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Validity of Wis. Stat. (1954) Section 215.02(18), Regulating Admittance in the Savings and Loan Business

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VALIDITY OF WIS. STAT. (1954) SECTION 215.02 (18), REGULATING ADMITTANCE IN THE SAVINGS AND LOAN BUSINESS

The extent of discretionary licensing power which may validly be delegated to an administrative agency in the exercise of the states' police power is one of the knottiest problems which confronts the courts today. No hard and fast rule can be laid down, and whether a specific delegation is constitutional or not, primarily depends on such factors as the nature of the business, profession or occupation to be subject to the agency's licensing authority and recognized scope of the police power over that business, profession or occupation.

The purpose of this article is to discuss the validity of Wis. Stats. (1954) Sec. 215.02 (18), authorizing the commissioner of savings and loan associations in the State of Wisconsin to accept or deny applications to enter the savings and loan business. This section reads as follows:

> The commissioner shall have discretionary power in the granting of certificates of authority to incorporators desiring to organize such association. He may also refuse to issue certificates of incorporation when the plan of operation, outlined in the articles of incorporation and the by-laws submitted, does not comply with the statutes or the accepted and prevailing practices of associations in this state, or when the incorporators or any of them are not of such character, responsibility and general fitness as to warrant the belief that the association will be conducted for the best interests of the members; when the location of the association is so close to an existing association that its business might be interfered with and the support of the new association would not be such as to assure its success; or when other good and sufficient reasons exist for such refusal.

From a perusal of Sec. 215.02(18) as quoted above, it can be seen that the legislature has designated three specific grounds upon which the commissioner may deny applications: (a) if applicants do not comply with the statutes or accepted and prevailing practices of associations in this state, in their articles of incorporation and by-laws as submitted to the commissioner; (b) if applicants be of such character, responsibility and general fitness, as to warrant the belief that the association will not be conducted for the best interests of the members; (c) if location of proposed association is not a sufficient distance from an existing association, that its business might be interfered with, and the support of the new association would not be such as to assure its success.

Within these standards the commissioner has authority to decide the merits of each application. This delegation of discretion would most probably be upheld by the Supreme Court on the basis of the state's police power.

However, Wis. Stats. (1954) §215.02 (18) also delegates to the commissioner authority to deny applications "whenever any other good and sufficient reasons exist for such refusal." On its face this language appears to delegate unfettered, legislative discretion to the commissioner. The only standards imposed upon him are those of his own conscience, and his decision as to what constitutes a good and sufficient reason is apparently fiat. It is the opinion of this writer that this statute is unconstitutional on the grounds that it delegates legislative discretion to an individual, therefore depriving the applicants of due process and the equal protection of the laws; and also gives authority to prohibit rather than to regulate a lawful business.

Although the issue of the constitutionality of the various regulatory statutes has been before the courts numerous times, the precise question of what degree of discretion may validly be delegated to an administrative officer to give or refuse permission to enter the savings and loan field has not arisen. The decided cases can be distinguished by the fact that they either deal with the regulation of savings and loan associations already in existence, or they interpret statutes dissimiliar to the one here discussed.[1] The various decisions are helpful, therefore, only insofar as the dicta they contain may indicate the attitude of the courts toward these associations.

Since the type of business subject to the delegated licensing power is of great importance, it is prerequisite to any discussion of the validity of §215.02 (18), to inquire into the nature of the savings and loan association.

These quasi-public corporations first came into existence in the United States in 1831, when an association was organized in Pennsylvania, now known as the mother state of saving and loan associations.[2] With the passage of time, it was recognized that these associations, like banks and similar financial institutions, might become dangerous to the public welfare if not regulated properly. Statutes were enacted in the majority of states until in some jurisdictions, the savings and loan associations became mere creatures of statute.[3]

Due to the fact that these associations differ somewhat in operation, a precise definition is difficult. The general principals and purposes of the various associations are, however, quite similar, and subject to little

[1] See, for example, State ex rel Great American Home Savings Institution et al. v. Lee 288 Mo. 679, 133 S.W. 20, (1921) where the court held that permission to incorporate a savings and loan association could not be denied for grounds not specified in the statutes governing incorporation of a new association.

