11-2-1942

Gamble v. Board of Osteopathic Examiners of Cal.

Roger J. Traynor

the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.' (11 U.S.C.A., § 50; 2 Remington on Bankruptcy (5th Ed.) p. 717; 8 C.J.S. 1032.) Since approval of the 'court,' rather than of the 'judge' is required, approval of a compromise may be given by the referee.

"But that which is as a matter of law a composition may not be accomplished without complying with the statutory requirements under the guise of being a compromise of controversy. 'This section (§ 27, 11 U.S.C.A., § 50) should not be confused with section 12 on compositions. It is intended to supply a summary and inexpensive way of settling questions arising in the administration of bankrupt estates. It is most often used in connection with contests on claims filed against the estate, or the contested collections of claims due the estate. It cannot, of course, be resorted to where the matter in controversy is the right to a discharge.' (Gilbert's Collier on Bankruptcy (one vol., 4th Ed.), p. 570.)

"A 'compromise of controversy' implies a dispute to be settled. In the case herein the papers in the bankruptcy proceeding which have been made part of the record in the present case show a dispute as to whether certain persons who claimed to be limited partners were in fact general partners. But there is no intimation of any dispute as to the status of the four general partners, including Raiter and Oleari. The trustee's petitions described them as general partners and the stipulation of facts upon which the present action was heard so describes them.

"The petition to compromise recites that it is doubtful that the estate can realize from marshaling of the individual assets of Raiter and Oleari a greater sum than they offered to pay, that is, $7,500, and that 'there is also some doubt as to the ability of your Trustee to prevail in the said proceeding to marshal the assets of the said Frank E. Raiter and Louis G. Oleari.' However, as to general partners the authority of the trustee to marshal assets to the end of applying any surplus remaining after paying individual debts to partnership obligations exists as a matter of right, unless, perhaps, where it appears unlikely that any surplus above individual debts will result. It would seem, therefore, that on the record the only dispute which could exist was whether liquidation of the individual assets of Raiter and Oleari would yield any surplus for partnership creditors. In our view such a dispute may not be made the subject of a compromise of controversy which will result in discharge of general partners from individual liability to partnership creditors."

"To summarize—the court in bankruptcy was without jurisdiction to discharge the individual liability of Raiter and Oleari as general partners except following full administration in bankruptcy or upon composition proceedings which met the statutory requirements. The referee's order was void as a discharge of the individual liability of Raiter and Oleari. It was void as a composition of creditors under section 12 of the Act because it lacked confirmation by a judge. The provision for compromise of controversies does not authorize a discharge of the individual liability of a partner to partnership creditors."

Edmonds, J., and Carter, J., concurred.

[L. A. No. 18450. In Bank. Nov. 2, 1942.]

WILLIAM O. GAMBLE, Petitioner, v. BOARD OF OSTEOPATHIC EXAMINERS OF THE STATE OF CALIFORNIA et al., Respondents.

[1] **Physicians — Licenses — Educational Requirements — Osteopaths.**—Bus. & Prof. Code, § 2493, as amended in 1941, requiring osteopaths to submit, with the annual tax and registration fee, evidence of the completion of 30 hours of educational work, is not unreasonable, although there is no such requirement applicable to physicians and surgeons. The Osteopathic Act (Stats. 1923, p. xciii; Deering's Gen. Laws, 1923, Act 5727) does not prohibit the Legislature from imposing varying requirements on osteopaths and other practitioners after its adoption as before, so long as the jurisdictions of the Board of Medical Examiners and the Board of Osteopathic Examiners are not disturbed.

PROCEEDING in mandamus to compel issuance of receipt for annual tax and registration fee. Writ denied.

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[1] See 20 Cal.Jur. 1060; 41 Am. Jur. 166.

McK. Dig. Reference: [1] Physicians and Surgeons, § 15.

Roscoe R. Hess for Petitioner.

Paul Vallée and Charles E. Hobart as Amici Curiae on behalf of Petitioner.

John L. Brannely for Respondents.

TRAYNOR, J.—Petitioner has brought this proceeding in mandamus to compel the respondent board to issue a receipt for the payment for the calendar year 1943, of the annual tax and registration fee required by section 2496 of the Business and Professions Code.

[1] Section 2493 of the Business and Professions Code, as amended in 1941 (Stats. 1941, chap. 945) requires each person licensed by the osteopathic board to pay an annual tax and registration fee and to submit therewith satisfactory evidence that he has completed during the preceding year a minimum of 30 hours of professional educational work approved by the board. Petitioner is a graduate of an osteopathic school and holds a physician and surgeon certificate issued in 1934, which authorizes "the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions." (§ 2137, Business and Professions Code.) He tendered the annual fee for the calendar year 1943 as required by section 2496 of the Business and Professions Code but declined to submit evidence of the performance of 30 hours of professional educational work. He contends that since holders of physician and surgeon certificates issued by the Board of Medical Examiners are not required to do annual educational work for the renewal of their licenses, the requirement of such work of holders of physician and surgeon certificates issued by the Board of Osteopathic Examiners violates, in addition to article I, section 21 of the California Constitution, the Osteopathic Act, which cannot be amended by the Legislature because it was adopted by initiative without special provision for its amendment. (Cal.Const., art. IV.)

