INDEX

WRIT OF CERTIORARI.

New Jersey to wit: The State of New Jersey to Honorable Andrew F. (SEAL) McBride, Commissioner of Labor for the State of New Jersey.

We, being willing, for certain reasons, to be certified of a certain order or direction made by you denying the application heretofore made by one Rupert Ribnik for a license to carry on an employment agency pursuant to the statute in such case made and provided, do command that you send under hand and seal to our Justices of the Supreme Court of Judicature of the State of New Jersey on the 13th day of November next, said order and direction made by you as aforesaid, together with all things touching and concerning the same as fully and entirely as they remain before you, together with this writ, that we may further cause to be done therein what of right and according to law ought to be done.

WITNESS, Honorable William S. Gummere, Chief Justice of our Supreme Court, at Trenton, N. J., the 24th day of October, nineteen hundred and twenty-five.

EDWARD J. KELLEHER,
Clerk.

LUM, TAMBLYN & COLYER,
Attorneys.

Allocatur.

WM. S. GUMMERE,
C. J.

RETURN TO WRITE.

Filed November 25, 1925.

New Jersey Supreme Court

RUPERT RIBNIK, *Prosecutor,* *vs.* ANDREW F. McBRIDE, Commissioner of Labor for the State of New Jersey, *Defendant.*	*On Certiorari.* *Return to Writ.*

I, Andrew F. McBride, Commissioner of Labor of the State of New Jersey, pursuant to the command of the within writ, and for a return thereto, do hereby certify that the annexed is a true and correct copy of the direction made by me denying the application heretofore made by said Rupert Ribnik for a license to carry on an employment agency during the year 1925, together with all things touching and concerning the same as fully and entirely as they remain before me, directed to be returned to the within writ.

Witness my hand this thirteenth day of November, A. D. nineteen hundred and twenty-five.

ANDREW F. McBRIDE,
Commissioner of Labor of the State
of New Jersey.

Return to Writ.

STATE OF NEW JERSEY

Department of Labor

Application for License for Employment Agency Rec'd *9-21-25* Issued *Rejected 10-1-25* Fee *$100. Paid Refunded 10-1-25 No.*

Commissioner of Labor,
#9 Franklin Street,
Newark, N. J.

Dear Sir:

Pursuant to the requirements of Chapter 227, Laws of New Jersey, 1918, entitled "An Act to regulate the keeping of Employment Agencies," the undersigned hereby applies for a license to carry on such a business as defined in said act and agrees to conduct said business in compliance with the provisions and in conformity with rules and regulations prescribed therein.

The surety bond required by law in the amount of One Thousand Dollars, $1,000.) and the necessary license fee are enclosed herewith.

1. Name of Agent *Rupert Ribnik*

2. Name of Agency *Ribnik Employment Agency*
(Use of the word Bureau will not be approved)

3. Location of Agency: Street *45 Clinton St., Newark, N. J.*
City New Jersey.

4. If a partnership, state name and address of each partner *Rupert Ribnik, 37 Avon Av., Newark, N. J.*

5. If a corporation, state names and addresses of president, secretary and treasurer

6. State names of all employees *None*

Return to Writ.

7. Is your agency located in room or rooms used for living purposes *No* 8. Where boarders or lodgers are kept? *No* 9. Where meals are served? *No.* 10. Where persons sleep? *No* 11. Are intoxicating liquors sold in the building where your agency is located? *No* 12. Do you conduct a lodging house for the unemployed separate and apart from such agency? *No* 13. Is abstract of law posted? *Not yet* 14. Are you equipped with records and stationery required by law? *Yes* 15. Do you confirm references of applicants for work in private families or in any trusted capacity? *I will* 16. Do you accept applications from on in behalf of children under the age of 16? *No* 17. Have you posted in your agency a schedule of the fees charged by you? *I will.* 18. State schedule of fees proposed *The equivalent of one full week's salary for permanent office, clerical, engineering and executive positions. Ten per cent. of salary received for temporary positions not to exceed an amount equal to one full week's salary. Ten per cent of one month's wages for mechanical, labor or domestic positions.*

19. State principal class of help you supply: domestic? *No* Foreign labor? *No* Common labor? *No* Skilled *No* Commercial? *Yes* Professional? *Yes* Other?

20. Are you a labor agent for a railroad or a highway contractor? *No* 21. Are you a steamship agent or associated with one? *No* 22. Do you maintain labor camps? *No* 23. Do you sell provisions to laborers? *No* 24. Is your agency conducted in connection with any other business? *No* What? 25. Have you ever been convicted of any crime? *No* What? *x* 26. Are you engaged in the business of con-

ducting an employment agency in any other state? *No* Where? *x* 27. Where have you ever been in employment agency business? *Nowhere.* 28. Has license ever been revoked or denied you for the conduct of such an agency in any state? *No* Where and when? *x* 29. Are you acquainted with the full requirements of the law and do you understand that, if granted, license may be revoked at any time for any good cause shown within the meaning and purpose of the law. *Yes*

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

Rupert Ribnik, being duly sworn, deposes and says that no person other than those mentioned in this application is pecuniarly interested in the business to be carried on under the license when issued, and that all the statements made in this application are true and correct.

(*Signed*) RUBERT RIBNIK.

Sworn and subscribed to before me
This *16th* day of *Sept* 1925

JOSEPH RIBNIK *Notary Public*
(SEAL) New Jersey

All changes to the above facts, after license is granted, must be brought to the attention of this department.

Return to Writ.

STATE OF NEW JERSEY,
COUNTY OF *Essex.* } *ss.*

Shirley Gittleman being duly sworn on her oath says she is a resident of *Newark* New Jersey and that she is personally acquainted with *Rupert Ribnik* who is an applicant for a license to conduct an employment agency at *45 Clinton* Street *Newark* New Jersey; that she has known said *Rupert Ribnik* for at least three years, and that she knows said applicant to be a person of good moral character and standing and a proper person to conduct such an agency as required by law

(*Signed*) SHIRLEY GITTLEMAN

Sworn and subscribed to before me
this *16th* day of *Sept* 1925 ·

JOSEPH RIBNIK *Notary Public*
New Jersey

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

Arthur S. Braker being duly sworn on his oath says that he is a resident of *Newark* New Jersey, and that he is personally acquainted with *Rupert Ribnik* who is an applicant for a license to conduct an employment agency at *45 Clinton* Street, *Newark* New Jersey, that he has known said *Rupert Ribnik* for at least three years, and that he knows said applicant to be a person of good moral character and standing and a proper person to conduct such an agency as required by law.

(*Signed*) ARTHUR S. BRAKER.

Sworn and subscribed to before me
this 16th day of Sept 1925

JOSEPH RIBNIK, *Notary Public*
New Jersey.

STIPULATION.

NEW JERSEY SUPREME COURT.

RUPERT RIBNIK, *Prosecutor,* *vs.* ANDREW F. McBRIDE, Commissioner of Labor for the State of New Jersey, *Defendant.*	*On Certiorari. Stipulation.*

It is hereby stipulated between the parties through their respective counsel as follows:

With said application of Rupert Ribnik for said employment agency license said applicant submitted also to the Commissioner of Labor a fully executed bond in the sum of $1,000.00 with said Rupert Ribnik as principal and New York Indemnity Company as surety thereon, which bond complied with the requirements of Chapter 227, of the Laws of 1918, and was satisfactory to said Commissioner of Labor as to both the form thereof and the surety thereon; said application was accompanied also by a treasurer's check of the Fidelity Union Trust Company of Newark in the sum of $100.00 to the order of Andrew F. McBride, Commissioner of Labor of the State of New Jersey, for the fee required by said act for such license. The Commissioner of Labor returned both said bond and said check to said applicant together with his letter ad-

Stipulation.

dressed to said applicant under date of October 1, 1925.

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutor.

EDWARD L. KATZENBACH,
Attorney-General,
Attorney for Defendant.

U. S. DEPARTMENT OF LABOR

U. S. Employment Service

Office of Federal Director
#9-11 Franklin Street,
Newark, New Jersey.

October 1st, 1925.

Mr. Rupert Ribnik,
#45 Clinton Street,
Newark, New Jersey.

Dear Sir:

Acknowledgment is made of the receipt of surety bond from the New York Indemnity Company together with check of one hundred dollars ($100.), and application for employment agency license at the above address. You state that: schedule of fees proposed is the equivalent of one full week's salary for permanent position—office, clerical, engineering and executive posisions and 10% of salary received for temporary positions not to exceed an amount equal to one full week's salary and 10% of one month's wages for mechanical, labor or domestic positions.

Stipulation.

This is to advise you that: I am rejecting your application for a license for the reason that I do not approve your proposed fee schedule in it's entirety. I believe that your proposed fee of one full week's salary for clerical, etc. positions is excessive and unreasonable and is more than the fee charged by some thirteen other similar agencies in this state and is more than the average which is permitted or is charged in practice in other similar industrial states in this country. I am willing to approve your other fee proposal of 10% for temporary positions and 10% of one month's wages for mechanical labor or domestic positions.

I return herewith the original check of $100. dated Sept. 17th and issued by the Treasurer of the Fidelity Union Trust Company of Newark under #13212 which will constitute full refund of the fee which you advance. I return also herewith the surety bond of the New York Indemnity Company.

Respectfully yours,

ANDREW F. McBRIDE,
Commissioner of Labor.

enc. RJE:M
cc for Dr. McBride

REASONS.

Filed November 25, 1925.

NEW JERSEY SUPREME COURT.

RUPERT RIBNIK, *Prosecutor,* vs. ANDREW F. McBRIDE, Commissioner of Labor for the State of New Jersey, *Defendant.*	*On Certiorari.* *Reasons.*

The said prosecutor, by Lum, Tamblyn & Colyer, his attorneys, comes and prays that the order made by the said defendant, as Commissioner of Labor of the State of New Jersey, denying the application of the prosecutor for a license to carry on an employment agency, may be set aside and reversed and for nothing holden for the following reasons:

1. Because the prosecutor has complied with the requirements for a license as prescribed by Chapter 227 of the Laws of 1918, entitled "An Act to Regulate the Keeping of Employment Agencies." P. L. 1918, page 822.

2. Because no valid ground, cause or reason existed or exists upon or by virtue of which the said defendant might lawfully deny the prosecutor's said application.

3. Because the only alleged ground, cause or reason upon which the defendant denied the prosecutor's said application was that the de-

Reasons.

fendant did not approve the schedule of fees which the prosecutor proposed to charge for his services.

4. Because the said statute, in so far as it purports to confer upon the Commissioner of Labor power and authority to fix, determine, limit, restrict or regulate the fees to be charged by the applicant for his services is unconstitutional in that it violates Article I, Section 1 of the New Jersey Constitution securing to the prosecutor the right of acquiring, possessing and protecting property.

5. That the said statute is unconstitutional in the respects aforesaid in that it violates the Fifth Amendment of the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law.

6. The said act is unconstitutional in the respects aforesaid because it violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it (1) abridges the privileges and immunities of citizens of the United States and (2) deprives persons of liberty and property without due process of law and (3) denies them the equal protection of the laws.