[2] Sundheim, *Law of Building and Loan Associations,* 3rd ed. (1931). The author here also points out that reasonable facsimilies of the modern savings and loan associations have been in existence in China as early as 200 B.C.; and they were known in England toward the end of the 18th century.

[3] Rocker v. Cardinal Building and Loan Association 13 N.J. Misc. 399 179 Atl. 667, (1935) White v. Wogaman, 47 Ariz. 195, 54 P.2d 793 (1936).

dispute. As defined in *Holt* v. *Aetna Building and Loan Association,* 190 Pac. 872, 78 Okla. 307 (1920),

> A building and loan association is an organization created for the purpose of accumulating a fund by the monthly subscription of savings of its members to assist them in building or purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the association upon good security.

As indicated, a savings and loan association has two primary purposes; to encourage thrift among people of moderate income, and to aid them to borrow money for the purpose of erecting or purchasing a home. These associations do not interfere with other lending institutions.[4] The court and textwriters have not failed to recognize those aspects of the savings and loan association beneficial to the entire community, and they have many times been highly praised.[5]

Probably the most important case involving a savings and loan association in Wisconsin is *State ex rel Cleary v. Hopkins Street Building and Loan Association,* 257 N.W. 684, 217 Wis. 179 (1934),[6] which involved the issue of whether the Home Owners' Loan Act of 1933, to the extent that it permits the conversion of state savings and loan associations into federal ones in contravention of the laws of Wisconsin, is an unconstitutional encroachment upon the powers reserved to the states by the Tenth Amendment to the Federal Constitution. In holding such an encroachment unconstitutional the court used the following language:

> Building and loan associations are quasi-public corporations chartered to encourage thrift and promote the ownership of homes, with powers and immunities peculiarly their own . . . Building and loan associations organized in Wisconsin are subject to strict supervision by administrative agencies of the state both in the course of doing business and in that of liquidation.

As can be seen from the quote above, there is little doubt that these associations are subject to the police power of the state.[7] However, this case again involves an association already in existence and moreover, the strong language used by the court can probably be attributed in part to the fact that the state's sovereignty was being threatened.

[4] First Nat. Bank of Glendive v. Dawson County et al, 66 Mont. 321, 213 Pac. 1097 (1923).

[5] See in particular Sundheim, *Law of Building and Loan Associations,* Chap. I, *supra,* note 2, also Rocker v. Cardinal Bldg. and Loan Ass'n of Newark, *supra,* note 3, White v. Wogaman, *supra,* note 3; Acklin v. Peoples Saving Association, 293 F. 392 (D.C. Ohio 1923).

[6] Appeal dismissed and certiorari granted, Hopkins Federal Savings and Loan Ass'n v. Cleary, 55 S.Ct. 925, 295 U.S. 721, 79 L.Ed. 1675; affirmed 56 S.Ct. 235, 296 U.S. 315, 80 L.Ed. 251, 100 A.L.R. 1403.

[7] See also State ex rel Schomberg v. Home Mut. Bld'g and Loan Ass'n, 220 Wis. 649, 265 N.W. 701 (1936), and Julien v. Model Bldg. and Loan Inv. Ass'n, 116 Wis. 79, 92 N.W. 561 (1902).

Actually, the case only illustrates the undisputed fact that the state has the right to regulate these associations once they are incorporated.[8] Nowhere, however, is there any authority to be found to sustain the proposition that a savings and loan association is not a lawful business which every man has a right to enter, subject to compliance with reasonable regulations. In *Brady v. Mattern* 100 N.W. 358, 125 Iowa 158 (1904), a case involving the constitutionality of a statute prescribing that only an incorporated association may carry on a savings and loan business, the court said:

> The legislature in the exercise of the police power may regulate the conduct of building and loan associations and in its discretion may limit the carrying on of such business to incorporated associations. . . . The absolute prohibition of unincorporated associations and individuals from engaging in the building and loan business does not create a monopoly *so long as the business is open to all corporations complying with reasonable statutory regulations.* (emphasis added).

