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The License Problem

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which they reside, when they have married outside the state, with the further provision that if the resident has left the state for the purpose of marrying to avoid the prohibition of the statutes of the domicile and with the intention of returning, and if he subsequently does return, the validity of the marriage will be determined by the laws of the domicile.¹¹ Recent court interpretations of the Uniform Act as well as some of the statutes of states that are concerned with the evasion problem¹² require the bad faith element, the intent to evade the provisions of the statutes, in order for the validity of the marriage to be successfully questioned.

North Dakota has a statute unlike that of any other state. It provides that two nonresidents may not marry within the state except when the parents of either reside there.¹³ This would tend to prevent domiciliaries of another state from being married in North Dakota to evade the laws of their own state. Thus it has the same effect as section two of the Marriage Evasion Act.¹⁴

The remaining states have no statutory provisions on the validity of foreign marriages.¹⁵

Study of the dates of statutes and court decisions involving the marriage evasion problem does not disclose any current trend either toward or away from the adoption of a marriage evasion policy. The state of the law appears to be static rather than dynamic.

CARL H. SMITH, JR.

THE LICENSE PROBLEM

When the problem is only one of definition, there seems to be no trouble in discovering the exact nature of a license. Lay or legal, dictionaries agree that a license is a permit to do something which would otherwise be illegal.¹

But the task of determining the nature of a license is not so easy as might at first appear, and is presented to courts in a great many different ways. One of the first problems encountered is the determination of whether a particular license is a right or only a mere privilege. If it is a right, then after it has once been obtained, agencies dealing with the licensee must afford him at least a degree of due process before they can deprive him of that right.² If the license is determined to be nothing more

11. Maine, New Hampshire, and Virginia.

12. Alabama, Arizona, Indiana, Maine, Massachusetts (Note 1 supra), Mississippi, Oklahoma, Pennsylvania, and Utah.

13. N.D. Rev. Stat. § 14-0310 (1943), as amended by House Bill No. 555, c. 120 (1951).

14. Note 1 supra, § 2, Uniform Marriage Evasion Act.

15. Florida, Iowa, Missouri, South Carolina, and South Dakota.

1. Black's Law Dictionary, 4th Ed., p. 1067; Webster's New International Dictionary, 2nd Ed., p. 1425.

2. On this point see 33 Am.Jur. 341.

than a mere privilege, the licensee will find that it receives little court protection.³

On the surface the criteria for categorizing licenses as rights or privileges are fairly well defined. A license to do something or to carry on some business which is generally useful, advantageous to the public and not very liable to do much harm is often considered to be a right.⁴ Licenses to practice dignified professions such as law⁵ and medicine⁶ are usually considered to be in this category, along with many business enterprises such as running a school.⁷

On the other hand, licenses which permit something not generally useful or which may be harmful to the health or morals of the community are categorized as mere privileges.⁸ The best examples of this are the licensing of the sale of intoxicating beverages, which has a fairly solid standing as mere privilege,⁹ and pool hall permits.¹⁰ It is confusing, however, to note that automobile licenses,¹¹ milk sales,¹² and (in the State of Maine) even lobster fishing licenses¹³ are apt to be called mere privileges.

With this generalization in mind let us turn to Wyoming case law on licenses, with this question in mind: to what extent must the due process clause be considered in connection with procedures for the issuance and revocation of permits for various licensed acts?¹⁴

On the subject of liquor, Wyoming seems to be willing to use the "right and privilege" test in arriving at a solution, and joins a host of other courts¹⁵ in holding that a liquor license is a mere privilege. In a prosecution for violation of the Sunday liquor laws, the Wyoming court categorized liquor regulations as expression of the police power and, therefore, not under the due process clause.¹⁶ Thus categorized, it can be presumed that a liquor dealer may have his license summarily revoked without being able to argue that the revoking agency or the statute¹⁷ providing for the license failed to accord him a fair hearing after notice.

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3. See 33 Am.Jur. 383.
 4. *Supra* note 2.
 5. *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 70 L.Ed. 494, 46 S.Ct. 215 (1926); *Abrams v. Jones*, 35 Idaho 352, 207 Pac. 724 (1922); and on professions in general see *Dent v. West Virginia*, 129 U.S. 114, 32 L.Ed. 623, 9 S.Ct. 231 (1888).
 6. *Dent v. West Virginia*, 129 U.S. 114, 32 L.Ed. 623, 9 S.Ct. 231 (1888); *Smith v. State Board of Medical Examiners*, 140 Iowa 66, 117 N.W. 1116 (1908).
 7. *Gilchrist v. Bierring*, 234 Iowa 899, 14 N.W.2d 724 (1944).
 8. *Supra* note 3.
 9. *State v. Smart*, 22 Wyo. 154, 136 Pac. 452 (1913); *Floeck v. Bureau of Revenue*, 44 N.M. 194, 100 P.2d 225 (1940); and see 137 A.L.R. 803 and 35 A.L.R.2d 1067.
 10. *Commonwealth v. Kinsley*, 133 Mass. 578 (1882).
 11. *Nulter v. State Road Commission*, 119 W.Va. 312, 193 S.E. 549 (1937); and see 10 A.L.R.2d 833.
 12. *People ex rel. Lodes v. Department of Health*, 189 N.Y. 187, 82 N.E. 187, 13 L.R.A. (N.S.) 894 (1907).
 13. *State v. Cote*, 122 Me. 450, 120 Atl. 538 (1923).
 14. Since all licenses exist only as some governing body requires them, one must always look to the act setting up the license to find just how much due process is accorded.
 15. See 137 A.L.R. 803 and 35 A.L.R.2d 1067.
 16. *State v. Smart*, 22 Wyo. 154, 136 Pac. 452 (1913).
 17. *Wyo. Comp. Stat. § 53-225* (1945).

