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Article 14

# Corporations - Statute Barring Corporate Mortuaries Contravenes New Jersey Constitution

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a matter of state reserved powers involved, the exclusionary intent must be clearly manifested.

In the light of previous decisions in relation to pre-emption, and noting that in the *Nelson* case there was a situation where the inherent police power of the states was in conflict with the inherent power of the federal government to protect itself, it would appear that the court has extended the pre-emption concept.

## CORPORATIONS–STATUTE BARRING CORPORATE MORTUARIES CONTRAVENES NEW JERSEY CONSTITUTION

Plaintiffs in this action challenged the constitutionality of that part of the Mortuary Science Act which forbade the conduct of funeral directing by a corporation.[1] A declaratory judgment voiding this statute was sought upon the constitutional contention that its requirements, insofar as they forbid the conduct of the undertaking business by corporations are unduly restrictive of private enterprise and an improper exercise of the police power. The court deemed this statute an attempt by the legislature to constitute the mortuary science a profession rather than a business. The court refused to categorize the science and concluded that the provisions of the statute and the rules involved must be considered as unduly restrictive of the right of private property, and thus an improper exercise of the police power. *Trinka Services, Inc. v. State Board of Mortuary Science*, 40 N.J. Super. 238, 122 A. 2d 668 (1956).

It is established law that the state may deny to corporations the right to practice professions and may insist upon the personal obligation of the individual practitioners.[2] The proposition appears to be founded upon the idea that such practice is against public policy because it interferes with or excludes the desired personal relationship between professional persons and those who consult them.[3]

The question of whether undertaking is a business or a profession has been involved in much litigation and authorities are in general agreement that undertaking is a business and not a profession.[4] Considering the special skill, education and training required of a funeral director, the occu-

[1] N.J. Stat. Ann. (1952) c. 45 § 7-32 and § 7-81.

[2] Winberry v. Hallihan, 361 Ill. 121, 197 N.E. 552 (1935); C. J. S., Corporations § 956 (1940).

[3] State v. Winninshiek Co-op. Burial Ass'n, 237 Iowa 556, 22 N.W. 2d 800 (1946). Consult 165 A.L.R. 1092 for further discussion.

[4] Frizen v. Poppy, 17 N.J. Super. 390; Bond v. Cooke, 237 App. Div. 229, 262 N.Y. S. 199 (1932); Building Comm'r of Brookline v. McManus, 263 Mass. 270, 160 N.E. 887 (1928); O'Reilly v. Erlanger, 108 App. Div. 318, 95 N.Y. S. 760 (1905).

pation does partake of the nature of a profession, but has nevertheless been held to be a business.[5] There are many other occupations which require training, examining and licensing. They are not changed from business to professions by the requirement that they are to be licensed.[6]

That the right to conduct a lawful business is a property right is settled law.[7] However, every owner's use of his property is subject to a valid exercise of the police power; that is, when the exercise bears a reasonable relation to the public health, comfort, morals, safety and general welfare.[8]

In *New State Ice Co. v. Liebmann*,[9] the Supreme Court of the United States said, "nothing is more clearly settled than that it is beyond the power of the state, under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."[10]

Thus it is established that the power of the legislature to regulate professions and businesses is not absolute but is subject to reasonable restrictions. Regulations that cut off the inherent right to engage in a lawful business must bear some direct relation to the health, safety, morals or welfare of those affected.[11]

However, the police power of the state in not to be as narrowly defined as these authorities might tend to indicate. The police power is not limited only to measures needful to subserve the public health, morals and safety. but can be invoked "to serve the pubilc convenience and general prosperity and well-being."[12]

In declaring parts of the Act in question unconstitutional, the court cited *Abelson's Inc. v. New Jersey State Board of Optometrists*,[13] wherein the court said, "But in the final analysis, it is the nature of the subject matter and the end to be served that determine the quality and content of the regulatory power."[14]

[5] Babcock v. Laidlaw, 113 N.J. Eq. 318, 166 Atl. 632 (1933); In re Dawson, 136 Okla. 113, 277 Pac. 226 (1929).

[6] Busse & Borgmann Co. v. Upchurch, 60 Ohio App. 349, 21 N.E. 2d 349 (1938).

[7] Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1923); Transamerican Freight Lines v. U.S., 51 F. Supp. 405 (Del., 1943); McGrew v. Industrial Commission, 96 Utah 203, 85 P. 2d (1938); Freeman v. Board of Adjustment of Great Falls, 97 Mont. 342, 34 P. 2d 534.

[8] Hannifind Corp. v. Berwyn, 1 Ill. 2d 28, 115 N.E. 2d 315 (1953).

[9] 285 U.S. 262 (1932). [10] Ibid.

[11] Schmidt v. Board of Adjustment of Newark, 9 N.J. 405, 88 A. 2d 607 (1952); Brandon v. Board of Comm'rs of Montclair, 124 N.J. L. 135, 11 A. 2d 304 (1940); Watchung Lake v. Molens, 119 N.J.L. 272, 196 Atl. 223 (1938); State ex rel. Vars v. Knott, 135 Fla. 206, 184 So. 752 (1938); F. E. Nugent Funeral Home v. Beamish, 315 Pa. 345, 173 Atl. 177 (1934).