Being a lawful business, it would appear the general rule relating to delegation of discretion to issue or withhold licenses is also applicable to savings and loan associations. As stated in 12 A.L.R. 1493:

> The generally accepted rule is to the effect that a statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business, profession, appliance, etc., in public officials, without prescribing a uniform rule of action, or in other words, which authorized the issuing or withholding of license permits, approvals, etc., according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rules or specified conditions to which all similarily situated might knowingly conform is unconstitutional and void.[9]

This rule has been expressed in various forms in almost every case involving administrative agencies. The leading case on the subject of delegating licensing power is probably *Wick Wo.*, v. *Hopkins* (1886), 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064, where the court held invalid an ordinance vesting arbitrary licensing power of the laundry business in an administrative board. The decision of the court can best be summed up in the following language.

> It is a fundamental principle of our system of government that the right of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus.

That the State of Wisconsin follows the general rule as stated in

[8] See for example the cases cited at notes 3, 5, 6, and 7; also the annotations at 86 A.L.R. 826, 87 A.L.R. 1020, 87 A.L.R. 1149 and 12 C.J.S. Building and Loan Associations, §4.

[9] See also supplementary annotations in 54 A.L.R. 1104 and 92 A.L.R. 401, with cases cited therein.

A.L.R. above was illustrated as early as 1893, when the Wisconsin Supreme Court in the case of *In re Garrabad,* 84 Wis. 585, 54 N.W. 1104, held that an ordinance conferring arbitrary power upon an individual to grant or deny permission to parade the streets, was unconstitutional and void as denying equal protection of the law, quoting with approval the *Wick Wo.* case, and this rule has many times been reiterated as in the *Clintonville Transfer Line, Inc. v. Public Service Commission,* 248 Wis. 59, 21 N.W.2d 5 (1945), where the court stated:

> It is not competent for the legislature even in a circumscribed field, to grant to an administrative agency unlimited legislative power. The power granted must be exercised in accordance with standards and limitations. . . . The power exercised by the commission must be exercised in accordance with some statutory standard fixed by the legislature or it constitutes the exercise of the kind of legislative power that cannot be delegated.[10]

In the most recent case to come before the Wisconsin Court presenting a question of this sort, the court again stated:

> It is also the established law that a legislative act may validly confer upon an agency of the government authority to grant or to withhold a license provided that where discretion is to be exercised by such agency proper standard or guides for the use of the discretion are established by the act and that the act may not be construed as conferring upon the agency the power to exercise its discretion unreasonably, arbitrary or capriciously.[11]

There is therefore, little doubt that the Wisconsin Court has always recognized the general principles as heretofore expressed. It seems that the words "good and sufficient reasons" constitute no sufficient standard and that the delegation here in question is unconstitutional, unless it can be maintained that it is necessary to the protection of the public health, safety and welfare that arbitrary power be vested in individual authorizing him to regulate admittance into the savings and loan business for reasons good and sufficient to himself.

It has been held that if a state can exclude a business completely, it can delegate arbitrary power to an individual to license it.[12] The Wisconsin Supreme Court has in effect followed this theory in a restricted line of cases, as for example in *Vieau v. Common Council of City of Chippewa Falls,* 235 Wis. 122, 292 N.W. 297 (1940) where the court held that the regulation of the sale of intoxicating liquors does not come within the equality provisions of the Federal Constitution. Of

[10] This case involved the refusal by the Public Service Commission to grant a motor carrier certificate of convenience. The court here also points out that equal protection of the law applies to the grant of privileges, as well as a regulated right.

[11] Robert C. Graebner v. Industrial Commission of Wisconsin, 269 Wis. 252, 68 N.W.2d 714 (1955). This case involves the constitutionality of a statute regulating the organization of an employment agency. Constitutionality of the statute was upheld by a 4 to 3 split decision.

[12] Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930).

course in cases involving immediate danger to health, morals or welfare of the general public, the justification for the exercise of the police power is clear.

It is however, a fundamental principle of our government that the police power of the state must be exercised in a manner reasonably necessary to the accomplishment of the purpose, and that it must not be unduly oppressive.[13] The difficulty of course, again arises in the application of this rule to a specific case. The writer fails to see why it is reasonably necessary in the exercise of the police power to delegate to an individual arbitrary power to regulate admittance into the savings and loan business.

Certainly the inherent nature of a savings and loan association is not such that merely granting authority to incorporate gives rise to immediate danger to the public welfare.[14] Neither can it be maintained that once permission to organize is granted, the state relinquishes all control over the new association. Quite on the contrary, by the terms of Chapter 215, the state retains complete control over the operation and liquidation of all state saving and loan associations, in addition to regulating the organization, by prescribing rules relative to the articles of incorporation, by-laws, character of incorporators, and location of the proposed association.

