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vent the law?⁶⁷ Or should they be couched in generalities so that the licensing board may have a free hand in regulating the class licensed? Somewhere a middle ground must be struck. A statute does not provide sufficient warning or an adequate standard of adjudication when conduct is judged after the fact by a court's or an administrative board's opinion of what the statute *then* meant.

*Robert A. Hyerle**

⁶⁷ But Mr. Justice Holmes has pointed out: "The fact that [he] desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395 (1930).

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INSOLVENCY AS GROUNDS FOR DISCIPLINING A LICENSED CONTRACTOR

There has been a recent efflux of criticism of our burgeoning occupational licensing laws.¹ Statutes regulating the constitutionally protected right² of one to pursue his chosen occupation have been passed in many states,³ including California.⁴ Our legislature has seen fit to decree conditions which one must fulfill before acquiring the "privilege"⁵ of performing such diverse tasks as cleaning finger nails⁶ and erecting buildings.⁷ One may well entertain doubts whether these sweeping laws, restricting as they do competition and free access to the employment market, are truly fulfilling their purpose of protecting the health, safety and welfare of the people.⁸ Even if one accepts occupational licensing in theory, he may question the propriety of specific enactments. This note calls into question the expediency and constitutional validity of those provisions in the Contractors' License

¹ See, e.g., Monaghan, *The Constitution and Occupational Licensing in Massachusetts*, 41 B.U.L. REV. 157 (1961); Clark, *Occupational Licensing in the Building Industry*, 1952 WASH. U.L.Q. 483.

² In *Bautista v. Jones*, 25 Cal. 2d 746, 749, 155 P.2d 343, 345 (1944), the Supreme Court observed, "The right to work, either in employment or independent business, is fundamental and, no doubt, enjoys the protection of the personal liberty guarantee of the Fourteenth Amendment to the federal Constitution as well as the more specific provisions of our state Constitutions," see also Monaghan, *supra* note 1.

³ See 33 AM. JUR. *Licenses* § 17 (1941).

⁴ See CAL. BUS. & PROF. CODE §§ 1-30047; 31 CAL. JUR. 2d *Licenses* § 9 (1956); 11 CAL. JUR. 2d *Constitutional Law* § 170 (1953).

⁵ This constitutionally protected right to pursue one's chosen occupation has been referred to as a privilege when subjected to legislative regulation. See, e.g., *Rosenblatt v. State Bd. of Pharmacy*, 69 Cal. App. 2d 69, 74, 158 P.2d 199, 204 (1945): "A license has none of the elements of a contract and does not confer an absolute right but a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed."

⁶ CAL. BUS. & PROF. CODE § 7321.

⁷ CAL. BUS. & PROF. CODE § 7002.

⁸ See Monaghan, *supra* note 1, at 164; Clark, note 1, at 536.

Law⁹ which require restitution of discharged trade debts as a condition of license reinstatement.

Section 7113.5

The purpose of the Contractors' License Law is to protect the public against "incompetent, inexperienced, unlawful and fraudulent acts of building contractors."¹⁰ As in other chapters of the Business and Professions Code, various acts or omissions are prescribed in the Contractors' License Law as causes for disciplinary action.¹¹ The penalty for a violation of any of these sections may be temporary suspension or permanent revocation of the contractor's license.¹² Included among the various acts or omissions constituting causes for disciplinary action are those which indicate financial irresponsibility and incompetency.¹³ Added to this list in 1959 was section 7113.5,¹⁴ providing for disciplinary action against a licensee who fails to pay in full obligations incurred by him as a contractor, whether because of an adjudication in bankruptcy or other acts of insolvency.¹⁵ The section was apparently enacted on the recommendation of the Contractors' License Board to provide a handy tool for disciplining unworthy contractors. Violations of the section are readily discoverable from notices of bankruptcies published in daily legal publications, and easily proved because an adjudication in bankruptcy is admissible as evidence in an administrative hearing.¹⁶ Since it has become law, section 7113.5 has been relied upon by the board more often than any other section as a disciplinary measure.¹⁷

Expediency

An analysis of the existing grounds for disciplinary action in the Contractors' License Law indicates that the bankruptcy section is unnecessary for

⁹ CAL. BUS. & PROF. CODE §§ 7000-158.

