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The Administrative Hearing for the Suspension of a Driver's License

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THE ADMINISTRATIVE HEARING FOR THE SUSPENSION OF A DRIVER'S LICENSE†

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Most driver license acts provide at least three methods by which a state may withdraw a citizen's license to drive; revocation, cancellation, and suspension. Revocations are in many jurisdictions discretionary,[1] but in one type of situation are usually mandatory, namely following court convictions for commission of certain offenses.[2] Cancellations take effect on the discovery of erroneous information given on applications.[3] Suspensions are almost exclusively discretionary with the agency administering driver license laws and may result from a variety of causes.[4] It is with this last mentioned method, or rather with the procedures used at the hearings which precede or follow these suspensions, that this note is primarily concerned.[5]

THE NATURE OF THE LICENSE

Before any detailed discussion of the necessary elements of a hearing for license suspension can be attempted there must first be a determination of whether the operation of a motor vehicle on the public highways is a *mere* privilege, a right, or something in between.

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[1] CAL. VEHICLE CODE ANN. §314(a) (1949); CONN. GEN. STAT. §2456 (1949); GA. CODE ANN. §92A421 (Cum. Supp. 1947) and regulations pursuant thereto; IND. ANN. STAT. §47-1081 (Supp. 1949); ME. REV. STAT. c. 19 §6 (1944); MASS. ANN. LAWS c. 90 §22 (1946); NEB. REV. STAT. §60-425 (1943); N. H. REV. LAWS c. 118 §32 (1942); N. M. STAT. ANN. §68-318 (1941); N. J. STAT. ANN. §39:5-30 (Supp. 1950); N. Y. VEHICLE LAW §41-3; R. I. GEN. LAWS c. 86, §6 (1938); S. C. CODE ANN. §5996 (5) (1942); and most states having in force The Uniform Motor Vehicle Operators' and Chauffeurs' License Act.

[2] All states which provide for administrative suspensions and revocations provide that for some convictions revocation *must* follow.

[3] Typical is §25 of the Uniform Motor Vehicle Operators' and Chauffeurs' License Act: "(a) The department is hereby authorized to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder or that said licensee failed to give the required or correct information in his application. . . ."

[4] Some of the many causes justifying a suspension are: The licensee, (1) is an habitually reckless or negligent driver of a motor vehicle, (2) is incompetent to drive a motor vehicle, (3) has permitted an unlawful or fraudulent use of such license.

The North Carolina Statute, N. C. GEN. STAT. §20-16 (Supp. 1951), includes under discretionary reasons, various court convictions in various combinations.

[5] This material is also applicable to those revocations which are left to the discretion of administrative bodies. See note 1 *supra*.

The earliest cases ruling on statutes regulating the operation of automobiles consistently held such statutes constitutional.[6] Certainly no one would question the correctness of these cases on the point. However, in 1913 the New York court, by way of dictum, stretched the power to regulate to the power to prohibit altogether. In *People v. Rosenheimer*[7] the court used these words: "The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the state."[8] The authorities cited by the court for the language quoted above are *State v. Mayo*[9] and *Commonwealth v. Kingsbury*.[10] The *Mayo* case actually was concerned with a city ordinance which permitted *particular* streets to be closed to automobiles. That opinion stands for nothing more than the rule that the operation of automobiles is subject to regulation; just as are all personal and property rights.[11] Nor does the *Kingsbury* case stand for any more.[12]

Of course the New York court was free to declare such a proposition as being the law in that state without citing any authority; and the position taken was actually a reasonable and proper one (rather than a misreading of the cases) in view of the court's attitude as of that date, toward automobiles. This is shown by the language immediately following the citation of the *Mayo* and *Kingsbury* cases: "Doubtless the Legislature could not prevent citizens from using the highways in the

[6] Emerson Troy Granite Co. v. Pearson, 74 N. H. 22, 64 Atl. 582 (1906); Unwen v. State, 73 N. J. L. 529, 64 Atl. 163 (Sup. Ct. 1906); Fletcher v. Dixon, 107 Md. 420, 68 Atl. 875 (1908); Cleary v. Johnston, 79 N. J. L. 49, 74 Atl. 538 (Sup. Ct. 1909); State v. Mayo, 106 Me. 62, 75 Atl. 295 (1909); City of Mobile v. Gentry, 170 Ala. 234, 54 So. 488 (1911).

[7] 209 N. Y. 115, 102 N. E. 530 (1913).

[8] *Id.* at 120, 102 N. E. at 532. The case has since been often cited for this language without analysis of the case or consideration of the date and circumstances of the decision.

[9] 106 Me. 62, 75 Atl. 295 (1909).

[10] 199 Mass. 542, 85 N. E. 848 (1908).

[11] "It is an equal right of all to use the public streets for purposes of travel . . . ; and it is also too well recognized in judicial decisions to be questioned that an automobile is a legitimate means of conveyance on the public highways. But the right to so use the public streets, as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled . . . ." State v. Mayo, 106 Me. 62, 66, 75 Atl. 295, 297 (1909).

The following language appears on the same page ". . . individuals may be subjected to restraints, and the enjoyment of personal and property rights may be limited, *or even prevented, if manifestly necessary* to develop the resources of the state, improve its industrial conditions, and secure and advance the safety, comfort, and prosperity of its people." [Italics added]

In other words a valid exercise of the police power does not offend the Constitution. The question remains as to whether the forbidding of the use of automobiles on public highways would be a valid exercise of the police power. This decision does not stand for the proposition that it would.

[12] "The right of the Legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets . . . , seems to us well established both upon principle and authority." Commonwealth v. Kingsbury, 199 Mass. 542, 546, 85 N. E. 848, 849 (1908).

ordinary manner. . . ."[13] [Italics supplied] When the two quotations are considered together it can be seen that what at first appears to be a misunderstanding of the cited cases was rather an inference drawn which is explainable by the date of the cases. The key to the court's reasoning is simply this: The driving of automobiles on the highways was not, even as late as 1913, considered by this court as an "ordinary use of the highways." It follows that when such use *is* considered an ordinary use the proposition must fall. The same respected justice who wrote the opinion in the *Rosenheimer* case could consistently hold in 1951 that the Legislature could no more prohibit altogether the use of automobiles on the highway than it could prohibit the use of sidewalks by pedestrians.[14] To continue citing the *Rosenheimer* case for the rule that driving an automobile is a mere privilege revocable by the state in any manner it sees fit seems highly unrealistic.[15]

[13] People v. Rosenheimer, 209 N. Y. 115, 120, 102 N. E. 530, 532 (1913).

[14] The Iowa Supreme Court recognized this principle as early as 1914. In *State v. Gish* that court stated: "It [the Legislature] can no more prohibit such use [of highways by motor vehicles] than it could prohibit the use of lumber wagons." 168 Iowa 70, 75, 150 N. W. 37, 38 (1914). As a corollary to this statement it could now be added that if the use of lumber wagons becomes an *extraordinary* use of the highways the Legislature can prohibit their use thereon.

[15] The courts of New York have, to a great extent, abandoned the exact language and proposition of the *Rosenheimer* case so far as this particular aspect is concerned.

The Court of Appeals has cited the case twice in the last ten years (as of the date of this writing). Good Humour Corp. v. City of New York, 290 N. Y. 312, 317, 49 N. E. 2d 153, 155 (1943) and People v. Bearden, 290 N. Y. 478, 483, 49 N. E. 2d 785, 788 (1943). In the *Good Humour* case the reference was as follows: "The right to use a street by any person even for travelling must be exercised in a mode consistent with the equal rights of others to use the highway." The reference in the *Bearden* case had to do with the difference between criminal and civil negligence.

