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the total of 57 in the class, 18 have college degrees, 3 have had 4 years of college work, 28 have had three years, 5 have had two years under the temporary exception in the trustees' regulation setting up a three-year entrance requirement, and 3 are special students.

The visiting professors in the summer session of 1933 included: Ralph Fuchs, Washington University, St. Louis; Albert C. Jacobs, Columbia University; Roscoe Turner Steffen, Yale University; and William E. McCurdy, Harvard University. Professor R. H. Wettach spent the summer teaching Constitutional Law and Conflict of Laws at the Northwestern University Law School. Professor M. S. Breckenridge was again engaged in research for the Interstate Commerce Committee of the House of Representatives. Professor Albert Coates is absent on leave during the fall semester in order that he may devote his time to the Institute of Government.

The University of North Carolina Press has just published *Lynching and the Law* by Assistant Professor J. H. Chadbourn. It is a study of the operation and effectiveness of the judicial process and the special legislation in relation to lynching, and concludes with a suggested model anti-lynching law for adoption by the several states. The study is the fruit of three years of coöperation between the Law School and the Southern Commission on Lynching.

NOTES AND COMMENTS

Administrative Law—Delegation of Legislative Power to President Under National Industrial Recovery Act.

The provisions of the National Industrial Recovery Act which tend to effectuate its policy are to be found in those sections which provide for the promulgation of compulsory codes and the issuance of licenses upon the discovery of specified abuses.¹ Congress has put both these weapons into the hands of the President, and this inquiry concerns the validity of such delegation as tested by precedent.²

¹ 48 STAT. 196 (d) (1933), 15 U. S. C. A. §703 (d) and 48 STAT. 197 (b) (1933), 15 U. S. C. A. §704 b). The scope of this note is confined to the question of delegation. For the purposes of discussion, it is assumed that Congress had the power to pass the act as to its other aspects.

² The cases examined yield no clear cut definition of what is or is not legislative. In the last analysis, it would seem that the outcome of each case depends on the attitude of the court upon the question involved in the particular legislation. See *Parke v. Bradley*, 204 Ala. 455, 86 S. 28 (1920) ("The limits beyond which a legislative may go have never been clearly defined").

It is asserted as a truism that there can be no delegation of legislative power.³ But such prohibition is said to include only the legislative prerogative of policy forming.⁴ Any power not legislative in character which the legislature may exercise, it may delegate.⁵ Such delegations of power as the following have been upheld: fact finding,⁶ the making of rules and regulations, even where the legislature has provided that these violations shall be punishable,⁷ the working out of administrative details⁸ and a determination of whether the occasion exists for executing the law.⁹

One of the tests of the validity of such delegation is the "completeness of the statute."¹⁰ Some say, if the subject matter has been acted upon as far as is practical, the statute will be upheld.¹¹ It has

³ Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294 (1892); Commonwealth v. Beaver Dam Coal Co., 194 Ky. 34, 237 S. W. 1086; Durham Provision Co. v. Daves, 190 N. C. 7, 128 S. E. 593 (1925).

⁴ Parker v. Bradley, 204 Ala. 455, 86 So. 28 (1920); State v. Atlantic Coast Line R. R. Co., 56 Fla. 617, 47 So. 969 (1908); State v. Moorer, 152 S. C. 455, 150 S. E. 269 (1929).

⁵ U. S. v. Grimand, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563 (1910); Merchants' Exchange v. Knott, 212 Mo. 616, 111 S. W. 565 (1908); Monroe v. Withycombe, 84 Ore. 328, 165 P. 227 (1917).

⁶ Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 361, 51 L. ed. 523 (1907); Monongahella Bridge Co. v. U. S. 216 U. S. 177, 30 Sup. Ct. 356, 54 L. ed. 435 (1910); J. W. Hampton & Co. v. U. S., 276 U. S. 394, 48 Sup. Ct. 348, 72 L. ed. 624 (1928); Sears Roebuck & Co. v. Federal Trade Com., 258 Fed. 307, 169 C. C. A. 323 (1919); Amchanitsky v. Carrougher, 3 Fed. Supp. 999 (E. D. N. Y., (1933) (In this case the Economy Act of Congress, 5 U. S. C. A. §673, providing for the reduction of Federal employers' salaries, is held constitutional).