¹⁰ 16 CAL. ADM. CODE § 701 (1948); see also *Lewis & Queen v. N. M. Ball Sons*, 48 Cal. 2d 141, 149-50, 308 P.2d 713, 718 (1957); *Fraenckel v. Bank of America*, 40 Cal. 2d 845, 848, 256 P.2d 569 (1953); *Matchett v. Gould*, 131 Cal. App. 2d 821, 281 P.2d 524 (1955); *Oddo v. Hedde*, 101 Cal. App. 2d 375, 382, 225 P.2d 929, 934 (1950); *Howard v. State*, 85 Cal. App. 2d 361, 193 P.2d 11 (1948); *West Coast Home Improvement Co. v. Contractors' State License Bd.*, 72 Cal. App. 2d 287, 301, 302, 164 P.2d 811, 818, 819 (1945). See also *Clark*, *supra* note 1, at 522. For the statutory definition of a contractor, see CAL. BUS. & PROF. § 7026.

¹¹ CAL. BUS. & PROF. CODE §§ 7101-124.

¹² CAL. BUS. & PROF. CODE § 7090.

¹³ CAL. BUS. & PROF. CODE §§ 7108 (misuse of funds), 7120 (withholding money).

¹⁴ Cal. Stat. 1959, ch. 1361 § 1, p. 3632; as amended Cal. Stat. 1961, ch. 1636 § 7, p. 3574; as amended Cal. Stat. 1963, ch. 991 § 1, p. 2253. For information concerning the effect of the 1963 amendment see 38 CAL. S. BAR J. 614 (1963).

¹⁵ Acts of insolvency which are causes for discipline are assignments for the benefit of creditors, trusteeship, dissolution, composition, arrangement, or reorganization. CAL. BUS. & PROF. CODE § 7113.5.

¹⁶ CAL. GOV. CODE § 11513(c).

¹⁷ CONTRACTORS' LICENSE BOARD *Disciplinary Actions—Statewide 1961-62*: §§ 7113.5 (bankruptcy): 267 violations; 7113 (breach of contract): 151 violations; 7120 (withholding of funds): 123 violations; total violations for the fiscal year, all sections, 1225; 1962-63: §§ 7113.5: 345 violations; 7113: 154 violations; 7120: 173 violations; total violations for the year, all sections, 1271. Statistics are taken from the files in the Contractors' State License Board's Investigator's Office, San Francisco, Calif.

the efficient regulation of the industry. Many of the causes of insolvency and hence bankruptcy are acts or omissions which constitute causes for disciplinary action. For example, any one or a combination of the following violations may lead to bankruptcy: abandoning projects,¹⁸ diverting funds,¹⁹ failing to keep records,²⁰ breaching contracts,²¹ wilfully failing to carry on a job with reasonable diligence,²² wilfully failing to pay matured trade obligations,²³ fraud,²⁴ and dishonesty.²⁵ Thus a contractor who has been adjudicated a bankrupt or committed an act of insolvency will in all probability be subject to license suspension or revocation for violation of one or more of the disciplinary sections of the Contractors' License Law, other than section 7113.5. Since published notices of bankruptcies could be used to discover violators of these other sections, the bankruptcy section is not an essential tool for disciplining unworthy contractors. It is nevertheless a useful tool since bankruptcy will be easier to prove than some of the other enumerated violations.

Constitutionality

While insolvency is far from conclusive evidence that the contractor is incompetent, inexperienced, unlawful or fraudulent, it is some indication that he is guilty of one or more of those deficiencies against which the public is to be protected by Contractors' License Law.²⁶ In light of the familiar reluctance of the courts to question the expediency and wisdom of economic legislation,²⁷ the reasonable relation²⁸ between the provisions of section 7113.5 and the evils which the license law was designed to prevent should be sufficient to protect the section from a due process attack.

¹⁸ CAL. BUS. & PROF. CODE § 7107.

¹⁹ CAL. BUS. & PROF. CODE § 7108.

²⁰ CAL. BUS. & PROF. CODE § 7111.

²¹ CAL. BUS. & PROF. CODE § 7113.

²² CAL. BUS. & PROF. CODE § 7119.

²³ CAL. BUS. & PROF. CODE § 7120.

²⁴ CAL. BUS. & PROF. CODE § 7116.

²⁵ CAL. BUS. & PROF. CODE § 7120.