During the same period three lower court decisions in New York have relied on the *Rosenheimer* case to support an expression of the privilege doctrine: Heart v. Fletcher, 184 Misc. 659, 53 N. Y. S. 2d 369 (Sup. Ct. 1945) (In this confusing opinion there appears this reasoning: "The payment by the petitioner of the required fees upon the issuance to him of the operator's license did not convert the privilege granted into a property right of which he might not be deprived without a notice and hearing, *i.e.* due process of law." Following this language the court quotes at length from Anderson Nat. Bank v. Luckett, 321 U. S. 233, 246-247 (1944). The passage which the court quotes discusses the requirements of due process when interfering with a property right. After this quotation the New York Court proceeds to point out that the New York statute under attack provides these requirements and *"therefore"* does not offend the due process clause) ; Ohlsen v. Mealy, 179 Misc. 13, 37 N. Y. S. 2d 123 (Sup. Ct. 1942) (this case, like the *Heart* case, was concerned with a *mandatory* suspension under the Financial Responsibility Act) ; Fochi v. Splain, 36 N. Y. S. 2d 774 (Sup. Ct. 1942) (this case was concerned with the refusal to re-issue a license to operate a drivers' school).

Although the New York courts have for the most part shown a change of attitude (as will be pointed out further in this note) regarding the language of the *Rosenheimer* case, other jurisdictions continue to cite it as authority for the *mere* privilege doctrine. Also often cited are People v. Stryker, 124 Misc. 1, 206 N. Y. Supp. 146 (Sup. Ct. 1924) (based squarely on the *Rosenheimer* case), and People v. Cohen, 128 Misc. 29, 217 N. Y. Supp. 726 (Sup. Ct. 1926) (based on the *Stryker* case).

Another case which has been often cited and which stands for the proposition that operating an automobile on the public highways is a *mere* privilege is *La Plante v. Board of Public Roads.*[16] In this opinion the Rhode Island court used this language: "It is evident that a license to operate a motor vehicle is a permit to do that which would otherwise be unlawful."[17] The court then cites a text[18] and three cases.[19] Two of the cases are concerned with the use of the highways by for-hire vehicles, and the other deals with the revocation of a milk dealer's license.[20] By its citation of cases involving for-hire vehicles the Rhode Island court showed itself to be either unaware of, or unconcerned with, the well established difference between the use of public property for business purposes and the ordinary use of public property by private citizens acting as such.[21] The court's label of "privilege" is also weakened by the fact that the statute which the decision upheld as constitutional, though permitting suspension without hearing, also provided for a full hearing on appeal to the courts.[22]

[16] 47 R. I. 258, 131 Atl. 641 (1926) (upholding a suspension of petitioner's driving license without any hearing by the administrative official).

[17] *Id.* at 261, 131 Atl. at 642.

[18] BABBITT, LAW APPLIED TO MOTOR VEHICLES §233 (3d ed. ——).

[19] Burgess v. Board of Alderman, 235 Mass. 100, 126 N. E. 456 (1920); Child v. Bemus, 17 R. I. 230, 21 Atl. 539 (1891) (both cases deal with for-hire vehicles); People *ex rel.* Lodes v. Dept. of Health, 189 N. Y. 187, 82 N. E. 187 (1907) (revocation of license to sell milk).

[20] See note 19 *supra.*

[21] That the distinction was well recognized at the time of the *La Plante* decision is shown by the following cases: Packard v. Benton, 264 U. S. 140 (1924); Scott v. Hart, 128 Miss. 353, 91 So. 17 (1922); Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516 (1920); *Ex parte* Dickey, 76 W. Va. 576, 85 S. E. 781 (1915) and cases cited in these decisions.

For later cases supporting the distinction see: Jewel Tea Co. v. City Council, 59 Ga. 305, 200 S. E. 503 (1938); Bell Bros. Trucking Co. v. Kelley, 277 Ky. 781, 127 S. W. 2d 831 (1939); Huffman v. City of Columbia, 146 S. C. 436, 144 S. E. 157 (1928).

The statement that the license "is a permit to do that which would otherwise be unlawful" is an over-simplification too often used as a substitute for an adequate analysis of the problem. In the first place it is historically untrue. See the historical discussion in *Ex parte* Dickey, 76 W. Va. 576, 85 S. E. 781 (1915) and City of Rochester v. Falk, 170 Misc. 238, 9 N. Y. S. 2d 343 (Rochester Crim. 1939). In the second place, if its truth as a legal proposition be conceded, the legislature having made driving "otherwise [*i.e.* without a license] illegal," it does not necessarily means that the license can be suspended or revoked summarily. For instance, to vote without meeting the qualifications set out by the legislature and without registering is illegal, therefore by the above reasoning a registration receipt is a "permit to do that which would otherwise be unlawful." But, it does not follow that the legislature may summarily revoke or suspend the right to vote.

This analogy is not meant to suggest that driving an automobile is in the same classification as the right to vote. It is rather meant to demonstrate that declaring the license to be a permit to do that which would otherwise be unlawful is meaningless so far as aiding in the proper classification of the activity.

[22] "Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process. Familiar examples are the decisions and orders of administrative agencies which determine rights subject to a subsequent judicial

A third case which is often cited for the "*mere* privilege" doctrine is *Commonwealth v. Funk,* decided in Pennsylvania in 1936.[23] This decision relies heavily on the *La Plante* case[24] and *People v. Stryker,*[25] a New York case based wholly on the *Rosenheimer* opinion.[26] The label here is also weakened by the fact that the driver concerned received a full hearing by the Secretary of Revenue and a hearing *de novo*[27] in the court of common pleas.[28]

It is clear from a study of the later decisions by the New York courts that they no longer regard the operation of an automobile on the public highway as a mere privilege to be withdrawn in a summary manner. A change of attitude can be detected in the cases as early as 1927. In *Albrecht v. Harnett* one New York court used this more careful language: "The use of automobiles, even by owners, is a matter reasonably subject to governmental regulation. . . ."[29] In 1939 another court of that state had this to say: "The license was not a gift of a sovereign as a favor. It was granted by the state as a right to whomever should

review." Anderson Nat. Bank v. Luckett, 321 U. S. 233, 246-247 (1944).

But see Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U. S. 4, 10 (1942). "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be idle ceremony if the situation were irreparably changed before the correction could be made."

There seems little danger that a licensee would be irreparably damaged between the time his license is suspended and the time when he can get judicial review. However, that damage could result which a reversal would not cure, must be admitted. By far the better practice is that provided by the vast majority of states, *i.e.* an administrative hearing, either before suspension or immediately thereafter. See note 45 *infra.* In view of the fact that most people can ill afford the expense and trouble of an appeal it would seem that ordinary considerations of fair play would dictate that a hearing be given on such an important matter as the suspension or revocation of a driver's license, whether full judicial review is available or not.

[23] 323 Pa. 390, 186 Atl. 65 (1936).

[24] La Plante v. State Board of Public Roads, 47 R. I. 258, 131 Atl. 641 (1926).

[25] 124 Misc. 1, 206 N. Y. Supp. 146 (Sup. Ct. 1924).

[26] People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530 (1913). Also cited in the *Funk* case are People v. Cohen, 128 Misc. 29, 217 N. Y. Supp. 726 (Sup. Ct. 1926) (See note 15 *supra.*); Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 Pac. 481 (1931) (this opinion upholds a financial responsibility law and cites for its "privilege" doctrine Hendricks v. Maryland 235 U. S. 610 (1915) which upheld a Maryland license act against an attack by a resident of the District of Columbia. The argument presented was that such act was a burden on interstate commerce); Burgess v. Mayor of Brockton, 235 Mass. 95, 126 N. E. 456 (1920) (a case dealing with for-hire vehicles).

[27] "This system sets up every requirement of due process of law, and an operator whose license has been revoked cannot complain that he has been arbitrarily deprived of the enjoyment of the privilege." Commonwealth v. Funk, 323 Pa. 390, 397, 186 Atl. 65, 68 (1936).