On the other hand, Wyoming has held that an optometrist cannot be deprived of his right to practice without good reason, and above all, notice thereof.¹⁸ In *Franzel v. Examiners in Optometry* an optometrist paid his fee with a bad check and the board mailed notice to the doctor to appear and show cause why his license should not be revoked, but he never received it. The Board then summarily revoked his license. The statute called for notice and a hearing. The court held that a professional license could not be revoked under such circumstances. The court seemed to see a necessity for substantive due process (actual notice and hearing), while the board seemed interested only in a technical application of due process. Though not so stated, the real reason for the court interpretation might well be the feeling that more than a mere privilege is involved in the protecting of the right to practice a legitimate profession, while in the case of liquor the court feels that a potentially harmful occupation needs little court or statutory protection.

On the question of automobile drivers' licenses, Wyoming has more or less adopted a middle of the road policy. An early case on the subject¹⁹ referred to a driver's license as a "privilege granted by law,"²⁰ which put a burden on the Highway Commission to prove a right under the facts of any case to revoke it. In this case the driver failed to prove financial responsibility after an accident, but the Department failed to prove any financial loss to anyone. By holding for the driver the court clearly indicated that not only were notice and a hearing necessary, but also that the burden fell on the Highway Department to make out a good case with definite proofs.

In the most recent Wyoming case on the subject of drivers' licenses²¹ the right or privilege solution was mentioned and considered but not used, as the court found the statute itself²² unconstitutional in that there was an improper delegation of legislative powers to the Highway Commission. This case held that the legislature had to set standards for what facts the Highway Commission had to find in order to revoke a license, and could not leave it so vague as to be a purely discretionary matter.

Probably these Wyoming cases on drivers' licenses show a trend which it would be well for all courts to consider. Despite talk about usefulness, danger to the public, mere privilege and all that goes with these words, it still seems that it is a faulty solution to any license case to try to categorize and then give or deny due process according to the category. It would be hard to believe that selling a can of beer one minute after closing time is so much more dangerous to the public than a completely incompetent

18. *Frenzel v. Examiners in Optometry*, 52 Wyo. 328, 74 P.2d 343 (1937).

19. *Travegia v. Wyoming Highway Department*, 67 Wyo. 93, 214 P.2d 975 (1949).

20. *Travegia v. Wyoming Highway Department*, 67 Wyo. 93, 113, 214 P.2d 975 (1949).

21. *Eastwood v. Wyoming Highway Department*, _____ Wyo. _____, 301 P.2d 818 (1956).

22. Wyo. Comp. Stat. § 60-1615 (1945) as amended. Subsection 4 provides for revocation if "the person . . . is incompetent or is unfit to operate a motor vehicle upon any grounds upon which license might be refused as stated in this Act." This is the only revocation clause and the Act has no grounds for refusal.

doctor, that we can summarily revoke the beer license while we must leave the doctor to go on filling graveyards until notice and a complete hearing have taken place. From the pecuniary aspect both licenses probably represent a very substantial investment.

Where the usual method of solving a problem has been criticised as unfair, it is in order to offer an alternative solution. In the matter of licenses this does not seem to be too difficult. Actually nearly all kinds of licenses require certain standards before granting, and an agency should not refuse to grant, or revoke, any license so long as there is compliance with these standards. Thus all that needs to be added is that with any license the agency should actually have to find the non-compliance after the licensee has been given notice and a chance to defend, rather than refusing or revoking certain licenses on mere suspicion or hearsay and without hearing or notice. Where there is a real danger, and summary revocation would seem to be necessary, the use of an injunction could solve the problem, thereby protecting the public in all things and not just within certain categories. Little burden would be added either to agencies or to courts. Even now agencies seldom revoke without some sort of fact finding. Actually, more stringent due process requirements in granting and revoking licenses would probably cut down the number of cases coming into the courts.

DONALD L. YOUNG

ANOTHER LOOK AT THE MARTEL CASE

In the *Martel*¹ case, an oil and gas lessee brought suit against a trespasser. *Martel*, the lessee, attempted to recover damages for the value of the mineral interest for leasing purposes from the trespasser who drilled a dry hole thereby rendering the lease valueless as a speculation. The Wyoming court denied recovery on the ground that *Martel's* damages were too speculative. *Barquin*, *Martel's* lessor, in an action arising out of the same trespass,² recovered for surface damages and punitive damages. In both of these cases, the court said that a right had been violated and the parties so deprived could recover damages as shown. Plaintiff's counsel in the *Martel* case brought to the court's attention the *Kishi*³ case in which the Texas court allowed recovery under a similar situation. The Wyoming court said that it was not disposed to follow the holding of the *Kishi* case. Out of this background has grown a general belief that the holdings in these two cases are in direct conflict⁴ as to whether a mineral owner may recover for the type of trespass involved in the *Martel* case. This note will be concerned with a discussion as to whether these cases truly represent conflicting views as to the rights of the injured party.

1. *Martel v. Hall Oil Co.*, 36 Wyo. 166, 253 Pac. 862 (1927).

2. *Hall Oil Co. v. Barquin*, 33 Wyo. 92, 237 Pac. 255 (1927).

3. *Humble Oil & Refining Co. v. Kishi* (Tex. Comm. App.), 276 S.W. 190 (1925).

4. 1 Wyo. L.J. 123 (1946).