²⁶ See text at note 10 *supra*. In a case where insolvency is unrelated to the competency of a contractor, the registrar may exercise his discretion in a manner fairest to the licensee. See CAL. BUS. & PROF. CODE § 7090. For the procedure for reviewing an abuse of administrative discretion, see CAL. GOV. CODE § 11523 and CAL. CODE CIV. PROC. § 1094.5.

²⁷ *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Day-Brite Lighting v. Missouri*, 342 U.S. 421 (1952); *In re Porterfield*, 28 Cal. 2d 91, 168 P.2d 706 (1946); *Hart v. City of Beverly Hills*, 11 Cal. 2d 343, 79 P.2d 1080 (1938); *Justesen's Food Stores, Inc. v. City of Tulare*, 43 Cal. App. 2d 616, 111 P.2d 424 (1941).

²⁸ *Serve Yourself Gasoline Stations Assoc. Inc. v. Brock*, 39 Cal. 2d 813, 249 P.2d 545 (1952). In *Rosenblatt v. California State Bd. of Pharmacy*, 69 Cal. App. 2d 69, 72, 158 P.2d 199, 202 (1945), the court said, "it is conceded that every citizen has a right to follow any lawful business or profession which is not injurious to the public or a menace to the health, safety or welfare of society, free from regulation by the exercise of the police power of the state except in cases of necessity for such health, safety or welfare, and when its authority is so interposed in behalf of the public *it must be by means reasonably necessary for the accomplishment of that purpose.*" (Emphasis added.) See also Comment, 40 HARV. L. REV. 943, 953, 955 (1927).

Satisfaction of Discharged Trade Obligations as Condition of License Reinstatement

However, the contractor whose license has been revoked because of an adjudication in bankruptcy and who is granted a discharge under the Federal Bankruptcy Act²⁹ may not obtain reinstatement unless he satisfies in full those trade obligations of which he has been relieved by federal law.³⁰ This requirement arguably violates both the supremacy³¹ and due process³² clauses of the Constitution.

Supremacy Clause

As stated by the Supreme Court, "One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'"³³ A state law providing that a bankrupt contractor remains legally obligated to pay discharged trade debts would clearly violate the supremacy clause of the federal Constitution. The Contractors' License Law requirement, depriving the bankrupt contractor of the benefit of a discharge only if he chooses to procure reinstatement of his license, though not so clearly unconstitutional, does clearly contravene one of the primary purposes of the Bankruptcy Act.

In *Kesler v. Department of Pub. Safety*³⁴ the Supreme Court recently had before it a state statute similar in import to section 7113.5. The Utah motor vehicle responsibility law requires satisfaction of judgments resulting from automobile accidents as a condition of driver's license reinstatement, and specifies that a discharge in bankruptcy does not relieve the judgment debtor from the requirement. The statute further provides that the judgment debtor may obtain reinstatement upon receiving the written consent

²⁹ 11 U.S.C. § 32(a) (1958).

³⁰ CAL. BUS. & PROF. CODE § 7102: "After revocation of a license upon any of the grounds set forth in this article, *the license shall not be reinstated or reissued* within a period of one year after the final decision of revocation and *then only on proper showing that all loss caused by the act or omission for which the license was revoked has been fully satisfied. . . .*" (Emphasis added.) This section, therefore, requires that all losses, including debts discharged in bankruptcy, must be satisfied as a condition for license reinstatement. This section would apply not only to section 7113.5, but also to a violation of any disciplinary section which resulted in a discharge of unpaid trade debts. For example, a licensee who breaches a contract violates section 7113; if his license is revoked and he is adjudicated a bankrupt, he must pay the discharged debts before his license will be reinstated.

³¹ U.S. CONST. art. VI.

³² U.S. CONST. amend. XIV, § 1.

³³ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); 11 U.S.C. § 35 (1958). "A discharge in bankruptcy shall release a bankrupt from all his provable debts. . . ." *Williams v. United States Fidelity Co.*, 236 U.S. 549 (1915); Rifkind, *Discharge of Debts in Bankruptcy and Some Problems Relating Thereto*, 7 N.Y.L.F. 354 (1961). See also, MACLACHLAN, *BANKRUPTCY* § 100 (1956); Hartman, *The Dischargeability of Debts in Bankruptcy*, 15 VAND. L. REV. 13 (1961); Ungerman, *Discharge: The Prime Mover of Bankruptcy*, 36 REF. J. 85 (1962); Nadler, *The Humaneness of the Bankruptcy Law*, 60 COM. L.J. 149 (1955)

