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Constitutional Law--An Invalid Exercise of the Police Power in the Regulation of the Practice of Optometry

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—AN INVALID EXERCISE OF THE POLICE POWER IN THE REGULATION OF THE PRACTICE OF OPTOMETRY. *State ex rel. Board of Examiners in Optometry v. Lawton*, 523 P.2d 1064 (Okla. 1974).

Plaintiff Lawton brought a declaratory judgment action to enjoin the State Board of Examiners in Optometry from taking action against him for his obvious violation of a state statute. In 1965, Dr. Lawton, a licensed optometrist, located his office on the opposite side of the hall from Lee Optical Company in a suburban shopping plaza. This close proximity was unknown to either party at the time they signed their leases. The Oklahoma Legislature subsequently passed a statute which precluded an optomerist from practicing "his profession adjacent to or in such geographical proximity to a retail optical outlet, optical store, optical dispensary or any establishment where optical goods and materials are purveyed to the public so as to induce patronage for himself thereby."[1] This provision was enacted in 1971 as part of "an Act relating to the practice of optometry"[2] for the purpose of raising the practice of optometry to the highest ethical and professional level by ridding the field of any taint of commercialism.[3] Section 597 of the Act provides for criminal penalties as well as the sanction of revocaion of the optometrist's license.

Prior to the enactment of this legislation the Board of Optometry had instituted proceedings to revoke Dr. Lawton's license under article III, sections 5 and 6 of the Rules and Regulations of the Board of Examiners in Optometry.[4] Dr. Lawton was joined with Dr. C.F. Sum-

1. OKLA. STAT. tit. 59, § 594 (1971).
2. OKLA. STAT. tit. 59, §§ 593-597 (1971).
3. OKLA. STAT. tit. 59, § 593 (1971).
4. OKLA. STAT. tit. 59, §§ 583, 585 (1961) provided the Board with authority to make regulations and institute revocation proceedings for violations. The Board, comprised solely of optometrists, amended their Rules and Regulations to include the following:

mers in *State ex rel. Board of Examiners in Optometry v. Summers*,[5] and together they challenged the authority of the Board's revocation of their licenses. The *Summers* court held that the Board's statutory authority to promulgate rules was not so comprehensive as to allow for the revocation of the optometrist's license for offenses enumerated in a separate section of the title.[6] The enactment of section 594 into title 59 was merely a codification of article III, section 6 of the Board Rules.

The *Lawton* court relied on a similar decision of the Supreme Court of Colorado, *Colorado State Board of Optometric Examiners v. Dixon*,[7] in liberally construing the Oklahoma Declaratory Judgments Act.[8] This action was held to have been appropriately brought by a person who potentially suffers the loss of profession or criminal prosecution. Dr. Lawton contended that the statute was unconstitutional because of the vagueness and ambiguity of its terms. He argued that "adjacent" and "geographical proximity" lacked clear definition for application in varied circumstances and therefore violated the due process clauses of the United States and Oklahoma Constitutions[9] for lack of clear standards to gauge the individual's conduct. The Board of Optometry relied upon the mandate of *Williamson v. Lee Optical Co.*[10] In *Williamson* geographical location was held to be a possible consideration in the liberal use of the police power by the legislature. This consideration had enough "rational relation" to the objective of the legislation to be within the constitutional bounds.[11]

The Oklahoma Supreme Court in rendering the unanimous decision accepted Dr. Lawton's argument and the reasoning of the United States Supreme Court in *Connally v. General Construction Co.*[12] In *Connally* the Court held that a criminal statute must be sufficiently unequivocal in its proscription to satisfy due process. The lack of a fairly

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5. No optometrist shall, with intent or purpose to induce patronage for himself, practice optometry in such proximity to a retail optical outlet as to induce the public to associate his practice with such retail optical outlet.

6. No optometrist shall knowingly allow or permit any person engaged in or interested in the sale of optical goods, appliances or materials to solicit business for him.

5. 487 P.2d 706 (Okla. 1971).

6. OKLA. STAT. tit. 59, § 944 (1971). The penalties for violations of this section are criminal prosecution and civil injunction.

7. 165 Colo. 488, 440 P.2d 287 (1968).

8. OKLA. STAT. tit. 12, § 1651 (1971).

9. U.S. CONST. amend. XIV, § 1; OKLA. CONST. art. II, § 7.

10. 348 U.S. 483 (1955).

