

1958

# L. C. Skelton v. Frank E. Lees et al : Reply Brief of Appellants

Utah Supreme Court

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JUN 6 - 1958

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Clerk, Supreme Court, Utah

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In the  
**Supreme Court of the State of Utah**

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L. C. SKELTON,  
*Plaintiff and Respondent,*

vs.

FRANK E. LEES, as Director of Department of Registration of the State of Utah; J. LaRUE OGDEN, JERALD CHRISTIANSEN, RAYMOND J. CORFIELD, DANIEL M. SCHWARTZ, GLEN L. ENKE, WAYNE SHAW, and E. W. ENGELMANN, as Members of the Representative Committee of Professional Engineers and Land Surveyors,  
*Defendants and Appellants.*

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Case No.  
8752

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**REPLY BRIEF OF APPELLANTS**

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ARROW PRESS, SALT LAKE

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In the  
Supreme Court of the State of Utah

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L. C. SKELTON,  
*Plaintiff and Respondent,*

vs.

FRANK E. LEES, as Director of Department of Registration of the State of Utah; J. LaRUE OGDEN, JERALD CHRISTIANSEN, RAYMOND J. CORFIELD, DANIEL M. SCHWARTZ, GLEN L. ENKE, WAYNE SHAW, and E. W. ENGELMANN, as Members of the Representative Committee of Professional Engineers and Land Surveyors,  
*Defendants and Appellants.*

Case No.  
8752

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REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

In respondent's brief it is claimed that Chapter 118, Laws of Utah 1955 (Chapter 22, Title 58, U. C. A. 1953, as amended), is unconstitutional. In our initial brief we did not consider the question of constitutionality and therefore it is deemed vital that respondent's arguments be met.

## STATEMENT OF POINTS

## POINT I.

CHAPTER 118, LAWS OF UTAH 1955 (CHAPTER 22, TITLE 58, U. C. A. 1953, AS AMENDED) IS CONSTITUTIONAL.

## ARGUMENT

## POINT I.

CHAPTER 118, LAWS OF UTAH 1955 (CHAPTER 22, TITLE 58, U. C. A. 1953, AS AMENDED) IS CONSTITUTIONAL.

The respondent's brief challenges the constitutionality of Chapter 118, Laws of Utah 1955 (Chapter 22, Title 58, U. C. A. 1953, as amended), as unlawfully delegating authority to an administrative agency without specifying the limitations within which the agency is to act. As authority respondent relies upon the 1953 case of *Prouty v. Heron* (Colo.), 255 P. 2d 755.

Our consideration of respondent's claim will be as follows:

"In approaching the subject we have in mind the rule that when an act of the Legislature is attacked on grounds of unconstitutionality the question presented is not whether it is possible to condemn the act, but whether it is possible to uphold it. The presumption is always in favor of validity, and legislative enactments must be sustained unless clearly in violation of fundamental law. \* \* \*

Every presumption will be indulged in favor of leg-

isolation and only clear and demonstrable usurpation of power will authorize judicial interference with legislative action. \* \* \*” *Lehi City v. Meiling*, 87 Utah 237, 48 P. 2d 526.

In *Prouty v. Heron*, supra, an action was brought to enjoin the Colorado State Board of Examiners for Engineers and Land Surveyors from classifying engineers as to specific branches, the plaintiff challenging the constitutionality of the Colorado legislation which authorized the Board to restrict engineering licenses to specific branches of the engineering field. In holding the act unconstitutional, the Colorado Supreme Court set out specific wording in the statute which it deemed objectionable. However, the same wording, and the problem of unlawful delegation has been considered in other jurisdictions and the issue resolved in favor of constitutionality.

In the 1955 case of *People v. Babcock*, 343 Mich. 671, 73 N. W. 2d 521, a Michigan act providing for the registration of professional engineers, architects and land surveyors, stated in part:

“An applicant for examination for registration  
\* \* \* must \* \* \* have not less than eight  
years of practical experience in architectural or  
engineering work \* \* \* or must be a graduate  
in architecture or engineering of a college or school  
*acceptable to the Board*, and have had not less than  
four years of experience of a nature *satisfactory to  
the Board*.” (Emphasis added.)

The Act also provided:

“The Board shall issue a certificate of registration upon payment of registration fees as provided



for in this act to any applicant who *in the opinion of the Board* has satisfactorily met all the requirements of the act \* \* \*. (Emphasis added.)

