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# Administrative Law -- Constitutionality of Statutes Licensing Occupations

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## NOTES AND COMMENTS

### Administrative Law—Constitutionality of Statutes Licensing Occupations

It has now been eighteen years since this *Law Review* published an article entitled *Haphazard Regimentation Under Licensing Statutes*.<sup>1</sup> This article criticised the practice of using licensing as a device to regulate professions, trades, and other such occupations when no substantial relation to the police power could be demonstrated. The recent decision in *Roller v. Allen*<sup>2</sup> holding the licensing of tile contractors<sup>3</sup> unconstitutional as an improper exercise of the police power makes timely a review of recent developments of the North Carolina law in this field.

In 1938, when the above article was written, there were fifty-three statutes providing for the licensing of occupations.<sup>4</sup> Some of these statutes, such as those regulating doctors,<sup>5</sup> lawyers,<sup>6</sup> and dentists,<sup>7</sup> were and still are considered by all authorities to be well within the scope of the police powers.<sup>8</sup> Other statutes, such as those applying to barbers<sup>9</sup> and cosmetologists<sup>10</sup> (beauty operators), were often questioned but generally have been accepted by the courts.<sup>11</sup> However, the article took a skeptical view as to whether any public purpose warranted the licensing of such occupations as photography, dry cleaning, and tile contracting.<sup>12</sup>

The writers of this article also pointed out that this entire system of regulation by licensing was springing up in a haphazard, piecemeal fashion. The licensing statutes differed in such important matters as the powers of the boards to make regulations, the extent of the judicial review afforded a person whose license was revoked, and the extent of the punishment provided for operating without a license. These serious inconsistencies at least partly resulted from special interest groups "pressuring" for the adoption of their own drafts of proposed legislation. The

<sup>1</sup> Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes*, 17 N. C. L. REV. 1 (1938).

<sup>2</sup> 245 N. C. 516, 96 S. E. 2d 851 (1957).

<sup>3</sup> N. C. GEN. STAT. §§ 87-28 to -38 (1950 and Supp. 1955).

<sup>4</sup> See Hanft and Hamrick, *supra* note 1, at 2.

<sup>5</sup> N. C. GEN. STAT. §§ 90-1 to -21 (1950 and Supp. 1955).

<sup>6</sup> N. C. GEN. STAT. §§ 84-15 to -38 (1950 and Supp. 1955).

<sup>7</sup> N. C. GEN. STAT. §§ 90-22 to -48 (1950 and Supp. 1955).

<sup>8</sup> 11 AM. JUR., *Constitutional Law*, § 289 (1937).

<sup>9</sup> N. C. GEN. STAT. §§ 86-1 to -25 (1950 and Supp. 1955).

<sup>10</sup> N. C. GEN. STAT. §§ 88-1 to -29 (1950 and Supp. 1955).

<sup>11</sup> 7 AM. JUR., *Barbers and Beauty Specialists*, § 2 (1937) states that the courts are generally agreed that barbers and beauty specialists may be regulated in the interests of the public health and welfare, but there is a wide divergence in the allowable extent of this regulation.

<sup>12</sup> Hanft and Hamrick, *supra* note 1, at 3-8.

article presented this challenge: "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."<sup>13</sup>

The legislature recognized the wide difference in the practices of these examining boards and in 1947 passed Resolution 31 which called on the Governor to appoint a commission of five members to study the problem.<sup>14</sup> In 1953, after approximately fifteen years of receiving reports and recommendations dealing with uniform administrative procedure, the General Assembly adopted the present far-reaching legislation.<sup>15</sup> This legislation consisted of an act setting out a uniform procedure for most of the licensing boards of the state,<sup>16</sup> and an act to provide for judicial review of certain decisions made by administrative agencies other than licensing boards.<sup>17</sup>

A stricter attitude toward the licensing of occupations appeared in the North Carolina decisions. In 1940 in *State v. Harris*<sup>18</sup> the court held the licensing of dry cleaners to be unconstitutional, stating that: "[T]he rule will still hold good that regulation of a business or occupation under the police power must be based on some distinguishing feature in the business itself or in the manner in which it is ordinarily conducted, the natural and probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare."<sup>19</sup>

Nine years later the court in *State v. Ballance*<sup>20</sup> overruled a former decision<sup>21</sup> which had sustained the licensing of photographers, and held this to be unconstitutional. Again the court emphasized lack of connection between the occupation licensed and the objects of the police power, namely health, order, morals, safety, and general welfare.

This year in *Roller v. Allen* the court struck down the licensing of tile contractors. Here the court sets forth the following guide for the legislature:

"From what this Court has said, in the cases cited, it may be concluded that the police power in seeking to extend its field of control, must not invade personal and property rights guaranteed and protected by Article I, Sections 1, 7, 17 and 31 of the Con-

<sup>13</sup> *Id.* at 18.

<sup>14</sup> See *Statutory Changes*, 25 N. C. L. REV. 376, 377-79 (1947).

<sup>15</sup> See, for a discussion of the changes accomplished, *Statutory Changes*, 31 N. C. L. REV. 375, 378-85 (1953).

<sup>16</sup> N. C. GEN. STAT. §§ 150-9 to -34 (Supp. 1955).

<sup>17</sup> N. C. GEN. STAT. §§ 143-306 to -316 (Supp. 1955).

<sup>18</sup> 216 N. C. 746, 6 S. E. 2d 854 (1940).

<sup>19</sup> *State v. Harris*, 216 N. C. 746, 758, 6 S. E. 2d 854, 863 (1940).