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutor.

I hereby consent to the filing of the within Reasons as within time and acknowledge due service thereof.

EDWARD L. KATZENBACH,
Attorney-General,
Attorney for Defendant.

OPINION.

Filed June 24, 1926.

NEW JERSEY SUPREME COURT.

No. 209, January Term, 1926.

RUPERT RIBNIK, *Prosecutor,* *vs.* ANDREW F. MCBRIDE, Commissioner of Labor of the State of New Jersey, *Defendant.*	*On Certiorari, Etc.*

Submitted January 30, 1926; decided June 24, 1926.

Before Justices Trenchard and Katzenbach.

For the prosecutor, Lum, Tamblyn & Colyer (Egbert J. Tamblyn and Chester W. Fairlie of counsel).

For the defendant, Edward L. Katzenbach, Attorney General, and Grover C. Richmond, Second Assistant Attorney General.

PER CURIAM:

This writ brings up for review the action of the Commissioner of Labor of the State of New Jersey in refusing to issue a license to the prosecutor to carry on an employment agency in this State.

The prosecutor applied under the provisions of Chapter 227 P. L. 1918, p. 822, entitled "An Act to regulate the keeping of employment agencies." The refusal of the Commissioner to

grant the license applied for is based upon the ground that he could not approve, in its entirety, the prosecutor's proposed schedule of fees to be charged in the conduct of the agency.

The prosecutor states in his brief that "The only question involved on this certiorari is whether the Commissioner's approval of the fees proposed to be charged by prosecutor for the services to be rendered by him to his clients can be made a condition precedent to the prosecutor's right to engage in that business in this State; that is, whether said act in so far as it purports to confer upon the Commissioner of Labor power and authority to fix, determine, limit, restrict or regulate the fees to be charged by the applicant for his services is constitutional under our State Constitution and under the Federal Constitution. Constitution and under the Federal Constitution."

We think that the questions thus raised and argued are determined in substance and effect adversely to the contention of the prosecutor by the principles declared by the Court of Errors and Appeals in the case of McBride *vs.* Clark, 127 Atl. 550, in reviewing proceedings under the same act. There it was held that the provisions of the statute requiring license, and regulating the business, and empowering the Commissioner (under Section 10) to refuse to issue license for any good cause shown, did not violate (1) the Fifth Amendment of the Federal Constitution which provides "Nor shall any person * * * be deprived of life, liberty or property without the process of law"; nor (2) the Fourteenth Amendment of the Federal Constitution which provides "Nor shall any State deprive any person of liberty, life or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law";

nor (3) Section 1, Article 1, of the State Constitution which provides that "All men are by nature free and independent and have certain * * * inalienable rights, amongst which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." Those are the constitutional provisions which it is contended in the present case were violated by the statute.

In the Clark case it was pointed out that it is common knowledge that an employment agency is a business dealing with a great body of our population, native and foreign born, which is susceptible to imposition, deception and immoral influences, and that the statute, in so far as the provisions mentioned are concerned, is within the police powers of the State. The Court quoted the language of Brazee *vs.* Michigan, 241 U. S. 340, as follows: "Considering our former opinions it seems clear that, without violating the federal constitution, a state, exercising the police power, may require licenses for employment agencies and prescribe reasonable regulations in respect of them to be enforced according to the legal discretion of a commissioner." And in the Clark case our Court of Errors and Appeals further said:

"The power to grant a license under the statute has been vested in the commissioner within certain limits. It is obvious that, unless a hard and fast line of conditions is indicated in the legislation itself, the power of deciding upon the fitness of the applicant must be vested in some other authority if the purpose of the act is to be made effective. In the case of Brazee *vs.* Michigan, *supra,* there were many regulations vested in the discretion of the commissioner of

labor, and this authority was expressly sanctioned by the Supreme Court. Under section 10 of our own statute the commissioner of labor may refuse to issue any license 'for any good cause shown' within the meaning and purpose of the act. Among the conditions of obtaining such license are that the 'applicant shall be required to furnish satisfactory proof of good moral character in the form of affidavits,' and imposes upon the commissioner the duty of investigating the character of the applicant. Deeming the business as one justifying intervention of the Legislature for the safety of the public morals and public health under its police powers, and that the power to determine the fitness and qualifications of those seeking to engage in the business was properly given to the Commissioner, the question arises, Was the power legally exercised in the individual case, the commissioner having refused the prosecutor's application for a license upon the grounds (1) that the applicant had already violated the statute by carrying on the business without a license, well knowing the legal requirements therefor; and (2) that the schedule of fees proposed by the relator were not approved by the Commissioner?''

As already indicated, the statute provides that every applicant shall file with the Commissioner ''a schedule of fees proposed to be charged for the services rendered to employers seeking employees, and persons seeking employment'' (section 5), and that the Commissioner ''may refuse to issue * * * any license for any good cause shown within the meaning of this act.''

We look upon this provision as a *regulation* of the business, and so, apparently, did the Court in the Clark case, and such seems to be the rule supported by other authorities. See the cases

collected in *6* R. C. L., p. 273, where in the text it is said: "The power of the legislature to regulate a business for the protection of the public carries with it the power to control and regulate the right to contract in relation to it. While therefore the right to contract may be subject to limitations growing out of the duties which the individual owes to society, the public, or the government, the power of the legislature to limit such right must rest on some reasonable basis, and cannot be arbitrarily exercised."

Here the question argued is solely the constitutionality of the statute conferring the power. It is not contended that the power was unreasonably or arbitrarily exercised by the Commissioner. No attack is made upon the finding of the Commissioner that the fee schedule proposed to be charged "is excessive and unreasonable and is more than the fee charged by some thirteen other similar agencies in this State and is more than the average which is permitted or is charged in practice in other similar industrial States in this country."

Our conclusion is that the present attack upon the statute is without substance, and accordingly the writ is dismissed, with costs.

Rule of Dismissal.

RULE ON DISMISSAL.

Filed July 14, 1926.

NEW JERSEY SUPREME COURT.

RUPERT RIBNIK, *Prosecutor,* vs. ANDREW F. McBRIDE, Commissioner of Labor of the State of New Jersey, *Defendant.*	*On Certiorari.* *Rule on Dismissal.*

The Court having inspected the transcript and proceedings of Andrew F. McBride, Commissioner of Labor of the State of New Jersey, returned with the writ of certiorari in this cause, the reasons for reviewing the action of the Commissioner, and heard the argument of counsel thereon, and having duly considered the same, do order that the said writ of certiorari be dismissed, with costs.

Dated July 13, 1926.

Entered July 14, 1926,

On motion of
EDWARD L. KATZENBACH,
Attorney General of New Jersey,
Attorney for Andrew F. McBride,
Commissioner of Labor of the State of
New Jersey.

Let the Rule be entered.

NOTICE OF APPEAL.

Filed September 8, 1926.

NEW JERSEY SUPREME COURT.

RUPERT RIBNIK, *Prosecutor,* *vs.* ANDREW F. McBRIDE, Commissioner of Labor of the State of New Jersey, *Defendant.*	*On Certiorari.* *Notice of Appeal.*

To the Hon. Edward L. Katzenbach, Attorney-General of New Jersey, attorney for the defendant, or whom it may concern:

TAKE NOTICE that the prosecutor above named appeals to the Court of Errors and Appeals in the last resort in all causes from the judgment entered in the above-entitled cause, and from each and every part thereof.

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutor.

Dated July 20, 1926.

Service of a copy of the within notice of appeal is hereby acknowledged, this 29th day of July, 1926.

EDWARD L. KATZENBACH,
Attorney-General,
Attorney for Defendant.

GROUNDS OF APPEAL.

Filed September 8, 1926.

New Jersey Court of Errors and Appeals

RUPERT RIBNIK, *Prosecutor-Appellant,* *vs.* ANDREW F. McBRIDE, Commissioner of Labor of the State of New Jersey, *Defendant-Respondent.*	*On Certiorari.* *Grounds of Appeal.*

To the Honorable Edward L. Katzenbach, Attorney-General of New Jersey, attorney for defendant-respondent, or whom it may concern:

TAKE NOTICE that the following are the grounds of appeal which the prosecutor-appellant hereby assigns and upon which he will rely at the hearing:

1. That the Supreme Court erred in giving judgment for the defendant-respondent instead of for the prosecutor-appellant.

2. The Supreme Court erred in giving judgment for the defendant-respondent for the following reasons:

(1) Because the prosecutor-appellant has complied with the requirements for a license as prescribed by Chapter 227 of the Laws of 1918, entitled "An Act to Regulate the Keeping of Employment Agencies." P. L. 1918, 822.

Grounds of Appeal.

(2) Because no valid ground, cause or reason existed or exists upon or by virtue of which the said defendant-respondent might lawfully deny the prosecutor-appellant's said application.

(3) Because the only alleged ground, cause or reason upon which the defendant-respondent denied the prosecutor-appellant's said application was that the defendant-respondent did not approve the schedule of fees which the prosecutor-appellant proposed to charge for his services.

(4) Because the said statute, in so far as it purports to confer upon the Commissioner of Labor power and authority to fix, determine, limit, restrict or regulate the fees to be charged by the applicant for his services is unconstitutional in that it violates Article I, Section 1 of the New Jersey Constitution securing to the prosecutor-appellant the right of acquiring, possessing and protecting property.

(5) That the said statute is unconstitutional in the respects aforesaid in that it violates the Fifth Amendment of the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law.

(6) The said act is unconstitutional in the respects aforesaid because it violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it (1) abridges the privileges and immunities of citizens of the United States and (2) deprives persons of liberty and property without due process of law and (3) denies them the equal protection of the laws.

LUM, TAMBLYN & COLYER,
Attorneys for and of Counsel with
Prosecutor-Appellant.

Grounds of Appeal.

Service of a copy of the within grounds of appeal is hereby acknowledged this 29th day of July, 1926.

EDWARD L. KATZENBACH,
Attorney-General of New Jersey,
Attorney for Defendant-Respondent.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

RUPERT RIBNIK, *Prosecutor-Appellant,* *vs.* ANDREW F. McBRIDE, Commissioner of Labor for the State of New Jersey, *Defendant-Respondent.*	*On Certiorari.* *On Appeal from Supreme Court.*

BRIEF FOR PROSECUTOR-APPELLANT.

Statement of the Case.

Pursuant to the requirements of Chapter 227, Laws of New Jersey, 1918 (C. S. 1911-1924, Cum. Sup., p. 1186), entitled, "An Act to Regulate the Keeping of Employment Agencies," the prosecutor applied to the Commissioner of Labor for the State of New Jersey for a license to carry on such a business as is defined in said act (Application for License, Bk. pp. 3-6).

The defendant rejected said application and refused to issue such license to prosecutor upon the sole ground as stated by him "that I do not approve your proposed fee schedule" (defendant's letter, Bk. pp. 8-9).

Before the Supreme Court on a review of this action of the Commissioner on a writ of certiorari, the prosecutor-appellant urged that said action of the Commissioner be set aside, reversed and for nothing holden for the following reasons (Bk. pp. 10-11):

1. Because the prosecutor had complied with all the valid requirements for a license as prescribed by said act.

2. Because no valid ground, cause or reason existed or exists upon or by virtue of which the defendant might lawfully deny the prosecutor's said application.

