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NOTES AND COMMENTS

Administrative Law—Licensing Boards—Police Power
Limitation Thereon

In 1938 North Carolina's Supreme Court in *State v. Lawrence* held the photographers licensing act to be a constitutional exercise of the police power of the State.¹ Although it discussed the fire hazard, pos-

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

sibility of fraud, use of photographs in court, and the actual degree of skill involved, the court gave the key to its real reason when it stated that it is largely within the legislature's discretion whether or not a business is subject to licensing under the police power.² The dissenting justices thought the act essentially class legislation to protect a particular group of tradesmen, and beyond the legitimate limits of the exercise of the police power.

Following the decision an article appeared in this REVIEW which criticized both the needless diversities in the provisions of North Carolina licensing statutes, and the fact that no consistent policy was apparent to explain why some occupations were subjected to licensing and others not.³ But in a later case⁴ the Supreme Court said the record precluded reconsideration of the decision in *State v. Lawrence*. Then, without distinguishing between photographers and dry cleaners, the court in *State v. Harris*⁵ declared the dry cleaners licensing statute violative of the Constitution of North Carolina, Article I, Sections 1, 17 and 31.⁶ The court thought the use of the police power to exclude persons from ordinary callings collectivistic and contrary to the basic concept of freedom of initiative. It also thought that, because of the growing public dislike of licensing agencies, it should critically consider the regulation of everyday callings;⁷ and using arguments which would have invalidated the photographers statute if applied to that act, it struck down regulation of a trade which affects the public health and welfare much more than does the trade of a photographer.

Although the North Carolina Court was not ready to confess that it had changed its view,⁸ every other court, except that of Florida, which

² *Id.* at 679, 197 S. E. at 589.

³ Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes*, 17 N. C. L. REV. 1 (1938).

⁴ *State v. Lueders*, 214 N. C. 558, 200 S. E. 22 (1938) (the purpose of the appeal was frankly avowed to be such reconsideration); *cf.* *State v. Nichols*, 215 N. C. 80, 200 S. E. 926 (1938) (court declined to consider constitutionality of dry cleaners statute since the special verdict below had been "not guilty"); *State v. Muse*, 219 N. C. 226, 13 S. E. 2d 229 (1941) (the Supreme Court said it would not render an advisory opinion on the constitutionality of the plumbers licensing statute where there was no jury verdict in the court below).

⁵ *State v. Harris*, 216 N. C. 746, 6 S. E. 2d 854 (1939) (7 to 0 decision).

⁶ N. C. CONST. Art. I, §1: "That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness"; §17: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land"; §31: ". . . monopolies are contrary to the genius of a free State and ought not to be allowed." The court also said the statute was an unwarranted delegation of legislative functions but this point does not affect the issue of whether dry cleaners can be licensed.

⁷ *State v. Harris*, *supra* at 752, 6 S. E. 2d at 858 ("The stage of internal protest has been reached.")

⁸ *Id.* at 764, 6 S. E. 2d at 866 ("In its factual setting the case departs completely from those in which this court has approved regulation of this kind.")

has since considered the constitutionality of the photographers statute⁹ says that *State v. Harris* is a complete recession from the viewpoint in *State v. Lawrence*, and indicates a greater reluctance on the part of the court to defer to legislative determination that a business is subject to licensing provisions under the police power of the State. Every one of these states, including Florida, declared its photographers statute unconstitutional, and left *State v. Lawrence* the sole decision supporting such a statute.

Since 1938 the General Assembly of the State of North Carolina has also evidenced a tendency to defeat bills designed to increase licensing regulation of everyday trades and businesses, although no uniform policy to that effect appears. In 1939 there were four bills introduced to repeal various licensing acts,¹⁰ but none of these were enacted though the Senate did pass the two dispensing with regulation of tile contractors and dry cleaners. On the other hand, four bills were introduced to set up new Boards of Examiners, two being tabled in the Senate¹¹ and the other two receiving unfavorable reports in the House,¹² although the bill to license funeral directors passed the Senate. The House of Representatives was the stumbling block of the opponents of the licensing boards, as it killed thirteen bills introduced to lessen control by these boards,¹³ most of them by unfavorable committee reports; but both

⁹ *Buehman v. Bechtel*, 57 Ariz. 363, 114 P. 2d 227 (1941) (the court said the dissenting opinion in North Carolina's photography case had become law in the dry cleaners case); *Sullivan v. DeCerb*, 156 Fla. 496, 23 So. 2d 571 (1945); *State v. Cromwell*, 72 N. D. 565, 9 N. W. 2d 914 (1943); *Moore v. Sutton*, 185 Va. 481, 39 S. E. 2d 348 (1946) (the court gave a complete discussion of the prior cases and North Carolina's new viewpoint; it adhered to "the philosophy that that state is best governed which is least governed"). Georgia had followed the dissent in the *Lawrence* case and cited the earlier cases of *Territory v. Kraft*, 33 Hawaii 397 (1935) (holding that photography has no real tendency to injure public safety, health or morals) and *Wright v. Wiles*, 173 Tenn. 334, 117 S. E. 2d 736 (1938) (dictum to same effect) in *Bramley v. State*, 187 Ga. 826, 2 S. E. 2d 647 (1939).