The statute was challenged on the basis of being vague, indefinite, an unlawful delegation of legislative authority to an administrative agency and in violation of the Fourteenth Amendment of the U. S. Constitution and Article V of the Constitution of Michigan. The court concluded:

“The object of the act is to safeguard the life, health and property of the citizens of the state by providing tests for each applicant and to provide certificates to those who meet the qualifications provided by the Legislature. The act is constitutional.”

In the case of *Clayton v. Bennett*, 5 Utah 2d 152, 298 P. 2d 531, this court held constitutional legislation which delegated to the Department of Registration, upon action and report of the appropriate representative committee, the following power:

“(1) defining \* \* \* what shall constitute a school, college, \* \* \* in good standing. (2) Establishing a standard of preliminary education deemed requisite to admission to any school, college or university. (3) Prescribing the standard of qualification requisite before license shall issue \* \* \*. (5) Providing for a fair and wholly impartial method of examination \* \* \*.”

We submit that the delegation considered in the *Clayton* decision was as broad, if not broader, in scope than the delegation under consideration in the case at bar. In the *Clayton* case, this court stated:

“In regard to the second matter complained of, the alleged failure of the legislature to prescribe



definite standards, it is to be noted that certain basic qualifications relating to education, age, moral character and the requirement of satisfactorily passing an examination are set forth in the statutes. It seems obvious that the legislature could go no further than to set up such general standards." \* \* \*

In *Douglas v. Noble*, 261 U. S. 165, the Supreme Court of the United States held:

"The statute provides that the examination shall be before a board of practicing dentists; that the applicant must be a graduate of a reputable dental school; and that he must be of good moral character. Thus, the general standard of fitness and the character and scope of the examination are clearly indicated. Whether the applicant possesses the qualifications inherent in that standard is a question of fact. \* \* \* The decision of that fact involves ordinarily the determination of two subsidiary questions of fact. The first, what the knowledge and skill are which fit one to practice the profession. The second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence, it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and, by embodying it in the statute, make it law. When it does so, the function of the examining board is limited to determining whether the applicant complies with the requirements so declared. But the legislature need not make this general finding. To determine the subjects of which one must have knowledge in order to be fit to practice dentistry; the extent of knowledge in each subject; the degree of skill requisite; and the procedure to be followed in conducting the examination;—these are matters appropriately com-

mitted to an administrative board. \* \* \* And a legislature may, consistently with the Federal Constitution, delegate to such board the function of determining these things, as well as the function of determining whether the applicant complies with the detailed standard of fitness.” \* \* \*

The foregoing was quoted with approval and was support for the decision of this court in *Clayton v. Bennett*, supra. See also *Graves v. Minnesota*, 272 U. S. 425.

*Garman v. Myers* (Okla.), 80 P. 2d, concerned itself with two of the problems before this court. In addition to setting forth a definition of “arbitrary” similar to that advocated in our initial brief, the court considered statutory language similar to that which is objected to by the respondent. That case held in part:

“Plaintiff here contends that to hold the Board has unlimited power to determine what constitutes engineering experience which is to say the Legislature provided no rule or standard to test the qualifications, in effect leaving the entire matter to an arbitrary declaration of the Board.

“Such is not our understanding of either the Act or the power vested in the Board. Plaintiff argues in this respect that the provision of the Act stating ‘*of a character satisfactory to the Board,*’ does not permit an exercise of discretion by the Board, so long as the experience claimed falls within the definitions of professional engineering as set forth in Section 2 of the Act, saying the delegation of an arbitrary power would clearly be unconstitutional.

“We find no merit in this argument. The legislature created this Board, defined the phases of en-

gineering to be considered, and empowered this Board to pass upon applicants, to determine whether they were properly qualified under the terms of the Act itself. No arbitrary power was vested in the Board, the only power vested in the Board being the power to examine applicants under the standards set forth in the Act. The Board did not prescribe what constituted engineering experience, but only, after hearing plaintiff's application, determined by applying the standard set up in the Act itself, that certain experience claimed by plaintiff was not the type of engineering service requiring the application of engineering principles." (Emphasis added.)

See *State v. Spears* (N. M.), 259 P. 2d 356; *Hatfield v. N. M. State Board of Reg.* (N. M.), 290 P. 2d 1077.

In *Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S. 230, a statute empowered a State Board of Censors to permit exhibition of "only such films as are in the judgment and discretion of censors of a moral, educational or amusing and harmless character." This statute was upheld as against an attack of unlawful delegation.