[12] Regal Oil Co. v. State, 123 N.J.L. 456, 10 A. 2d 495 (1939).

[13] 5 N.J. 412, 75 A. 2d 867. [14] Ibid., at 870.

And in the instant case the court said:

> And insofar as mortuary science involves the preparation of human remains for display and interment, involving proficiency in the fields of anatomy, chemistry, cosmetic technique and the like, there is obviously a relationship with the public health and welfare entitling the State, in the exercise of the police power, to surround that practice with rigid requirements of training, education, licensing and like precautions in the public interest.[15]

Other courts have had little or no trouble finding that the business of embalming and funeral directing is a business affected with a public interest and therefore is subject to regulatory measures which prescribe qualifications for members who engage in the vocation as well as standards of conduct for those who qualify.[16]

After a discussion of the nature of the relationship between the undertaker and the family and friends of the decedent, the court in the instant case refused to accept the proposition that there was a need for a personal, individual, and confidential relationship between the undertaker and the bereaved.

> The exigencies of this relationship, confined as they are to sentiment, are distinguished from the very tangible dependence of a patient upon his doctor, of a client upon his lawyer, or of the mentally or spiritually disturbed person upon his psychiatrist or clergyman.[17]

In striking down the Act, it was stated:

> Once the State and its Board of Mortuary Science have secured the health and welfare of the public in the usual sense, by its education, licensing and like provisions pertaining to the technical treatment of the human remains, and associated services such as interment, this is as far as the State can go in regulating what is otherwise a private property right, i.e., the doing of business in the corporate frame.[18]

This decision is particularly worthy of note in Illinois because there is a statute in this state[19] with wording very similar to that contained in the New Jersey statute.[20] This particular section of the statute has never been the subject of litigation in this state.

From the reported decisions it appears that the state of the law of Illi-

[15] Trinka Services, Inc. v. State Board of Mortuary Science, 40 N.J. Super. 238, 122 A. 2d 668–669 (1956).

[16] State Board of Funeral Directors and Embalmers v. Cooksey, 147 Fla. 337, 3 S. 2d 502 (1941); Prata Undertaking Co. v. State Board of Embalming & Funeral Directing, 55 R.I. 454, 182 Atl. 808 (1936).

[17] Trinka Services Inc. v. State Board of Mortuary Science, 40 N.J. Super. 238, 122 A. 2d 668, 670 (1956).

[18] Ibid., at 670.

[19] Ill. Rev. Stat. (1955) c. 111½, § 73.8a.

[20] N.J. Stat. Ann. (1952) c. 45, §§ 7–32, 7–81.

nois in regard to the conflict between property rights and the police power is the same as that of New Jersey. The court in *Lasdon v. Hallihan* said that while a person's business, profession or occupation is property within the meaning of the due process clause, the power of the legislature to interfere by passing laws for the preservation of good order or to promote public welfare and safety, or to prevent fraud, deceit, cheating and imposition, has always been recognized in Illinois.[21]

In *Gadlin v. Auditor of Public Accounts,* the court said:

> Legislative determination that regulations are needful . . . in order to be imposed must bear some definite, substantial relation to the public health, safety morals or public welfare.[22]

The decision in the instant case will no doubt be of benefit and importance if the corresponding section of the Illinois statute[23] is ever involved in litigation. The final determination of the question, however, will lie in the opinion of the court as to whether the regulation bears definite, substantial relation to the public health, safety, morals or welfare.[24]

[21] 377 Ill. 187, 36 N.E. 2d 227 (1941).

[22] 414 Ill. 89, 95, 110 N.E. 2d 234, 237 (1953); cf. Hannifin Corp. v. Berwyn, 1 Ill. 2d 28, 115 N.E. 2d 315 (1953).

[23] Ill. Rev. Stat. (1955) c. 111½, § 73.8a.

[24] Hannifin v. Berwyn, 1 Ill. 2d 28, 115 N.E. 2d 315 (1953); Gadlin v. Auitor of Public Accounts, 414 Ill. 89, 110 N.E. 2d 234 (1953); Lasdon v. Hallihan, 377 Ill. 187, 36 N.E. 2d 227 (1941).

## DIVORCE–ILLINOIS 60-DAY "COOLING-OFF" PERIOD HELD CONSTITUTIONAL

Plaintiff sought the issuance of a writ of mandamus to compel the clerk of court to receive and file a complaint for divorce without first filing a praecipe for summons as required by the 1955 amendment to the Divorce Act[1] which provides for a 60-day "cooling-off period" between service of the summons and filing of the complaint, except in cases specifically provided for.[2] Plaintiff contended that the act was violative of due process, in that it was vague, indefinite, and uncertain; that it contravened Art. VI, sec. 29, of the Illinois constitution, which provides that "all laws relating to courts shall be general, and of uniform operation;" and that it violated Art. IV, sec. 22, of the Illinois constitution, which states: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For–Granting divorces." The trial court denied mandamus, and on direct appeal the Illinois Supreme Court held

[1] Ill. Rev. Stat. (1955) c. 40, §§ 7a, 7b.

[2] Ibid., at § 7c.