¹⁰ Sen. Bill No. 55 (1939) (tile contractors); H. R. Bill No. 268 (1939) (dry cleaners, dyers, and pressers); Sen. Bill No. 141 (1939) (unfavorable committee report on photographers board dissolution); Sen. Bill No. 173 (1939) (dry cleaners, dyers, and pressers).

¹¹ Sen. Bill No. 196 (1939) (State Board of Examiners of Warm Air, Sheet Metal and Roofing Contractors); Sen. Bill No. 336 (1939) (State Board of Naturopathic Examiners).

¹² H. R. Bill No. 138 (1939) (State Board of Painters, Paper Hangers and Decorators); Sen. Bill No. 236 (1939) (State Board of Embalmers and Funeral Directors).

¹³ Sen. Bill No. 103 (1939) (would have admitted to the practice of law graduates of Wake Forest, Duke, and University of North Carolina Schools of Law who had attended 4 years, had received the LL.B. degree, and had worked in the office of a practicing attorney for 6 months); H. R. Bill No. 311 (1939) (would have permitted pharmacist applicant to retake practical part of the examination when he had failed only that part); H. R. Bill No. 322 (1939) (would have broadened exemptions from the photographers statute); Sen. Bill No. 149 (1939) (would have allowed issuance of a license without examination to land surveyors in Buncombe County with 35 years' experience); Sen. Bill No. 165 (1939) (would

houses passed three other bills restricting the boards. Whereas before this time the policy of the legislature toward these established boards had been a liberal one, the legislature brought the licensing agencies under some measure of control by setting up a uniform procedure for the revocation of licenses to eliminate discrimination by some of the boards.¹⁴ The other two bills exempted certain activities from the photographers¹⁵ and plumbers¹⁶ acts. Another bill, to stiffen requirements for cosmetologists, was given an unfavorable report in the Senate.¹⁷

In 1941 the legislature seemed willing to make minor changes which would extend restrictions in the licensing statutes,¹⁸ but would not make major changes to extend the provisions of the photography statute to cities with less than 2,500 population,¹⁹ nor would it set up a State Board of Real Estate Examiners,²⁰ although the Supreme Court had earlier indicated that this field of endeavor is a proper one for regulation.²¹ However, only one²² out of five bills to lessen restrictions by the individual boards²³ or to give the unlicensed tradesmen a greater voice

have allowed schools of beauty culture to charge for work done by advanced students); H. R. Bill No. 446 (1939) (same as H. R. Bill No. 322); H. R. Bill No. 566 (1939) (would have licensed as registered pharmacists without examination all registered assistant pharmacists with 5 years' experience under a registered pharmacist); H. R. Bill No. 590 (1939) (would have granted licenses to veterinarians in Sampson County who had practiced at least 30 years); H. R. Bill No. 609 (1939) (would have exempted Alamance County from the dry cleaners statute); Sen. Bill No. 266 (1939) (would have transferred the powers of the State Board of Barber Examiners, the Board of Cosmetic Art Examiners and the Dry Cleaners Commission to the State Board of Health); H. R. Bill No. 881 (1939) (would have allowed applicant who had been working for 10 years under a registered optometrist to take the examination without complying with certain sections of the statute); H. R. Bill No. 889 (1939) (would have exempted Forsyth County from the dry cleaners statute); Sen. Bill No. 450 (1939) (would have exempted Alamance County from the dry cleaners statute); and Sen. Bill No. 463 (1939) (would have granted licenses to those plumbing and heating contractors with 10 years' service).

¹⁴ N. C. Pub. Laws 1939, c. 218.

¹⁵ N. C. Pub. Laws 1939, c. 280.

¹⁶ N. C. Pub. Laws 1939, c. 224.

¹⁷ Sen. Bill No. 56 (1939) (also would have opened the records to the public).