<sup>20</sup> 229 N. C. 764, 51 S. E. 2d 731 (1949).

<sup>21</sup> *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586 (1938).

stitution of North Carolina. 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. . . .

"This Court, in the cases cited, has surveyed and marked the dividing line between the professions and skilled trades which in the public interest permit of regulation by licensing under the police power, and those ordinary lawful and innocuous occupations and trades which are protected from regulation by constitutional guarantees. The occupations and trades in the latter category constitute off-limits ground on which trespassing is forbidden by the Constitution. The police power of the State must stop at the line."<sup>22</sup>

The decision is a far reaching one because it was made despite the fact that the tile contractor involved had failed to pass the examination and there was evidence that he had been discharged on one job for unsatisfactory work, and evidence that tile contracting required special skill, and despite the lower court's conclusion that the licensing act was reasonable and necessary to prevent fraud and incompetence, and to promote public health.

While the court has eliminated some of the licensing statutes on constitutional grounds, the legislature has added others. Some of the acts appear to be on sound constitutional ground. Practical nurses,<sup>23</sup> dispensing opticians,<sup>24</sup> and physical therapists<sup>25</sup> are all in occupations which have a substantial relation to the public health. Other occupations recently subjected to licensing have a questionable connection with the public purposes included in the police power. This group includes scale mechanics<sup>26</sup> and refrigeration contractors.<sup>27</sup> Finally, it can be argued that the act licensing motor vehicle dealers<sup>28</sup> has no substantial relation to the police power. The act states that one of its primary purposes is ". . . to prevent frauds, impositions and other abuses upon its [North Carolina's] citizens."<sup>29</sup> The opinion in *State v. Harris* would seem to

<sup>22</sup> *Roller v. Allen*, 245 N. C. 516, 525, 96 S. E. 2d 851, 859 (1957).

<sup>23</sup> N. C. GEN. STAT. §§ 90-171.1 to -171.12 (1950 and Supp. 1955) adopted in 1947.

<sup>24</sup> N. C. GEN. STAT. §§ 90-234 to -255 (Supp. 1955) adopted 1951; *Statutory Changes*, 29 N. C. L. REV. 352, 360-65 (1951).

<sup>25</sup> N. C. GEN. STAT. §§ 90-256 to -270 (Supp. 1955) adopted 1951.

<sup>26</sup> N. C. GEN. STAT. §§ 81-52 to -58 (1950) adopted 1941; see, *Statutory Changes*, 19 N. C. L. REV. 435, 447-49 (1941) for critical comment.

<sup>27</sup> N. C. GEN. STAT. §§ 87-52 to -64 (Supp. 1955) adopted 1955; *Statutory Changes*, 33 N. C. L. REV. 513, 520-21 (1955).

<sup>28</sup> N. C. GEN. STAT. §§ 20-285 to -308 (Supp. 1955) adopted 1951. Licensing statutes for automobile dealers and various provisions of such statutes are discussed in Note, 5 OHIO ST. L. J. 377 (1939).

<sup>29</sup> N. C. GEN. STAT. § 20-285 (Supp. 1955).

render it doubtful whether this act will be declared constitutional on the basis of preventing fraud. The court quoted from a Kentucky decision involving licensing of real estate brokers as follows:

"If occasional opportunity for fraud is to be the test, then there is no reason why every grocer, every merchant, every *automobile dealer*, every keeper of a garage, every manufacturer, and every mechanic who deals more frequently with the public in general, and whose opportunities for fraud are far greater than those of a real estate agent or salesman, may not be put on the same basis. . . . In our opinion, the right to earn one's daily bread cannot be made to hang on so narrow a thread. Broad as is the police power, its limit is exceeded when the State undertakes to require moral qualifications of one who wishes to engage or continue in a business which, as usually conducted, is no more dangerous to the public than any other ordinary occupation of life.'"<sup>30</sup> (Emphasis added.)

The court in cases including *Roller v. Allen* has now clearly established that there is a large category of innocuous occupations the licensing of which will not come within the police power of the state. This attitude, combined with the growing public awareness of the situation, should result in better considered and more appropriate licensing legislation in the future.

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### Bankruptcy—International Jurisdictional Problems Arising Between the United States and Canada

Since World War II there has been an expanding international development in the economy of the United States.<sup>1</sup> This will give rise to a problem which has been little considered heretofore:<sup>2</sup> the bankruptcy of an individual or corporation engaged in international operations. Since it is with Canada that our most important economic expansion has taken place,<sup>3</sup> this paper will seek to point out some of the jurisdictional

<sup>30</sup> *State v. Harris*, 216 N. C. 746, 761, 6 S. E. 2d 854, 864 (1940) quoting from *Rawls v. Jenkins*, 212 Ky. 287, 292, 279 S. W. 350 (1925).

<sup>1</sup> "Since the war, total investments in new foreign plants and facilities amounted to more than \$12 billion, or more than 170% of the investment at the end of World War II." THE AMERICANA, *Foreign Investments* 267 (Annual 1956).

<sup>2</sup> "Probably in no branch of the law is information in foreign law lacking to such a degree as in the matter of bankruptcy. . . ." Nadelmann, *Recognition of American Arrangements Abroad*, 90 U. P. A. L. REV. 780, 783 (1942).

<sup>3</sup> "Canada continued as the most important area for new direct investments, with an indicated volume of \$600 million during 1955, two thirds of which was new United States capital. . . . As a result, American direct investments in that country