[28] The petitioner herein had been tried by a court for operating an automobile while under the influence of intoxicating liquor and found not guilty. In spite of the court's verdict, the Secretary revoked the petitioner's license on the grounds of drunken driving. This decision upholds the ruling of the Secretary and finds no double jeopardy on the theory that the court trial was a criminal proceeding and the hearing before the Secretary was civil.

[29] 221 App. Div. 487, ——, 224 N. Y. Supp. 97, 99 (4th Dept. 1927).

establish his ability. . . ."[30] In a case decided in 1940 the court used this language concerning a driver's license: "He has a vested right therein which cannot be taken from him capriciously or arbitrarily."[31] Later decisions continue to demonstrate the regard which the New York courts have come to hold for what was once so definitely labelled a *mere* privilege.[32]

The same regard can be discerned by a glance at the more recent Pennsylvania decisions.[33] In 1942 the highest court of that state used these words: ". . . a qualified person may not be deprived of the privilege . . . by arbitrary action of the officers entrusted with the administration of the code."[34] On consideration of a case in 1948 where the court of common pleas had affirmed a suspension by merely determining that the evidence justified the Secretary's finding, the supreme court on appeal said this: "The court's action . . . amounted to a denial of the full, fair and impartial hearing which is an inherent and unalienable right of our Anglo-Saxon legal heritage and which our constitutional guarantees are designed to safeguard and protect."[35]

The Rhode Island court seems to have expressed no change in attitude since the *La Plante* case but as was the situation when that case[36] was decided, the Rhode Island statute provides a full court review of the administrative decisions.[37]

The courts of most jurisdictions continue to pay at least lip service to the "privilege" doctrine.[38] However, in addition to the change of

[30] City of Rochester v. Falk, 170 Misc. 238, ——, 9 N. Y. S. 2d 343, 346 (Rochester Crim. 1939).

[31] Application of Goodwin, 173 Misc. 169, ——, 17 N. Y. S. 2d 426, 428 (Supp. Ct. 1940).

[32] Application of Kafka, 272 App. Div. 364, 41 N. Y. S. 2d 179 (1st Dept. 1947); Cohn v. Fletcher, 272 App. Div. 1080, 75 N. Y. S. 2d 329 (3d Dept. 1947); Sand v. Fletcher, 54 N. Y. S. 2d 449 (Sup. Ct. 1945); McCord v. Fletcher, 182 Misc. 447, 44 N. Y. S. 2d 89 (Sup. Ct. 1943).

[33] Actually the Pennsylvania courts have never clearly placed the operation of a motor vehicle for private purposes in the same class with recognized *mere* privileges such as permits for commercial use of the highways, beer and liquor licenses, pool room and dance hall permits, etc.

[34] Commonwealth v. Irwin, 345 Pa. 504, 507, 29 A. 2d 68, 69 (1942).

[35] Commonwealth v. Herzog, 359 Pa. 641, 644, 60 A. 2d 37, 39 (1948).

[36] La Plante v. State Board of Public Roads, 47 R. I. 258, 131 Atl. 641 (1926).

[37] R. I. GEN. LAWS c. 86 §6 (1938), as interpreted by the *La Plante* case.

[38] Roden v. State, 15 Ala. App. 156, 72 So. 605 (1916); Goodwin v. Superior Court of Yavapai County, 68 Ariz. 108, 201 P. 2d 124 (1948); People v. Higgins, 87 Cal. App. 2d 938, 197 P. 2d 417 (1948); Doyle v. Kahl, 46 N. W. 2d 52 (Iowa 1951); Commonwealth v. Harris, 278 Ky. 218, 128 S. W. 2d 579 (1939); Larr v. Dignan, 317 Mich. 121, 26 N. W. 2d 872 (1947); State v. Moyers, 86 Okla. Cr. 101, 189 P. 2d 952 (1948); Taylor v. State, 151 Tex. Crim. Rep. 568, 209 S. W. 2d 191 (1948); Goulter v. Huse, 196 Wash. 652, 84 P. 2d 126 (1938); Nutler v. State Road Comm'n., 119 W. Va. 312, 193 S. E. 549 (1937).

The Virginia decisions on the point seem to have developed in just the opposite manner from those in New York. In Virginia's first case dealing with the issue, Thompson v. Smith, 155 Va. 367, 377, 154 S. E. 579, 583 (1930), the Virginia Court said: "The right of a citizen to travel upon the public highways . . . is a

attitude demonstrated by the decisions of New York and Pennsylvania, there are other jurisdictions in which comparatively recent cases have recognized the principle that considerably more than a *mere* privilege is involved. The court which has openly declared the rule which most other courts are now leaning toward (in results if not in language), is the Supreme Court of Idaho. In *State v. Kouni*,[39] where that court considered a discretionary suspension by an administrative official, the majority held that such action under the particular statutory provision

common right which he has under his right to enjoy, life and liberty, to acquire and possess property, and to pursue happiness and safety. It includes the right . . . to use . . . a horse drawn carriage or wagon, or to operate an automobile thereon . . . . It is not a mere privilege, like the privilege of moving a house in the street, operating a business stand in the street, or transporting persons or property for hire along the street, which a city may permit or prohibit at will. . . ." In referring to the doctrine that because a state may prohibit the doing of a thing altogether, it also may regulate in any manner it wishes, the court adds (*Id.* at 378, 379, 154 S. E. at 583, 584), "This doctrine has been pronounced most often in cases involving the granting, refusing, and revoking of licenses . . . to sell intoxicating liquors . . . keeping a gambling house or a bawdy house, or operating a junk or pawn shop. . . . But this doctrine has no application to . . . private automobiles [operated] in the usual and ordinary way. . . ."

This well reasoned decision recognized a distinction which other enlightened courts have come to appreciate in effect if not in words, yet for some reason, in later cases in Virginia there seems to have been a deliberate effort to undermine the law of this case. In Hannabass v. Ryan, 164 Va. 519, 524, 180 S. E. 416, 417 (1935), the court refers to granting or withholding the "privilege." In Law v. Commonwealth, 171 Va. 449, 454, 199 S. E. 516, 519 (1938), the court cites with strong approval a West Virginia case which is contra the *Thompson* case. In Commonwealth v. Ellett, 174 Va. 403, 414, 4 S. E. 2d 762, 767 (1938) the court states, "The license . . . is not a contract or property right in a constitutional sense." For this the *Thompson* case is cited. (The *Thompson* case has been interpreted to stand for just the opposite; see the dissent in State v. Kouni, 58 Idaho 493, 76 P. 2d 917 (1938), and Note, 24 VA. L. REV. 922 (1938). In Pritchard v. Battle, 178 Va. 455, 17 S. E. 2d 393 (1941), the court ignores the distinction in licenses recognized in the *Thompson* case and cites the *Law* case for the privilege doctrine. *But see* Kizee v. Conway, 184 Va. 300, 35 S. E. 2d 99 (1945). In Auglin v. Joyner, 181 Va. 660, 664, 26 S. E. 2d 58, 59 (1943), the court uses the very phrase "mere privilege." But, in Butler v. Commonwealth, 189 Va. 411, 53 S. E. 2d 152 (1949) the court condemned as inadequate for suspension the finding that a licensee was an 'habitual violator' without application of the standard "necessary for the safety of the public on the highways of this state."

It is here respectfully submitted that the Virginia Court could well reconsider its critical attitude regarding the *Thompson* case since those courts dealing most with the point have approximated its law if not its language.