¹⁸ Passed: Sen. Bill No. 77 (1941) (requires a licensed tile contractor to be present and in charge of work of a firm); Sen. Bill No. 83 (1941) (defines "practice of law" to include the preparation of certain forms and reports); H. R. Bill No. 244 (1941) (amends law relating to general contractors to classify contractors as unlimited, intermediate, or limited and restrict the latter two classes to projects not exceeding in value \$300,000 and \$75,000 respectively).

¹⁹ H. R. Bill No. 869 (1941); and it would not allow the Board of Pharmacy to set a different fee for granting a license without an examination to a pharmacist licensed by other pharmacy boards from that charged other candidates for a license, H. R. Bill No. 920 (1941).

²⁰ H. R. Bill No. 552 (1941).

²¹ *State v. Dixon*, 215 N. C. 161, 1 S. E. 2d 521 (1939).

²² N. C. Pub. Laws 1941, c. 369 (excepting from the architects licensing statute persons who furnish plans for construction of a value not exceeding \$15,000, and limiting the act to apply only to persons planning construction for pay).

²³ H. R. Bill No. 100 (1941) (to remove Morehead City from the plumbing and heating contractors licensing act); Sen. Bill No. 189 (1941) (to lower annual renewal fee for plumbing and heating contractors from \$50 to \$25); H. R. Bill No. 945 (1941) (to require that persons who have served on the examining board be granted a plumbing and heating contractors license without examination).

in their administration²⁴ was passed. But where the public health was clearly concerned,²⁵ the legislators showed no hesitation in passing regulatory measures; and of course, they provided for the liquidation of the dry cleaners commission²⁶ in accordance with the decision in *State v. Harris*.

A strict attitude toward certain licensing boards was manifested by the legislature in 1943 as it enacted bills to bring the State Board of Barber Examiners²⁷ and the State Board of Cosmetic Art Examiners²⁸ under the Director of the Budget. A third bill,²⁹ which passed the House of Representatives, would have authorized a full-scale investigation of the books and records of the State Board of Cosmetic Art Examiners. With the exception of two bills,³⁰ one of which became law, all proposed bills during that session of the General Assembly pointed in the direction of less legislative regulation of ordinary vocations.³¹

Interest in the activities of the licensing boards diminished during the 1945 session of the General Assembly, probably because the war was still in progress. Still, opposition existed toward the boards, and the legislative body refused to set up a State Board of Opticians³² and a State Board of Shorthand Reports,³³ and refused to tighten the requirements of the cosmetologists statute,³⁴ yet where the public health was vitally affected, the legislature passed the bill to license dental hygienists without unnecessary delay.³⁵ A notable exception to the general

²⁴ H. R. Bill No. 118 (1941) (to require the Governor to appoint one journeyman barber to the State Board of Barber Examiners).

²⁵ N. C. Pub. Laws 1941, c. 163 (the inclusion of radiology in the practice of medicine).

²⁶ N. C. Pub. Laws 1941, c. 127 (this decision brought to the attention of the legislature the new view of the court).

²⁷ N. C. Sess. L. 1943, c. 53.

²⁸ N. C. Sess. L. 1943, c. 354.

²⁹ H. R. Res. 768 (1943).

³⁰ N. C. Sess. L. 1943, c. 25 (preventing issuance of coupons redeemable for photographic products unless \$2,000 bond is placed with the clerk of the Superior Court of each county in which such issuance takes place); Sen. Bill No. 95 (1943) (attempting to create a State Board of Naturopathic Examiners).

³¹ H. R. Bill No. 70 (1943); H. R. Bill No. 379 (1943) (to permit a licensed cosmetologist to hire assistants who are not licensed apprentices); Sen. Bill No. 86 (1943) (to enable a retired cosmetologist to get back into practice merely by paying the annual fee); Sen. Bill No. 166 (1943) (to dissolve the State Board of Cosmetic Art Examiners and put cosmetologists under the State Board of Health). The noticeable lack of bills to repeal acts setting up licensing boards may possibly be due to the absence from the General Assembly of Senator Cogburn who led the opposition to these boards in 1939 and 1941.

³² Sen. Bill No. 186 (1945) (the North Carolina Supreme Court has recently declared that an optician cannot be regulated under an optometrists statute, *Palmer v. Smith*, 229 N. C. 612, 51 S. E. 2d 8 (1948)).

³³ Sen. Bill No. 339 (1945) (passed the Senate only).

³⁴ E. R. Bill No. 278 (1945) (unfavorable committee report in the House).