³⁴ 369 U.S. 153 (1962).

of the judgment creditor, in effect granting him a preference over other creditors of the bankrupt.³⁵ Despite this powerful weapon of the creditor for the collection of a debt discharged in bankruptcy, the Court in a divided opinion found no conflict with the Bankruptcy Act. In language perhaps more sweeping than he intended, Mr. Justice Frankfurter said for the majority that "the Bankruptcy Act does not forbid a State to attach any consequence whatsoever to a debt which has been discharged."³⁶ Taken literally, this language indicates that the requirement that the bankrupt contractor satisfy his discharged trade obligations as a condition of license reinstatement is not an unconstitutional violation of the supremacy clause.

There are three considerations indicating that the constitutionality of the contractor's financial responsibility provisions has not been determined by the *Kesler* case. The first is that a law such as the Contractors' License Law, depriving the bankrupt contractor of his constitutionally protected right³⁷ to pursue his chosen occupation, should be more carefully scrutinized than the Utah statute, which merely deprives the bankrupt judgment debtor of a "privilege"³⁸ of using the state's highways.

The second is that there is not nearly as great a demand to protect the public against financially irresponsible contractors³⁹ as there is for protection against careless and irresponsible drivers. Mr. Justice Frankfurter's opinion stressed the widespread adoption of state automobile financial responsibility laws, and the legitimate and important interest of the states in making safe their highways.⁴⁰ Thus it seems reasonable to infer that the underlying basis for the *Kesler* decision was the reluctance of the Court to interfere with the states in their exercise of police power in this vital area. However, this sensitive federal-state relationship does not loom nearly as large in the area of contractor licensing as in that of driver licensing.

Third, and probably most important, the provisions of the Utah act present only an indirect conflict with the Bankruptcy Act, while the provisions of the Contractors' License Law requiring full satisfaction of discharged trade debts as a condition of license reinstatement are in direct conflict with the federal statute. The Utah act does not proscribe financial irresponsibility as an indication that one is an unsafe driver, but rather is designed to promote safety on the highways by imposing severe penalties on those who have proved themselves unsafe drivers. The provisions of the Contractors' License

³⁵ Utah Laws 1951, ch. 71 as amended, Utah Code Ann., 1953, tit. 41, ch. 12 §§ 14(b), 15.

³⁶ 369 U.S. 153, 171 (1962).

³⁷ See note 2 *supra*.

³⁸ *Hendrick v. Maryland*, 235 U.S. 610 (1915); *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 298 Pac. 481 (1931); *Shivell v. Municipal Court*, 188 Cal. App. 2d 333, 10 Cal. Rptr. 283 (1961).

³⁹ Clark, *supra* note 1, at 539, points out that only 15 states have contractors' licensing laws: Ala., Ariz., Ark., Calif., Idaho, Ind., Mont., Nev., N. Mex., N.C., N.D., S.C., Tenn., Utah, Va. Further research indicates that Hawaii also has contractors' licensing regulations. HAWAII REV. LAWS ch. 166A (Supp. 1961). In addition Arizona has a bankruptcy section; 10 WEST'S ARIZ. REV. STAT. ANN. § 32-1154.

⁴⁰ 369 U.S. at 169. Ten pages of majority opinion are devoted to tracing the history of the development of state automobile financial responsibility laws. They have been adopted by nearly every state and the District of Columbia.

Law, on the other hand, are aimed at financial irresponsibility as such. They proscribe bankruptcy as an indication that the contractor is one against whom the public should be protected and deprive the bankrupt contractor of the federal immunity afforded by the Bankruptcy Act. Thus, while Mr. Justice Frankfurter can say that the Utah act is not "directed to bankrupts as such"⁴¹ and is "tangential"⁴² to the Bankruptcy Act, the same cannot be said of the Contractors' License Law provisions.

It is clear from the decision in the *Kesler* case that the states, at least in the narrow area of automobile financial responsibility legislation, are free to enact what are in effect exceptions to the Bankruptcy Act. On the other hand, the need for a contractors' financial responsibility law should not be sufficient to justify the deprivation of a federal immunity designed to give one a fresh start in life, where in order to make that start he must obtain reinstatement of his license. Since it is axiomatic that only Congress may enact exceptions to federal laws, there should be no hesitation on the part of any court, state or federal, to strike down a state statute which encroaches on this exclusive power of Congress. It is to be expected that the doctrine of the *Kesler* case will not be extended.