New Jersey decisions have consistently held to the *mere* privilege doctrine; approving in one case a statute with an extremely "loose" administrative standard (Hinnekens v. Magee, 135 N. J. L. 537, 53 A. 2d 356 (Sup. Ct. 1947)) and approving in another case the grant of discretionary authority as to giving hearings at all (Tichenor v. MaGee, 4 N. J. Super. 467, 67 A. 2d 895 (1949). However, in Wolan v. Ferber, 12 N. J. Super. 167, 79 A. 2d 86 (1951), the court expresses doubt as to the adequacy of the standard, "or any other reasonable grounds."

Another state which, like Virginia, has an early case holding "the owner's right to use his vehicle after complying with the statutory duties" to be a substantial property right, is Iowa. State v. Gish, 168 Iowa 70, 150 N. W. 37 (1914); and again like Virginia, the law of the case (which is well reasoned) has been undermined by a later decision. Doyle v. Kahl, 46 S. W. 52 (Iowa 1951).

[39] 58 Idaho 493, 76 P. 2d 917 (1938). To almost the same effect is Thompson v. Smith, 155 Va. 367, 154 S. E. 579 (1930). See note 38 *supra*.

involved,[40] permitted the Commissioner to "deny to the owner or operator of the motor vehicle the right to the use, in a lawful manner, of his property," in violation of the due process clause of the Federal Constitution.[41]

The highest court of North Dakota has used language in a recent case which would indicate that it also views the right to operate a motor vehicle as considerably more than a privilege subject to suspension without safeguards. In *Helland v. Jones*[42] that court in dismissing an appeal by the State Highway Commissioner from a lower court's reversal of his refusal to reissue applicant's license said: "His [the applicant's] personal right to freedom of action in regard to driving a motor vehicle on the highways is involved. That is an important right under our present mode of living."

In a recent decision by the North Carolina Supreme Court it was stated that, "a license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by the statute."[43] Just what constitutes a "privilege in the nature of a right" is not clear, but considering the attitude of watchfulness with which this court views administrative actions[44] it is doubtful that anything less than due process of law would suffice to take away a privilege so labelled.

From an examination of the statutes of the various states it appears that the overwhelming majority of legislatures are convinced that a driver is entitled to a hearing either preceding or immediately following a suspension of his license.[45] However, if a statutes does not spell out

[40] The provision under attack was a subsection of the Uniform Motor Vehicle Operators' and Chauffeurs' License Act: "The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee. . . .

"Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage." Most states which have adopted this Act change this subsection so as to make "fault" the basis of the suspension.

[41] In a later decision, O'Conner v. City of Moscow, 69 Idaho 37, 202 P. 2d 401 (1949), dealing with a different matter, the Idaho court displays a highly enlightened concept of licenses in general.

[42] 37 N. W. 2d 513, 514 (N. D. 1949).

[43] *In re* Wright, 228 N. C. 584, 489, 46 S. E. 2d 696, 699, 700 (1948). The same court in State v. McDaniels, 219 N. C. 763, 764, 14 S. E. 2d 793, 794 (1941), had referred to a drivers' license as "evidence of a privilege granted by the State."

[44] See Bowie v. West Jefferson, 231 N. C. 408, 411, 57 S. E. 2d 369, 371 (1949) and cases cited therein.

[45] The only state statutes which permit discretionary suspension and revocations by administrative agencies without an administrative examination or hearing before or after suspension are: CONN. GEN. STAT. §2456 (Rev. 1949), with full hearing on appeal to the superior court (§2458); KY. REV. STAT. §186.570 (1948), with §18.580 providing for appeal at which "the quarterly court may grant adequate relief"; N. H. REV. LAWS c. 118, §33 (1942) with §34 providing hearing at which the court may "determine whether the petitioner is entitled to a license"; N. J. STAT. ANN. §39:5-38 (1945) with §39:5-23 providing review of the entire record if a hearing is given, otherwise mandamus will lie; OKLA. STAT. tit. 47, §296

the details of the hearing (which few of them do), the necessary procedures may yet depend on whether the courts of a particular jurisdiction regard a driver license as a *mere* privilege to be withdrawn summarily, or as something more, to be withdrawn only with due process of law.[46]

The Uniform Motor-Vehicle Operators' and Chauffeurs' License Act

Because the Uniform Act, with varying modifications, is in force in many states,[47] and because it does not spell out the details attendant to its required hearing, the pertinent sections of that act have been chosen for analysis.[48]

The first section of the Act to be considered is section 30.[49] In it the

(1949) with §300 providing full review at which the court may affirm, reverse, or modify; R. I. GEN. LAWS c. 86, §6 (1938) with a full appeal; and WIS. STAT. §85.08 (1949) in which the department may refuse a hearing, but such procedure is probably subject to the provisions of the Uniform Administrative Procedure Act in which §277.07 (the Wisconsin statute) requires a full fair hearing in any contested case.

[46] It can be argued that regardless of how the courts view a particular activity, when the Legislature provides for a hearing regarding that activity it means a hearing in the judicial concept with all necessary safeguards. The Supreme Court of the United States so held where a statute required a "full hearing." Morgan v. United States, 298 U. S. 468 (1936). It has been said that the necessity of notice and hearing in driver license suspension cases depends upon statutory provisions. See note, 10 A. L. R. 2d 833, 834. This is generally true but with exceptions which will depend on how the courts of a particular jurisdiction view the operation of a motor vehicle. For instance, a statute failing to provide notice and hearing would certainly be held unconstitutional in Idaho. That court in State v. Kouni, 58 Idaho 493, 76 P. 2d 917 (1938), clearly labelled the operation of a motor vehicle a property right which could not be taken away without due process of law. Futhermore, the procedures which would be absolutely required at a hearing in a particular state could easily depend on the attitude of the courts of that state toward the operation of a motor vehicle. A court dealing with a statute requiring a hearing could, if driving were labelled a *mere* privilege, permit any kind of hearing without any procedural safeguards whatsoever; whereas if the activity had been labelled by that court as something more than a *mere* privilege, the court would probably be impelled to require some semblance of a full and fair hearing.

[47] States in which the original Act is in force substantially as written are: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Montana, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, Wyoming.

[48] This material, in the absence of special provisions in the statutes of a particular jurisdiction, should be applicable to all statutes providing discretionary administrative suspensions or revocations.

[49] "(a) The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;
2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage;
3. Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;
4. Is an habitually reckless or negligent driver of a motor vehicle;
5. Is incompentent to drive a motor vehicle;
6. Has permitted an unlawful or fradulent use of such license; or

department administering the Act is given the power to suspend an operator's license without preliminary hearing, for any of the several listed reasons.[50] Following the suspension, notice and opportunity to be heard must be given the licensee. The present inquiry is as to the nature and procedure of this hearing.

THE HEARING

1. *The "Complaint."* It is clear from the statute that in the great majority of cases the department will itself initiate the proceedings for suspension. This appears from the fact that most of the reasons for suspension are based on convictions or other conduct which is a part of a driver's permanent record. This record is ordinarily found only in the files of the department. However, in cases of incompetency or habitual recklessness, the proceedings could, and probably would, be instigated by persons outside the department. This could be done by letter, petition, etc. Is the department then expected to make a preliminary investigation before making the initial suspension, and if so are the facts uncovered put in evidence at the subsequent hearing? Since the initial suspension is to occur only on a showing by records "or other sufficient evidence," certainly a letter or petition would not support action without some investigation.

As to whether the prosecuting witness must appear at hearing and whether the facts uncovered by the preliminary investigation must be

7. Has committed an offense in another state which if committed in this state would be grounds for suspension or, revocation.

(b) Upon suspending the license of any person as hereinbefore in this section authorized, the department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed 20 days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county. Upon such hearing the commissioner or his duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the department shall either rescind its order of suspension or, good cause appearing therefor, may extend the suspension of such license or revoke such license."

