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Presented below is the sixth 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 third-year students on the staff 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 1958. 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

Revocation of License to Practice Dentistry—Scope of Review. The case of *In re Flynn*[1] involves an appeal from administrative action to revoke a license to practice dentistry. Dr. Flynn was found guilty of unprofessional conduct by an administrative hearing board. The board found he employed an unlicensed dentist to perform work on the teeth of one his patients in violation of RCW 18.32.230 and RCW 18.32.350.[2] The director of licenses issued an order revoking

[1] 152 Wash. Dec. 519, 328 P.2d 150 (1958).

[2] RCW 18.32.230 gives authority to the director of licenses to revoke or suspend the license of any dentist for obtaining or seeking to obtain a practice or money fraudulently or for any other improper, unprofessional, or dishonorable conduct in the practice of dentistry, or is convicted of a felony, or when the licensee if [is] found guilty of any of the following acts or offenses: . . .

> (5) Employing, procuring, inducing, aiding or abetting a person not licensed or registered as a dentist to engage in the practice of dentistry. . . .
>
> (7) Professional connection or association with, or lending his name to another for the illegal practice of dentistry by another, or professional connection or association with any person, firm, or corporation holding himself, themselves, or itself out in any manner contrary to this chapter.

RCW 18.32.350 provides, in part, that the employment of an unlicensed person or dentist as an operator constitutes "improper, unprofessional, and dishonorable conduct."

Dr. Flynn's license to practice dentistry.[3] On appeal to the superior court, the director's action was affirmed. The trial judge noted that, although the penalty seemed unduly severe, the acts complained of were supported by evidence in the record, and he did not believe he had any authority to do other than affirm the revocation.

The supreme court reversed the decision and remanded the case to the director of licenses for the imposition of an appropriate disciplinary penalty.

The majority based its opinion on the argument in *Schware v. Board of Bar Examiners*.[4] The Supreme Court of the United States there held that:

> A State cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law*.[5] (Emphasis added.)

In the *Schware* case, an attorney had been denied application to take a state bar examination on the ground that his past membership in the Communist party, prior arrest record, and use of aliases evinced substantial doubt as to his good moral character. The United States Supreme Court held that there was no basis for such doubt, since these acts occurred fifteen years prior to his application to take the examination, and all evidence showed his present character within recent years was and had been excellent. The Court further stated that the nature of the offense which the applicant has committed must be taken into account to determine whether the person's character is good.[6]

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[3] RCW 18.32.270 provides:

> The revocation or suspension of a license shall be in writing signed by the director, stating the grounds upon which such order is based and the aggrieved person shall have the right to appeal from such order within fifteen days after a copy thereof is served upon him, to the superior court of Thurston county, which shall hear the matter de novo. In such appeal the entire record shall be certified by the director to the court, and the review on appeal shall be confined to the evidence adduced at the hearing before the director.

[4] 353 U.S. 232 (1957). *In re* Flynn was handed down in July, 1958. In August a report of the Conference of Chief Justices of state courts was published, criticizing the action of the United States Supreme Court in Schware v. Board of Bar Examiners. The report stated that such decisions as the Schware case represented an infringement on the states' power and freedom to select their own bars composed of attorneys of good character. CONFERENCE OF CRIEF JUSTICES, REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS (1958).

[5] 353 U.S. 232, 238-39 (1957).

[6] 353 U.S. 232, 243 (1957).

In like manner, the Washington supreme court found that inadvetently employing a dentist who 1) was a graduate of an accredited dental school, 2) was licensed in at least one other state, although not in Washington, and 3) had previously been employed by the state itself (at Firland Sanitorium, Seattle) did not indicate "a state of mind which should be characterized as such untrustworthiness so as to constitute a 'valid reason' for revoking his license and tossing him out of his profession."[7]

To assess a penalty as drastic as revocation of a professional license, it is not enough for the administrative board to find a bare violation of the statute in its literal wording. There must be some "rational connection" with the ability and fitness to practice the profession and the punishment. To find such "rational connection" necessitates going beyond the mere fact that the particular act defined an unprofessional conduct was done. There must be evidence of something more that will constitute a "valid reason" for denying a means of livelihood. To do otherwise does not meet constitutional due process standards.[8]

The dissenting opinion suggests an inconsistency in the majority's reasoning. Since the court remanded the action for appropriate penalty, it admits there is some rational basis for disciplinary action. How can this be reconciled with the statement by the majority that there is no rational connection between the statutory violation and ability to practice? Apparently the majority meant there was no rational connection between the violation and this particularly severe penalty, i.e., revocation, which implies an unfitness for practice.

The conflict between the majority and minority opinions in *In re Flynn* again directs attention to the struggle courts have with the problem of the scope of judicial review.[9] It would seem that a determination of whether a dentist is "fit" to practice or is not requires intimate and specialized knowledge of the field of dentistry and its professional obligations. The appropriate penalty or disciplinary action for misconduct ordinarily should be left to the discretion of the administrative board established by statute.

