

case may be, for the interest earned and for the profits arising from the deposit of such funds.

7. If after the exercise of due diligence, a board of education or a board of township trustees is unable to provide a depository for the funds of their respective subdivisions according to law, such boards can not be held for the penalties prescribed by sections 7609 and 3326 of the General Code, for failing to provide such depositories.

8. In a township where there is located but one bank, the trustees of the township are limited in awarding a contract for the deposit of its funds to making that award to this bank, providing it agrees to pay at least two percent on daily balances and furnishes proper security for the funds according to law, and is in the opinion of the trustees safe and conveniently located.

9. In a township where there are two or more banks, the trustees shall select as a depository for the township funds, the one which offers to pay the highest rate of interest on daily balances (not less than two percent in any case) and properly secures the funds according to law.

10. When there is no bank located in a township that is willing or able to qualify as a depository for township funds, the trustees may enter into a contract for the depositing of those funds with one or more banks within the county in which the township is located or in an adjoining county thereto, that offers to pay the highest rate of interest on the average daily balances, which in no case shall be less than two percent for the full time the funds are on deposit, and that will properly secure the funds according to law.

11. A board of education or a board of township trustees may permit tax funds to remain in the county treasury, to be drawn by the proper local authorities upon warrants of the county auditor, in sums of not less than one hundred dollars.

12. Boards of education and boards of township trustees have no authority to deposit public funds coming into their respective treasuries, in banks without interest, or in any place or places other than their duly designated depositories provided according to law.

Respectfully,

JOHN W. BRICKER,

Attorney General.

195.

CONSTITUTIONAL LAW—PUBLIC ACCOUNTANCY BILL CONSTITUTIONAL.

SYLLABUS:

Senate Bill No. 242 of the 90th General Assembly relating to the practice of public accountancy held constitutional.

COLUMBUS, OHIO, March 8, 1933.

HON. HAROLD G. MOSIER, *Chairman, Judiciary Committee, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your request for my opinion as to the constitutionality of Senate Bill No. 242, copy of which is attached to your request.

Senate Bill No. 242 is entitled a bill "to regulate the practice of public accountancy; to establish the Ohio state board of accountancy and to prescribe its duties, and to further provide for the examination, registration and licensing of qualified practitioners of public accountancy; to provide penalties for violation of this act, and to repeal sections 1370 to 1379 inclusive and section 13176 of the General Code." This bill is contained in twenty-five sections, the greater number of which it is unnecessary to quote in this opinion for the reason that their provisions do not in my judgment raise constitutional questions.

Sections 1 and 2 of the bill provide as follows:

"SECTION 1. The following terms in this act, unless the context requires a different meaning, shall be construed as follows:

(A) 'Practitioners and practice of public accountancy.' A person engages in the practice of public accountancy, and is a practitioner thereof, within the meaning and intent of this act, who holds himself out to the public as a public accountant, and, *as such*, offers to perform on behalf of clients, for compensation, services which requires skill in the art and science of accountancy and the practical applications thereof.

(B) The term 'public accountant' shall mean any person authorized by law to practice public accountancy.

(C) The term 'board' shall mean the Ohio State board of accountancy.

(D) The term 'certificate' or 'certificate of qualification' shall mean the certificate issued by the board to any person authorizing him to practice as a public accountant.

(E) The term 'registration card' shall mean any unrevoked registration card issued by the board for a calendar year pursuant to section 13 of this act." (Italics the writer's.)

"SECTION 2. (A) This act shall not apply to accountants of other states temporarily engaged in the practice of public accountancy in this state which practice is incidental to their regular practice in the state of their domicile.

(B) This act shall not prevent the employment by a 'public accountant', or by a firm or corporation furnishing public accounting services as principal, of non-registered persons to serve as accountants in various capacities as needed; provided that such non-registered persons work under the control and supervision of persons authorized to practice public accountancy as provided in this act; and provided further, that such non-registered persons do not issue any statements or reports over their own names, except such office reports as are customary; and provided further, that such non-registered persons are not in any manner held out to the public as duly authorized practitioners of public accountancy.

(C) This act shall not prevent a practicing attorney, in connection with his professional work, from preparing reports or presenting records of a form or character usually prepared and presented by attorneys.

(D) This act shall not apply to any person who may be employed for the purpose of keeping books, making trial balances, statements, or preparing reports, provided the person so engaged or the employer engaging him, does not represent to the public that such statements, or reports, were prepared by a public accountant.

(E) This act shall not prevent the practice of public accountancy by any person, firm, or corporation, eligible to registration as required by this act, from the effective date of this act to January 1, 1935."

Section 3 provides for the appointment of a state board of accountancy of five members, their term and the filling of vacancies.