The comparable statutes in the various states which have passed this Act in forms substantially similar to the original Act are as follows: ALA. CODE ANN. tit. 36, §68 (1940); ARIZ. CODE ANN. §§66-249, 66-252 (1939); ARK. STAT. ANN. §§75-334, 75-338 (1947); COLO. STAT. ANN. c. 16, §§145, 149 (1935); DEL. REV. CODE §5606 (1935); FLA. STAT. ANN. §§322.27, 332.31 (1943); IDAHO CODE §§49-330, 49-334 (1947); IOWA CODE §§321.210, 321.215 (1950); KAN. GEN. STAT. ANN. §§8-250, 8-255 (1949); LA. STAT. ANN. tit. 32 §414(3), (4) (1950); MD. ANN. CODE GEN. LAWS art. 66½ §§95, 99 (Cum. Supp. 1947); MINN. STAT. ANN. §§171, 18, 19 (West 1945); MISS. CODE ANN. §8107 (1942); MONT. REV. CODES ANN. §§31-147, 31-152 (1947); N. C. GEN. STAT. §§20-16, 20-25 (Supp. 1951); ORE. COMP. LAWS ANN. §§115-219, 115-220 (Supp. 1947); PA. STAT. ANN. tit. 75, §§192, 193 (Supp. 1950); TENN. CODE ANN. §2715.25 (1934); TEX. REV. CIR. STAT. ANN. art. 667 b §§22 (b), 33 (1948); UTAH CODE ANN. §§57-4-22, 57-4-23 (1943); WASH. REV. STAT. ANN. §6312-66 (1937); WYO. COMP. STAT. ANN. §60-1515 (3) (Supp. 1949).

50 See note 49 *supra*.

put in evidence at hearing, the law is unsettled. These problems are merely raised at this point and will be discussed in the subsection on *Evidence.*

2. *Notice.* From the statutory mandate, "the department shall immediately notify the licensee in writing," it would seem that some sort of "personal service" is necessary to effectuate a suspension. This could be accomplished by having an officer serve the suspension notice or by delivery of a registered letter. However, if the officer was unable to find the licensee, or if the licensee refused to accept the registered letter, or if due to a change of address or an incomplete address the letter was never received, under a literal interpretation of the statute the suspension might be ineffective.

A more reasonable rule would be that exemplified by N. C. Gen. Stat. §20-48. That statute states that if the department sends a letter to the address which the licensee himself has furnished the department (on his application for a license), the service is complete four days after mailing.[51]

The notice should contain the "time, place, and offense of which there has been a conviction, but in cases where the records of the division giving rise to the complaint consist of accident reports or other documents, the specific acts or conduct relied on by the commissioner with respect to each accident should be set out in the notice, as well as the names of the operators of the other vehicles involved, if they appear on the reports."[52]

3. *The Issues To Be Decided.* Once the hearing has begun, the first issue to be determined is whether or not the licensee's conduct has placed him within one of the listed conditions which will justify a suspension. For instance, has he committed enough serious violations of traffic regulations to satisfy the department that he has a disregard for such regulations and for the safety of other persons? Or, is he an habitually reckless or negligent driver?[53] If this issue is decided in the affirmative, what next?

Since the statutory direction is not that the department *shall,* or *must* suspend the license on an affirmative finding on the first issue, the legislature must have contemplated situations in which the first issue

[51] Ratliff v. State, 182 Tenn. 177, 184 S. W. 2d 572 (1944) holds that where highway officers take possession of the license following an arrest, no notice is necessary. (Query, as to the wisdom of granting authority to take a license immediately following an arrest.)

[52] Willis v. Commonwealth, 190 Va. 294, 298-299, 56 S. E. 2d 222, 224 (1949).

[53] Or, as in North Carolina, has he "within one (1) year, been convicted of two or more charges of speeding in excess of fifty-five (55) and not more than seventy-five miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour"? N. C. GEN. STAT. §20-16 (a) 9. (Supp. 1951).

would be answered against the licensee but in which nevertheless the license should not be suspended. A case illustrating this point was decided in Pennsylvania in 1944.[54] In that case the licensee had broken the speed limit which was one of the offenses for which his license could be suspended.[55] After hearing, the Secretary suspended the license and the licensee appealed to the court of common pleas. The court, on a showing that petitioner had been driving since 1914 without a previous arrest, had used his car chiefly for going to and from work, and had exceeded the speed limit by only a few miles, held the violation to be only "technical" and reinstated the license.[56] On the Secretary's appeal to the supreme court the reinstatement was affirmed.

So it appears that there are two issues to be decided: (1) whether or not the licensee's conduct has been such as to bring him within the department's jurisdiction under the statute, and (2) whether the license shall in fact be suspended.

4. *Evidence.* The statute grants to the representatives of the department who hold the hearing, the power to administer oaths and issue subpoenas,[57] which may be taken to indicate that *evidence,* rather than informal statements, should be produced at the hearing. This

[54] Appeal of Schwartz, 348 Pa. 267, 35 A. 2d 290 (1944).

[55] "(b) The secretary may suspend the operator's license . . . after a hearing before the secretary or his representative . . . whenever the secretary finds upon sufficient evidence . . . that such person has committed any violation of the motor vehicle laws of this Commonwealth." PA. STAT. ANN. tit. 75, §192 (1939).

[56] The Pennsylvania Supreme Court has interpreted the scope of review on appeal from the department to be full *de novo* hearing with the court having power "to determine anew whether the operator's license should be suspended." Commonwealth v. Funk, 323 Pa. 390, 399, 186 Atl. 65, 69 (1936). This interpretation of the statute has been affirmed in an interesting series of cases which will be discussed further in this note. It is in conflict with the North Carolina Supreme Court's interpretation of the same statute as expressed in *In re* Wright, 228 N. C. 584, 46 S. E. 2d 696 (1948). This conflict will also be discussed under the section, *Review.*

In the *Funk* case the court also stated, in effect, that on the hearing, the Secretary has discharged his statutory function when he has decided that this writer has listed as "issue number one" [*i.e.* finding a violation so as to bring the licensee within the operation of the statutes]. Reiterated in Appeal of Oesterling, 347 Pa. 241, 31 A. 2d 905 (1943). This appears to mean that the Secretary is to suspend the license whenever he finds a violation regardless of any mitigating circumstances which might be present; and the court is to be the sole determiner of whether the suspension was in fact justified.

In view of the scope of review provided under Pennsylvania law this reasoning probably results in little, if any, substantial injustice. Nevertheless, it is respectfully submitted that such was not intended by the Legislature and that the result is questionable. It places all discretion in the court and none in the department. The basic reason for the creation of administrative tribunals is to make use of the experience and special abilities of those officials closest to the problem, and to remove many of the decisions which require that experience and particular skill from the work load of the courts, thus leaving the courts to keep a watchful eye on all such agencies in order to secure a proper administration of justice as known to American law. The law of Pennsylvania on this particular point defeats that purpose.

[57] See note 49 *supra.*

would of course, necessitate the exclusion of testimony not given under oath.[58] Nor should a decision be made which is supported only by hearsay evidence.[59] However, common law rules of evidence are not applicable.[60] As is the case with most administrative hearings, no set rules as to the kind of evidence admissible may be stated. The modern trend is toward an acceptance of evidence that satisfies the standard set forth by Judge Learned Hand in *Nat. Labor Relations Board v. Remington Rand, Inc.*:[61] "evidence on which responsible persons are accustomed to rely in serious affairs."[62]

Whether or not the licensee has the right to confront and cross-examine his accusers will depend on various factors. The exact point seems to have been raised in only one of the states which have enacted the statute.[63] In a case decided in 1939,[64] the Pennsylvania Supreme

[58] In a New Jersey decision in which the court quoted with approval from 22 C. J. 66 these words appear, ". . . testimony is accurately used to designate only a particular kind or species of evidence, namely, that which comes to the tribunal through living witnesses speaking *under oath* in the presence of the tribunal." [Italics added] Bednarik v. Bednarik, 18 N. J. Misc. 633, ——, 16 A. 2d 80, 89 (Ch. 1940).