2. Because the only alleged ground, cause or reason upon which the defendant denied the prosecutor's said application was that the defendant did not approve the schedule of fees which the prosecutor proposed to charge for his services.

4. Because the said statute, insofar as it purports to confer upon the Commissioner of Labor power and authority to fix, determine, limit, restrict or regulate the fees to be charged by the applicant for his services is unconstitutional in that it violates Article I, section 1 of the New Jersey Constitution, which provides:

> "All men are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and the pursuing and obtaining safety and happiness."

5. Because the said statute is unconstitutional in the respects aforesaid in that it violates the Fifth Amendment of the Constitution of the United States, which in part provides:

> "* * * nor shall any person * * * be deprived of life, liberty or property without due process of law * * *."

6. Because the said act is unconstitutional in the respects aforesaid in that it violates the provisions of the Fourteenth Amendment of the Constitution of the United States, which in part provides:

> "* * * nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court sustained the constitutionality of the act and of the Commissioner's action thereunder (Opinion Bk. pp. 13-17) and a rule dismissing the writ of certiorari was entered accordingly (Rule p. 18).

From the aforesaid action of the Supreme Court this appeal is taken and as grounds of appeal (Bk. pp. 21-21) it is urged (1) that the Supreme Court erred in giving judgment for defendant-respondent instead of for the prosecutor-appellant and (2) that the Supreme Court erred in giving such judgment for the six reasons which are above set forth.

The pertinent parts of the statute in question are as follows:

Section 1, paragraph (d):

> "(d) The term 'employment agency' when used in this act shall mean and include the business of procuring or offering to procure help or employment, or the giving of information as to where help or employment may be procured, whether such business is conducted in a building or on the street or elsewhere; or the business of keeping an intelligence office, employment bureau, or shipping agency, nurses' registry, or agency for procuring engagements for vaudeville or theatrical performers, or other agency or office for procuring work or employment for persons, where a fee or privilege is exacted, charged or received directly or indirectly for procuring or assisting or promising to procure employment, work, engagement or a situation of any kind, or for procuring or providing help or promising to provide help for any person, whether such is collected from the applicant for employment or the applicant for help."

Section 3, paragraph (a):

"(a) No person shall open, keep or carry on any employment agency as defined above unless such person shall procure a license therefor from the Commissioner of Labor. Such license shall be posted in a conspicuous place in said agency. Any person who shall open or conduct such an employment agency without first procuring said license, or who shall conduct such an agency after revocation of such license, shall be liable to a penalty of not less than fifty dollars and not more than two hundred and fifty dollars."

Section 3, paragraph (b):

"(b) An application for such license shall be made in writing to the Commissioner of Labor, and shall state the name and number of the building and place where the employment agency is to be conducted. The application for such license shall be filed not less than one week prior to the granting of said license, and the Commissioner of Labor shall act upon such application within thirty days from the time of such application."

Section 3, paragraph (c):

"(c) Every such applicant shall be required to furnish satisfactory proof of good moral character in the form of affidavits by at least two reputable citizens of the State, and any person may protest against the issuance or the transfer of any license. The Commissioner of Labor, or his representative, shall investigate, or cause to be investigated, the character and responsibility of the applicant, and shall examine, or cause to be examined, the premises designated in such application as the place in which it is proposed to conduct such agency."

Section 3, paragraph (e) in part provides:

"(e) Before such license is issued he shall also deposit with the Commissioner of Labor a bond in the penal sum of one thou-

sand dollars, with two or more sureties, or a duly authorized surety company, as surety, to be approved by the Commissioner of Labor."

Section 5, paragraph (a) in part provides:

"(a) Every employment agent shall file with the Commissioner of Labor, for his approval, a schedule of fees proposed to be charged for any services rendered to employers seeking employees, and persons seeking employment, and all charges must conform thereto. The schedule of fees may be changed only with the approval of the Commissioner of Labor. No registration or other fees in lieu thereof shall be charged or received by such employment agent. No such licensed person shall receive or accept any valuable thing or gift as a fee or in lieu thereof."

Section 10 in part provides:

"The said Commissioner of Labor may refuse to issue and may revoke any license for any good cause shown within the meaning and purpose of this act."

The only question involved on this appeal is whether the Commissioner's approval of the fees proposed to be charged by the applicant for the services to be rendered by him to his clients can be made a condition precedent to the applicant's right to engage in that business in this State, that is, whether said act insofar as it purports to confer upon the Commissioner of Labor power and authority to fix, determine, limit or regulate the fees to be charged by the applicant for his services is constitutional under our State Constitution and under the Federal Constitution.

ARGUMENT.

1. Both our State and Federal constitutions guaranty to appellant the right to sell his personal services at the highest price he can command for them.

2. Limitation of the price at which appellant may sell his personal services as an employment agent is not a valid exercise of the police power.

No question is raised as to the power of the Legislature to delegate to the Commissioner of Labor authority to limit the price at which an employment agent may sell his services, *if* the Legislature itself has such power.

No question is raised as to the power of the Legislature to prescribe "that he who engages in the business of an employment agency should first submit himself to the permission and license of the State, or that he shall be subject to *reasonable* regulation in the conduct of such business." This Court so held in *Clark* v. *McBride*, 127 Atl. 550, in which the Commissioner had refused an application for a license upon two grounds, viz (1) that the applicant had already violated the statute by carrying on the business without a license, well knowing the legal requirements therefor; and (2) that the schedule of fees proposed by the applicant were not approved by the Commissioner. The Commissioner's action was sustained upon the first of said grounds, but this Court did not pass upon the other, saying "we do not pass upon the added reason that the schedule of fees as proposed was disapproved." That question which the Court did not pass upon in the *Clark* case is the only question presented in this case.

Brazee v. *Michigan*, 241 U. S. 340, 60 L. Ed. 1034, 36 Sup. Ct. Rep. 561, was the authority

upon which this Court rested its decision in the Clark case. It involved a statute very nearly identical in all respects with our said New Jersey statute. The United States Supreme Court upheld every section of the Michigan act, excepting the one fixing the fee, as to which the Court said:

> "Provisions in respect of fees to be demanded or retained are severable from other portions of the act, and we think might be eliminated without destroying it. Their validity was not passed upon by the Supreme Court of the State, and has not been considered by us."

The United States Supreme Court was thus careful to avoid any possibility of being interpreted as sustaining the price-fixing provisions of the act.

It is against the statute as price-fixing legislation that the present attack is made. Without the Commissioner's approval of the fees proposed to be charged by him for his services the applicant cannot procure a license, and without a license he is debarred from pursuing this lawful occupation. If one who has procured a license is offered by his clients and accepts more than the schedule of fees approved by the Commissioner, his license is subject to revocation. The declared purpose and the plain effect of the sections in question is to limit the right of an employment agent in making contracts and to limit and restrict the compensation which he may receive for the services which he renders.

The opinion of the Court below seems to interpret the rule that "the power of the Legislature to limit such right (of contract) must rest on some reasonable basis, and cannot be arbitrarily exercised" as meaning in this case that the

prosecutor must show that the Commissioner has unreasonably or arbitrarily exercised the power purported to have been delegated to him. It is respectfully submitted that it is the *assumption of power* by the Legislature which must rest on some reasonable basis and which must not be arbitrary. As was said in the case of *In re H. B. Smith, post,* the question as to *whether the amount limited is too low is "an immaterial issue, and the only question left for determination is the constitutionality of the act."* We submit that *any* legislative limitation (either directly by statute or indirectly by power delegated to the Commissioner) of the price at which appellant may sell his services as an employment agent is arbitrary and unreasonable, and is not a proper exercise of the police power of the Legislature; that neither the Legislature nor the Commissioner as legislative agent has power under our State and Federal Constitutions to decree that the price which appellant proposes to charge for his services to such persons as are willing to pay him his price "is excessive and unreasonable" (Bk. p. 9, l. 9); that the fact that his proposed schedule of fees "is more than the fee charged by some thirteen other similar agencies in this State" has no bearing whatever upon his right to be paid more for his services if his clients are willing to pay him more; that the fact that his proposed charge "is more than the average which is permitted or is charged in practice in other similar industrial States in this country" is likewise no ground for restricting him to such alleged average. On the record it must be conceded that his proposed fee "is more than the fee charged by some thirteen other similar agencies in this State and is more than the average which is permitted or is charged in practice in other

similar industrial States in this country" (Commissioner's letter, p. 9), but in this country what one may earn by his labor is not limited to averages established by the Legislature or by legislative agents and is not limited to what "some thirteen others" may be willing to sell their services for.

In *Adams* v. *Tanner,* 244 U. S. 590; 61 L. Ed. 1336, L. R. A. 1917 F. 1163, the United States Supreme Court had before it a statute of the State of Washington prohibiting employment agencies from collecting fees from applicants for employment. The Court held that the statute in effect prohibited the carrying on of the business of an employment agency and that it unduly restricted the liberty of the appellant guaranteed by the Fourteenth Amendment to engage in a useful business. The Court, speaking through Mr. Justice McReynolds, said in part:

> "We have held employment agencies are subject to police regulation and control. The general nature of the business is such that, unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them. Brazee *v.* Michigan, 241 U. S. 340; 60 L. Ed. 1034; 36 Sup. Ct. Rep. 561. But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable and in great demand. In Spokane *v.* Macho, 51 Wash. 322, 324; 21 L. R. A. (N. S.) 263; 130 Am. St. Rep. 1100; 98 Pac. 755, the Supreme Court of Washington said: 'It cannot be denied that the business of the employment agent is a legitimate business as much so as is that of the banker, broker or merchant; and under the methods prevailing in the modern business world it may be said to be a necessary adjunct in the prosecution of business enterprises.' "

The case of *Ex parte Dickey, post,* is also cited and quoted to like effect, and the Court observes that "this conclusion is fortified by the action of many states in establishing free employment agencies charged with the duty to find occupation for workers." The Court further said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no buisness, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

In *Allgeyer* v. *Louisiana,* 165 U. S. 578, 41 L. Ed. 832; 17 Sup. Ct. Rep. 427, the United States Supreme Court held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside of the state for insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment, the Court saying:

> "The liberty mentioned in that amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration; but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to

> pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In considering the question as to whether the legislature has power to limit his compensation, the occupation of an employment agent must necessarily be viewed from an entirely different agnle from that in which it is viewed when considering merely the power of the legislature to subject it to reasonable regulation in the interest of public morals, health or safety. From the latter viewpoint this Court took into consideration "that the business of an employment agency is one dealing with a great body of our population, both native and foreign born, which is susceptible to deception and immoral influences" and that "embracing as it does male and female, the ignorant, the poor, the young as well as the old, the weak and the strong, it would seem to be appropriate that the state should regard them as peculiarly situated for the exercise of its protecting arm." This is sufficient reason for subjecting the occupation to *reasonable* regulation, but it is not reason for limiting the price at which an employment agent may sell his services. These same natives and foreign born, males and females, the ignorant, the poor, the young as well as the old, the weak and the strong must pay a price for whatever they get, whether it be from a department store, a plumber, a dentist, or what not, and it is no proper exercise of the protecting arm of the state to determine by statute or by edict of a legislative agent what price they shall pay for another man's services.

