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# Adminstrative Law—Driver's License Suspension—Opportunity to Be Heard

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# WASHINGTON CASE LAW-1961

Presented below is the ninth annual Survey of Washington Case Law. The articles in this survey issue have been written by second-year students as a part of their program to attain status as nominees to the *Law Review*. The second-year students were guided in their work by the Casenote Survey Editor of the *Law Review* and by various members of the law school faculty.

The case survey issue does not represent an attempt to discuss every Washington case decided in 1961. Rather, its purpose is to point out those cases which, in the opinion of the Editorial Board, constitute substantial additions to the body of law in Washington.

## ADMINISTRATIVE LAW

**Driver's License Suspension — Opportunity to be Heard.** In *Gnecchi v. State*[1] the Washington Supreme Court failed to take advantage of an opportunity to discredit the right-privilege dichotomy, a concept which the court has used in the past to determine a citizen's interest in his driver's license. The court continued to consider the driver's license a privilege which may be revoked or suspended without a hearing.

In the *Gnecchi* case the defendant, Director of Licenses (hereinafter referred to as the Director), without a hearing entered an order suspending the plaintiff's driver's license for a period of sixty days, pursuant to RCW 46.20.290.[2] The plaintiff filed notice of appeal under RCW 46.20.340. He also moved for and obtained, ex parte, a temporary order restraining the Director from enforcing the order suspending his license.

[1] 158 Wash. Dec. 475, 364 P.2d 225 (1961).

[2] RCW 46.20.290 provides in part, "The director may in his sound discretion immediately suspend the vehicle operator's license of any person whenever he has reason to believe:... (4) That such person is a habitually reckless or negligent operator of a motor vehicle or has committed a serious violation of the motor vehicle laws of this state...."

The Director filed a motion to quash the temporary restraining order. At the hearing on the motion the trial court permanently enjoined the Director from suspending the plaintiff's driver's license, holding that the Washington Administrative Procedure Act[3] applied to the Director[4] and that he had not complied with its provisions. On appeal the Director urged that the Washington Administrative Procedure Act does not afford the holder of a driver's license an administrative hearing *prior to* suspension of the license.

The supreme court accepted the Director's contention in a 5-to-4 decision. The court held that no statute provides for a hearing at the administrative level prior to suspension of the license,[5] and that the plaintiff had no constitutional right to such a hearing since due process requirements were satisfied by a de novo review in superior court. This decision was based on an interpretation of the Washington Administrative Procedure Act.

RCW 34.04.090 (1) provides in part, that "In any *contested case* all parties shall be afforded an opportunity for hearing after reasonable notice." (Emphasis added.) "Contested case" is defined in RCW 34.04.010 (3) as "... a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by *law or constitutional right* to be determined after an agency hearing." (Emphasis added.)

The Washington legislature has expressly provided for de novo review of the Director's order of suspension in the superior court.[6] There are no other statutory provisions relating to hearings in connection with the Director's action.[7] An agency hearing prior to the suspension is not required by (statutory) law.

After determining that no hearing prior to suspension is required by law, the court considered whether the plaintiff had a constitutional

[3] RCW 34.04.

[4] "It is not disputed that the act applies to the department of licenses of this state...." Gnecchi v. State, 158 Wash. Dec. 475, 477, 364 P.2d 225, 227 (1961).

[5] "In answer to the first question, we find no statute requiring a hearing prior to the suspension of a motor vehicle operator's license by the director under RCW 46.20.290." Gnecchi v. State, 158 Wash. Dec. 475, 478, 364 P. 2d 225, 227 (1961).

[6] RCW 46.20.340.

[7] Counsel for the license holder also contended that the director had adopted a point system for the purpose of determining when a person's license should be suspended. That a point system was used to some extent was admitted by the counsel for the director. The majority refused to speculate as to its mode or extent of operation or how the system was constituted, since there was nothing in the record concerning the system. There is a possibility that had the question of rule making been raised below and sufficient facts included in the record to support the rule making contention that the court may have found that the director had not complied with the rule-making publication requirements of the Administrative Procedure Act. Judge Rosellini in his

right to an agency hearing prior to the suspension of his license. Both the Washington constitution and the fourteenth amendment to the United States Constitution[8] require due process before property can be taken. The court held that the requirements of due process are satisfied where the decision of the Director is subject to de novo review in the superior court. In support of its decision the court cited a United States Supreme Court decision which allowed summary confiscation in an emergency situation, subject to later full review.[9] The Washington court failed to discuss whether suspension of a driver's license is necessitated by such an emergency as will justify a state agency in acting summarily. Instead, it went on to say, "Preventing . . . a habitually reckless or negligent operator of a motor vehicle . . . [RCW 46.20.290 (4)] from driving on public highways is a reasonable exercise of the police power."[10]

To support this statement the court cited *Rawson v. Department of Licenses*,[11] which held, in effect, that a license is neither a contract nor a right but a mere privilege subject to summary revocation by the officer with power to grant the license.[12] This view, that a license to drive is a mere privilege, has been adopted by a majority of the courts which have met the issue.[13] The New Mexico Supreme Court, interpreting a nearly identical statute, followed this approach.[14] The privi-

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dissent took judicial notice of the point schedule and stated that the department of licenses had promulgated rules and regulations to determine the standard by which a driver's license would be suspended and formal adoption of standards was needed to prevent arbitrary and capricious action.