The North Carolina Supreme Court, in reference to the reading of medical textbooks to the jury, has said, "The theory which excludes the reading of such publications is based upon the idea that declarations in a book or opinions of experts contained therein, *are not under oath, and hence cannot be classified as evidence.*" [Italics supplied] Conn v. Seaboard R. R., 201 N. C. 157, 160, 159 S. E. 331, 333 (1931).

[59] Consolidated Edison Co. v. Nat'l Labor Relations Board, 305 U. S. 197 (1938); Maley v. Thomasville Furn. Co., 214 N. C. 589, 200 S. E. 438 (1939).

In a California case concerned with the revocation by the city council of petitioner's license to operate an auto-wrecking business where the only "evidence" was a letter from the chief of police setting forth various violations of ordinances, the concurring opinion agreed that the petitioner did not have to rebut the charges contained in the letter as "there was no evidence to rebut." The opinion adds that even were the letter to be considered as evidence it was only hearsay and, "there is no substantial evidence to support an administrative decision if the only evidence is hearsay." Walker v. San Gabriel, 20 Cal. 2d 879, 882, 129 P. 2d 349, 351 (1942).

[60] People ex rel. Albrecht v. Harnett, 221 App. Div. 487, 224 N. Y. Supp. 97 (4th Dept. 1927). See also cases cited in note 59 *supra*.

For recent discussions of evidence requirements at the administrative level see Cahill, *Administrative Agencies; Also Some Minnesota and Wisconsin Comparison*, 34 MARQ. L. REV. 90 (1950); Davis, *Evidence Reform: The Administrative Process Leads the Way*, 34 MINN. L. REV. 581 (1950).

[61] 94 F. 2d 862 (1938).

[62] *Id.* at 873. This phraseology is adopted in the California Administrative Procedure Act. CAL. POLITICAL CODE ANN. §11513 (Supp. 1945) (However, this Act is not applicable to the Department of Motor Vehicles). Substantially the same language appears in the Model State Administrative Procedure Act. The Federal Administrative Procedure Act requires "reliable, probative, and substantial evidence."

[63] However, in Alabama the Attorney General has ruled as follows: "The hearing referred to in this section includes a fair hearing, together with all of its accustomed incidents. . . ." REP. ATTY. GEN. July-Sept., 1944 p. 64.

A New York court speaks as follows concerning a fair hearing: "Petitioner has a right to be confronted with the witness at such hearing and given an opportunity to cross examine his accusers. That is the only way he can secure a *fair hearing.*"

Court held that petitioner had no right to cross-examine his accuser and affirmed a suspension made by the department after a hearing at which the accused was not present.[65] However, the court took the occasion to reprimand the Secretary for permitting such a procedure.[66]

A New York case decided in the same year and on almost identical facts (but under a different statute), vacated the commissioner's order of suspension, holding that substantial rights had been violated.[67]

The substantial, and probably controlling difference in the statutes, was the scope of judicial review provided by each. Pennsylvania has interpreted its statute as providing a full *de novo* hearing by the trial court.[68] The New York statute provides only a review of the record.[69] In addition to the difference in statutes it is also noteworthy that the Pennsylvania court labels suspension by the Secretary as an administrative act.[70] The New York case, in spite of statutory language to the effect that the commissioner's act is administrative and to be reviewed as such, holds that the function is quasi-judicial.[71] Certainly, the right

[Italics added] Application of Godwin, 173 Misc. 169, ——, 17 N. Y. S. 2d 426, 428 (Sup. Ct. 1940).

[64] Commonwealth v. Cronin, 336 Pa. 469, 9 A. 2d 408 (1939) (The arresting officer failed to appear at hearing. A postponement was made and a second hearing held of which the licensee had no notice and at which he did not appear. At the second hearing the officer testified and suspension followed).

[65] The court rested its decision on two grounds: (1) there had been no denial of due process since the decision by the Secretary was an "administrative" and not a "judicial" function; (2) the full *de novo* hearing on appeal "remedied the infringement of any constitutional right of which defendent may have been deprived." Commonwealth v. Cronin, 336 Pa. 469, 474, 9 A. 2d 408, 411 (1939).

Without the full *de novo* review on all issues, a procedure earlier established by a strained interpretation of the statute providing for court rehearing, the second reason given above could not have existed. See section on *Review* and note 79, *infra*.

[66] "We are free to say, however, that the procedure followed by the Secretary, in cases of this character (*i.e.* taking the testimony at different times and places of the licensee charged with a violation of the Vehicle Code, and of the arresting officer who brings the charge), is not the most desirable under the circumstances. While it may be permissible by law, especially in view of the right of the licensee to appeal to the court of common pleas, it does not, in our opinion, conform to the rudimentary requirements of fair play, and afford an open and impartial hearing." *Id.* at 474, 9 A. 2d at 411.

[67] Application of Goodwin, 173 Misc. 169, ——, 17 N. Y. S. 2d 426, 428 (Sup. Ct. 1940). See note 63 *supra*. To the same effect are: Application of Kafka, 272 App. Div. 364, 71 N. Y. S. 2d 179 (1st Dept. 1947); Sands v. Fletcher, 54 N. Y. S. 2d 449 (Sup. Ct. 1945).

[68] Commonwealth v. Funk, 323 Pa. 390, 186 Atl. 65 (1936). For a complete discussion of the function of the appeal under the Pennsylvania interpretation of the statute see Commonwealth v. Herzog, 359 Pa. 641, 60 A. 2d 37 (1948).

[69] N. Y. VEHICLE LAW §71-6, Cohn v. Fletcher, 272 App. Div. 1080, 75 N. Y. S. 2d 329 (3d Dept. 1947); Sheridan v. Fletcher, 270 App. Div. 29, 58 N. Y. S. 2d 466 (3d Dept. 1945); Heart v. Fletcher, 53 N. Y. S. 2d 369 (Sup. Ct. 1945); Sands v. Fletcher, 54 N. Y. S. 2d 449 (Sup. Ct. 1945).

[70] Commonwealth v. Cronin, 336 Pa. 469, 9 A. 2d 408 (1939).

[71] Application of Goodwin, 173 Misc. 169, 17 N. Y. S. 2d 426 (Sup. Ct. 1940). Morgan v. United States, 298 U. S. 468 (1936), holds that a hearing held in the exercise of the legislative function of rate-setting is *quasi-judicial*.

to confront and cross-examine adverse witnesses at the initial hearing should be required in any jurisdiction which permits the court, on review, to base any part of its decision on matters which were established at the initial hearing.

5. *The Decision.* Subsection (b) of section 30 states: "Upon such hearing the department shall either rescind its order of suspension or, good cause appearing therefor, may extend the suspension of such license or revoke such license."[72]

Under a literal interpretation of the above subsection the department has no authority to shorten a suspension. It may rescind its order, extend the suspension, or revoke the license.[73] The act provides in a later section that suspensions shall not be for more than one year except for driving while a license is suspended or revoked.[74] If it should so happen that the department should issue its initial suspension (as provided in subsection (a)) for less than a year, the only question at the hearing would be whether the suspension had been wrongfully made in the first instance, which would justify rescinding its order; or whether the circumstances were so aggravated as to justify extending the suspension or revoking the license. There would be no encouragement to licensees to attempt to show mitigating circumstances which would justify a reduction in the suspension.[75] If such an interpretation were adhered to there would probably be few demands for hearings. It is not beyond possibility that the legislature intended to restrict the power of the department in this manner, but it would seem unlikely.