It should be noted that it is "commercial" and "professional" help that this appellant proposed

to deal with (Application Bk., p. 4, ll. 28-31)—certainly not a class as to whose contracts and expenditures the legislature needs to or may lawfully exercise its protecting arm as if they were idiots.

In the magazine called "Management" there will soon appear an article on employment agencies. We quote from that article, not to state facts, but to illustrate and point out the kind of service that an employment agent may render:

> *"Putting It Up to the Agency.*
>
> "There is a widespread but mistaken belief that employment agencies are useful only for filling the minor positions in office, factory and work gang. This error is due to the fact that the number of minor positions to be filled is much greater than the number of 'big' positions, and that the hiring of executives is usually attended by considerable secrecy.
>
> "Prior to the World War, the Kyshtim Corporation, Ltd., of London, England, desired an American engineer to rehabilitate one of their mining properties in Russian Siberia. An American employment agency, after several months of investigation, found the right man.
>
> "The engineer was engaged through the agency, and furnished through the agency with some $1,700 for transportation and expenses in reaching the job. He sailed from the Pacific Coast, entered Russia through China, and was on the job about a year. In that time he spent about $240,000 of the company's money and brought the property up to the desired standard of efficiency.
>
> "He then returned to America to resume his more usual occupation. And to this date he has never personally met any official of the London company that employed him or of the agency that recommended him.

"Selection of Executives.

"In a very recent case one of the most successful textile mills in the country desired to retire its seventy-year-old superintendent on a well-earned pension as soon as a satisfactory successor could be found. After advertising extensively but unsuccessfully in the daily and weekly textile publications, the mills asked an employment agency to find the proper executive.

"The agency knew that not over twenty-five men in the country were available for the position. Through correspondence the field was narrowed to twelve, for whom interviews were arranged. Among the dozen was found a man who suited them so well that the mills offered him $13,000 a year and a bonus, and later were glad to renew his contract.

"In this case the agency helped the employer out of a very difficult situation. It was able to do so both because it knew the available candidates, and also because men of the calibre desired would not answer blind advertisements but would negotiate through a recognized agency."

These stories, of course, cannot be accepted as facts in the case, but they thereby lose none of their force in the argument. They demonstrate that the value of the service rendered cannot be reduced to unit measurement or be justly scaled according to any prescribed schedule.

An employment agent may spend days going from one employer to another seeking the most suitable and advantageous position possible to be found for a client. He may give his client the benefit of his wide acquaintance with employers, of the esteem in which employers hold him, of his personal appearance, bearing and persuasiveness, of his experience, of his ability to judge the sort of work a man is best suited to and the sort of man that is best suited to fill an open posi-

tion. In all of this nothing is involved but the employment agent himself, his personality and effort, and yet, under the statute in question, his maximum compensation is fixed without regard to the respects in which one agent may excel another, or the length of time that may be devoted to a client's interest, or the effort that is put forth, or the fitness of the result accomplished.

Limitation of the service fee must tend to keep out the more desirable persons who might otherwise engage in the business, and must tend also to limit the quality and quantity of service that those in the business will render.

It is the inalienable right of every man to sell *his labor* at the highest price it will command that is involved in this case. To render service as an employment agent is not only a harmless but is a lawful and useful occupation. It involves nothing else than the rendering of personal service—the work of one's hands, feet and mind—to those who desire to employ such service. It affords opportunity for all degrees of personal effort or sloth, intelligence or ignorance, skill or bungling, honesty or dishonesty in the rendering of the service. In such an occupation all men do not deserve to be paid equally. The constitution guarantees to each the fruit of his labor, intelligence, skill and integrity, free from such limitation as is imposed by the act in question. This Court, speaking through Mr. Justice Pitney in the case of *Brennan* v. *United Hatters*, 73 N. J. L. 729, at p. 742, said:

> "The common law has long recognized as a part of the boasted liberty of the citizen the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow-men, saving such as

may result from the exercise of equal or superior rights on their part—such for instance, as the right of fair competition in the like field of human effort—and saving, of course, such other hindrance or obstruction as may be legally excused or justified.

This right is declared by our Constitution to be unalienable. The first section of the Bill of Rights sets forth that 'All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.'

As a part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services, which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and right of acquring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community, which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it. The cup of Tantalus would be a fitting symbol for such a mockery. Our Constitution recognizes no such notion.''

In *Coppage* v. *United States,* 236 U. S. 14; 59 L. Ed. 446; L. R. A. 1915 C. 960; 35 Sup. Ct. Rep. 240, the United States Supreme Court, speaking through Mr. Justice Pitney, said:

''Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make

> contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property save by working for money.
>
> An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state."

Few cases can be found which are on all fours with the present case, for, notwithstanding the paternalistic, socialistic, communistic tendencies of some legislators and the extremes they may go to in exercising "police power" to promote what seems to them to be the "public welfare," they have seldom gone so far as to assail the holy of holies of American liberty—the right of every man to work and to put such price upon his labor or services as he may choose. "Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked." The courts of this country have steadfastly declared unconstitutional all legislative attempts to fix wages for labor or compensation for personal services.

The only cases we have found that are on all fours with the present case arose in California and involved a statute in effect identical with that now under consideration in so far as it attempts to limit the compensation of employ-

ment agents. The first is *Ex parte Dickey,* 144 Cal. 234; 66 L. R. A. 928; 103 Am. St. Rep. 82; 77 Pac. 924; 1 Ann. Cas. 428 in the Supreme Court of California. We quote the opinion *in toto:*

> "By this writ the petitioner attacks the constitutionality of an act of the legislature defining the duties and liabilities of employment agents, making the violation of the act a misdemeanor, and fixing penalties therefor (Stat. 1903, p. 14, chap 11), and in particular section 4 of this act, under which he was charged and convicted of a misdemeanor."
>
> "Section 4 reads as follows: 'It shall be unlawful for an employment agent in the state of California to receive, directly or indirectly for registration made or for information or assistance such as is described in section 2 hereof, any money or other consideration which is in value in excess of 10 per cent. of the amount earned, or prospectively to be earned, by the person for whom such registration is made or to whom such information is furnished, through the medium of the employment regarding which such registration, information, or assistance is given, during the first month of such employment: Provided, that said value shall not be in excess of 10 per cent. of the amount actually prospectively to be earned in such employment when it is mutually understood by the agent and person in this section mentioned, at the time when said information or assistance is furnished, that said employment is to be for a period of less than one month.' Whether or not the act be a valid exercise of the police power is the single question here calling for determination."
>
> "As to the scope of the legislative exercise of the police power, the Supreme Court of the United States, in the recent case of *Holden* v. *Hardy,* 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, discussing the question of the right of one to pursue an

ordinary and legitimate vocation, to acquire property, and to make contracts to that end, says: 'This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held * * * that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.' And Judge Cooley—Constitutional Limitations, 7th ed., p. 837—declares: 'The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society.' In the same connection this court has said (*Sonora* v. *Curtin*, 137 Cal. 583, 70 Pac. 674): 'A police regulation or restraint is for the purpose of preventing damage to the public or to third persons. There are certain lines of business and certain occupations which require police regulation because of their peculiar character, in order that harm may not come to the public, or that the threatened danger may be averted. Where the profession or business is not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation for revenue.' It appears, therefore,

that the due exercise of the police power is limited to the preservation of the public health, safety, and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation. The business in which this defendant is engaged is not only innocent and innocuous, but is highly benefical, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals nor, indeed, is the purpose of this statute to regulate in these regards, or in any of them. The declared purpose and the plain effect of the above-quoted section is to limit the right of an employment agent in making contracts—a right free to those who follow other vocations—and arbitrarily to fix the compensation which he may receive for the services which he renders."

"Here, then, is laid down a most drastic rule governing the conduct of a man in the prosecution of a harmless, legitimate and beneficial business. Under the Constitution of the United States and of this state, the protection guaranteed in the possession of property and in the pursuit of happiness is extended, as of necessity it must be, to cover the right to acquire property, and the right to acquire property must and does include the employment of proper means to that end. Says Judge Cooley (Constitutional Limitations, 7th ed., p. 889): 'The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away.' And this court has said (*Ex parte Newman*, 9 Cal. 517): 'The right to protect and possess property is not more clearly protected by the Constitution than the right to acquire. The right to acquire must include the right to use the proper

means to attain the end. The right itself would be impotent without the power to use its necessary incidents. The legislature therefore cannot prohibit the proper use of the means of acquiring property, except the peace and safety of the state require it.' In strict accord with this is the language of the Supreme Court of the United States in *Holden* v. *Hardy,* 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383: 'As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision (due process of law). Indeed, we may go a step further, and say that, as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.' And says Judge Cooley (p. 560), treating of this same subject matter: 'The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express

constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

"The application of these principles to the statute under consideration leads to the following irresistible conclusion. The petitioner is engaged in a harmless and beneficial business. As part of his 'property' in that business are the services that he renders in obtaining employment for those seeking it. It is not compulsory upon anyone to employ him, and who so seeks to avail himself of his services is at liberty to reject them if the terms of the contract for compensation are not satisfactory to him. This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations. Such legislation is of the class discussed by Judge Cooley in the paragraph above quoted —'entirely arbitrary in its character, and restricting the rights, privileges, or legal capacities of one class of citizens "in a manner before unknown to the law." For such legislation, as he very justly adds, those who claim its validity should be able to show a specific authority therefor, "in-

stead of calling upon others to show how and where the authority is negatived." And where, it may be asked, could the line be drawn, if the legislature, under the guise of the exercise of its police power, should thus be permitted to encroach upon the rights of one class of citizens? Why should not the butcher and the baker, dealing in the necessaries of life, be restricted in their right of contract, and, consequently, in their profits, to 10, 5 or 1 per cent.? Why should not the contractor, the merchant, the professional man, be likewise subjected to such paternal laws, and why might not the legislature fix the price and value of the services of labor? The law is clearly one of those, the danger of whose enactment was foreshadowed by this court in *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803, when it said: 'So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the Republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant.' "

"We have not, in this discussion, been called upon to consider adjudications from any sister states, for the reason that no such enactments as this have been passed by their legislatures, or, if passed, have come before their courts for review. We have been referred to no cases by the respondent. In Illinois, however, an act not dissimilar in character was passed requiring that all coal produced in the state should be weighed on scales at the mines, and that such weight should be taken as a basis for computing the wages of the operators, and prohibiting the owners and employees from contracting for labor on any other basis. In *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, the

defendant was convicted of having failed to furnish a track scale as provided in the act, and he appealed. In stating the proposition the Supreme Court of Illinois said: 'The question is thus presented whether it is competent for the general assembly to single out owners and operators of coal mines, as a distinct class, and provide that they shall bear burdens not imposed on other owners of property or employers of laborers, and prohibit them from making contracts which it is competent for other owners of property or employers of laborers to make.' The court, in its discussion, quoted Judge Cooley, as above, and, in declaring the law invalid, said: 'What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor, or in regard to the mode of ascertaining the price? And why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract?' "

"There are but two classes of legislation standing upon the books which bear any similarity to the law here under consideration, but an examination of those classes discloses that the similarity is superficial and not substantial. The first is found in the laws against usury, not recognized in this state, saving in the particular case of pawnbrokers, who are forbidden to charge more than 2 per cent. a month interest. But usury laws, without regard to their wisdom, are a heritage to us from the common law, which we have adopted as the basis of our jurisprudence, and had their origin in the somewhat spiritual and theological notion that it was against the law of God that a thing which was by nature unfruitful should be made to bear fruit, and from time immemorial have been upheld as police regulations. *Ex parte Lichtenstein*, 67 Cal. 359, 56 Am. Rep. 713, 7 Pac. 728. The second is the law

> of Congress, apparently impairing the right of contract, in declaring that no agent, attorney, or other person engaged in preparing, presenting, or prosecuting any claim under the provisions of the pension act shall demand, receive, or retain for his services any sum greater than $10, and making a violation of the act a misdemeanor. But the constitutionality of the act is upheld by the Supreme Court of the United States upon the express ground that no pensioner has a vested legal right to his pension. The pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall at its discretion, and, being at liberty so to give or withhold, 'may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be presented. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others.' *Frisbie* v. *United States,* 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586.
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> For the foregoing reasons, the provision of the act under consideration is declared void."