Perhaps the court would have had much less difficulty with this case had the administrative board stated in more detail the grounds on which the penalty was assessed. Absent such an explanation

[7] *In re* Flynn, 152 Wash. Dec. 519, 524, 328 P.2d 150, 154 (1958).
[8] 152 Wash. Dec. 519, 522-523, 328 P.2d 150, 153 (1958); *cf. In re* Kindschi, 151 Wash. Dec. 466, 319 P.2d 824 (1958).
[9] See Peck, *The Scope of Judicial Review of Administrative Action in Washington*, 33 WASH. L. REV. 55 (1958).

grounded on the standards of professional competence, it appears that the administrative determination rested on a conclusion that, as a matter of statutory construction, violation of the statute per se required revocation of a license. It is clear that the court, which had no reason to defer to an administrative view on problems of statutory construction, reached a contrary conclusion.

It is to be noted that the court itself did not assess a penalty in lieu of that of the director of licenses, but remanded the case to the director for the appropriate disciplinary action. Thus the court stated it was not substituting its own judgment for that of the director.[10] Had the board expressly stated in its findings what professional standard a dentist is expected to meet and clearly indicated how, in terms of professional standards, such a violation established that the dentist was unfit for practice, it is quite possible that the court might have affirmed the director's action of revocation.[11] The Washington supreme court apparently will uphold the statutory authority of an administrative body to assess an appropriate penalty, so long as there is a demonstrated rational connection between misconduct and the ability to practice the profession.

A second and important question involved in *In re Flynn* was whether the practice of dentistry should be viewed as a constitutionally protected right or an unprotected privilege. *In re Harmon*,[12] a recent case relied on by the dissenting judges, also involved the revocation of a dentist's license by administrative action. The primary issue on appeal in the *Harmon* case was whether, on appeal of an administrative action, the superior court's jurisdiction was limited to review of the record for determination if the action was arbitrary, capricious, or contrary to law.[13] The court in the *Harmon* case held that the

[10] This action was sharply criticized by the dissenting judges as doing indirectly what the court said it could not do directly. The court can keep remanding the case until the director's penalty is "appropriate" in the eyes of the court.

[11] In SEC v. Chenery Corp., 318 U.S. 80 (1942), the SEC disapproved a reorganization plan of a public utility holding company that would have allowed considerable voting control to be held by corporate managers. The grounds of the Commission's decision rested on the "fiduciary duty" of fair dealing required of corporate managers and upon "equitable principles," by reason of which the Commission could not approve the organization plan. The Supreme Court remanded with instructions that the Commission clearly indicate adequate grounds for its decision. The case came to the Supreme Court a second time in SEC v. Chenery Corp., 332 U.S. 194 (1947). This time the identical action of the Commission was affirmed. The grounds for that action by the SEC were extensively stated, the theory underlying its action no longer vague and indecisive. The Commission in effect established itself as being experienced in reorganization matters and clearly explained under the facts of the case the reasons behind its decision.

[12] 152 Wash. Dec. 81, 323 P.2d 653 (1958).

[13] Household Finance Corp. v. State, 40 Wn.2d 451, 244 P.2d 260 (1952).

superior court was so limited and affirmed the director's action. The difference between the *Harmon* case and *In re Flynn* lies in the fact that the only assignment of error in the *Harmon* case was that the hearing de novo as provided in RCW 18.23.270[14] was an insufficient review and divested the appellant of a valuable property right without due process of law. It was not contended on appeal that the action taken by the director of licenses was arbitrary, capricious, or unsupported by the evidence.

In the *Flynn* case the appeal was predicated on the allegation that the penalty assessed by the director in this particular instance was arbitrary and capricious. The right to administer such a penalty *under the appropriate circumstances* was not challenged.

The court in the *Harmon* case also stated that the "privilege of practicing dentistry is subject to regulation under the police power of the state."[15] The dissenting judges in *In re Flynn* relied strongly upon this point, saying flatly that the license to practice dentistry is a privilege and not a property right, and thus not subject to the due process standard. The majority neatly parried the property right or privilege argument, citing with approval the statement by the Court in *Schware v. Board of Bar Examiners*[16] that there need be no discussion of whether law practice is a privilege or a right. *"Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons."*[17] The court further stated that "due process considerations apply in the field of licensing which involves, at the very least, quasi-property rights."[18] Thus the Washington court in the *Flynn* case avoided determination of the licensing problem with a mechanical technique in which labels assume controlling importance. It remains to be seen if the court will wholly abandon the right-privilege concept which it has used in other licensing cases.[19]

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[14] See note 3, *supra*.
[15] 152 Wash. Dec. 81, 82, 232 P.2d 653, 655 (1958).
[16] 353 U.S. 232 (1957).
[17] *In re* Flynn, 152 Wash. Dec. 519, 522, 238 P.2d 150, 153 (1958), quoting Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957). See also *Ex parte* Garland, 71 U.S. 366 (1867).
[18] 152 Wash. Dec. 519, 521, 238 P.2d 150, 152 n.2 (1958).
[19] State *ex rel.* Puyallup v. Superior Court, 50 Wash. 650, 97 Pac. 778 (1908) (liquor license); State *ex rel.* Aberdeen v. Superior Court, 44 Wash. 526, 87 Pac. 818 (1906) (liquor); Bungalow Amusement Co. v. Seattle, 148 Wash. 485, 269 Pac. 1043 (1928) (dance hall).