Section 4 authorizes the board to compel the attendance of witnesses to administer oaths and take testimony in certain matters. This section also provides that "the board shall have the power to adopt and print reasonable rules and regulations."

Section 5 relates to the organization of the board, its annual report to the governor and the keeping of its records.

Sections 6 and 7 provide for meetings of the board and the compensation of board members.

Section 8 provides in part as follows:

"The board shall issue a 'certificate of qualification' to each applicant who successfully passes an examination in the following subjects: Theory of accounts, accounting practice, auditing and commercial law; provided the applicant has complied with all other requirements of this act and the rules of the board. Examinations may be held in such other subjects as the board shall deem necessary to determine applicants' qualifications to practice public accountancy, provided that any additional subject in which examinations will be held shall have been publicly announced at least three years prior to the inclusion of such subject in the examination."

Section 9 contains the usual requirements as to qualification for examination such as are customarily provided for applicants to practice a profession or occupation requiring special training. It is provided that four years' continuous practical accounting experience as public accountant shall be the equivalent to college or university study and the two years' practical experience following such study. The section contains further provisions to preclude any question as to retroactivity.

Sections 10 and 16 provide for examination and registration fees and section 11 provides for the issuance of reciprocity certificates to those holding similar certificates in other states having equivalent standards and requirements.

Section 12 provides that the act shall not invalidate certificates heretofore granted by the Ohio state board of accountancy under any previous law and section 13 provides for the registration under this act of public accountants heretofore issued certificates by the Ohio state board of accountancy under former statutes, as well as for annual registration after January 1, 1935. Section 15 provides for the registration of a firm existing at the time of the effective date of the act of which all resident members, officers or managers are eligible to registration.

Section 14, in effect, provides that after January 1, 1935, applicants for registration must take the examination of the board.

Section 17 provides for certain credits to be given to those eligible to registration under section 13.

Sections 18 and 19 provide as follows:

"SECTION 18. No person or firm shall use in this state any words, abbreviations, symbols or other means of identification indicating that they are public accountants, as defined herein, except as provided in section 2 of this act, unless a registration card for the current calendar year shall first have been obtained from the board."

SECTION 19. Any person shall be deemed guilty of a misdemeanor, the penalty for which shall be not more than five hundred dollars for each offense, or imprisonment in the county jail for a period not exceeding 60 days, or both.

(a) Who shall engage in the practice of public accountancy in this state either individually or as a member, resident manager, partner principal of a firm, unless he shall have first obtained a registration card for the current calendar year and the firm so practicing, of which he is a member, resident manager, partner, principal or officer, shall have first obtained a registration card for the current calendar year; or

(b) Who shall falsely use any term indicating that he is holder of a certificate of qualification, when he is not the holder of an unrevoked certificate issued by the Ohio state board of accountancy; or

(c) Who shall wilfully prepare or certify to any false or fraudulent report, certificate, exhibit, schedule or statement; or

(d) Who shall, as an individual, or as a member of a firm or organization, permit to be announced by printed or written statement that any report, certificate, exhibit, schedule or statement had been prepared by a registered practitioner of public accountancy, as defined in sections 1 and 13 of this act, when the person or firm who prepared the same was not qualified."

Section 20 authorizes the revocation or suspension of a certificate of registration for violation of the provisions of the act or of any of the regulations of the board. This section further provides for notice and hearing before any action toward revocation or suspension may be taken, and appeal of such action to the common pleas court.

Section 21 relates to presumptive evidence of the practice of public accountancy and section 22 to the disclosure of information secured by a public accountant in his practice.

Section 23 provides that records, memoranda, etc., made by a public accountant in his practice, except reports submitted to a client, shall be the property of such accountant.

Section 24 is the usual constitutional saving section to preclude the failure of the entire act in the event of the unconstitutionality of any section or clause of the act. Section 25 repeals the present accountancy law.

The first matter to be determined in considering your question is whether or not an act to regulate the practice of public accountancy may be said to be within the police power of the state. In *Leonard vs. State*, 100 O. S. 456, 127 N. E. 464, Judge Wanamaker said:

"The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare. The measure of police power must square with the measure of public necessity. The public need is the polestar of the enactment, interpretation, and application of the law. If there appears

in the phrasing of the law and the practical operation of the law a reasonable relation to the public need, its comfort, health, safety, and protection, then such act is constitutional, unless some express provision of the Constitution be clearly violated in the operation of the act. Moreover the growth of the police power must from time to time conform to the growth of our social, industrial, and commercial life. You cannot put a straight-jacket on justice any more than you can put a straight-jacket on business. Private initiative, enterprise, and public demand are constantly discovering and developing new methods and agencies, honest and dishonest, and the police power must be always available to afford apt and adequate protection to the public."