There has hardly been a case, dealing with the subject of the right of contract, decided since the case of *Ex parte Dickey,* in which that decision has not been referred to or quoted with approval. It has been woven into the fabric of our structure of law, both State and national, and has become a cornerstone upon which rests much of the constitutional law in existence in the nation today.

In his brief submitted to the Court below in this case the attorney for defendant said: "The case of *In re Dickey* was virtually overruled by the Superior Court of the State of California in the case of W. W. Payne, &c., *v.* Walter G. Mathewson, Commissioner of Labor of the State

of California, decided in 1923 (a typewritten copy of which opinion is in the Attorney-General's department, but is not to be found in reports contained in the State Library), in which the Court sustained the act of June 18, 1923 (Chap. 414, Laws of 1923) prescribing maximum fees to be charged by employment agencies as the proper exercise of the police power of the State." The opinion in that Payne case was set up in full in the Attorney-General's brief. The Supreme Court, and not the Superior Court, is the highest court of the State of California. *In re H. B. Smith,* 233 Pac. Rep. 971, decided March 24, 1924, upon the authority of the *Dickey case* and of *Adkins* v. *Children's Hospital, post,* the California Supreme Court declared unconstitutional the act which was involved in said case of *W. W. Payne* v. *Mathewson, Commissioner,* without even so much as referring to the decision of the lower court which had previously been rendered in the *Payne* case. *In re H. B. Smith, supra,* the petitioner was arrested by virtue of a warrant issued upon a criminal complaint charging him with violation of that portion of the act of the legislature of California approved June 18, 1923, fixing a maximum fee to be charged by an employment agency. The California Supreme Court in a *per curiam* opinion said:

> "It is admitted by the respondent that the business of conducting an employment agency is lawful, useful and beneficial to society. It is claimed, however, that the business furnishes an exceptionally fertile field for the growth of industrial abuses, which it was the purpose of the legislature to prevent by the adoption of the said amendatory act. It is the claim of respondent that the act is regulatory merely and operates upon a subject which properly falls within the police power of the state."

All the facts of the case were agreed upon, excepting the question as to whether the maximum fees fixed by the act were so low as to be prohibitory of the business rather than regulatory. The Court said, however: "The disputed question of fact, in view of our conclusion, becomes an immaterial issue, and the only question left for determination is the constitutionality of the act." After citing and quoting from the *Dickey* case the Court cited also *Adkins* v. *Children's Hospital,* 261 U. S. 525; 43 Supreme Court 394; 67 L. Ed. 785; 24 A. L. R. 1238, in which the United States Supreme Court made an exhaustive review of the authorities touching the right to contract about one's affairs, including the right to make contracts of employment. The California Supreme Court's opinion says concerning the Adkins case:

> "The question under consideration was whether Congress had the constitutional power to fix maximum wages for women and children engaged in any occupation within the District of Columbia. Its conclusion was that the act in question passed the limits prescribed by the Constitution and was therefore invalid. Surely the reasons which may be advanced for establishing standards of maximum wages for women and children are not less potential than those which may be urged in favor of the validity of the act before us. The same arguments made for and against the validity of the act in the instant case were made in the Adkins case, and the conclusion there reached was the result of a full and deliberate consideration of the many authorities which have been cited in the case at bar. The question being a federal one, the decision of the highest court of the country on the subject is conclusive, even if we find ourselves without a precedent within our own jurisdiction. Upon the authority of the cases cited, and a long list of

> others referred to therein, we are of the opinion that the statute in question is invalid."

In *Adkins* v. *Children's Hospital, supra,* Mr. Justice Sutherland, delivering the opinion of the Court said: "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause (Fifth Amendment) is settled by the decisions of this Court, and is no longer open to question," citing numerous cases. "Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as a result of private bargaining." He observes that "there is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints, but freedom of contract is, nevertheless, the general rule and restraint the exception." He then reviews and classifies many of the decisions in which restraints have been upheld (and which we shall consider later in this brief), and concludes by saying:

> "It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases even in innocent matters is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable, but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and when these have been passed it becomes the plain duty of the courts, in the

> proper exercise of their authority, to so declare. To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."

Upon the authority of *Adkins* v. *Children's Hospital* the U. S. Supreme Court in a *per curiam* decision announced October 19, 1925, held the Arizona minimum wage law to be unconstitutional in the case of *John W. Murphy, Atty.-Gen. of Arizona,* v. *A. Sardell.*

The law is well established that those engaged in legitimate business (excluding certain businesses which, by reason of particular circumstances attendant thereon, are legitimate subjects of regulation as to rates and charges and to which we will give attention hereafter) have the right to make such contracts as they may deem prudent, and such right cannot be impaired by legislation.

Allgeyer v. *Louisiana,* 165 U. S. 578, 589, 41 Law Ed. 832;

Lochner v. *New York,* 198 U. S. 43, 53, 49 Law Ed. 937;

Adair v. *United States,* 208 U. S. 161, 52 Law Ed. 436;

Adams v. *Tanner,* 244 U. S. 590, 61 Law Ed. 1336; L. R. A. (917 F. 1163);

Coppage v. *Kansas,* 236 U. S. 1, 14, 59 Law Ed. 441;

Adkins v. *Children's Hospital,* 67 Law Ed. (U. S.) 440; 24 A. L. R. 1238;

Charles Wolff Packing Co. v. *Court of Industrial Relations, etc.,* 67 Law Ed. (U. S.) 756;

In re *Opinion of Justices,* 220 Mass. 627, 108 N. E. 807;

Atchison, et al., v. *Brown,* 80 Kans. 312, 102 Pac. 459, 133 Am. St. Rep. 213, 23 L. R. A. N. S. 247;

St. Louis, etc., v. *Griffin,* 106 Tex. 477, 171 S. W. 703;

People v. *Steele,* 231 Ill. 340, 121 A. S. R. 321, 13 L. R. A. N. S. 361;

People v. *Chicago, etc.* (Ill.), 138 N. E. 155;

American Surety Co. v. *Shallenberger,* 183 Fed. 640;

Ex parte Dickey, 144 Cal. 234; 66 L. R. A. 928.

In the case of *Allgeyer* v. *Louisiana, supra,* the Court had under consideration a statute restricting the right of a citizen to contract with reference to insurance, and the Court held that the statute was invalid as an unlawful restriction on the right of contract.

In the case of *Lochner* v. *New York, supra,* the Court had under consideration a statute limiting the hours of employment in bakeries to sixty hours a week and ten hours a day. The Court held the statute to be unconstitutional as an unwarranted interference with the right of contract between employer and employee. The Court said:

> "Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act."

In a previous case, to wit, *Holden* v. *Hardy,* 169 U. S. 366, 42 L. Ed. 780, the Court had sus-

tained a statute restricting the hours of labor in mines and smelters on the ground that such occupations, when too long pursued, were injurious to the health of employees, and in a later decision in *Bunting* v. *Oregon,* 243 U. S. 426, 61 L. Ed. 83, a statute forbidding the employment of any person in any mill, factory or manufacturing establishment more than ten hours in any one day was sustained on the ground that the Legislature and the State Supreme Court had found such a law necessary for the preservation of health of employees in these industries and that the Supreme Court of the United States would accept their judgment in the absence of facts to support a contrary conclusion.

These cases are discussed and *Holden* v. *Hardy* and *Bunting* v. *Oregon* distinguished from the case of *Lochner* v. *New York* in the case of *Adkins* v. *Children's Hospital, supra.*

In the case of *Adair* v. *U. S., supra,* the Court had under consideration a statute making it an offense for an interstate carrier to discharge an employee on account of membership in a labor organization. The Court held the statute unconstitutional and quoted from Cooley on Torts, as follows:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice. With his reasons, neither the public nor any third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others he is entitled to redress."

In the case of *Coppage* v. *Kansas, supra,* the Court had under consideration a statute of the State of Kansas, making it unlawful to coerce or otherwise influence an employee not to become a member of a labor organization. The Supreme Court held the statute to be unconstitutional as an unlawful attempt to interfere with the right of contract existing between employers and employees.

In the case of *Charles Wolff Packing Co.* v. *Court of Industrial Relations, etc., supra,* the Court passed upon the statute in the State of Kansas creating the Court of Industrial Relations. The Court held the statute to be unconstitutional as an unwarranted interference with the right of contract, and in the course of the decision used the following language concerning the statute, to wit:

> "These qualifications do not change the essence of the act. It curtails the right of the employer, on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment."

In *re Opinion of Justices, supra,* the Supreme Court of Massachusetts had under consideration a proposed statute prohibiting railroad corporations from discharging an employee by reason of information touching his conduct until the employee had been confronted with the accuser. The Court held the statute unconstitutional as an unwarranted infringement on the liberty of the employer to contract.

In the case of *Atchison, etc.,* v. *Brown, supra,* the Supreme Court of the State of Kansas had under consideration a statute which required the employer of labor, upon request of a discharged

employee, to furnish in writing the true cause or reason of discharge. The Court held that the statute was unconstitutional and was an unwarranted interference with the liberty of the employer.

In the case of *St. Louis, etc.*, v. *Griffin, supra,* a similar statute was involved, and the Court, in an exhaustive opinion, held the statute unconstitutional as an infringement of the right of contract of the employer.