³⁵ N. C. Sess. L. 1945, c. 639 (replacing N. C. GEN. STAT., §90-49 (1943)).

inclination of the legislature to restrict the licensing boards is the protection by the legislature of the "practice of law."³⁶

In 1947 the legislature refused to create a board of examiners for funeral directors³⁷ or a board to regulate practical nurses,³⁸ although it did add two practical nurses to the Board of Nurse Examiners and place practical nurses under that board.³⁹ The frequently recurring critical attitude of the legislature toward licensing boards reached fruition in an enactment plainly indicating doubt that these boards were fulfilling adequately their public purposes, and suspicion that they might be serving other ends. A resolution was passed calling upon the governor to appoint a five man commission of members of the legislature to study and investigate the examining boards of the state.⁴⁰ The legislative attitude is shown by some of the objectives specified for the investigators: 4. Determine if the powers of the board have been used to suppress competition, and, if so, in what manner and to what extent. 5. Determine to what extent the authority is actually exercised in the public interest. 6. Determine to what extent the practices of the boards are not in the public interest. 7. Determine to what extent the members of the boards use their official powers for promotion of their private enterprises. The legislature obviously doubted whether some of the boards should be retained, because the commission was directed to recommend legislation with the view of "amending the existing laws with respect thereto or to the abolishment of such board or boards should it be found that the continuation of such board or boards is not in the public interest."⁴¹ The report of that commission has now been made

³⁶ N. C. Sess. L. 1945, c. 468 (extending the "practice of law" to include "aiding in the preparation of" deeds, mortgages, wills, and trust instruments); H. R. Bill No. 813 (1943) (bill to repeal law extending the "practice" to the preparation of certain forms and reports was defeated); N. C. Pub. Laws 1941, c. 177.

³⁷ Sen. Bill No. 73 (1947) (passed Senate only).

³⁸ H. R. Bill No. 379 (1947).

³⁹ N. C. GEN. STAT. §§90-171.1 *et seq.* (1947 Cum. Supp.). The General Assembly either tabled or received unfavorable committee reports on bills to investigate the State Board of Barber Examiners (H. R. Res. 185 (1947)), to make the general contractors licensing statute inapplicable where the proposed construction is less in value than \$30,000 (Sen. Bill No. 423 (1947)), and to repeal various sections of the barbers statute (H. R. Bills Nos. 877, 878, 936 (1947)).

⁴⁰ N. C. Sess. L. 1947, House Resolution 31, p. 1698. For a thorough criticism of our licensing boards as to their similarity to the old guild system, Davis, *Our 21 "Little Legislatures,"* Journal and Sentinel (Winston-Salem, N. C.), Dec. 5, 1948, §3, p. 1; as to their unregulated handling of funds, Davis, *Carolina's Chaotic Licensing,* Journal and Sentinel (Winston-Salem, N. C.), Dec. 12, 1948, §3, p. 1; as to their exclusion of newcomers and their varied regulations, Davis, *How Business Self-Regulation Leads to Monopoly,* Journal and Sentinel (Winston-Salem, N. C.), Dec. 19, 1948, §3, p. 1; and for a discussion of the photographers statute as to the constitutionality, before the latest Supreme Court decision, and of the report of the Commission, Davis, *N. C. Licensing Boards Skate on Thin Legal Ice,* Journal and Sentinel (Winston-Salem, N. C.), Dec. 26, 1948, §3, p. 1.

⁴¹ Other objectives specifically assigned the Commission were: Make a detailed examination of the books and records to determine the number of applicants, num-

after detailed study of the years 1944 through 1946. Its recommendations, thirteen in number, are based upon the premise that regulation by the professions and trades themselves does not protect the public interest sufficiently.⁴² The commission recommends the establishment of a North Carolina General Licensing Board, with power to control the funds of the individual boards, and to approve examinations and prescribe their time and place. Also, the commission recommends granting to such Board power to issue all licenses upon certification by the regular boards (or upon review of an adverse decision of the regular board where the applicant failed to pass the examination), to suspend or revoke all licenses, and to review any action of a lesser board.⁴³ It is submitted that placing such power in the hands of the general board would sacrifice much of the advantage of the specialized knowledge of particular boards. The general board would not be expert in all the diverse fields in which particular boards operate.

The commission also stated that the public "is entitled to a voice in . . . administration"⁴⁴ of the various boards. In order to give the public such a voice a bill was introduced in the 1949 Senate authorizing the Governor to appoint one additional member from the State at large to serve on each of 21 licensing boards, but the bill died in the Senate.⁴⁵

This year the legislature finally acceded to the pressure behind the funeral directors licensing fight, and after ten years of denial it has now put funeral directors under the State Board of Embalmers and Funeral Directors.⁴⁶ Of the other bills introduced to decrease the number of persons and trades subject to licensing regulation only one was enacted.⁴⁷

ber passing the examinations, collections and disbursements; investigate the revocations of licenses and causes therefor; determine extent of time it takes to grant licenses after the examination; make any other inquiry with respect to the activities of the boards which the Commission may deem pertinent.

