Public Serv. Comm.*, 212 Wis. 184, 248 N. W. 458 (1933).

¹²⁵ *Brazee v. People*, 241 U. S. 340, 36 Sup. Ct. 561, 60 L. ed. 1034 (1915); *Commissioner of Labor v. Clark*, 101 N. J. L. 223, 127 Atl. 550 (1925). However, procurement of employment for others for pay may not be entirely forbidden. *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. ed. 1336 (1917). Nor may the charge for such service be limited to ten per cent of the earnings of the employee. *Ex parte Dickey*, 144 Cal. 234, 77 Pac. 924 (1904).

¹²⁶ *People v. Kupusinac*, 261 Mich. 398, 246 N. W. 159 (1933).

¹²⁷ *Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29 (1895); *Asakura v. Seattle*, 122 Wash. 81, 210 Pac. 30 (1922).

¹²⁸ *Lewis v. Quinn*, 217 Cal. 410, 19 P. (2d) 236 (1933).

¹²⁹ *People ex rel. Schwab v. Grant*, 126 N. Y. 473, 27 N. E. 964 (1891); *San Antonio v. South Trunk Co.*, 13 S. W. (2d) 401 (Tex. Civ. App. 1929). But cf. *Empire Home Furnishers v. White*, 235 App. Div. 522, 258 N. Y. Supp. 3 (3d Dep't 1932) (Auction sales of ordinary commodities by a merchant may not be subjected to license, since they do not involve health or morals.)

¹³⁰ *Jacobs v. Mayor and City Council of Baltimore*, 191 Atl. 421 (Md. 1937).

¹³¹ *Nature's Rival Co. v. Chicago*, 324 Ill. 566, 155 N. E. 356 (1927).

well insist on being shown that the regulation is in the interest of those public purposes nurtured by the police power.¹³² Of course, it may be argued that the trend of the times is in the direction of complete subordination of the individual to his government, that licensing regulation is part of the trend, and that courts can not thwart that trend. It is true that courts can not hold back the inevitable. But they can do much good in restraining mass inroads on individual liberty until those inroads have proved themselves inevitable. Otherwise put it is true that the courts should not arbitrarily override the will of the people. However, they can and should restrain mass inroads on individual liberty until those inroads have been consciously and continuously approved by the majority of the citizens.

In the light of the above discussion the significance of a recent North Carolina case¹³³ upholding a statute¹³⁴ providing for the licensing of photographers will be examined. The statute embodies a common scheme. A board composed of photographers is set up, which is to examine and license those who desire in the future to become photographers, and which has authority, for prescribed cause, to revoke licenses. The board is expressly empowered to require proof of the technical qualifications, business record, and moral character of applicants, and to give a written, oral, or practical examination or combination of these covering photography and photo-finishing. The statute, without any flat-footed requirement in the matter, makes it plain that preliminary study with a licensed photographer is expected of applicants.¹³⁵ Attack was made on the statute on the ground that it violated various state and federal constitutional provisions, including the due process clause of the Fourteenth Amendment. The court held, however, that the statute came within the police power of the state. As a specific reason for thinking so the court pointed to the fire hazard involved in the use by photographers of chemicals, celluloid, and other combustible materials. This reasoning lacks force; even if photography involves any special fire hazard, the licensing regulation here involved is specifically directed toward competence in taking pictures. This goes away beyond preventing fires. The court refers to the use of pictures to illustrate sworn testimony in court, and overlooks entirely the fact that pictures can be so used regardless of whether they are taken by a licensed photographer or any private person. The statute does not protect the quality of pictures offered in evidence. The court says photographs are used to detect forgeries, and in connection with finger-

¹³² Legis. (1926) 26 COL. L. REV. 472, 473.

¹³³ *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586 (1938). *Certiorari* was denied by the United States Supreme Court (1938) 6 U. S. L. WEEK 178, 182.

¹³⁴ N. C. CODE ANN. (Michie, 1935) §§7007(1)-(29).