[8] U.S. CONST. amend. XIV; WASH. CONST. art. 1, § 3.

[9] North American Cold Storage v. City of Chicago, 211 U.S. 306 (1908). The Supreme Court sustained seizure and destruction of spoiled poultry by inspectors without a prior hearing. The Court sustained this action on two grounds: (1) This was such an emergency that if speedy action was not taken the public might possibly suffer from food poisoning, and, (2) The seizure and destruction, being only of a product produced for sale, could be easily compensated for in damages should the seizure and destruction later be found to be wrongful.

[10] Gnecchi v. State, 158 Wash. Dec. 475, 478, 364 P.2d 225, 227 (1961).

[11] 15 Wn.2d 364, 130 P.2d 876 (1942).

[12] *Id.* at 372, 130 P.2d at 879.

[13] Dentamaro v. Motor Vehicles Comm'r, 20 Conn. Supp. 205, 130 A.2d 568 (1956); Smith v. City of Gainsville, 93 So. 2d 105 (Fla. 1957); Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52 (1951); Ballow v. Reeves, 238 S.W.2d 141 (Ky. 1951); Burgess v. Mayor & Aldermen of Brockton, 235 Mass. 95, 126 N.E. 456 (1920); Barbieri v. Morris, 315 S.W.2d 711 (Mo. 1958); Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952); Garford Trucking Inc., v. Hoffman, 114 N.J.L. 522, 177 Atl. 882 (1935); Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960); Commonwealth v. Harrison, 183 Pa. Super. 133, 130 A.2d 198 (1957); La Plante v. State, 47 R.I. 258, 131 Atl. 641 (1926); Sullins v. Butler, 175 Tenn. 468, 135 S.W.2d 930 (1940); Law v. Commonwealth, 171 Va. 449, 199 S.E. 516 (1938); Nulter v. State, 119 W. Va. 312, 193 S.E. 549 (1937); State v. Stehlek, 262 Wis. 642, 56 N.W.2d 514 (1953). A directly contrary view has been reached in Colorado. People v. Nathas, 363 P.2d 180 (Colo. 1961).

[14] Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960).

lege doctrine has been followed by the Washington court in other licensing areas.[15]

Courts in some jurisdictions, after labeling the driver's license as a privilege, allow summary revocation without any statutory provision for review of the administrative action.[16] Their rationale is that since the activity can be constitutionally prohibited, it can also be restricted in almost any way the state deems necessary.[17] These courts do not explain why an individual whose driving can constitutionally be prohibited is not entitled to procedural fairness after he is licensed.

The privilege doctrine has been rejected in some jurisdictions. The state courts in Minnesota, New York and California have flatly rejected it in their more recent decisions.[18] The Minnesota court in *State v. Moseng* stated:

> It is therefore clear that, whether a driver's license may be termed a privilege or a right, such license, whether restricted or not, once granted, is of substantial value to the holder thereof and it may not be suspended or revoked arbitrarily or capriciously.[19]

These courts have adopted a policy worthy of examination by the Washington court. They look beyond the right-privilege concept and determine whether a particular type of license suspension gives the holder fair treatment. The value of the license to its holder and the harm which may result to him from a wrongful suspension are weighed against the needs of the motoring public for quick action.[20] Procedural safeguards provided in the administrative process are also taken into consideration.

The automobile has become an essential means of transportation to the average American. A license to drive that automobile is equally

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[15] State *ex rel.* Sayles v. Superior Court, 120 Wash. 183, 206 Pac. 966 (1922) (Pool hall); Asakura v. City of Seattle, 122 Wash. 81, 210 Pac. 30 (1922), *rev'd on other grounds*, 265 U.S. 332 (1923) (Pawn broker); Bungalow Amusement Co. v. City of Seattle, 148 Wash. 485, 269 Pac. 1043 (1928) (Dance hall).

[16] Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52 (1951); Nulter v. State, 119 W.Va. 312, 193 S.E. 549 (1937).

[17] Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960).

[18] Irvine v. State Board of Equalization, 40 Cal. App. 2d 280, 104 P.2d 847 (1940); State v. Moseng, 254 Minn. 263, 95 N.W.2d 6 (1959); People v. McAnarney, 210 N.Y.S.2d 340 (Schuyler County Ct. 1961).