Due Process Clause

Although the California courts have assumed the position of the Supreme Court in exercising judicial self-restraint, and disavow any inclination to investigate the wisdom of economic legislation,⁴³ it is also doubtful that the provisions in question could withstand the due process attack. While legislation need not be wise, it must at least be reasonably necessary for the accomplishment of the purpose for which it was intended.⁴⁴ Legislation which restricts one in the exercise of his constitutionally protected right to pursue his chosen occupation should be subjected to close scrutiny under this requirement. To require the contractor whose obligations have been discharged in bankruptcy to satisfy those obligations in full as a condition of reinstatement is patently to punish the contractor rather than to protect the public. The requirement decreases the chances that a contractor who has been granted a discharge in bankruptcy or has reached a settlement with creditors will be able to return to business. And it increases the chances that the contractor who does return to business will be forced once again into an act of insolvency by depleting his newly acquired assets before he has the opportunity to apply them to his business. Since the justification for occupational licensing laws is protection of the public rather than punishment of the licensee,⁴⁵ the requirement that the bankrupt contractor pay

⁴¹ *Id.* at 174.

⁴² *Ibid.*

⁴³ *Leland v. Lowery*, 26 Cal. 2d 224, 157 P.2d 639 (1945); *Justesen's Food Stores, Inc. v. City of Tulare*, 43 Cal. App. 2d 616, 111 P.2d 424 (1941); *People v. Velarde*, 45 Cal. App. 520, 188 Pac. 59 (1920).

⁴⁴ See note 28 *supra*. See also *Blumenthal v. Board of Medical Examiners*, 57 Cal. 2d 228, 18 Cal. Rptr. 501, 368 P.2d 101 (1962).

⁴⁵ "It is well settled that the revocation or suspension of a license is not penal in nature but is a mechanism by which licensees who have demonstrated their ignorance, incompetency or lack of honesty and integrity may be removed from the licensed business. The legislation was not intended to provide for punishment but to afford protection

in full his discharged obligations is therefore arbitrary, unreasonable, and hence an unconstitutional exercise of the state's police power.⁴⁶

Conclusion

To strike down the provisions in question only on the basis that they violate the due process clause of the fourteenth amendment would avoid the task of distinguishing the *Kesler* case. However, in order to deter future state legislation from encroaching on one of the primary purposes of the Bankruptcy Act, it is urged that the provisions be struck down as a violation of both the supremacy and due process clauses.

The constitutional issues raised by the insolvency provisions in the Contractors' License Law highlight the important responsibility of the legislature in enacting occupational regulatory provisions. Since this legislation is often proposed by groups whose sole concern is not the public welfare,⁴⁷ it is the responsibility of the legislature to insure that the laws are truly for the purpose of protecting the health, safety and welfare of the people. And while proposed regulatory provisions may appear to be reasonable, and hence constitutionally valid, they are not always expedient and necessary. Thus a more careful examination of these provisions is necessary to prevent inexpedient and unnecessary restrictions on one's right to pursue his chosen occupation.

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of the public." *Meade v. State Collection Agency Bd.*, 181 Cal. App. 2d 774, 776, 5 Cal. Rptr. 486, 487 (1960); *Brodsky v. California State Bd. of Pharmacy*, 173 Cal. App. 2d 680, 688, 344 P.2d 68, 74 (1959). *But see* CAL. BUS. & PROF. CODE § 7030: "Any person who acts in the capacity of a contractor without a license is guilty of a misdemeanor."

⁴⁶ A bankrupt may receive the benefit of a discharge only once every six years; therefore, chances that a contractor would abuse this right to circumvent the purpose of the Contractors' License Law are unlikely. See 11 U.S.C. § 32(c)(5) (1958). In 1963, section 7071.9 was added to the Contractors' License Law providing that a \$1,000 bond must be posted as a condition for issuance and reinstatement of a license. Cal. Stat. 1963, ch. 1971 § 1, p. 4048. This requirement may also be of doubtful validity.

⁴⁷ See note 1 *supra*. See also *Blumenthal v. Board of Medical Examiners*, 57 Cal. 2d 228, 18 Cal. Rptr. 501, 368 P.2d 101 (1962); CAL. BUS. & PROF. CODE §§ 7001-02. The Contractors' License Board is composed of eight licensed contractors and one public member.

* Member, Second Year Class.