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Constitutional Law - Illinois Plumbing License Law Void

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and a decided reluctance to face the problem of racial equality that is provided for under the Constitution. As the Louisiana court decided in the *Wilson* case, the Alabama court could have recognized as a class those Negroes qualified to vote and possessing no disqualifications.

The court in the instant case was faced with none of these technicalities but chose to circumvent the issue under the guise of judicial discretion. Judicial discretion is that power of the court to determine a question of fair judicial consideration with regard to what is right and equitable under law and circumstances and should be directed by reason and conscience to a just result.[7] It is submitted that substantial justice was not dispensed in the instant case. The court may have deemed it prudent to defer the class question due to the volatile nature of the issue. However practical it may have seemed under the existing conditions to dismiss the question, the affirmance of the trial court's decision seems to constitute a dereliction from that standard of equality sought to be established by the Fourteenth Amendment. Technically the decision is not subject to reversal because there must be a clear cut abuse of discretion above and beyond the scope of reason.[8]

Unless the courts cease their practice of hiding behind the veil of discretionary power and bowing to local prejudices in cases involving racial discrimination, final determination of these problems must be postponed until such time as definitive rules are prescribed either by legislation or the Supreme Court of the United States.

CONSTITUTIONAL LAW–ILLINOIS PLUMBING LICENSE LAW VOID

As citizens and taxpayers engaged in the business of selling hardware, heating, and plumbing equipment at retail, the plaintiffs commenced an action in the Circuit Court of Sangamon County against the defendants who are state officers charged with enforcement of the Illinois Plumbing License Law of 1951.[1] The plaintiffs sought to enjoin the defendants from the expenditure of public funds in the administration of such act, contending that the act was unconstitutional. The circuit court entered a decree finding the statute unconstitutional as violative of the due process clause of the state Constitution, and the due process and equal protection

[7] Schneider v. Hawkins, 179 Md. 21, 16 A. 2d 861 (1941).

[8] Hartford Empire Co. v. Obear-Nester Glass Co., 95 F. 2d 414 (C.A. 8th, 1938); Blackhawk Motor Transit Co. v. Illinois Commerce Commission, 383 Ill. 57, 48 N.E. 2d 341 (1943); In re Loeb, 315 Mass. 191, 52 N.E. 2d 37 (1943); Alford v. Alford, 190 Ga. 562, 9 S.E. 2d 895 (1940); In re Garrett's Estate, 335 Pa. 287, 6 A. 2d 858 (1939); Benedict v. Calkins, 19 Cal. App. 2d 416, 65 P. 2d 831 (1937).

[1] Ill. Rev. Stat. (1951) c. 111½, §§ 116.1–116.35.

clauses of the federal Constitution. The Supreme Court of Illinois affirmed the decision of the lower court. *Schroeder v. Binks*, 113 N.E. 2d 169 (Ill., 1953).

Whenever a business is affected with a public interest or is generally of such nature as to be subject to regulation, it becomes subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression.[2] However, a mere declaration by the legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.[3] The matter is one which is always open to judicial inquiry.[4]

In the *Schroeder* case, the general power of the state to regulate plumbing and plumbers for the protection of the public health was not disputed. The issue was whether, in the exercise of a power acknowledged to exist, constitutional limitations had been transgressed.[5]

In *People v. Brown*,[6] the Illinois Plumbing Law of 1935 was held unconstitutional. The plaintiffs contended that the same infirmities which had rendered the act of 1935 unconstitutional were present in the 1951 statute.

The basis of the court's decision in the *Brown* case dealt with two of the provisions in the 1935 act. One of the provisions required that journeymen and apprentice plumbers be employees of master plumbers. The court pointed out that although the legislature defined the trade of a journeyman plumber and set down requirements for a license to practice said trade, the legislature through its act denied the journeyman plumber the right to ply his trade freely by forcing him to find employment from a master plumber.

After hearing evidence from experts in the field, the court found that the relationship of employer and employee between the master plumber and the journeyman plumber was not necessary in order to protect adequately the health, safety and welfare of the public.[7] This provision, therefore, was held unconstitutional for the reason that:

[2] Offield v. New York, N. H. & H. R. Co., 203 U.S. 372 (1906); Friedenburg v. Times Pub. Co., 170 La. 5, 127 So. 345 (1930); Public Service Commission v. Spokane & I. E. R. Co., 89 Wash. 599, 154 Pac. 1110 (1916); State ex rel Star Pub. Co. v. Associated Press, 159 Mo. 410, 60 S.W. 91 (1900).