[19] State v. Moseng, 254 Minn. 263, 95 N.W.2d 6, 13 (1959).

[20] The legislature has determined that the safety of the public requires immediate action before a hearing. The argument in support of this determination is weakened by the fact that after a period of sixty days, with nothing except the deprivation of the right to drive, the license holder will be able to drive again. The statute appears to be punishing the driver in hopes of better driving habits in the future. Punishment is usually preceded by a hearing.

essential. In some cases a license to drive may be more important than an automobile since many occupations require a driver's license.

At the same time, the reasons for not allowing certain unsafe drivers on our public highways are obvious. The need for immediate action in removing habitually reckless or negligent drivers from the highway is obvious too. The Washington legislature[21] has determined that there is a compelling public need for summary revocation to protect the public on our highways.[22] The Washington statute provides for a summary suspension with full de novo review within ten days after the suspension.[23]

In some instances judicial review will not provide the most practical means for finding facts. In technical areas and where the cost of appealing is great the requirements of fair procedure may require a hearing at the administrative level.[24] The revocation or suspension of a driver's license does not fall into either of these categories. In suspending a driver's license, the question which according to the statute the administrator must answer, is whether the driver is habitually reckless or negligent.[25] In the de novo review before the superior court the same issue receives a complete review. The court's judgment is based upon the violation then before it and the driver's past convictions for improper operation of a motor vehicle. In most cases the judge will be as well qualified as the administrator in his determination. As a result every driver will receive as fair treatment as the law can provide, within ten days. As a California court has stated, "Although the requirements of due process often involve a full hearing, it has long been recognized that where public necessity requires, there can be action followed by a hearing."[26]

A less extreme approach might have been taken. The Washington legislature could have provided that during the ten-day period following notice of appeal to the superior court the driver's suspension would be

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[21] RCW 46.20.290.

[22] The Massachusets legislature decided that the value of a drivers license out-weighs the public need for immediate summary action. The Massachusets Administrative Procedure Act provides in part, "Except as otherwise provided in this section, (referring to suspension without administrative discretion) no agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for a hearing." Mass. G.L. (Ter. Ed.) ch. 30 A, § 13.

[23] RCW 46.20.340.

[24] Davis, *The Requirement of Opportunity To Be Heard In The Administrative Process*, 51 YALE L.J. 1093 (1942).

[25] RCW 46.20.290.

[26] Hesperia Land Development Co. v. Superior Court, 7 Cal. Rptr. 815, 820 (Cal. Dist. Ct. App. 1960).

temporarily stayed. The net effect of such a legislative provision would be that, in most instances the individuals who had received fair treatment at the administrative level would not appeal, and those drivers with a special hardship or with an improper suspension could, with a small amount of danger to the public, continue to drive until they had had an opportunity to be heard. Texas has adopted this approach in the licensing area.[27]

In *Gnecchi* the Washington court has continued to follow the privilege doctrine in the licensing area. It is suggested that the privilege doctrine should have been rejected and at the same time the Director's action could have been sustained. The court should have adopted the position that once the state has issued the license a valuable interest attaches and that the license holder cannot be deprived of his interest without receiving fair treatment. Immediate suspension of a driver's license, subject to speedy and complete judicial review such as is provided in Washington, affords fair treatment when viewed in terms of the pressing public necessity which is involved. This, rather than the conclusion that a driver's license is a privilege for which any procedure will satisfy due process, should be the basis for upholding the immediate suspension of a driver's license without a prior hearing.

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**Standing to Challenge Constitutionality of Loyalty Oath.** In *Nostrand v. Little*,[1] the Washington State Supreme Court had an opportunity to pass on the much publicized loyalty oath required of certain state employees. Against a charge that procedural due process was violated because the statute calls for immediate dismissal upon non-compliance, the court found that the oath abridged no constitutional rights of the plaintiffs, two University of Washington professors.

The background of the case is both interesting and complex. In 1959, the professors asked for a declaratory judgment[2] to determine the constitutionality of the statute requiring them to take an oath and sign an affidavit in which they disclaimed any present association with the Communist Party or any other subversive organizations. They

[27] Dep't of Public Safety v. Gillaspie, 254 S.W.2d 180 (Tex. Civ. App. 1952) *aff'd on rehearing*, 259 S.W.2d 177 (Tex. Sup. 1953), *cert. denied*, 347 U.S. 933 (1954).

[1] 58 Wn.2d 111, 361 P.2d 551 (1961), *cert. denied*, 368 U.S. 436 (1962).

[2] Nostrand v. Balmer, 53 Wn.2d 460, 335 P.2d 10 (1959), *remanded*, 362 U.S. 474 (1960).