⁷ U. S. v. Grimand, *supra* note 5; I. C. C. v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. ed. 729 (1912); United States v. Calisbad Packers, 4 Fed. Supp. 660 (N. D. Col. 1933) (The Agricultural Adjustment Act [7 U. S. C. A. §§601-619] is not unconstitutional because of an invalid delegation of legislative power); State v. Atlantic C. L. R. Co., 56 Fla. 617, 47 So. 969 (1908) (The Commission itself may not prescribe a penalty); Durham Provision Co. v. Daves, *supra* note 3.

⁸ *In re* Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. ed. 813 (1897) (design of stamp used for oleomargarine); Arms v. Ayer, 192 Ill. 601, 61 N. E. 851 (1901) (number and location of fire escapes); Steele v. Louisville & M. R. Co., 54 Tenn. 208, 285 S. W. 582 (1926) (designate form of railroad crossing sign).

⁹ U. S. v. Chemical Foundation, 272 U. S. 1, 47 Sup. Ct. 1, 71 L. ed. 131 (1926).

¹⁰ People v. Barnett, 344 Ill. 62, 176 N. E. 1108 (1931); Welton v. Hamilton, 344 Ill. 82, 176 N. E. 333 (1931) (The term "complete" is used to mean almost anything. It may mean merely a declaration of policy exists in the statute or, as in this case, it may include the existence of a policy and a sufficient standard to carry it into effect); Steele v. Louisville & M. R. Co., *supra* note 8. (The maxim that the law must be complete when coming from the legislature means that the duties or privileges must be definitely fixed or determined or rules for fixing and determining them clearly established).

¹¹ Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 525 (1904).

also been said that the permissibility of delegation may vary with the scope and authority of the delegating body.¹² But the most frequent inquiry is the existence of a standard definite enough to effectuate the legislative will. It is generally said that the statute should prescribe a definite rule of action for the guidance of any discretionary power conferred.¹³ But even in such cases the precision of a criminal statute is not required.¹⁴ An exception to the above rule is recognized where the problem involved is technical¹⁵ or where it is difficult or impractical to lay down some definite rule.¹⁶ Even where such special conditions do not exist, some courts accept the most flimsy of standards.¹⁷ Still other courts have held that a general standard can be dispensed with entirely since exercise of a reasonable discretion will be implied.¹⁸

In the past, the tendency in administrative licensing, has been towards a greater observation of the requirement of a fixed standard, than in other administrative functions. The doctrine is frequently re-iterated that a statute which purports to vest an absolute discretion in an official to license a lawful enterprise is invalid.¹⁹ There must be a uniform rule of action except where it is difficult or impractical to establish one.²⁰ A liberal delegation of discretion is also considered appropriate where the regulation of the government's

¹² *Ruggles v. Collier*, 43 Mo. 353 (1869).

¹³ *Welton v. Hamilton*, *supra* note 10; *Merchants' Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565 (1908).

¹⁴ *Tarpey v. McClure*, 190 Cal. 521, 213 P. 983 (1923); *State v. Public Service Com.* 94 Wash. 274, 162 P. 523 (1917).

¹⁵ *Mahler v. Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. ed. 549 (1924); *U. S. v. Cohen Grocery Co.* 255 U. S. 81, 41 Sup. Ct. 298, 65 L. ed. 516 (1921).

¹⁶ *Avent v. U. S.* 266 U. S. 127, 45 Sup. Ct. 34, 69 L. ed. 202 (1924); *Merchants' Exchange v. Knott*, *supra* note 13.