In the case of *People* v. *Steele, supra,* the Supreme Court of Illinois passed upon the constitutionality of a statute prohibiting the sale of a ticket by a theatre without the requirement on its face that it should not be resold in advance and prohibiting the sale of a ticket in advance, and prohibiting the keeping of a place for such sale. The Court held the statute unconstitutional as an unwarranted interference with the right of contract, and in the course of the decision said:

> "Liberty, as that term is used in the Constitution, means not only freedom of the citizens from servitude and restraint, but is deemed to embrace the right of every man to be free of the use of his powers and faculties, and to adopt and pursue such a vocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. '* * * The right of every man to choose his own occupation, profession or employment, though not expressly guaranteed by the Constitution, is included in the right to the pursuit of happiness.' Black on Constitutional Law, p. 411. The privilege of contracting is both a liberty and a property right, and is protected by the Constitution."

In the case of *People* v. *Chicago, etc., supra,* the Supreme Court of Illinois had under consideration a statute providing that employees

should be allowed not exceeding two hours' absence from work for the purpose of voting, and that no deduction should be made from the wages of such employees for such absence. The Court held the statute unconstitutional as an unlawful interference with the right of contract between employer and employee. In the course of the decision the Court said:

> "In Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315, it was held that liberty includes the right to make contracts as well with reference to the amount and duration of labor to be performed as concerning any other lawful matter, and that any attempt to unreasonably abridge this right is opposed to the Constitution."

In the case of *American Surety Company* v. *Shallenberger, supra,* the United States Circuit Court in the State of Nebraska had under consideration a statute fixing the maximum rates of premiums to be charged by fidelity or surety companies transacting business in the State.

The Court held the statute unconstitutional as an unwarranted interference with the right of contract.

See also *Barr* v. *Council,* 53 N. J. Eq. 101.

The cases above cited and the many other cases cited therein establish the principle that the right of private contract cannot be impaired by legislation except where such legislation is justified in the proper exercise of police power.

Except for the instances hereinafter noted, all the cases we have found in which legislative power to fix tolls, rates or prices has been sustained are differentiated from the present case in that they all involve the use of some form

of property other than mere personal labor and services. Many cases in which such power has been sustained are collated in a note on the subject of "Legislative power to fix tolls, rates or prices," in 33 L. R. A., pp. 177-189, in which the cases are grouped under the headings: (a) elevators and warehouses, (b) carriers, including railroads, street railways, canals, ferries, &c.; (c) toll roads, (d) bridges, (e) wharves, (f) telegraphs, (g) telephones, (h) gas, (i) water, (j) bread, (k) mills, (l) boomage and salvage of logs, (m) personal services. Under the last-mentioned heading "personal services" are found only two cases, viz, *Clark* v. *State,* 102 N. Y. 101, in which the constitutionality of an act fixing the rate of compensation to be paid for labor or services performed *upon public works* was sustained, and *Frisbie* v. *United States,* 157 U. S. 160, in which the constitutionality of an act of Congress making it a misdemeanor for a pension agent to charge more than $10 for services on a pension claim was sustained. It is also observed in the note that "fees of officials are manifestly subject to regulations by law." So, too, fees of attorneys at law have sometimes been limited as in *Calhoun* v. *Massie,* 253 U. S. 170, in which Congress limited the amount which an attorney might charge for prosecuting a claim against the Government, much like the *Frisbie* case, and provisions have been sustained in Workmen's Compensation Acts limiting the fee which an attorney may charge for his services in prosecuting claims thereunder. But all such cases are clearly distinguishable. The services rendered in such cases and the compensation to be paid therefore are incident to the determination of the claim to be paid by the Government or the compensation to be received by the person injured. Moreover, attor-

neys at law are in a class quite distinct. They are licensed as officers of the court and are part of the machinery of administering justice. In a sense, theirs is not a private business, but a public service, a part of the functioning of the State itself.

The said case of *Frisbie* v. *United States* did not rest upon an exercise of police power, but, as pointed out *In re Dickey, supra,* "pensions are the bounties of the Government which Congress has the right to give, withhold, distribute or recall at its discretion, and, being at liberty so to give or withhold, 'may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be presented. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others.' " *Clark* v. *State, supra,* and the other cases involving statutes relating to contracts for the performance of public works which are mentioned in *Adkins* v. *Children's Hospital, supra,* are not at all in point, for, as stated in *Adkins* v. *Children's Hospital,*

> "These cases sustain such statutes as depending, not upon the right to condition private contracts, but upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or, in the case of a state, for its municipalities."

We have been able to find no other cases in which legislative limitation upon the price or compensation which one may receive in exchange for his mere labor and personal services in any lawful occupation has been sustained.

In *Adkins* v. *Children's Hospital, supra,* the Court reviewed many of the decisions in which interference with the right of contract had been

upheld, and grouped the decisions under four headings:

(2) *"Statutes relating to contracts for the performance of public work,"* which we have already mentioned.

(3) *"Statutes prescribing the character, methods and time for payment of wages,"* in respect to which the Court said:

> "In none of the statutes thus sustained was the liberty of employer or employee to fix the amount of wages one was willing to pay and the other willing to receive interfered with. Their tendency and purpose was to prevent unfair and perhaps fraudulent methods in the payment of wages, and in no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes."

(4) *"Statutes fixing hours of labor,"* in respect to which the opinion says:

> "This court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the legislature to regulate hours of labor, and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two."

(1) *"Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest,"* as to which the Court said:

> "The power here rests upon the ground that where property is devoted to a public use, the owner thereby, in effect, grants to the public an interest in the use which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld."

The cases mentioned in the above-cited L. R. A. note on the subject of "Legislative power to

fix tolls, rates or prices'' are of this class, as also are the cases collated in 6 L. R. A. (N. S.), pages 834-837, under a note entitled ''Kinds of business affected with a public interest subjecting them to regulation and control in respect to rates or prices.'' In none of them was there involved any limitation upon the price or compensation which one might lawfully receive in exchange for his personal labor or services. In all of them there was some form of property involved other than mere personal labor and services, as, for instance, a franchise or public grant of privilege, or property and equipment used by a public carrier, elevators, warehouses, canals, mills, toll roads, bridges, wharves, telegraphs, telephones, public utilities such as gas, water, electricity, street railways, ferries and irrigation systems.

The same distinction exists in respect to laws against usury and regulating rates of interest, for they involve the use of money or property and not the sale of personal labor. Moreover, the cases dealing with legislative power to limit the right of contract uniformly recognize usury laws as a heritage which has come to us from the common law and as constituting a distinct and peculiar class of exceptions to the general rule of freedom of contract. However, regulation of abuses incident to money lending is in no way analogous to and affords no precedent for a limitation of the price at which one's personal services may be sold.

The utmost limit to which the United States Supreme Court has gone, so far as we can find, in adding to the list of businesses held to be so affected with a public interest as to justify regulation of rates and prices, is the case of *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 58 L.

Ed. 1011, 34 Sup. Ct. Rep. 612, L. R. A. 1915C 1189, in which the constitutionality was sustained of an act of the State of Kansas providing for the regulation and control of rates of premium on fire insurance. Mr. Justice McKenna delivered the opinion for the Court and Mr. Justice Lamar wrote a dissenting opinion, in which Mr. Chief Justice White and Mr. Justice Van Devanter concurred. The Court was careful to say: "We have tried to confine our decision to the regulation of the business of insurance." Among the considerations which led the Court to hold that the business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates were the following, none of which, it will be noted, are applicable to the employment agency business, viz:

> "A large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it, and we need not dispute with the economists that this is the result of 'substitution of certain for uncertain loss,' or the diffusion of positive loss over a large group of persons. * * * Contracts of insurance, therefore, have a greater public consequence than contracts between individuals to do or not do a particular thing whose effect stops with the individuals."
>
> "Insurance has definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world."
>
> "Contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the assured, possessing great power thereby, and charged with great responsibility."

"It is practically a *necessity* to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions."

"The price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of *monopolistic* character and that 'it is illusory to speak of liberty of contract.'"

"The problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads," &c.

Even this insurance case involved property other than mere personal services. "A contract for fire insurance is one of indemnity against loss." The Court looked upon the vast fund of assets of insurance companies as being a fund for "the diffusion of positive loss," and inasmuch as "it is practically a necessity to business activity and enterprise" and monopolistic in character, society, which has become dependent upon it, has acquired the right to regulate its rates by virtue of legislative police power. Notwithstanding that the Court said: "It is the business that is the fundamental thing; property is but its instrument, the means of rendering a service which has become of public interest," the fact remains that in that case, as in every other case in which a business has been held to be so affected with a public interest as to justify regulation of its rates, some form of property was involved other than

mere personal labor or services. The Court said:

> "Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77, is an instructive example of legislative power exerted in the public interest. The Constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern, and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, 'that when private property is affected with a public interest, it ceases to be *juris privati* only' and it becomes 'clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large'; and, so using it, the owner 'grants to the public an interest in that use, and must submit to be controlled by the public for the common good.' And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, 'for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.'"

The limitation has always been upon the price to be charged for service involving the sale or use of property in some form. No occupation which involves merely the use of one's hands, feet and mind, unassociated with any other form

of property, has ever been held to be subject to legislative control of the price to be paid for such service.

There is nothing monopolistic in the nature of employment agencies. Many other means of finding suitable employment are open to those seeking it. They may advertise in the newspapers, go to the free employment agencies maintained by the States, personally call at or telephone to places where employment is likely to be found, or correspond with employers. If to any of those means they prefer to employ the services of an agent, there are a great many agents in every city of this State from whom they may choose. Competition will regulate their charges. No one is obliged to go to them, nor is anyone under compulsion to pay an exorbitant charge.

What the employment agent may be paid for his service has no more relation to the public health, morals, safety or welfare than has the compensation which may be paid for any other form of personal service.

To limit the compensation of an employment agent is an arbitrary, unreasonable and unjustifiable exercise of police power. It deprives him of the equal protection of the laws. Without due process of law it deprives him of liberty and property. It singles him out from all other lawful occupations and subjects him to a burden which others are not required to bear. Under the laws of this State as they now stand he is the only person who is not permitted to accept all that others are willing to pay him to purchase his services. While it is true that legislation has been enacted to regulate the practice of certain professions, such as dentistry

and medicine, yet you will search in vain for any legislative limitation upon the charges or fees that may be secured by such practitioners in the pursuit of their profession. In fact, the statute in question is the only enactment which attempts in any way to control the fees and charges of a licensed practitioner. As was said in *Adkins* v. *Children's Hospital, supra,* after reviewing the four classes of cases above mentioned:

> "If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest, or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for protection of persons under a legal disability, or for the prevention of fraud. *It is simply and exclusively a price fixing law.* * * * It forbids two parties having lawful capacity to freely contract with one another in respect to the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree."

The opinion of the Court below seems to take the view that if a business or occupation is subject to any regulation it follows necessarily that it is subject to regulation in respect to compensation to be paid for service rendered. It is respectfully submitted that no authority can be cited to that effect. As illustrated by the cases above referred to, it is clear that a business may be so affected with a public interest as to

render it subject to regulation, without at the same time being of such nature and affected with a public interest in such manner as to justify also a limitation of prices to be charged in the business. An occupation which involves merely personal service, such as that of a window cleaner or an employment agent, although it may be so far affected with a public interest as to justify regulation, is not so affected with a public interest as to justify regulation of the price of the service rendered. The cases cited in the notes in 6 R. C. L., page 273, referred to in the opinion of the Court below, do not sustain the proposition upon which the opinion below seems to rest.