Between 1913 and 1922 all physicians and surgeons were licensed by the Board of Medical Examiners. Graduates of all schools recognized by the medical board, whether osteopathic, homeopathic, eclectic or allopathic, were entitled to take the physician and surgeon's examination if they met the

prescribed conditions. The Osteopathic Act created a Board of Osteopathic Examiners and gave it jurisdiction, formerly residing in the Board of Medical Examiners, over graduates of osteopathic schools. The act was intended to effect administrative changes only, and made no substantive changes in the standards of education and examination for the physician and surgeon certificate. When the Osteopathic Act was adopted the rights and duties attached to the physician and surgeon certificate did not vary according to the kind of school from which the holder graduated. Petitioner argues that since the Osteopathic Act made the Medical Practice Act applicable to graduates of osteopathic schools such rights and duties remain invariable. The Legislature, however, is not committed to a uniform policy in this regard. There is no provision in the Osteopathic Act limiting its power to change the standards for receiving or holding a physician and surgeon certificate. The argument submitted to the voters in support of the act set forth that it left the Legislature free to change the standards of education and examination. The act itself demonstrates the care with which its framers guarded that freedom and made the act exclusively administrative in character: "All persons who are graduates of osteopathic schools and who desire to apply for any form of certificate mentioned or provided for in the state medical practice act, approved June 2, 1913, and all acts amendatory thereof, shall make application therefor, to said board of osteopathic examiners and not to the board of medical examiners of the State of California. The board of osteopathic examiners in respect to graduates of osteopathic schools, applying for any form of certificate mentioned or provided for in the state medical practice act, approved June 2, 1913, *and all acts amendatory thereof,* is hereby authorized and directed to carry out the terms and provisions of the state medical practice act, approved June 2, 1913, *and all acts amendatory thereof, and all laws hereafter enacted prescribing and regulating* the approval of schools, *the qualifications of applicants for examination for any form of certificate,* the applications for any form of certificate, the admission of applicants to examinations for any form of certificate, the conduct of examinations, *the issuance of any form of certificate,* the collection of fees from applicants, the collection of an annual tax and registration fee, the compilation and issuance of a directory, *the revocation of any form of license or certificate,* the prosecution of persons who attempt to prac-

tice without a certificate, *and all other matters relating to the graduates of osteopathic schools, holding or applying for any form of certificate or license.* Every applicant to said board of osteopathic examiners for any form of certificate shall pay to the secretary-treasurer of the board the fees prescribed for such application by said state medical practice act, approved June 2, 1913, *or any acts amendatory thereof or laws hereafter enacted.* Said board of osteopathic examiners shall, in respect to all the matters aforesaid, relating to graduates of osteopathic schools, applying for or holding any form of certificate or license, take over, exercise and perform all the functions and duties imposed upon and heretofore exercised or performed by the board of medical examiners of the State of California under the provisions of the state medical practice act, approved June 2, 1913, *and acts amendatory thereof.* The provision of said state medical practice act, approved June 2, 1913, *and acts amendatory thereof* are hereby declared to be applicable to said board of osteopathic examiners in respect to all of the aforesaid matters and *all other matters now or hereafter prescribed by law* relating to the graduates of osteopathic colleges holding or applying for any form of certificate or license. In no other respects than as herein provided shall the jurisdiction, duties or functions of said board of medical examiners of the State of California be in any wise limited or changed; nor shall the board of osteopathic examiners have any power or jurisdiction over the graduates of any other than osteopathic schools. From and after the time of the organization of the board of osteopathic examiners said board of medical examiners of the State of California shall have no further jurisdiction, duties or functions with respect to graduates of osteopathic schools holding or applying for any form of certificate or license and the said jurisdiction, duties and functions shall be assumed and performed by said board of osteopathic examiners." [Italics ours.] (Stats. 1923, p. xciii; Deering's Gen. Laws, 1923, Act 5727; Osteopathic Act, § 2.)

Every reference in the foregoing act to the Medical Practice Act is followed immediately by a phrase including all acts amendatory thereof. The act, moreover, specifically contemplates "laws hereafter enacted" affecting persons applying for or holding the physician and surgeon or other certificate, including laws "regulating . . . the issuance of any form of certificate . . . the revocation of any form of license

or certificate . . . and all other matters relating to the graduates of osteopathic schools, holding or applying for any form of certificate or license." The only limitation in the act upon legislation on these matters is that the administration thereof in relation to graduates of osteopathic schools be by the Board of Osteopathic Examiners. So long as the respective jurisdictions of the Board of Medical Examiners and Board of Osteopathic Examiners are not disturbed, the Legislature remains as free to impose varying requirements on osteopaths and other practitioners after the adoption of the Osteopathic Act as before.