¹³⁵ *Id.* §7007(16).

prints. True, but not true only of photographs taken by licensed photographers. The court argues that photographs are used in advertising as samples, and that dishonest photographs can therefore be used to perpetrate fraud. Would anyone bent on fraud hesitate to take a deceptive picture himself? If not, the statute has no bearing; it covers only photographers engaged in business as such and has no application to pictures taken by anyone else. Photographs are used in newspapers and magazines says the court, ignoring the fact that the statute expressly excepts from its operation any person in the employ of a newspaper or periodical. One gathers from the opinion that even a court anxious to sustain the act could find little legal justification for doing so in any aspect of photography differentiating it from other occupations. But the court points out that photography requires skill. Are all occupations requiring skill to be brought within the licensing power? The answer, apparently, is, "Yes." The court says, quoting with approval from an earlier case, "It is not to be questioned that the lawmaking power of a state has the right to require an examination and certificate as to the competency of persons desiring to . . . exercise other callings, whether skilled trades or professions, affecting the public and which require skill and proficiency." ¹³⁶ The court further says, "Competency and ability are required to guard against imposition of an unskilled photographer upon the public which we think is a proper object for the exertion of the police power." ¹³⁷

More important still is the court's declaration, "The matter is largely in the discretion of the General Assembly as to what professions and occupations are within the police power of the State and subject to regulation." ¹³⁸ Here is probably the real reason for the decision; the court is leaving to the legislature responsibility for the choice of policy as to what businesses shall be regulated.

The position taken by the majority of the court must have been taken deliberately and with full realization of its import, for the majority had to face a vigorous and unusually able dissent. The heart of the dissent is the proposition that this licensing statute can further no public interest comparable in importance with the public's interest in free opportunity for individuals to engage in ordinary occupations.

Only two other cases have been found on the validity of licensing statutes for photographers. Both stand opposed to the North Carolina decision. One, a Hawaii case, ¹³⁹ is squarely in point, and holds such a statute invalid. The court points out that no business, however inno-

¹³⁶ State v. Lawrence, 213 N. C. 674, 679, 197 S. E. 586, 589 (1938).

¹³⁷ State v. Lawrence, 213 N. C. 674, 680, 197 S. E. 586, 590 (1938).

¹³⁸ State v. Lawrence, 213 N. C. 674, 679, 197 S. E. 586, 589 (1938). The court adds that due regard must be had, however, to constitutional provisions.

¹³⁹ Territory v. Kraft, 33 Hawaii 397 (1937).

cent and harmless, is free from the possibility of becoming in some degree harmful to the public interest. The shining of shoes improperly done might injure the leather. No special public interest requires regulation of photography. It is not within the police power. The court contends that there is as great peril in the injudicious extension of the police power as in its injudicious restriction.

The other case involving the validity of a statute licensing photographers arose in Tennessee.¹⁴⁰ The court decided that the statute was not passed in the legislature by proper procedure, but indicated by way of dictum that it was unconstitutional in any event. The court said, "We find it difficult to perceive just how the licensing of photographers and regulation of the taking and finishing of pictures . . . 'has any real tendency to protect the public safety, the public health or the public morals'; or how and why 'the interests of the public generally, as distinguished from those of a particular class, require such interference' as this Act provides."¹⁴¹

If the North Carolina decision and its reasoning are consistently adhered to by the North Carolina court in future cases, the gates are open for licensing regulation of occupations generally in this state. Squarely on the legislature rests the responsibility to choose whether we are to have a policy of licensing ordinary occupations. If such a policy is adopted it is time for orderly, consistent, systematic development of such a policy. If we are to have regimentation, let us at least have better regimentation.

Of course, human nature being what it is and legislatures being what they are, we shall in actual practice continue to have miscellaneous, haphazard licensing regulation brought about by the pressure of interested groups. The legislation will continue to serve the aims of these groups in the name of the public welfare. A horde of guardians of the public health, safety, morals, and welfare will continue to crowd forward. If we are ever to approach anything like orderly lawmaking adequately embodying a consistent policy actually designed to further the public interest, there must also be pressure for such an objective. This article is a step in that direction.

¹⁴⁰ *Wright v. Wiles*, 117 S. W. (2d) 736 (Tenn. 1938).

¹⁴¹ *Wright v. Wiles*, 117 S. W. (2d) 736, 738 (Tenn. 1938).