[3] Tyson & Brother-United Theatre Ticket Offices v. Banton, 273 U.S. 418 (1927); Weller v. People, 268 U.S. 319 (1925); Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923); People ex rel Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 130 N.E. 601 (1921).

[4] Tyson & Brother-United Theatre Ticket Offices v. Banton, 273 U.S. 418 (1927).

[5] Schroeder v. Binks, 113 N.E. 2d 169 (Ill., 1953).

[6] 407 Ill. 565, 95 N.E. 2d 888 (1951).

[7] "The fact that the act permits those groups to engage in the defined business of plumbing constitutes an acknowledgment that the relationship of licensed master

The legislature cannot invoke the police power to enact an unlawful statute on the pretense of protecting public interests when the actual objective of the statute constitutes an arbitrary interference with private business or imposes unusual and unnecessary restrictions upon lawful occupations. If such statute does not tend to preserve the public health, safety or welfare, it is void as an invasion of individual property rights.[8]

The other provision objected to by the court dealt with the requirements a person would have to meet in order to apply for a master plumber's license. One of the conditions precedent in all cases was that the applicant must have been employed by a master plumber for a certain length of time. No matter how well qualified a person was through instruction, training and experience, he could never become a master plumber unless he had been employed by a master plumber before his application. The act did not impose on a licensed plumber the obligation of employing a person who desired to enter into an apprenticeship. Therefore, unless a master plumber so willed, a man could never of his own choice or free will become a master plumber.

The court decided this provision violated the due process clause of the Illinois Constitution which provides for the protection of a person's business, profession, trade, occupation, labor and the avails of each. The court recognized the fact that these rights might have to yield to the inherent police power of the state when such police power was being used to secure either the public health, welfare, morals or safety.[9] However, the court felt that the restraint imposed by the legislature upon a person by requiring him to work for a master plumber before applying for a master plumber's license was not a reasonable exercise of the police power and as such was an invasion of individual property rights and a violation of due process.[10]

The court in the *Brown* case took cognizance of the fact that a person could, through proper training and experience, become qualified to apply for a master's license without being required to seek employment from a master plumber, the latter having the right to refuse him such employment:

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plumber employer and licensed journeyman plumber employee is not an indispensable condition precedent to the general supervision of the work of the journeyman by the master." Ibid., at 575 and 894.

[8] Ibid., at 573 and 893.

[9] Munn v. People, 94 U.S. 113 (1876).

[10] People v. Brown, 407 Ill. 565, 573, 95 N.E. 2d 888, 891 (1951): "The restraint imposed upon a legitimate activity by an exercise of the police power for regulatory purposes must be a reasonable one, be for the protection of the public health, safety, comfort, or common welfare, and also be reasonably adopted to attain the objective intended. . . ."

A law which deprives one class of persons of the right to acquire and enjoy property, or to contract in relation thereto in the same manner as others under like conditions and circumstances, is not comprehended within the true meaning of the words 'due process of law.'[11]

The Illinois Plumbing License Law of 1951[12] differed from the 1935 act in that it eliminated the requirement that journeymen and apprentice plumbers be employees of master plumbers. However, substituted for this provision was a requirement that master plumbers supervise all plumbing work done by journeymen or apprentices.[13] The defendants in the *Schroeder* case argued that this change had cured the defect which rendered the 1935 act unconstitutional while the plaintiffs contended that the underlying vice of the 1935 statute was still present in the 1951 statute.

The court in the instant case decided that the substitution of the word "supervision" by a master plumber for the former requirement of "employment," has the same economic effect. The master plumber still may supervise or he may not as he sees fit. The employer-employee relationship which existed under the 1935 statute still exists under the 1951 statute.

The court concurred with the reasoning of the *Brown* case in finding that the relationship of employer and employee between the master plumber and the journeyman plumber was not necessary to protect adequately the health, safety and welfare of the public, and that such a requirement would only impose "an economic pattern which is anachronistic today."[14] The court took cognizance of the fact that economic relationships are not per se beyond the regulating powers of the General Assembly[15] but since the statute in its preamble recites that its only concern is for the public health,[16] the court said:

The rigid hierarchy it imposes upon the plumbing business appears to be an incidental, or accidental, appendage to regulations aimed primarily at protection of the public health.[17]

Since the public health is not being enhanced through imposing this rigid hierarchy upon the plumbing business, the act was uncon-

[11] Metropolitan Trust Co. v. Jones, 384 Ill. 248, 253, 51 N.E. 2d 256, 259 (1943).