In *Lochner* v. *New York, supra,* the United States Supreme Court was considering an act limiting the hours of employment in bakeries, which was sought to be sustained as a regulation in the interest of public health, but the observations of Mr. Justice Peckham, speaking for the Court, are even more forcibly applicable to the present case if we bear in mind that neither public health, morals, safety or welfare can be urged as justification for the limitation now in question. The opinion of the Court in that case says, in part:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—because another

> and delusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraint."

And again (pp. 57, 58):

> "It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

Coming, then, directly to the statute (p. 58), the Court said:

> "We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris,* as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go."

And, after pointing out the unreasonable range to which the principle of the statute might be extended, the Court said (p. 60):

> "It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong

and robust; and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature."

And further (p. 61):

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual * * * whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed."

Even if, in the absence of direct precedent, it be assumed on principle that the police power may be extended to the regulation of rates in an occupation which involves no property other than personal labor and services, still some valid ground for invoking the police power must exist, and in this case no such ground can be found. Clearly, public health, morals and safety are not involved. It does not appear that in any legitimate sense is public welfare promoted by singling out this one class of lawful workers and restricting the price which they may charge for their services. Applicants for employment are adequately protected, and the legitimate purposes of the act may be fully accomplished by

strict regulation of the business. Limitation of fees has no direct or real relation to any appropriate or legitimate end. It is nothing more than arbitrary wage-fixing legislation, without precedent to sustain it, and violative of the above-mentioned constitutional guaranties.

Respectfully submitted,

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NEW JERSEY
Court of Errors and Appeals.

RUPERT RIBNIK,
Prosecutor-Appellant,

vs.

ANDREW F. MCBRIDE, COMMISSIONER OF LABOR OF THE STATE OF NEW JERSEY,
Defendant-Respondent.

On Certiorari.
On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT

Statement of Facts

The certiorari in this case seeks a review of the action of the Commissioner of Labor of the State of New Jersey in refusing to issue a license to the prosecutor to carry on an employment agency in this State.

The prosecutor applied under the provisions of Chapter 227, P. L. 1918, for a license to conduct an employment agency. No question is raised as to his compliance with the requirements of the statute except his failure to file a schedule of fees which the Commissioner of Labor would approve under the statute. The refusal of the Commissioner of Labor to grant the license applied for (Case, pages 8 and 9), is based upon the ground that he could not approve the prosecutor's pro-

posed schedule of fees to be charged in the conduct of the agency in its entirety.

The Supreme Court in its opinion printed in full (Case, page 13), held that the present attack upon the statute is without substance and dismissed the writ of certiorari.

An appeal is now taken to this court to review the decision in the Supreme Court.

ARGUMENT

I.

The Regulation by the State of the Conduct of Employment Agencies, Including the Fixing of Fees to be Charged, is a Proper Exercise of the Police Power.

II.

The Authority Conferred Upon the Commissioner of Labor Under the Provisions of Chapter 227, P. L. 1918, is Valid and Lawful.

III.

The Action of the Commissioner of Labor in Refusing the Prosecutor a License Was a Reasonable and Proper Exercise of His Authority Under the Statute.

I.

The pertinent provisions of the statute are:

The statute provides in section 3, paragraph (b):

> "(b) An application for such license shall be made in writing to the Commissioner of Labor, and shall state the name and number of the building and place where the employment agency is to be conducted. The application for such license shall be filed not less than one week prior to the granting of said license, and the Commissioner of Labor shall act upon such application within thirty days from the time of such application."

And in section 3, paragraph (c):

> "(c) Every such applicant shall be required to furnish satisfactory proof of good moral character in the form of affidavits by at least two reputable citizens of the State, and any person may protest against the issuance or the transfer of any license. The Commissioner of Labor, or his representative, shall investigate, or cause to be investigated, the character and responsibility of the applicant, and shall examine, or cause to be examined, the premises designated in such application as the place in which it is proposed to conduct such agency."

Section 3, paragraph (e) in part provides:

> "(e) Before such license is issued he shall also deposit with the Commissioner of Labor a bond in the penal sum of one thousand dollars, with two or more sureties, or a duly authorized surety company, as surety, to be approved by the Commissioner of Labor."

Section 5, paragraph (a) in part provides:

> "(a) Every employment agent shall file with the Commissioner of Labor, for his approval, a schedule of fees proposed to be charged for any services rendered to employers seeking employees, and persons seeking employment, and all charges must conform thereto. The schedule of fees may be changed only with the approval of the Commissioner of Labor. No registration or other fees in lieu thereof shall be charged or received by such employment agent. No such licensed person shall receive or accept any valuable thing or gift as a fee or in lieu thereof."

In *Moore* v. *The City of Minneapolis,* 43 *Minn.* 418, the Court clearly upheld an ordinance of the City of Minneapolis, enacted under a special act of the Legislature of that State, requiring licenses for the conduct of the business of employment agencies. The Court, at page 419, said:

> "The business was a proper subject of police regulation and control. The nature of the business, and the character of those with whom the business is likely to be conducted in point of intelligence, experience and capacity for self protection from fraudulent practices are such that it might well be deemed necessary by the Legislature, as a matter of proper police regulation, that, by means of a license system dishonest and disreputable persons should, so far as possible, be excluded from the right to engage in the business and that the conduct of the business be so regulated as to afford means for the detection of fraudulent practices and of redress for wrongs done. The propriety of police regulation seems apparent when it is considered that by means of such agencies ignorant and credulous persons might easily be defrauded of their money under a mere pretense of employment to be afforded them in a distant part of the State, so that the fraud would not be discovered until the victim should have gone so far away as to be unlikely to trouble the fraudulent agent by prosecution. Again, such business might be resorted to as a means of bringing girls into places unfit for their employment or presence."

In *Price* v. *The People,* 193 *Ill.* 114, the Court held that an act (Laws of 1899, page 271) requiring persons running private employment agencies to pay a license fee is not unconstitutional. The Court, at page 117, said:

> "It is an attribute of sovereign power to enact laws for the exercise of such restraint and control over the citizen and his occupation as may be necessary to promote the health, safety and welfare of society. This power is known as police power. In its exercise the general assembly may provide that any occupation which is a proper subject of the power may not be pursued by the

citizen except authorized by license issued by public authority so to do. Such enactment may require the payment of a fee and the execution of a bond with security, conditioned in view of the objects and purpose of the act as a prerequisite to the issuance of such license."

In People ex. rel. Armstrong v. *Warden, etc.,* 183 *N. Y.* 223, the Court upheld a law regulating employment agencies as a proper exercise of the police power of the State. The Court, at page 226, said;

"A statute to promote the public health, the public safety or to secure public order, or for the prevention or suppression of fraud is a valid law, although it may in some respects interfere with individual freedom. All business and occupations are conducted subject to the exercise of the police power. Individual freedom must yield to regulations for the public good. It may be laid down as a general principle that legislation is valid which has for its object the promotion of the public health, safety, morals, convenience and general welfare, or the prevention of fraud or immorality. We think that such is the character of the statute in question. It was intended to regulate employment agencies in cities. The Legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality."

In *Brazee* v. *Michigan,* 241 *U. S.* 340, the Supreme Court of the United States upheld a statute of Michigan exercising the police power in requiring

licenses for employment agencies and prescribing reasonable regulations in respect to them to be enforced according to the legal discretion of a commissioner. Mr. Justice McReynolds, delivering the opinion of the Court, at page 343, said:

> "Considering our former opinions, it seems clear that without violating the Federal Constitution a State, exercising its police power, may require licenses for employment agencies and prescribe reasonable regulations in respect of them to be enforced according to the legal discretion of a commissioner. The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them."

In *McBride, Commissioner of Labor,* v. *Clark,* 127 *Atl. Rep.* 550, the Court of Errors and Appeals of this State, in confirming the opinion of the Supreme Court, said:

> "It is common knowledge that the business of an employment agency is one dealing with a great body of our population, both native and foreign born, which is susceptible to imposition, deception, and immoral influences. Embracing as it does male and female, the ignorant, the poor, the young as well as the old, the weak and the strong, it would seem to be appropriate that the State should regard them as peculiarly situated for the exercise of the protecting arm. In consequence of these conditions and the dangers to which this great body of people is exposed, many States have adopted similar legislation, among them the State of Michigan, upon the legislation of which the cited case arose.
>
> "Regarding the right of the State to regulate the employment agency, insofar as the Federal Constitution is concerned, as clear, we think, upon reasons analogous to those expressed by the Supreme Court of the United States as well

> as those set forth in the foregoing recital, the Constitution of our own State is not offended in the enactment of the law in question. The right of a State to regulate under its police powers a business which involves dangers to public morals and public health cannot at this date be called in question. It is not an infringement of any right that the legislature has prescribed that he who engages in the business of an employment agency should first submit himself to the permission and license of the State, or that he shall be subject to reasonable regulation in the conduct of such business. The conclusion we reach is that the act in question is within the police power of the State in so far as it requires the obtaining of a license by one seeking to engage in the business of an employment agency."

The prosecutor does not appear to question the right of the State to regulate employment agencies as such. He disputes the right of the State in the regulation of employment agencies to fix fees to be charged, but the trend of the later decisions on the subject indicate that the fixing of the fees to be charged by the employment agencies is included in and is a proper exercise of the police power of the State. The prosecutor relies principally for support of the contrary of this proposition upon the cases of *Adams* v. *Tanner,* 244 *U. S.* 590, and *ex parte Dickey,* 144 *Cal.* 234.

In *Adams* v. *Tanner* the Supreme Court of the United States declared unconstitutional an act of the State of Washington forbidding employment agents from receiving fees from workers for whom they find places. Mr. Justice Brandeis, however, wrote a strong dissenting opinion which was concurred in by Messrs. Justice McKenna, Holmes and Clark. Mr. Justice Brandeis, at page 599, said (after citing cases):

> "These cases show that the scope of the police power is not limited to regulation as distin-

guished from prohibition. They show, also, that the power of the State exists equally whether the end sought to be attained is the promotion of health, safety or morals, or is the prevention of fraud or the prevention of general demoralization. If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere unless, in looking at the matter, they can see that it is a clear, unmistakable infringment of rights secured by the fundamental law. * * * Or as it is so frequently expressed, the action of the legislature is final, unless the measure adopted appears clearly to be arbitrary or unreasonable, or to have no real or substantial relation to the object sought to be attained. Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts actual or possible—*ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.

"It is necessary to inquire therefore: What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other States or countries in this connection? But these inquiries are entered upon not for the purpose of determining whether the remedy adopted was wise or even for the purpose of determining what the facts actually were. The decision of such questions lies with the legislative branch of the government."

The case *In re Dickey* came before the Supreme Court of California in 1904 and the Court held the law of California limiting the compensation of employment agents and making it a misdemeanor to receive any money in excess of a certain percentage was unconstitutional and void. Mr. Justice Shaw in that case delivered a dissenting opinion and at page 242 said:

> "There can be no doubt that the Legislature possesses the power in cases where the comfort, health, well being or prosperity of the community demand it to make reasonable regulation of the right of persons to make such contracts with others as they please."