11. *Id.* at 491.

12. 269 U.S. 385 (1926).

explicit definition in the terms "adjacent" and "geographical proximity" resulted in their failure to meet this standard. *Williamson* was distinguished because it did not define the possible uses of geographical location with any particularity.

Although the court in *Lawton* addressed itself mainly to the proximity question, many of the same "commercialism" arguments have been raised concerning the validity of the regulation of corporations in the field of optometry. Lawmaking bodies have long been divided on the extent to which regulation of optometry is necessary to adequately protect the public. The basic issue is whether a mercantile corporation is in effect practicing optometry when it either employs or leases office space to an optometrist. The main conceptual difference is whether the practice of optometry is characterized as a "learned profession"[13] similar to medicine, or a "skilled calling"[14] similar to accountancy. This divergent outlook is displayed in the statutory proscriptions against corporate involvement in optometry. The "learned profession" view is generally rejected in favor of a trade classification where the presence of leasing or employment arrangements are held not to constitute practicing optometry.[15] In *Silver v. Lansburgh & Bro.*,[16] a mercantile corporation engaged licensed optometrists in its retail optical department. An injunction against this arrangement was denied on the grounds that the profession of optometry was similar to that of engineers and accountants and dissimilar to the medical and legal professions. The optometrist's duties were characterized as merely a technical observation without the corresponding confidential relationship found in the professions. It was conceded that certain standards should be imposed but that corporations could maintain such standards as readily as individuals. The thrust of this decision was that the purpose of the statute involved,[17] to protect the public from inexpertness by insuring competent care for the eye, was achieved in the employment of licensed optometrists.

13. Silver v. Lansburgh & Bros., 72 App. D.C. 77, 111 F.2d 518 (D.C. Cir. 1940).
14. State *ex rel.* Harris v. Kindy Optical Co., 235 Wis. 498, 292 N.W. 283 (1940).
15. *See* Silver v. Lansburgh & Bro., 72 App. D.C. 77, 111 F.2d 518 (D.C. Cir. 1940); Georgia State Exam. in Optom. v. Friedman's Jwlrs, 183 Ga. 669, 189 S.E. 238 (1936); Klein v. Rosen, 327 Ill. App. 375, 64 N.E.2d 225 (Ct. App. 1936); State v. Goodman, 206 Minn. 203, 288 N.W. 157 (1939); State *ex rel.* McKittrick v. Gate City Optical Co., 339 Mo. 427, 97 S.W.2d 89 (1936); Golding v. Schubach Optical Co., 93 Utah 32, 70 P.2d 871 (1937); State *ex rel.* Harris v. Kindy Optical Co., 235 Wis. 498, 292 N.W. 283 (1940).
16. 72 App. D.C. 77, 111 F.2d 518 (D.C. Cir. 1940).
17. D.C. CODE ANN. § 2-501 *et seq.* (1973).

Recently, in *Dixon v. Zick*,[18] the Colorado Supreme Court invalidated an optometry board regulation, similar to the present Oklahoma statute.[19] Although the sole issue before the *Dixon* court was whether the regulation exceeded the statutory authority of the agency, Justice Kelley commented that:

> No reason has been suggested, and we can find none, as to why those conducting a commercial or mercantile business should be singled out by the Board from the broad class of potential landlords from whom a licensed optometrist may not lease space in which to practice his profession. There is no evidence that there is, in a rental relationship between an optometrist and a commercial or mercantile establishment, any inherent evil or a propensity to violate the statutorily proscribed conduct of an optometrist or that the conduct of the practice on such premises affects in any manner the public health, safety and welfare. We can find no reasonable basis for Rule 11 in the Act.[20]

In Oklahoma,[21] and other jurisdictions,[22] corporations are prohibited from either employing or leasing office space to licensed optometrists. Generally, this view is based on the theory that optometry is a learned profession and that such arrangements constitute practicing optometry without being licensed.

The Supreme Court of the United States, in *Semler v. Oregon State Board of Dental Examiners*,[23] provided the authority for those states which chose to isolate the practice of optometry to the sole practitioner. In *Semler*, the Court held that the legislature has the discretionary power to regulate the "ethics" of a profession by deciding which practices will generally be unscrupulous, and therefore prohibit such

18. 179 Colo. 278, 500 P.2d 130 (1972). This case is the sequel to Colo. State Bd. of Optom. Exam. v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

19. OKLA. STAT. tit. 59, § 596 (1971); OKLA. STAT. tit. 59, § 944 (1971).

20. 500 P.2d at 133-34.