There are numerous cases of courts of last resort holding that the legislature has power to forbid one from holding himself out as a certified public accountant or as a public accountant unless such person has a certificate from a state board authorizing him so to do. This was the holding of the Louisiana Supreme Court in the well considered case of *State vs. DeVerges*, 153 La. 349, 95 So. 805, 27 A. L. R. 1526. The syllabus is as follows:

"1. The legislature has power to forbid one from holding himself out as a certified public accountant without a certificate from the state board permitting him to do so.

2. A state may regulate the practising of any profession whenever the general welfare requires to protect the public against ignorance, incompetence, or fraud.

3. A statute fixing the fee for certificates of a certified public accountant is not void for discrimination in charging \$10 to all who apply within ninety days after passage of the act, while it charges nonresidents \$25 for a certificate, without examination, on presentation of their credentials in the state of their residence.

4. A statute authorizing a state board in its discretion to register the certificates of public accountants of other states and authorize them to practise as public accountants charges the board with the duty of ascertaining and determining the actual qualifications of applicants.

5. A statute providing for licensing public accountants is not invalid because, after enumerating subjects for examination, it gives the board power to add such other branches of knowledge as the board may deem necessary to maintain the highest standard of proficiency in the profession.

6. Empowering a board of examiners to add to the subjects mentioned in the statute for examination of candidates for certificates as public accountants does not authorize the designation of subjects entirely foreign to the profession.

7. Fees provided for the issuance of certificates to certified public accountants, which are intended to make effective the provisions of the law, are not unconstitutional as authorizing the examiners to collect fees for their own benefit."

The fifth and sixth branches of the syllabus of the foregoing case contain direct authority for the provisions contained in section 8 of the bill here under consideration and hereinabove quoted. I refer to the power given to the board to

examine applicants in "such other subjects as the board shall deem necessary to determine applicants' qualifications to practice public accountancy."

An act to regulate the practice of public accountancy and forbid one from holding himself out as a certified public accountant without a certificate from the board of regents of the university of the state was held not to be an arbitrary exercise of power by the state but legislation "in the public interest and for the general welfare" and a valid exercise of the power of the legislature to regulate the highly skilled and technical profession of public accountancy. *People vs. Marlowe*, 203 N. Y. Supp. 474.

To the same effect is *Henry vs. State*, 97 Tex. Crim. Rep. 67, 260 S. W. 190. See also *Davis vs. Sexton*, 211 App. Div. 233, 207 N. Y. Supp. 377; *Goldsmith vs. Klabaugh*, 6 Fed. (2d) 94; *People vs. National Assoc.*, 204 App. Div. 288, 197 N. Y. Supp. 775.

There are two cases holding the accountancy laws of Oklahoma and Illinois respectively to be unconstitutional: *State, ex rel. Short vs. Riedell*, 109 Okla. 35, 233 Pac. 684, and *Frazer vs. Shelton*, 320 Ill. 253, 150 N. E. 696. The syllabus in the Oklahoma case is as follows:

"House Bill No. 204, Session Laws of 1917, chap. 5, known as the Accountancy Act (art. 10, chap. 87, Comp. Stat. 1921), in so far as it prohibits uncertified accountants from holding themselves out as professional or expert accountants or auditors for compensation, or engaging in the practice of that profession, is in conflict with the spirit and express provision of the Constitution and void, in this, that it abridges the right of private property and infringes upon the right of contract in matters purely of private concern, bearing no perceptible relation to the general or public welfare, and thereby tends to create a monopoly in the profession of accountancy for the benefit of certified accountants, and denies to uncertified accountants the equal protection of the laws of the enjoyment of the gains of their own industry."

In the opinion of the court, reference was made to cases in which the validity of the statutes regulating accountancy had been upheld as being within the purview of the police power of the state and attention was directed to the fact that in those cases a person who did not hold a certificate to practice accountancy was not prohibited from practicing, but was merely prohibited from holding himself out as a public accountant. To the same effect is the Illinois case, the first branch of the syllabus being as follows:

"An act forbidding anyone to work at the business or occupation of accountancy for more than one person without a certificate from a state department is not so far related to the public welfare as to be within the police power of the state."

Here again the court recognized the power of the state to require that anyone holding himself out to be a public accountant must be licensed so to do. The language of the court is as follows:

"We do not say that it is beyond the power of the General Assembly to enact a statute requiring that no one shall use the term 'certified public accountant' or the term 'public accountant' without having met the re-

quirements of such an act. Such a provision may well be within the power of the Legislature on the ground that it is to the public interest that no one shall use a term indicating that he has been examined and certified as an accountant when such is not the fact. Of such character was the Accountancy Act of 1903 (Acts 1903, p. 281) herein referred to. By §6 of that act any one who represented himself to the public as having received the certificate provided by the act, or who made use of the term 'certified public accountant' or its abbreviation, was declared guilty of a misdemeanor. Such is a misrepresentation which the legislature may prevent by statute. There is, as we view it, however, a wide difference between acts of such character and one which provides that no one who has not received a certificate as public accountant from the department of registration and education shall be allowed to work at the business or occupation of accountancy for more than one person. Such an act does not spring from a demand for the protection of the public welfare, but is an unwarranted regulation of private business and the right of the citizen to pursue the ordinary occupations of life."