Again, at page 244:

> "I can see no real distinction between laws of the character above considered and the one here involved. If one who desires to borrow money, or the miner in an underground mine, the one having property to pledge and the other being already employed, are likely, from their necessity, to submit to unjust exactions by those with whom they deal, how much more likely to do so is the person out of employment, who depends on his daily wage or monthly salary for his daily bread, and who sees before him starvation for himself and his dependent family if he does not speedily secure remunerative employment. The number of this class of persons far exceeds the number of those who borrow from the pawnbroker, or those who work underground in the mine. The general welfare and prosperity of the community will be affected in proportion to the number of the class which is subject to the oppression and exactions of the more fortunate and prosperous."

The case of *In re Dickey* was virtually overruled by the Superior Court of the State of California in the case of *W. W. Payne, transacting business under the firm name and style of the Fiske Teachers' Agency* v.

Walter G. Mathewson, Commissioner of Labor of the State of California et al., decided in 1923 (a typewritten copy of which opinion is in the Attorney-General's Department, but is not to be found in the reports contained in the State Library), in which the court sustained the act of June 18, 1923 (Chapter 414, Laws of 1923), prescribing maximum fees to be charged by employment agencies as the proper exercise of the police power of the State. Mr. Justice Burks, in delivering the opinion of the court, said:

> "The decision of the Supreme Court of the United States in *Brazee* v. *Michigan*, 241 *U. S.* 340, leaves no room to doubt the right of a State to subject employment agencies to reasonable rules and regulations to prevent unfair practices towards applicants for employment.
>
> "Conceding this right, which is now being exercised pursuant to the provisions of the Act of June 3, 1915, as amended, the questions to which able arguments have been directed are:
>
> "First: Whether the State may, in the exercise of police power, regulate the fees which private employment agencies may charge for their services; and if so, then, * * *
>
> "As bearing upon the first proposition the contention of the plaintiffs find support in the decision of the Supreme Court of California in the case of *In re Dickey*, 144 *Cal.* 234; *Wilson* v. *City and County of Denver*, 178 *Pac.* 17, and in some of the other decisions referred to in the argument of counsel. Opposed to these to some extent is the action of the Supreme Court of the United States in the case of *Brazee* v. *Michigan*, 241 *U. S.* 340, in sustaining the validity of the Michigan statute containing a section limiting the fees which might be charged. It is true that the prosecution in this case and the conviction under it was not based upon the fee section of the Michigan law, nor was the validity of

that section passed upon by the Supreme Court. The doctrine of *stare decisis* cannot with safety to the republic be too rigidly adhered to. Our courts should not be so fettered by the weight of authority as to prevent forward steps, calculated to promote the general welfare of society. Changes in industrial and economic conditions necessitate recessions from long established views and render necessary new regulations. Constitutional guaranties essential to just and stable government are not to be lightly infringed. The importance of protecting the property rights as well as the liberties of our people cannot be overemphasized. Our Constitution, however, is sufficiently flexible and pliable to enable it to contract and expand as public necessity may require, and the reflection in the decision of our courts of an appreciation of this fact will go far towards curbing a spirit of unrest and increase respect for our institutions.

"It may safely be assumed that the legislation under consideration was enacted for the purpose of correcting abuses regarded by the Legislature as being so flagrant as to require correction.

"There is to-day a higher standard of justice in all the affairs of life than in the past.

"An awakened conscience has outlawed commercial standards that were false subversive of real progress. An aroused sense of the duty which each member of society owes to every other member of society is responsible for much of the recent remedial legislation. Laws must be justified by something more than the will of the majority. They must rest upon the eternal foundation of righteousness. It is the duty of the Court to give effect to the legislative will, unless it is a palpable invasion of the constitutional guaranties.

"The Court is not unmindful of the persuasiveness of argument of plaintiffs and of the decisions cited in support thereof. These arguments have frequently been employed to defeat what has later, after fair trial, proven to constitute real progress. The conclusiveness of the argument directed towards the constitutionality or unconstitutionality of the law in question has not been demonstrated to a degree that carries conviction to the Court. In these circumstances it is the plain duty of the Court, in the case of doubt, to sustain the will of the electors as determined by their legislators. This Court is not prepared to hold that the Act actually and flagrantly goes beyond the field proper for the exercise of the police power or that it widens that field, and in the circumstances it becomes the duty of the Court to sustain the validity of what was enacted and approved in the belief that it was needed humanitarian and remedial legislation.

"It is true that the case *In re Dickey* appears to sustain the contention of the plaintiff. At the time that decision was rendered in 1904 the Supreme Court of the United States had not passed upon the question as to the right of a State to regulate the particular agency here involved. In 1913, in following the decision in the Dickey case, the Legislature of California assumed jurisdiction over the subject matter, and since that time has exercised the right to regulate the agency here involved. The Court is of the opinion that the dissenting opinion of Mr. Associate Justice Shaw, in *In re Dickey,* is, in view of the changes which twenty years have wrought in our industrial and economic life, more in consonance with the dominating spirit of our times. Particularly pertinent to the situation here presented is that portion of the opinion in which it

is said: 'I think it is a mistake to say that our heritage from the common law in this respect consists solely of the specific right to pass such laws, without regard either to their wisdom or to the conditions which sanction the exercise of the power. Our heritage is rather the sound principle that, in the performance of its duty to promote the general welfare, a declared object of the Constitution of the United States, the Legislature may pass such laws as may reasonably be found necessary to protect the helpless and weak from the exaction of the strong.'

"Having reached the conclusion that it is the duty of the court to refrain from declaring that the exercise of the power to prescribe maximum fees was beyond the power of the Legislature, it then becomes necessary to determine whether plaintiffs have sustained the burden of establishing whether maximum charges are fixed so low as to be confiscatory or so unreasonable as to amount to a prohibition against the carrying on of a lawful business."

Therefore, it is clear, we submit, that the right of the State to regulate the conduct of employment agencies, even to the extent of fixing the fees to be charged by such agencies in the conduct of its business is a proper exercise of the police power of the State.

The only question remaining, then, is whether the method adopted by our own State Legislature in so doing is unlawful.

II.

It is to be noted that the fees to be charged by the employment agencies are not specified in the statute. The Legislature left this to the discretion of the Commissioner of Labor. He has general supervision of the whole subject matter under the act. Such delegation of power is not unlawful. The courts will not interfere

unless the power conferred is arbitrarily exercised. The Legislature may place its own estimate upon the evils to be corrected in the plan of legislation provided for.

In *Gundling* v. *Chicago,* 177 *U. S.* 183, the Supreme Court of the United States upheld an ordinance of the City of Chicago conferring upon the mayor discretionary authority in the issuance of licenses. The Court, at page 188, said:

> "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country and what the regulation shall be and to what particular trade, business or occupation they shall apply are questions for the State to determine, and the determination comes within the proper exercise of the police power of the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass and they form no subject for Federal interference."

In *Lieberman* v. *Vandercarr,* 199 *U. S.* 552, the Court, at page 562, said:

> "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business, which is the proper subject of regulation within the police power of the State, is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised and when it is shown to be thus exercised against the individual, under sanction of State authority, this Court has not hesitated to interfere for his protection when a case has

> come before it in such a manner as to authorize the interference of a Federal court."

Again, in *Engel* v. *O'Malley,* 219 *U. S.* 128, the Supreme Court refused to hold a statute of the State of New York unconstitutional because it gave the comtroller arbitrary power to deprive the appellant of his right to carry on his business.

In *Armour & Co.* v. *North Dakota,* 240 *U. S.* 510, the Court, in dealing with the same subject matter, at page 513, said:

> "We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the Legislature, and there is no impeachment of such estimate in differences of opinion however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them to be convinced of the wisdom or adequacy of the laws."

The Legislature, then, may confer discretionary power upon an individual, the exercise of which power will affect the conduct of a particular business, and this of itself is not unlawful. The question always is whether the power was exercised arbitrarily or unreasonably. The determination of this question depends not upon presumptions, but upon the existence of actual facts. Each case must be examined with this in view. Here the exercise of the power conferred upon the commissioner under the statute was not arbitrary, but reasonable and justified.

III.

In *McBride, Commissioner of Labor* v. *Clark, cited supra,* the Court, at page 551, further said:

> "The power to grant a license under the statute has been vested in the commissioner within cer-

> tain limits. It is obvious that, unless a hard and fast line of conditions is indicated in the legislation itself, the power of deciding upon the fitness of the applicant must be vested in some other authority if the purpose of the act is to be made effective. In the case of *Brazee* v. *Michigan, supra,* there were many regulations vested in the discretion of the Commissioner of Labor, and this authority was expressly sanctioned by the Supreme Court."

The statute directs that every employment agency shall file with the Commissioner of Labor, for his approval, a schedule of fees proposed to be charged for any services rendered to employers seeking employees and persons seeking employment, and all charges must conform thereto. The schedule of fees may be changed only with the approval of the Commissioner of Labor. The fixing of these fees, therefore, is left to the discretion of the Commissioner. Obviously, the fixing of fees to be charged in conducting of employment agencies is inherent in the regulation of employment agencies. The undoubted purpose of the Legislature was to protect those seeking employment from the exhorbitant charges which might be made by such agencies. The provisions of the statute stand against the unscrupulous demands of those carrying on this character of business and no criticism can come unless it be that the exercise of the discretionary power vested under the act is arbitrarily and unreasonably exercised by the commissioner.

Here no such charge can be made. The Commissioner (Case, page 9), in refusing to issue a license to the prosecutor, said:

> "I am rejecting your application for a license for the reason that I do not approve your proposed fee schedule in its entirety. I believe that your proposed fee of one full week's salary for clerical, etc., positions is excessive and unreasonable and is more than the fee charged by some thirteen other similar agencies in this State and

> is more than the average which is permitted or is charged in practice in other similar industrial States in this country. I am willing to approve your other fee proposal of 10% for temporary positions and 10% of one month's wages for mechanical labor or domestic positions."

The commissioner, in the exercise of his discretion, took the position that the charge of one full week's salary for clerical, etc., positions was excessive and unreasonable, particularly was this so because, as he points out, some thirteen other similar agencies in the State charge less and moreover, the fee of one full week's salary was in excess of that charged in other similar industrial States in this country. There is no attempt upon the part of the commissioner to single the prosecutor out arbitrarily in fixing fees to be charged by him. He places him in the class with other agencies in the State in respect to the fees to be charged. He even approves in part the schedule of fees filed by the prosecutor. His refusal to approve the fee of one full week's salary is merely tantamount to saying to the prosecutor "You must charge, and you cannot charge in excess of, the fees charged by similar agencies in this State." The position thus taken by the commissioner is not arbitrary in any sense, but is sound and based upon the reasonable and proper exercise of the power and authority vested in him under the act.

It is respectfully submitted that the decision of the Supreme Court should be affirmed.

Respectfully submitted,

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