The drafters of the Act probably intended for the initial suspension to be for no definite period. The notice could inform the licensee that his license was suspended indefinitely and if no mitigating circumstances were shown the suspension would be effective for the maximum statutory period. At hearing a determination could be made as to just how long the suspension was to remain in effect. Of course, if the licensee did not ask for a hearing the provisional period would stand. This procedure would satisfy the literal wording of the statute, but would probably cause a big increase in the number of hearings demanded.

A third possibility, and probably the one being used, is for the initial

[72] UNIFORM MOTOR VEHICLE OPERATORS' AND CHAUFFEURS' LICENSE ACT.

[73] The North Carolina adaptation of this section omits "or revoke such license." N. C. GEN. STAT. §20-16 (Supp. 1951). Hence the only authority given to the department under this adaptation is to rescind its order, or extend the suspension.

[74] UNIFORM MOTOR VEHICLE OPERATORS' AND CHAUFFEURS' LICENSE ACT. §§32, 38. Some states have incorporated into their adaptation of the Act a section which specifies the minimum and maximum time for suspensions resulting from particular offenses. N. C. GEN. STAT. §20-19 (Supp. 1951) is typical.

[75] It is highly possible that the persons holding these hearings are not aware of the literal limitations on their authority and modify the suspension whenever they think the circumstances justify such action. It is unlikely that there would be an appeal from such a decision.

suspension to be made for the maximum period allowed; and on a showing of justifying circumstances to reduce the period accordingly.[76]

Another problem which could arise from the practical administration of this section, is whether it permits a decision to be recommended by the department representative who hears the case and later made final by a higher official in the department. The wording of the statute shows no indication that recommended decisions were contemplated. However, there is no specific provision forbidding such a procedure. A department using this method might find itself confronted with the rule of the *Morgan* case: "he who decides must hear," which is held to mean that the one making the final decision must at least address himself to the evidence.[77]

THE REVIEW

Section 35 of the Act provides for court review of any discretionary suspension, cancellation, or revocation. Upon this review it is the duty of the court "to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license under the provisions of this act."

The first interpretation of this section was by the Pennsylvania Supreme Court in *Commonwealth v. Funk*.[78] This case declared that the reviewing court was "to hear *de novo* the witnesses . . . and, from the testimony taken, *to determine anew whether the operator's license should be suspended.*"[79] [Italics added] This interpretation has stood

[76] The writer is informed that this procedure is the one used by the Department of Motor Vehicles of North Carolina.

[77] The hearing required in a proceding of quasi-judicial character "is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations. . . .

". . . the weight ascribed . . . to the findings . . . rests upon the assumption that the officer who makes the findings has addressed himself to the evidence. . . ." Morgan v. United States, 298 U. S. 468, 480-481 (1936). As a practical matter a department could save time, expense, and perhaps trouble if the officer hearing the case is permitted to make the final decision.

[78] 323 Pa. 390, 186 Atl. 65 (1936). The pertinent part of the section as in force in Pennsylvania at the time of this decision read as follows: ". . . to take testimony and examine into the facts of the case, and to determine whether the petitioner is subject to suspension of operator's license or learner's permit under the provisions of this Act." So far as the point under discussion is concerned this is substantially the same as the wording of the original act.

[79] *Id.* at 399, 186 Atl. at 69. It can be seen from the reasoning of Commonwealth v. Cronin, 336 Pa. 469, 9 A. 2d 408 (1939) (the case which held that the licensee had no *right* to cross-examine adverse witnesses at the initial hearing; see subsection on *Evidence, supra*) that if the rule of the *Funk* case had not been as it was (*i.e.* a *full de novo* review on *all* issues) the holding of the *Cronin* case would have been otherwise. This conclusion is made more positive by language from the opinion in Commonwealth v. Herzog, 359 Pa. 641, 643, 60 A. 2d 37, 38 (1948). "One of the principal offices of the appeal, in obedience to constitutional requirements, is to furnish a judicial hearing on the merits. In no way does the appeal partake of the nature of certiorari."

as the law of Pennsylvania in spite of repeated efforts by the Secretary of Revenue of that state to secure a change.[80] He has contended that under the statute, the reviewing court must hear witnesses, etc., but if the court find that the licensee is "subject to suspension" (*i.e.*, the licensee has committed the charged offenses) it must affirm the Secretary's order.[81] In 1939 the Legislature further confused the issue by changing the wording of the statute.[82] This change has been interpreted by the court as bolstering the interpretation made in the *Funk* case.[83] It appears clear that the opinion in the *Funk* case had stretched the meaning of the statutory language;[84] but it is by no means clear that the change in the section by the Legislature was made to support such an interpretation.[85]

In a comparatively recent North Carolina case the supreme court of that state extracted a different meaning from the same section.[86] According to that court, the department not only "finds upon sufficient

[80] See cases discussed in note 81 *infra*.

[81] In Appeal of Oesterling, 347 Pa. 241, 31 A. 2d 905 (1943), the court of common pleas agreed with the Secretary but was reversed on appeal. In Appeal of Handwerk, 348 Pa. 263, 35 A. 2d 289 (1944), the Supreme Court again rebuffed the Secretary's attempts to secure a change in the interpretation. To the same effect are Appeal of Schwartz, 348 Pa. 267, 35 A. 2d 290 (1944), and Commonwealth v. Herzog, 359 Pa. 641, 60 A. 2d 37 (1948). In Commonwealth v. Garman, 361 Pa. 643, 66 A. 2d 271 (1949), the court leaned slightly toward the Secretary's contentions, but in Commonwealth v. Wagner, 364 Pa. 566, 73 A. 2d 676 (1950), the court definitely slammed the door on the Secretary in a case raising the very issue. The court here points out that in 1939 the Legislature changed the wording of the section so as definitely to conform with the interpretation set out in Commonwealth v. Funk, 323 Pa. 390, 186 Atl. 65 (1936). See note 82 *infra*.

[82] At the time Commonwealth v. Funk, 323 Pa. 390, 186 Atl. 65 (1936), was decided the controlling part of the section read as follows: ". . . to take testimony and examine into the facts of the case, and to determine whether the petitioner is subject to suspension of operator's license or learner's permit under the provisions of this Act."

The Legislature, in 1939, inserted after the word "permit" above, the words, "or whether he may be deprived of the privilege of applying for an operator's license or learner's permit by the secretary. . . ." PA. STAT. ANN. tit. 75, §193 (Supp. 1950).

[83] Commonwealth v. Wagner, 364 Pa. 566, 73 A. 2d 676 (1950).

[84] For an interpretation which is in accord with not only the words of the statute but also with the fundamental purposes of administrative law, see *In re* Revocation of License of Wright, 228 N. C. 584, 589, 46 S. E. 2d 696, 700 (1948) (Discussed in text, *infra* p. ——).

The interpretation made in the *Funk* case was possibly made to meet the constitutional arguments there presented; and once having been made the Pennsylvania Court seems determined to uphold it.

[85] The theory upon which the *Wagner* case bases its reasoning seems to be this: Since the legislature did make some change in the wording of the statute and yet neglected to make changes which would definitely refute the earlier interpretation, then the earlier interpretation must have met the Legislature's approval. Reasoning along such lines is certainly not without substance and logic, but it attributes to the members of the Legislature an awareness of decisions and of theories of law which they do not necessarily possess.