These Oklahoma and Illinois cases were followed in the recent case of *Campbell vs. McIntyre*, decided in 1932 by the Supreme Court of Tennessee and reported in 52 S. W. (2d) 162. The syllabus is as follows:

"Statute requiring certificate and license by board of accountancy as condition to practice of public accounting held void as imposing an arbitrary restriction on right of private contract (Code 1932, §7095; Const. art. 1, §8, art. 11, §8)."

Here again the law prohibited other than registered accountants from practicing accountancy for more than one employer.

The bill which you have submitted for my consideration does not prohibit an unregistered accountant from practicing accountancy for more than one employer. Paragraph (a) of section 19, supra, provides a penalty for engaging "in the practice of public accountancy in this state" without having first obtained a registration card for the current calendar year. The term "practice of public accountancy" under section 1 of the bill, supra, is defined as follows:

"A person engages in the practice of public accountancy, and is a practitioner thereof, within the meaning and intent of this act, who holds himself out to the public as a public accountant, and, as such, offers to perform on behalf of clients, for compensation, services of accountancy and the practical applications thereof."

It is obvious that as long as an accountant does not hold himself out to be a "public accountant" or does not offer to perform accounting services and sign statements, reports, etc., as a "public accountant", such an accountant is not engaged in the practice of public accountancy within the meaning of the act. This view is strengthened by a consideration of paragraph D of section 2, supra. I find nothing to indicate that an unregistered person may not perform accounting services for any number of employers. Were the act to be construed as prohibiting the rendition of accounting services for the public as an accountant by an unregistered accountant, there might be serious question as to its constitutionality

under the Oklahoma, Illinois and Tennessee cases. However, it is an elementary rule of statutory construction that when it is possible to construe an act in two ways, the former of which will render it constitutional and the latter of which will render it unconstitutional, the courts will adopt the former. Construing this act then as I have, the Oklahoma, Illinois and Tennessee cases are not controlling, and the act is in my judgment a valid exercise of the police power.

Section 4 of the bill authorizes the board "to adopt and print reasonable rules and regulations." This section, standing alone, does not disclose whether the board may adopt reasonable rules and regulations to govern the proceedings of the board or whether such rules and regulations may be adopted to govern the practice of public accountancy. In view of section 20, the board is obviously authorized to adopt rules and regulations to govern the practice of public accountancy, since under this last mentioned section a certificate or registration card issued by the board may be revoked or suspended for violation of any of the regulations of the board. A question arises as to whether or not such delegation of power to an administrative board may be said to be an unconstitutional delegation of legislative authority. Section 1274-1, General Code, contains a similar provision. This section provides that "the state medical board shall also examine and register persons desiring to practice any limited branch or branches of medicine or surgery, and shall establish rules and regulations governing such limited practice." This section of the General Code, being one of the sections of an act of the General Assembly passed April 27, 1915 (106 O. L. 202), was held to be constitutional in the case of *Williams vs. Scudder*, 102 O. S. 305, the seventh branch of the syllabus reading as follows:

"The act of the General Assembly, passed April 27, 1915 (106 O. L. 202-204), now sections 1274-1 to 1274-7, General Code, further regulating the practice of medicine and surgery by authorizing the examination and registration of practitioners in the limited branches thereof, is a constitutional and valid exercise of legislative power."

A far more sweeping delegation of power by the legislature to an administrative board is contained in Section 1235, General Code, which authorizes the public health council "to make and amend sanitary regulations to be of general application throughout the state." These sanitary regulations, under Section 1238, General Code, must be enforced by health authorities, police officers, sheriffs, constables and other officers of the state and county. This delegation of legislative authority was challenged in *Ex parte Company*, 106 O. S. 50, the Supreme Court holding the law constitutional. The language of the court appearing on pp. 57, 58 is dispositive of this question. See also *Moxon vs. State, ex rel.*, 36 O. A. 24, 28 and *Board of Health vs. Greenville*, 86 O. S. 1.

There are undoubtedly other provisions in this bill which could be discussed as to their constitutionality, but in my judgment a discussion of these less obvious and less important constitutional points is not necessary nor would it cause any variation in my conclusion, that the bill is constitutional.

Respectfully,

JOHN W. BRICKER,
Attorney General.