⁴² REPORT OF COMMISSION TO STUDY AND INVESTIGATE CERTAIN EXAMINING BOARDS IN THE STATE, October, 1948, p. 1.

⁴³ *Id.* at 3, 4. For an earlier editorial to the effect that what North Carolina needs is one State Board to regulate all the trades and professions, see News and Observer (Raleigh, N. C.), March 4, 1939, p. 4, col. 2.

⁴⁴ REPORT OF COMMISSION TO STUDY AND INVESTIGATE CERTAIN EXAMINING BOARDS IN THIS STATE, October, 1948, p. 2.

⁴⁵ Sen. Bill No. 116 (1949) (after amendment to exclude the boards regulating professions directly affecting public health and law).

⁴⁶ H. R. Bill No. 661 (1949) (the bill, as amended and passed, limits regulation to matters of sanitation); Sen. Bill No. 73 (1947); Sen. Bill No. 236 (1939).

⁴⁷ H. R. Bill No. 393 (1949) (would provide that the State Board of Accountancy shall have right to regulate only Certified Public Accountants—unreported); H. R. Bill No. 407 (1949) (would exempt certain practices from the regulatory power of the State Board of Accountancy, add one public member to that Board, and allow procurement of necessary technical assistance, the latter provision to cover administering of the examinations prepared by the American Institute of Accountants—tabled in Senate after passing House); H. R. Bill No. 684 (1949) (would grant licenses without examination to pharmacists in North Carolina who have practiced for 25 years under a registered pharmacist—unfavorable House

The stricter attitude toward licensing of ordinary occupations reached its culmination when, in a well reasoned opinion,⁴⁸ the North Carolina Supreme Court flatly reversed the decision in *State v. Lawrence* and declared that the statute setting up the State Board of Photographic Examiners violates Article I, Sections 1, 17, and 31 of the Constitution of the State of North Carolina.⁴⁹ This decision removes the inconsistency in our law brought about by the departure in *State v. Harris*⁵⁰ from the attitude taken in the *Lawrence* case, and makes it plain that engaging in ordinary occupations having no special connection with the objectives of the police power may not be restricted by the enactment of licensing statutes. The earlier haphazard enactment of licensing statutes and uncritical judicial approval of them appears during the eleven years since the *Lawrence* case to have given way to a legislative attitude requiring that these enactments be justified by a bona fide public purpose, and to a judicial policy of close scrutiny of such enactments to ascertain whether they genuinely protect the public health, safety, morals, or general welfare and thus bear an actual relationship rather than a theoretical one to these objectives of the police power.

ROBERT LEE HINES.

Civil Procedure—Less Than Unanimous Jury Verdicts

A recent discussion¹ in a Senate Committee of the 1949 state legislature concerned the feasibility of introducing a bill to provide for less than unanimous verdicts in civil cases. Although no action was taken in the matter, it would seem timely to consider briefly herein the arguments for and against a modification of our current requirement of unanimity.

At common law a jury verdict meant a unanimous verdict.² There-

Committee report); H. R. Bill No. 713 (1949) (would repeal Art. 2 of Chapter 87 of the General Statutes which set up the State Board of Examiners for Plumbing and Heating Contractors—unfavorable House committee report); H. R. Bill No. 906 (1949) (would remove persons furnishing or erecting industrial equipment, power plant equipment, or radial brick chimneys from the general contractors licensing act—enacted); H. R. Bill No. 1233 (1949) (would authorize issuance of "limited licenses" for practice of law in certain districts—unfavorable House committee report).

⁴⁸ *State v. Ballance*, 229 N. C. 764, 51 S. E. 2d 731 (1949).

⁴⁹ See note 6 *supra*.

⁵⁰ *State v. Harris*, 216 N. C. 746, 6 S. E. 2d 854 (1939).

¹ *News and Observer*, Jan. 20, 1949, p. 16, col. 7.

² 3 BL. COMM. *379 ("The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. . . . it is the most transcendent privilege which any subject can enjoy . . . that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals."); 1 COOLEY'S CONST. LIM. 677 (8th ed., Carrington, 1927); SEDGWICK, CONSTRUCTION OF STATUTORY AND CONST. LAW 493 n. (2nd ed. 1874).