[12] Ill. Rev. Stat. (1951) c. 111½, § 116.4.

[13] Ibid.

[14] Schroeder v. Binks, 113 N.E. 2d 169, 171 (1953).

[15] Oak Woods Cemetary Ass'n v. Murphy, 383 Ill. 301, 50 N.E. 2d 582 (1943).

[16] Ill. Rev. Stat. (1951) c. 111½, § 116.1. "To insure such skill and thereby protect the public health, this act shall provide for the examination and licensing of Plumbers by the State of Illinois."

[17] Schroeder v. Binks, 113 N.E. 2d 169, 171 (Ill., 1953).

stitutional as violating the due process clause and Article 4, section 22[18] of the Illinois Constitution and the due process and equal protection clauses of the Federal Constitution.

Another provision of the 1951 act invalidated by the court was the one dealing with the qualifications for applying for a master plumber's license.[19] Many of the barriers to securing a license which existed in the 1915 act had been substantially lowered in the 1951 act,[20] but the court was of the opinion that in essence the control of the master plumber over access to the occupation still continued. The court said:

> There is nothing in the record before us to indicate that the manual skills at which the experience requirements appear to be aimed cannot be obtained by methods other than the supervised experience which the act requires.[21]

The court decided this provision violated the due process clause of the Illinois Constitution and the due process and equal protection of the laws clauses of the federal Constitution because of the monopolistic control over the avenues of entry into the plumbing business which it placed in the master plumber. Since the two provisions to which the court objected were the essence of the act, the Supreme Court of Illinois held that the entire act with the exception of section 20 which authorizes municipal regulation of plumbing was unconstitutional.[22]

Courts elsewhere have split in their decisions on the constitutionality of regulations of the plumbing business similar to those here involved. The decisions which have upheld such regulations have done so on the theory that they are necessary in the light of the health and welfare of the people, and that it is not unreasonable for municipal authorities to pass statutes requiring all plumbing to be done by master plumbers or those employed by him.[23] These courts do not go into the question of

[18] Ill. Const., Art. IV, § 22. "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . for granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

[19] Ill. Rev. Stat. (1951) c. 111½, § 116.12.

[20] Ibid.

[21] Schroeder v. Binks, 113 N.E. 2d 169, 173 (Ill., 1953).

[22] People v. Bartholf, 388 Ill. 445, 58 N.E. 2d 172 (1944); Winter v. Barrett, 352 Ill. 441, 186 N.E. 113 (1933): Where provisions held invalid are the essence of an act, the entire act must fall.

[23] "It is not unreasonable for municipal authorities to insist that the responsibility for altering, repairing or making connections to any part of the plumbing system in their cities shall be upon men of good repute, character and responsibility who have a place of business in the city, who have passed an examination as to their competency in their trade and who may be personally found promptly and held to that responsibility, by the municipality or its residents, for acts of commission or omission by themselves or those whom they have employed." People ex rel Stepski v. Harford,

the constitutionality of the qualifications set down by the municipal authorities as necessary in order to apply for a master plumber's license. Other courts which have held similar legislation unconstitutional have used the same line of reasoning as the court in the *Schroeder* case.[24]

It is now well recognized that if a business or occupation is so concerned with the public health, safety, and welfare so as to come within the police power, the aim of the legislature should be reasonable regulation for proper purposes and the exercise of the power cannot unduly abridge the right of a citizen to pursue a lawful vocation.[25] The split of authority on the constitutionality of regulations such as contained in the Illinois Plumbing Act of 1951, indicates that courts differ considerably as to what is reasonable.

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286 N.Y. 477, 484, 36 N.E. 2d 670, 673 (1941). ". . . and one can hardly question the power of the Legislature to impose such restraints and prescribe such requirements as it may deem proper for the protection of the public against the evils resulting from incapacity and ignorance." Roundtree Corporation v. City of Richmond, 188 Va. 701, 708, 51 S.E. 2d 256, 261 (1949).

[24] City of Sioux Falls v. Kadinger, 50 N.W. 2d 797 (S.D., 1951); Hench v. Michigan State Plumbing Board, 289 Mich. 108, 286 N.W. 176 (1939); Benedetto v. Kern, 167 Misc. 831, 4 N.Y.S. 2d 844 (S.Ct., 1938); People v. Ringe, 197 N.Y. 143, 90 N.E. 451 (1910).

[25] City of Sioux Falls v. Kadinger, 50 N.W. 2d 797 (S.D., 1951).