[86] *In re* Revocation of License of Wright, 228 N. C. 584, 46 S. E. 2d 696 (1948) which is a rehearing of the same case reported in 228 N. C. 301, 45 S. E. 2d 370 (1947).

evidence [whether] the offenses enumerated have been committed,"[87] but also determines whether the license actually shall be suspended.[88] In fact, this second determination (*i.e.*, whether the license actually shall be suspended)[89] is not subject to review by the court.[90] If the court finds, by taking testimony and examining into the facts of the case, that issue number one (*i.e.*, "whether the offenses enumerated have been committed") in answerable in the affirmative, the order of the department mut be affirmed.[91]

In the same decision the North Carolina court refers to this as a "full *de novo* review."[92] Since the final determination of one of the two issues presented at the initial hearing is left with the department and is not reviewable, it is obvious that this was a loose use of the term, "full *de novo* review."[93] It is possible that in North Carolina a review of this second issue could be secured by a different procedure from that followed in this case, namely a proceeding to invoke the "inherent power of the judicial branch of the government to review the discretionary acts of an administrative officer."[94]

[87] Commonwealth v. Funk, 323 Pa. 390, 397, 186 Atl. 65, 68 (1936). In this case such a finding was held to be the extent of the Secretary's duty under the section.

[88] "It must be noted, however, that the discretion to suspend or revoke, is vested in the department, subject to a judicial review of the facts upon which its action is based. No discretionary power is conferred upon the Superior Court. Hence, if the judge, upon the hearing, finds and concludes that the license of the petitioner is in fact subject to suspension or revocation under the provisions of the statute, the order of the department entered in conformity with the fact found must be affirmed." *In re* Revocation of License of Wright, 228 N. C. 584, 589, 46 S. E. 2d 696, 700 (1948).

This is the interpretation contended for by the Pennsylvania Secretary of Revenue in Commonwealth v. Wagner, 364 Pa. 566, 73 A. 2d 676 (1950) and the other cases cited in note 80 *supra.*

[89] This is what the writer has referred to as "issue number two." See subsection on *The Issues To Be Decided, supra* p. 37.

[90] See note 88 *supra.* [91] See note 88 *supra.*

[92] *In re* Revocation of License of Wright, 228 N. C. 584, 589, 46 S. E. 2d 696, 700 (1948).

In the court's opinion on the first appeal of this case (228 N. C. 301, 303, 45 S. E. 2d 370, 372 (1947)), it was said that, "This is more than a review as upon a writ of *certiorari.* It is a rehearing *de novo,* and the judge is not bound by the findings of fact or the conclusions of law made by the department."

[93] "We hope that counsel understand in a de novo hearing the judgment of the trial court is suspended and we determine the case as though it originated in our court, and give no attention to the findings and judgment of the trial court. . . ." Reck v. Reck, 46 N. E. 2d 429, 430 (Ohio App. 1942). "Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved. . . ." Lone Star Gas Co. v. State, 137 Tex. 279, 298, 153 S. W. 2d 681, 692 (1941). In a case concerned with an appeal from a justice on the peace the North Carolina court said, "On a appeal to the Superior Court the trial is *de novo,* 'a new trial of the whole matter.'" Fochtman v. Greer, 194 N. C. 674, 675, 140 S. E. 442 (1927). The phrase quoted by the court is from what is now N. C. GEN. STAT. §1-300 (1943).

[94] *In re* Revocation of License of Wright, 228 N. C. 301, 303, 45 S. E. 2d 370, 372 (1947).

Once violations sufficient to justify suspension under the statute have been

Comparing the Pennsylvania and North Carolina interpretations, it would seem that the Pennsylvania court misinterpreted the section but correctly referred to the review demanded by its interpretation, as a *de novo* hearing. On the other hand, it seems that the North Carolina court interpreted the statute correctly but was incorrect in referring to the review demanded by its interpretation, as a full *de novo* hearing. It is highly probable that the difference in the review provided, along with the slight difference in the status given the activity in the two states (*mere* privilege or right),[95] will necessitate different procedures at the initial hearings held in the two jurisdictions.

CONCLUSIONS AND SUGGESTIONS

The operation of motor vehicles on public highways is clearly subject to reasonable regulations under the police power of the state. Although the activity was early classed as a *mere* privilege (such as the use of public property for profit-making activities, operating pool halls, moving houses in the streets, etc.), the majority of cases show that at this date the operation of an automobile has assumed a status more closely resembling a right. Some cases have gone so far as to hold it a property right.

The privilege may not be suspended (other than temporarily) without an administrative hearing unless a right to a full hearing by a court is available. It may not be suspended arbitrarily or capriciously in any case.

Proper procedure under the Uniform Motor-Vehicle Operators' and Chauffeurs' License Act necessitates notice given (probably necessary before the suspension can become effective), and a hearing on demand. The notice should include a detailed statement of the causes for which the suspension is made.

At the administrative hearing two issues are decided: (1) Has the

found, just what standards are to be used by the department to determine whether the license should actually be suspended? According to the reasoning of one recent case, this lack of review as to the second issue could well raise a problem of standards. The Virginia Court in Butler v. Commonwealth, 189 Va. 411, 53 S. E. 2d 152 (1949), refused to uphold the sufficiency of an administrative finding that the licensee was a 'habitual violator' and insisted that the trial court, on review, hear evidence related "to the question whether it was necessary 'for the safety of the public on the highways' to revoke the operator's license. . . ." The court said, "In the first place, there is no standard to determine what constitutes an habitual violator of such laws. . . ." *Id.* at 421, 53 S. E. 2d at 156.

[95] "The permission to operate a motor vehicle upon the highways of the Commonwealth is not embraced within the term civil rights, nor is a license to do so a contract or a right of property in any legal or constitutional sense." Commonwealth v. Funk, 323 Pa. 390, 395, 186 Atl. 65, 67 (1936).

"A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute." *In re* Revocation of License of Wright, 228 N. C. 584, 589, 46 S. E. 2d 696, 699, 700 (1948).

licensee committed such violations as will give the department the power to suspend his license, and (2) shall the license be suspended? The initial suspension may be rescinded or extended; whether it may be shortened remains in doubt.

The rules of evidence will largely depend on the scope of the review. However, there at least should be *evidence* to support the finding of "good cause" which will justify a continuance of the suspension. Where, on petition to the courts a full *de novo* hearing on all issues is provided, the licensee at the initial hearing has no *right* to be confronted by his accusers or to cross-examine witnesses. Where the review is only of the record, the rules of a full hearing should apply at the administrative level. It would seem that a full, fair hearing by the agency would be necessary in a jurisdiction providing anything less than a full *de novo* review.

The Uniform Act does not provide for recommended decisions. If they are used, the rule that "the official who makes the decision must address himself to the evidence," should apply. This would almost certainly be true in states holding that the hearing is quasi-judicial.

The scope of the review provided by the Act is in dispute. The wording itself indicates that only the issue of jurisdiction should be reviewed, but that evidence should be taken anew to determine this issue. Such a review would be more in keeping with the fundamental principles of administrative law in that it permits use of specialized skills and knowledge of officials closest to the problem.

It may be added that the Act is loosely worded, leaving room for most of the law governing the details of administration to be settled by the agencies and courts of the particular jurisdictions. This fact, added to the confusion and conflict regarding the nature of the privilege (or right), necessarily results in a great variety of procedures in the different states.

Because of this conflict of rulings and variety of procedures, the following suggestions are respectfully submitted: Let there be an understanding that once the legislature has set out what it considers the necessary qualifications for driving an automobile, all citizens have a right to attempt to meet those qualifications. Those who meet the requirements have a right to be issued a license; and the license is evidence of a right to the reasonable use of the public highways for the ordinary pursuits of life.

In modern America the right to operate an automobile in a lawful manner is a right of the greatest importance; certainly as important as other rights around which considerably more safeguards have been placed. It should be taken away (other than temporarily) only for

good causes arrived at by a fair and impartial investigation or hearing. This initial hearing should be surrounded by the safeguards which will insure the fair treatment demanded by our Anglo-Saxon legal heritage; *i.e.*, notice, reliable evidence, the right to cross-examine, findings of fact with a decision based on those findings, and provision for some type of judicial review.

A review of the material discussed in the above note and a study of the cases cited therein will reveal that the trend in the majority of jurisdictions is in the direction of such an attitude toward the nature of the license and the safeguards to be placed about it.