In *Ex Parte Whitley*, 77 P. 879, a statute granted power to a Board of Dental Examiners to determine what constitutes "a reputable dental college." The statute was upheld as against a challenge of unlawful delegation.

In *Gundling v. Chicago*, 177 U. S. 183, an ordinance provided for the granting of a license to sell cigarettes:

"\* \* \* if the mayor shall be satisfied that the [applicants] are of good character and reputation \* \* \*."

The ordinance was upheld.

In *People v. Witte* (Ill.), 146 N. E. 178, a statute provided that undergraduate studies for candidates to practice medicine shall be such "as shall be satisfactory to the Department." The court held that such phraseology did not constitute an unlawful delegation. See also *State v. Lawrence* (N. C.), 197 S. E. 586; *State v. City of Billings* (Mont.), 255 P. 11.

According to 33 Am. Jur., Licenses, Sec. 60, page 378-9:

"\* \* \* It is generally held that licensing boards may be invested with discretion in respect of the personal fitness or character of applicants or mere matters of detail."

In the annotation, Vesting discretion in public officials, 92 A. L. R. 400 at 410, the text states:

"It has been held that it is not always necessary that statutes and ordinances prescribe a special rule of action, but, on the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare. It may be noted that the modern tendency is to be more liberal in permitting grants of discretion to administrative bodies or officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases."

It is an accepted rule that statutes granting in general terms to public officials the discretionary right to grant

or refuse licenses have been upheld where the discretion involved personal fitness of the applicants. The theory behind this principle is that if a statute is susceptible of two constructions, the construction sustaining its validity must be given, and therefore the statute giving discretionary power will be construed as giving reasonable discretion, rather than the right arbitrarily to discriminate between applicants. See annotation, Vesting discretion in public officials, 12 A. L. R. 1435 at 1450; 54 A. L. R. 1104 at 1112, and 92 A. L. R. 400 at 415.

Thus far we have considered respondent's objection to language of Chapter 118, Laws of Utah 1955 (Chapter 22, Title 58, U. C. A. 1953 as amended) other than the wording found in the grandfather clause of the act. Directing our analysis specifically to the latter provision, we submit that the phrase therein, "mechanical, electrical, or civil engineering" lends itself to such certainty that further definition is impractical and unnecessary. We base our conviction upon a consideration of the history and purpose of this grandfather clause, and the use of the terminology in the experience of men.

Under Section 58-10-2, U. C. A. 1953, the engineer licensing act so defined engineering as to include only those applying "civil, electrical, or mechanical engineering principles and data." The Department of Business Regulation so applied the law in its execution, and received re-affirmance in this application through a legal opinion of the Attorney General in 1953, which opinion in substance concluded that the Act applied to only civil, mechanical and electrical engineers.

The 1955 legislation in question can only be interpreted in its historical setting, for according to *State v. Streeter* (Minn.), 33 N. W. 2d 56:

“\* \* \* The purpose of an exception or grandfather clause is to exempt from the statutory regulation imposed *for the first time* on a trade or profession those members thereof who are then engaged in the newly regulated field on the theory that they who have acceptably followed such profession or trade for a period of years, or who are engaged therein on a certain date, may be presumed to have the qualifications which subsequent entrants to the field must demonstrate by examination.”  
\* \* \* (Emphasis added.)

See also Annotation, Construction of Grandfather clause, 4 A. L. R. 2d 667.

Had Chapter 22, Title 58, U. C. A. 1953 as amended, been couched in phraseology so as to limit grandfather rights to practitioners “other than those subject to Chapter 10, Title 58, U. C. A. 1953,” we submit there would be no question as to proper delegation. The present phraseology does nothing more than make the same limitation. The respondent being subject to the provisions of Chapter 10, Title 58, U. C. A. 1953, the grandfather exemption in the 1955 law would have no application to him, for its savings features extend to those who are being regulated for the first time.

In the *Prouty* case, the Colorado court found vagueness or uncertainty where a statute provided for licensing of engineers by “branches”. No such problem exists here. The Utah statute is not concerned with distinctions between, or similarities of, the various branches of engineering, but

rather with the extension of grandfather privileges to the newly regulated.

The controlling rule of statutory construction is that legislative intent should be ascertained and given effect. We submit that the general purpose behind grandfather provisions, and the peculiar history of the engineer licensing laws in Utah, establish sufficient guides and standards in this case for administrative action.