The contention that the 1941 amendment to section 2493 of the Business and Professions Code violates article I, section 21 of the California Constitution is based on the theory that since osteopaths must meet the same educational requirements as other practitioners and receive the same certificate they cannot be made subject to additional requirements not imposed upon the others. It is generally recognized, however, that the power to regulate the treatment of disease is an elastic one and that regulations may vary according to the schools or methods of practice so long as they entail no unreasonable discrimination. (*In re Rust,* 181 Cal. 73 [183 P. 548]; *People* v. *Jordan,* 172 Cal. 391 [156 P. 451]; *People* v. *Ratledge,* 172 Cal. 401 [156 P. 455]; *Ex parte Gerino,* 143 Cal. 412 [77 P. 166, 66 L.R.A. 249]; *People* v. *Mills,* 74 Cal. App. 353 [240 P. 296]; *People* v. *Chong,* 28 Cal.App. 121 [151 P. 553]; *Bohannon* v. *Board of Medical Examiners,* 24 Cal.App. 215 [140 P. 1089]; *Crane* v. *Johnson,* 242 U.S. 339 [37 S.Ct. 176, 61 L.Ed. 348]; see cases cited in 16 A.L.R. 709.) In the light of the foregoing cases the requirement in question in the present case cannot be regarded as unreasonable. *In re Rust, supra,* held that the Optometry Act of 1913 (Stats. 1913, p. 1097) forbidding osteopaths but not physicians and surgeons, from practicing optometry without a license from the State Board of Optometry, did not violate article I, section 21 of the state Constitution. The opinion set forth a history of the distinctions that the Legislature has made at various times between practitioners of osteopathy and other practitioners. Thus for many years different licenses were issued to osteopaths than to physicians and surgeons with different rights and duties attached to the respective licenses. Although the certificates as well as the educational requirements for graduates of osteopathic schools and graduates of medical

schools may now be the same the Legislature is as free to return to different certificates and educational requirements as it was to abandon them.

The petition for writ of mandate is denied.

Gibson, C. J., Shenk, J., Edmonds, J., and Carter, J., concurred.

Petitioner's application for a rehearing was denied November 30, 1942. Curtis, J., and Edmonds, J., voted for a rehearing.

[L. A. No. 18080. In Bank. Nov. 9, 1942.]

FIRST TRUST & SAVINGS BANK OF PASADENA (a Banking Corporation) et al., Appellants, v. THE CITY OF PASADENA (a Municipal Corporation), Respondent.

[1] **Taxation—Remedies of Taxpayer—Proceedings in Action—Pleadings.**—In an action against a city to recover taxes, an amended complaint which contains no allegation showing compliance with the claims provisions of the city charter, requiring presentation of "all claims" within six months as requisite to an action on any claim for money or damages against the city, is insufficient to state a cause of action.

[2] **Estoppel—Parties Affected—Municipal Corporations.**—In an action against a city to recover taxes paid, the city was not estopped from raising the defense of lack of compliance with the claims provisions of the city charter because of the alleged practice of the city officials of making tax refunds in cases where claims have not been filed within the period prescribed by the charter. Only in rare cases may the doctrine of estoppel be invoked against a municipal corporation.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank C. Collier, Judge. Affirmed.

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[1] See 24 **Cal.Jur.** 310.

[2] See 10 **Cal.Jur.** 650; 19 **Am.Jur.** 820.

McK. Dig. References: [1] Taxation, § 285; [2] Estoppel, § 44.

Action to recover taxes paid. Judgment of dismissal following the sustaining of a demurrer to amended complaint and plaintiffs' refusal to plead further, affirmed.

Holbrook & Tarr and W. Sumner Holbrook, Jr., for Appellants.

Harold P. Huls, City Attorney, and H. Burton Noble, Assistant City Attorney, for Respondent.

THE COURT.—A further study of this case leads us to the conclusion that the opinion of the District Court of Appeal rendered when the case was before that court correctly disposes of all questions presented by the record herein. That opinion written by Mr. Justice Spence of the First District, Second Division, we therefore adopt as the opinion of this Court. It is as follows:

Plaintiffs brought this action seeking to recover a portion of the taxes paid by plaintiffs to the city of Pasadena for the tax year 1933-1934, which portion was alleged to have resulted from an over-assessment of plaintiffs' properties through the use of erroneous methods of valuation. Defendant's demurrer to plaintiffs' amended complaint was sustained. Plaintiffs elected to stand upon said amended complaint and refused to plead further. Thereupon a judgment of dismissal was entered and from said judgment, plaintiffs appeal.

[1] It is conceded by plaintiffs that their amended complaint contained no allegation showing compliance with the so-called claims provision of the Pasadena charter and that if compliance with said claims provision was required, then the ruling of the trial court was correct. Plaintiffs contend, however, that they were not required to allege compliance with said claims provision of said charter; that their amended complaint was sufficient in all respects; and that the trial court erred in sustaining said demurrer.

The above mentioned claims provision of the Pasadena charter is found in article 11 thereof. Said article requires the presentation of "all claims" within six months and further provides that unless a claim has been so presented, "No suit shall be brought upon any claim for money or damages" against the city of Pasadena.

Plaintiffs state that the trial court based its ruling on *Farmers and Merchants Bank of Los Angeles* v. *City of Los*