¹⁷ *Red C. Oil Co. v. North Carolina*, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. ed. 240 (1912) (oil to be safe, pure and to afford satisfactory light); *Mahler v. Eby*, *supra* note 14 (undesirable residents); *New York Central Securities Co. v. U. S.*, 287 U. S. 12, 53 Sup. Ct. 45 (1932) (Public interest); *Sears Roebuck & Co. v. Federal Trade Comm.*, *supra* note 6 (authority to stop unfair methods of competition); *Spencer-Sturta Co. v. City of Memphis*, 155 Tenn. 70, 290 S. W. 608 (1927) (the ordinance by requiring the board to follow "fundamental purpose and intent of the ordinance," provided sufficient guide); *State ex rel Central Steam Heat & Pr. Co. v. Gettle*, 196 Wisc. 1, 220 N. W. 201 (1898.)

¹⁸ *State v. Whitman*, 196 Wisc. 472, 220 N. W. 929 (1928).

¹⁹ *Yick Wo. v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220 (1886); *Bizzell v. Board of Aldermen of City of Goldsboro*, 192 N. C. 348, 135 S. E. 50 (1926); *Village of St. Johnsbury v. Aron*, 103 Vt. 22, 151 Atl. 650 (1930); *Thompson v. Smith* 155 Va. 367, 154 S. E. 579 (1930).

²⁰ *Mutual Film Corp. v. Kansas*, 236 U. S. 230, 35 Sup. Ct. 387, 59 L. ed. 552 (1915) (due to numerous types of pictures, it would be impossible to devise language which would be comprehensive and automatic); *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879 (1904); *State v. Briggs*, 45 Ore. 366, 77 Pac. 750 (1904).

own resources are concerned.²¹ On the other hand, in businesses which are a matter of privilege rather than of right, a larger discretion is granted in order to protect the public health, morals, safety or welfare.²² Statutes are upheld which confer authority to make rules and regulations and to license in pursuance to them.²³ And in the licensing of both lawful pursuits and those within the police power, where there is no uniform rule or even the existence of a general one, the discretion conferred is often upheld on the ground that a public official will be presumed to exercise his power impartially and according to law.²⁴ As a result of such attitude, the courts will not pass on the validity of a licensing act, on the ground that too much discretion has been given, unless there has been a dereliction by officials in refusing a license.²⁵

There has been a growing trend to hold those cases of delegated powers which have heretofore been in the twilight zone of uncertainty, valid. It is pointed out that such shift of view is necessitated by the complex situations created by modern society and business.²⁶ The question is no longer whether there has been an invalid delegation of power, but whether such delegation is necessary and expedient due to the limited time and necessarily restricted knowledge of the legislature and whether it is in the interest of greater speed, efficiency, elasticity, and justice.²⁷

²¹ *Dastervigres v. U. S.*, 122 Fed. 30 (C. C. A. 9th, 1903); *Port Royal Mining Co. v. Hagood*, 30 S. C. 519, 9 S. E. 686 (1889); *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15 (1922).

²² *Davis v. Mass.*, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. ed. 71 (1897); *State v. Sherow*, 87 Kans. 235, 123 Pac. 866 (1912); *State v. Hyde*, 315 Mo. 681, 286 S. W. 363 (1926); *State v. Fleming*, 129 Wash. 64, 225, Pac. 647 (1924).

²³ *First Natl. Bk. v. Union Trust Co.*, 244 U. S. 416, 37 Sup. Ct. 734, 61 L. ed. 1233 (1917); *State Racing Com. v. Loma Agri. Assoc.*, 136 Ky. 173, 123 S. W. 681 (1909).

²⁴ *Lieberman v. Van deCarr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. ed. 305 (1905); *Engel v. O'Malley*, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. ed. 128 (1911); *Hall v. Gieger-Jones Co.*, 242 U. S. 539, 37 Sup. Ct. 217, 61 L. ed. 480 (1917); *Schaake v. Dolley*, 85 Kan. 598, 118 Pac. 80 (1911). (The courts are bound to take for granted the honesty and right mindedness of public officials chosen directly or indirectly by the people to administer the law).

²⁵ *Interstate Buses Corp. v. Holyoke St. Ry. Co.*, 273 U. S. 45, 47 Sup. Ct. 298, 71 L. ed. 530 (1927); *Alaska Gold Mining Co. v. Territory of Alaska*, 236 Fed. 64 (C. C. A. 9th, 1916); *People v. Globe Grain & Milling Co.*; 80 Cal. 625, 294 Pac. 3 (1930).