All of this, of course, is not to abandon the argument that the phrase, "mechanical, electrical, and civil engineering" reduces itself to definition common to the sense and experience of men, and that further explanation is in this instance impractical and unnecessary. It is deemed noteworthy in this connection that the curricula of the colleges of engineering in this state, as well as others, offer courses in civil, mechanical and electrical engineering; that degrees are awarded in these branches, as distinguished from other engineering classifications; that engineers refer to specializations in the branches enumerated.

In *Howarth v. Gilman* (Pa.), 73 A. 2d 655, a Pennsylvania statute defined practice of engineering as "the practice of civil engineering, mechanical engineering, electrical engineering \* \* \*." The court rejected arguments attacking the definition for want of certainty, holding that an act will not be declared inoperative if common sense and reason can devise and provide the means necessary for its execution. Respondent's argument, if applied to the Pennsylvania case would in fact require further definition of the definition.



“Civil engineering”, “mechanical engineering” and “electrical engineering” are all defined in Webster’s New International Dictionary with sufficient precision to be applicable to interpretation of the Utah statute in question.

In *Hatfield v. New Mexico State Board of Registration* (N. M.), 290 P. 2d 1077, a state board had power to revoke a certificate of registration if the registrant was found guilty of “gross negligence, incompetency or misconduct \* \* \*.” No definition of these terms was set forth in the act. Against a challenge of unlawful delegation the court held the statute constitutional.

In *Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S. 230, the court stated:

“The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the ‘personal equation’ to enter, resulting ‘in unjust discrimination against some propagandist film,’ while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies.” \* \* \*

In *Block v. Chicago* (Ill.), 87 N. E. 1011, an ordinance empowered the Chief of Police to refuse permits for the

showing of pictures which were "immoral or obscene." This statute was upheld as against an attack of unlawful delegation.

We submit that the wordings in question in the foregoing cases are much more susceptible to diverse interpretation and meaning than the phraseology before this court; yet such wording was not fatal despite the lack of further definition, all of which points up the inescapable conclusion that ultra strict adherence to any rule which requires legislative defining of all terms in licensing statutes must result in a definition of definitions to insure absolute certainty; and on ad infinitum. The public health, safety, and welfare demand regulation of the professions; such cannot be sacrificed upon respondent's altar which consists of nothing more than a play on words.

The ironical thing about respondent's argument on this point is that the applicant and the Committee talk the same language and have no misunderstanding as to what is civil, mechanical or electrical engineering. The applicant claimed that he applied the principles of civil and mechanical but not electrical engineering (Tr. 56). Exhibit P-4 sets forth references denoting his engineering experience as being civil or mechanical. Making his application, respondent did not consider the words "mechanical, electrical or civil engineering" so vague or ambiguous that any objection was raised; in fact, he had no difficulty in alleging experience in those areas and his references indicate a common understanding of those terms.

Heretofore we have set forth the rule that the presumption is always in favor of the legislative validity and enact-

ments must be sustained unless clearly in violation of fundamental law. *Lehi City v. Meiling*, supra.

Furthermore, the act in question contained a savings clause to the effect that "if any section or sections of this act shall be declared unconstitutional or invalid this shall not invalidate any other sections of this act." (Section 23, Chapter 118, Laws of Utah 1955.)

"The principles which underlie the application of the savings clause have been well established. In the absence of legislative declaration that invalidity of a portion of a statute shall not affect the remainder, the presumption is that the Legislature intends the act to be effective as an entirety. The effect of such a statutory declaration is to create, not the presumption of entirety in effect ordinarily accorded the statutes, but an opposite presumption of separability." 11 Am. Jur., Constitutional Law, Sec. 156, page 847, and cases cited therein.

Particularly appropriate in summary is the following quotation from Sutherland, *Statutory Construction*, Third Edition, Sec. 322:

"The tendency of the more recent cases is to sustain delegations of the licensing power even when broad discretions are delegated. This tendency seems justifiable when activity of licensing is an appropriate field for legislative regulation and where the determination of conditions is impracticable for legislative resolution and the legislature has provided as practical a standard for administrative guidance as is appropriate for the particular regulation. This rule, of course, leaves most cases to be decided on the particular facts involved *but it should always be recognized that in the determination of*

*quaifications for licenses, the agency who is able to see and examine the applicant is usually in the best position to decide; that abuses of discretion may be held invalid without invalidating the statute; and that no appreciable divesting of legislative power is involved in the delegation.” (Emphasis added.)*

## CONCLUSION

In view of the authority and reasoning set forth in our initial brief and the argument outlined in our reply, we submit that the decision of the lower court should be reversed.

Respectfully submitted,

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