An examination of the statutes of other states in respect to the provisions for incorporating new saving and loan associations is helpful insofar as they indicate that definite standards can be prescribed without, apparently, endangering public welfare. For example, the Illinois Statute reads as follows:

> **Licenses, how obtained:** Whenever any number of persons, not less than ten (10) may desire to become incorporated as a mutual building, loan or homestead association, for the purpose of accumulating funds to be loaned to the members thereof only, they shall make a statement to that effect under their hands and seal, duly acknowledged before some officer in the manner provided for the acknowledgment of deed. Such statement shall set forth the name of the proposed association, the capital stock to be accumulated, its location, and the duration of the association, which statement shall be filed in the office of the Auditor of Public Accounts. The Auditor of Public Accounts shall thereupon issue to such persons a license as commissioners to open books for subscription to the shares of stock of said association at such time and place as they may determine;

[13] An enumeration of authority here would be redundant. For Wisconsin decisions on point, see for example: State v. Withrow, 280 N.W. 364, 116 A.L.R. 1310 (1938); State v. Chittendon, 134 Wis. 891, 107 N.W. 137 (1906), and State ex rel Wisconsin Inspection Bureau et al., v. Whitman, State Comm'r of Insurance, 220 N.W. 929 (1928).

[14] Sundheim, in his text *Law of Building and Loan Ass'n, supra,* note 2, points out that of all financial institutions, these organizations have suffered the least financial loss.

> provided, however, that the Auditor of Public Accounts may withhold the issuing of a license to commissioners to open books for subscriptions to the share of stock of said association if he is not satisfied as to the personal character and standing of the officers or directors to be elected or if the proposed location would not warrant the issuance of a charter, but no charter shall be issued to two associations having the same or similar names.[15]

Although a certain amount of discretion is vested in the Auditor of Public Accounts as to the character of the proposed incorporators, and the location of the new association, no blanket discretion for "good and sufficient reasons" is delegated as there is to the commissioner in Wisconsin. In fact, the majority of states appear to have statutes closely akin to that of Illinois.[16] None have been found that provide for the delegation of such broad licensing discretion as does Sec. 215.02 (18). It would seem that this fact alone indicates that the arbitrary power given to the commissioner in Wisconsin is unnecessary.

Moreover, it can be contended that the delegation here, in effect gives to the commissioner the power to prohibit rather than to regulate a lawful business. He could for example, decide that no more savings and loan associations were needed in Wisconsin, and refuse to approve any further applications, that being good and sufficient reason by him.

Since the savings and loan association business is analogous to the banking business,[17] an examination of the statute regulating the incorporation of a bank in Wisconsin would perhaps best illustrate that definite standards may be specified. Wis. Stats. (1954) Sec. 221.01 (5) reads as follows:

> The banking commission shall thereupon ascertain at the hearing and from the best sources of information at its command, and by such investigation as it may deem necessary, whether the character, responsibility and general fitness of the persons named in such application are such as to command confidence and to warrant the belief that the business of the proposed corporation will be honestly and efficiently conducted in accordance with the intent and purpose of this chapter; and whether public convenience and advantage will be promoted by allowing such bank to organize; and it also shall investigate the character and experience of the proposed officers, the adequacy of existing banking facilities, and the need of further banking facilities, and the need of further banking capital; the outlook for the growth and development of the city, town or village in which such bank is to be located, and the surrounding territory from which patronage would be drawn; the methods and banking practices of the existing bank or banks; the interest rate which

[15] Illinois Revised Statutes (1953) Chap. 32, §214.

[16] See for example Code of Iowa (1954) Chapter 534, §534.9; Ky. Rev. Stats. (1953), §289.030; Corrick, General Stats. of Kan. Anno. Chap. 17-5201-02; Del. Code (1954) Chap. 5, §1723; Minn. Stats. (1953), §51.07; Rev. Stats. of Maine (1954), Chap. 59, §158.

[17] Brady v. Mattern, 125 Iowa 158, 100 N.W. 358 (1904).