²⁶ *Cook v. Burnquist*, 242 Fed. 321 (1917); *Sears Roebuck & Co. v. Federal Trade Com.*, *supra* note 6; *State ex rel Jonason v. Crosby*, 92 Minn. 176, 99 N. W. 636 (1904); *Dillon Catfish Drainage District v. Bk. of Dillon*, 143 S. C. 178, 141 S. E. 274 (1928); *State v. Moorer*, *supra* note 4; *State v. Public Service Com.*, *supra* note 15.

²⁷ *Monongahela Bridge Co. v. U. S.*, *supra* note 6; *Mutual Film Corp. v. Kansas*, *supra* note 20; *Avent v. U. S.*, *supra* note 16; *J. W. Hampton, Jr. and*

From all the foregoing one can only conclude that the provisions in question are valid. The act starts with an extensive declaration of policy, so that nothing essentially legislative has been left undone.²⁸ The power to impose a compulsory code is to be exercised only where it can be shown that there are abuses inimical to the public interest and contrary to the policy of the act.²⁹ And the President is to license a business, only when it appears that it is engaged in destructive price or wage cutting.³⁰ The exercise of both these powers is further limited by the requirement that any license or code shall contain certain specified conditions.³¹ And in addition the procedure to be used in arriving at these conditions is delineated.³² The licensing power is further curtailed by the provision that it shall expire within a year. Moreover, should anyone doubt that the standard fixed is more than sufficient, would it not seem reasonable to indulge in the presumption that the President will act with fairness commensurate with the dignity of his office? There are also cases available which sustain the delegation of unusually large powers during periods of emergency.³³ However, could the provisions not be upheld under the most orthodox tenets, ample justifications for them could still be found in the existing crisis and sufficient precedent in the legislation enacted during the World War.³⁴ And finally, since the nondelegability of legislative power is largely a myth, why should it not be openly discarded by the courts?³⁵

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Co. v. U. S., *supra* note 6; State of Wisc. v. State of Ill. & Sanitary District of Chicago, 278 U. S. 367, 49 Sup. Ct. 163, 73 L. ed. 426 (1929).

²⁸ 48 STAT. 195 (1933), 15 U. S. C. A. §701.

²⁹ 48 STAT. 196 (a) (1933), 15 U. S. C. A. §703 (a).

³⁰ 48 STAT. 197 (b) (1933), 15 U. S. C. A. §704 (b).

³¹ 48 STAT. 198 (a) (1933), 15 U. S. C. A. §707 (a).

³² N. I. R. A. §7 (b), 7 (c). *Id.* (b) & (c).

³³ *Avent v. U. S.* *supra* note 16; *Contract Cartage Co. v. Morris*, 59 F. (2d) 437 (D. C. Ill. 1932); *City of Chicago v. Mariotto*, 332 Ill. 44, 163 N. E. 369 (1928); *Blue v. Beach*, 195 Ind. 121, 56 N. E. 89 (1900).

³⁴ *New State Ice Co. v. Lieberman*, 285 U. S. 262, 282, 52 Sup. Ct. 371, 76 L. ed. 747 (1932) (dissent of Brandeis, J., "the people of the United States are now confronted with an emergency more serious than war.") *Selective Draft Law Cases* 245 U. S. 366, 38 Sup. Ct. 159, 62 L. ed. 349; (1918); *U. S. v. Ford*, 265 Fed. 424 (S. D. Ohio 1920); 40 U. S. Stat. L. 277, Chapter 53 §5 (Wilson given the authority to regulate by licensing the importation, manufacture, storage, mining or distribution of any necessities); HART, *THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF U. S.*

³⁵ *Trustees of Saratoga Springs v. Saratoga Gas E. L. & Pr. Co.*; 19 N. Y. 123, 83 N. E. 693 (1908) ("The true meaning of constitutional division of governmental powers being that the whole power of one of the three shall not be exercised by the same hands which possess the power of either of other two, there being no objection to the imposition on an administrative body of some powers legislative in character.")