December 1958

Constitutional Law--Due Process--Pre-Need Burial Contract Statute Held Unconstitutional

M. D. W. Jr.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol61/iss1/7

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
to warrant achieving the desire by a shorter cut than the constitution-
al way of paying for the change." Pennsylvania Coal Co. v. Mahon,
260 U.S. 393, 416 (1922).

L. S. D.

CONSTITUTIONAL LAW—DUE PROCESS—PRE-NEED BURIAL CON-
TRACT STATUTE HELD UNCONSTITUTIONAL.—D, a corporation selling
burial merchandise under pre-need contracts, refused to comply with
a West Virginia statute, W. VA. CODE ch. 47, art. 14, § 1 (Michie
1955), which declared all such contracts to be against public policy
and void unless the money paid thereunder be placed in and held by
a federally insured banking institution authorized to do business in
this state. The state sought an injunction to restrain D from viola-
tions of the deposit provisions of the statute. D's answer and cross-
bill asserted that the statute was unconstitutional and that compli-
ance with the deposit provisions thereof would compel it to cease
doing business. Held, that the statute was an unwarranted exercise
of state police power and was unconstitutional, being violative of the
due process clauses of both state and federal constitutions. State v.

The court in the principal case indicated no regulation of this
business is necessary. Several other jurisdictions have enacted simi-
Code § 1817.12 (Baldwin 1953). This legislation prompts study of
the court's reasoning in the principal case.

In declaring the legislation invalid, the court stated that the
police power of a state is too narrow and too limited to permit regu-
lation of such a business. While no fixed rule can be stated as to
when a business will come within the police power of a state, it is
settled law that this power is broad and sweeping, and it may be
drawn upon by the legislature for the public good. State ex rel. Mor-
ris v. West Virginia Racing Comm'n, 133 W. Va. 179, 55 S.E.2d 263
(1949); Hinebaugh v. James, 119 W. Va. 162, 192 S.E. 177 (1937).
It is not only the right, but the duty of the legislature to employ the
police power where necessary for the protection of the safety, health,
502 (1934).
A statute may not, however, under the guise of police power, impose an arbitrary restriction on a business, and to this extent, regulations of the legislature may be controlled by the courts. *Quessenberry v. Estep*, 95 S.E.2d 832 (W. Va. 1956). But legislative determination that a particular business is subject to the regulatory power of the state is not to be lightly disregarded by the courts. *Clarksburg Light & Heat Co. v. Public Serv. Comm’n*, 84 W. Va. 638, 100 S.E. 551 (1919).

Many varied types of private enterprise have been held to come within the police power of various states. *E.g.*, *Hodge Co. v. Cincinnati*, 234 U. S. 335 (1912) (automobile rental); *Roschen v. Ward*, 279 U.S. 337 (1929) (optometry); *Whitfield v. Aetna Life Ins. Co.*, 205 U.S. 489 (1907) (insurance); *McCullough v. Scott*, 182 N. C. 685, 109 S.E. 789 (1921) (public accounting); *Sperry & Hutchinson Co. v. Weigle*, 166 Wis. 613, 166 N.W. 54 (1918) (trading stamps). These businesses have been held subject to legislative action, being affected with public interest, and regulation necessary for the benefit of the public welfare of the community and its people.

Highly similar to the business here under discussion are funeral and cemetery associations. They are businesses so clearly of a public nature that the legislature may regulate and control them. *Drummond v. State Board of Funeral Directors*, 13 Cal. 2d 75, 87 P.2d 848 (1939). This control is necessary because of the inherent nature of any business dealing with final disposition of dead bodies, and the high moral standards necessary to the conduct of such business. *Pierstorff v. Board of Embalmers and Funeral Directors*, 68 Ohio App. 453, 41 N.E.2d 889 (1941). These businesses have been held in every instance to be subject to the control of regulatory legislation under the police power. *Prata Undertaking Co. v. State Board of Embalming & Funeral Directing*, 55 R.I. 454, 182 Atl. 808 (1936).

Can it then be said that a business, clothed with such public interest and so closely related to other regulated businesses concerned with burial, is too narrow to warrant regulatory legislation under the police power?

Although no cases other than the principal case have been found which directly decide this issue, the available authority seems to indicate that such regulation is within the police power. In *Falkner v. Memorial Gardens Ass’n*, 298 S.W.2d 954 (Tex. 1957), the court passed on the validity of a statute, *Tex. Civ. Stat. Banks & Banking*,
art. 548b, §§ 1-12 (Vernon Supp. 1956), quite similar to the statute passed on in the principal case. While the question was not raised as to its constitutionality in relation to regulation by police power, the statute was held to be a valid regulation of the pre-need burial contract business.

In another case, *Union Cemetery Ass'n v. Cooper*, 414 Ill. 23, 110 N.E.2d 239 (1953), a cemetery association represented that it would give future care, similar to the type of care promised by D in the principal case. The court, in upholding Ill. Rev. Stat. ch. 21, § 64.4 (1957), which required a certain portion of the money received in advance for such care to be placed in trust, said that this did not transcend the police power of the state, and it was a reasonable and practical way of assuring the purchaser that he would get that for which he bargained.

In consideration of the broad powers vested in the legislature to regulate businesses, particularly those clothed with a public interest, and indications by other jurisdictions that trust provisions of future care contracts are constitutional, it appears that legislative regulation of pre-need burial contracts is a valid application of the state's police power. The right of an individual to contract is subject to governmental restraint where such is required for the protection of the public. It appears that legislation providing for such protection in this field is not an arbitrary exercise of authority, but a public need to which individual rights must yield.

M. D. W., Jr.

Constitutional Law—Nationality—Involuntary Expatriation.—During World War II, P, a natural born citizen of the United States and member of the United States Army, was tried and convicted of desertion by a general court martial, and was sentenced to dishonorable discharge. Later, having been denied a passport on statutory grounds, he sought a declaratory judgment of citizenship; its denial was affirmed. On certiorari, however, without a majority opinion, the Supreme Court reversed both lower courts. *Held*, that Congress exceeded its constitutional power in providing for expatriation as a consequence of desertion when there is no attempt to transfer allegiance to a foreign power. *Trop v. Dulles*, 78 Sup. Ct. 590 (1958).