> they charge to borrowers; the character of the service which they render the community, and the prospects for the success of the proposed bank if efficiently managed. Such investigation shall be completed within ninety days from the filing in the office of the banking commission of proof of publication and the making of the deposit herein required, but in the event a majority of the applicants and the banking commission mutually agree to it, the time may be extended an additional period of sixty days.

As can be seen, although wide discretion is vested in the banking commission, no unfettered authority is conferred. It would appear that the banking business is no less dangerous to financial safety, or less complicated than a savings and loan association. In discussing the right to enter the banking business, the Wisconsin Supreme Court stated:

> Banking is a common law right pertaining equally to every member of the community, and cannot be prohibited under a Constitution which recognizes the right and grants power to the Legislature to regulate and supervise it. . . .
>
> Under the Constitution recognizing the right of all persons to engage in the banking business and granting power to the Legislature to regulate and supervise it, banking may be regulated so far as can be reasonably necessary to secure the public welfare and safety, but it must be true regulation and not prohibition under the guise of regulation.[18]

In light of the similarity between these two financial institutions, the court could, it seems, readily extend the rule of *Weed v. Bergh* to the statute here discussed.[19]

To sum up, it is the conclusion of the writer that the delegation of authority to the Wisconsin Commissioner of Savings and Loan Associations would be declared unconstitutional if the issue came before the Supreme Court of Wisconsin.

The court might decide the words "good and sufficient reasons" constitute a sufficient norm to satisfy the requirements of due process and equal protection of the law, or they might hold that a savings and loan association is of such an inherently dangerous nature that the vesting of complete discretion in an individual is necessary for the protection of the public welfare.

In support of the delegation in question here, it may be said that it is of great importance that the financial stability of these associations be maintained, since the failure of any one association might have adverse effect on the community, and therefore, it is necessary they be

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[18] Weed v. Bergh, 141 Wis. 569, 124 N.W. 664 (1910).

[19] The language of the court in State ex rel Cleary v. Hopkins Street Building and Loan Association, 217 Wis. 179, 257 N.W. 648 (1934), to the effect that these associations are not banks, nor have the powers or privileges of banks, would appear not to apply to the situation herein discussed.

strictly supervised and regulated to protect the public from the evils of such collapses. As stated in one case:

> The court knows judicially that building and loan associations are financial institutions of major importance to the credit system of the state, and that by reason of their depreciated assets owing to a prolonged period of economic depression and lack of income they cannot meet heavy withdrawals, and that the protection of building and loan associations against the catastrophe of excessive withdrawals is within legislative power.[20]

While this may be conceded, it is the opinion of the writer that any protection which might be achieved by a provision such as contained in 215.02 (18) is negligible in the light of the fact that by it are sacrificed not only the fundamental rights of equal protection and due process, but also the theory of free enterprise. After all, if such arbitrary power be allowed here, why not also in the professions, or other occupations. Are not the same arguments available in favor of permitting law graduates to practice law in Wisconsin only upon their having received authority to do so by some state agency which has the right to completely prohibit the admission of any new members to the bar? Would not the possible evils to be remedied be far outweighed by the evils which might result from this system? It is the suggestion of this writer that if the exercise of discretion by the commissioner of savings and associations in and for the State of Wisconsin were confined to within the definite standards as contained in Sec. 215.02 (18), no protection would be sacrificed, and the spirit of the constitution would be preserved.

The words of Chief Justice Broadfoot in a recent case sums up the situation clearly.

> It used to be quite clear that the framers of our state and federal constitutions did not incorporate blindly the provisions guaranteeing life, liberty, and the pursuit of happiness. And it is equally clear today that it was not intended by those framers of the constitutions that modern efforts to insure integrity in administrative conduct of business should violate those provisions to the extent of classifying by restriction those who may not engage in a lawful calling to be selected by an individual. Competition and individual enterprise have not been entirely written off as obsolete. A conservatism that clings to the broad fundamentals written into our bill of rights is well grounded liberalism. True the public may be protected against the machinations of men lacking in integrity, but that does not mean that one of several qualified men shall be permitted to enter a legitimate field of enterprise and the opportunity denied to others.[21]

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[20] Harry M. Veix v. Seneca Bldg. and Loan Ass'n of Newark, 126 N.J.L. 314. 19 A.2d 219.

[21] Robert C. Graebner v. Industrial Commission of Wis., *supra*, note 11, (dissenting opinion).