21. OKLA. STAT. tit. 59, § 944 (1971).

22. *See* Funk Jewelry Co. v. State, 46 Ariz. 348, 50 P.2d 945 (1935); Lieberman v. Conn. State Bd. of Exam. in Optom., 130 Conn. 344, 34 A.2d 213 (1943); State *ex rel.* Beck v. Goldman Jewelry Co., 142 Kan. 881, 51 P.2d 995 (1935); Kendall v. Beiling, 295 Ky. 782, 175 S.W.2d 489 (Ct. App. 1943); McMurdo v. Getter, 298 Mass. 363, 10 N.E.2d 139 (1937); Sears, Roebuck & Co. v. State Bd. of Optom., 213 Miss. 710, 57 So. 2d 726 (1952); State *ex rel.* Sisemore v. Standard Optical Co., 182 Or. 452, 188 P.2d 309 (1947); Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419 (1938); State *ex rel.* Loser v. National Optical Stores Co., 189 Tenn. 433, 225 S.W.2d 263 (1949); Ritholz v. Commonwealth, 184 Va. 339, 35 S.E.2d 210 (1945); State *ex rel.* Standard Optical Co. v. Super. Ct., 17 Wash. 2d 323, 135 P.2d 839 (1943); Eisensmith v. Buhl Optical Co., 115 W. Va. 776, 178 S.E. 695 (1934).

23. 294 U.S. 608 (1935).

practices for the protection of the public even if it hinders honest practices.

This application of the police power was applied to optometry in *Williamson v. Lee Optical Co.*[24] Justice Douglas, writing for a unanimous Court, analogized office rentals to optometrists in commercial establishments to the prohibition of a corporation practicing dentistry. Both laws have the purpose of raising the treatments to professional levels and reducing the possibility of the "taint of commercialism".[25]

Under this mandate, measures have been enacted and validated prohibiting solicitation and advertising;[26] employment of optometrists by corporations, partnerships, firms or any other unlicensed individual;[27] and leasing space to optometrists in mercantile establishments.[28] The prohibition against corporate employment of optometrists has been based on rationales ranging from the requirement that each optometrist must practice under his own name,[29] to the disability of the corporate entity to meet the licensing requirements.[30] The primary objection (despite separate statutory proscriptions)[31] is that illegal rebates or kickback agreements will abound and the corporation will induce patronage to the optometrist.

The public policy of the State of Oklahoma includes the regulation of optometry to insure that the public receives the best possible visual care.[32] Obviously, some regulation is necessary to protect the public from fraudulent, deceptive, and misleading advertising; however, a less than total ban has presumedly been effective in other jurisdictions. The prohibition against the mercantile corporation employing an optometrist should be questioned in light of the experience of other states which are achieving the desired result without such a proscription. This prohibition has the detrimental effect of denying to the consumer the possibility of realizing competitive, mass-market savings that a cor-

24. 348 U.S. 483 (1955).
25. *Id.* at 491.
26. Eisensmith v. Buhl Optical Co., 115 W. Va. 776, 178 S.E. 695 (1934); OKLA. STAT. tit. 59, § 943 (1971).
27. State *ex rel.* Beck v. Goldman Jewelry Co., 142 Kan. 881, 51 P.2d 995 (1935); OKLA. STAT. tit. 59, § 944 (1971).
28. CONN. GEN. STAT. ANN. tit. 20, § 133a (1969); KAN. STAT. ANN. tit. 65, § 1504 (1971); OKLA. STAT. tit. 59, § 944 (1971).
29. Eisensmith v. Buhl Optical Co., 115 W. Va. 776, 178 S.E. 695 (1934); KAN. STAT. ANN. tit. 65, § 1504 (1971); OKLA. STAT. tit. 59, § 942 (1971).
30. State *ex rel.* Beck v. Goldman Jewelry Co., 142 Kan. 881, 51 P.2d 995 (1935).
31. OKLA. STAT. tit. 59, § 944 (1971).
32. OKLA. STAT. tit. 59, § 593 (1971); OKLA. STAT. tit. 59, § 941 (1971).