

1948

# Constitutional Law--May a State Prohibit the Designation of a Particular Undertaker to Perform the Services Required Under a Burial Association Contract?

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## Recommended Citation

Hopkins, John J. (1948) "Constitutional Law--May a State Prohibit the Designation of a Particular Undertaker to Perform the Services Required Under a Burial Association Contract?," *Kentucky Law Journal*: Vol. 37 : Iss. 1 , Article 7.  
Available at: <https://uknowledge.uky.edu/klj/vol37/iss1/7>

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## STUDENT NOTES

### CONSTITUTIONAL LAW—MAY A STATE PROHIBIT THE DESIGNATION OF A PARTICULAR UNDERTAKER TO PERFORM THE SERVICES REQUIRED UNDER A BURIAL ASSOCIATION CONTRACT?

In its recent decision of *Kenton & Campbell Benevolent Burial Ass'n. v. Goodpaster*,<sup>1</sup> the Kentucky Court of Appeals held to be unconstitutional that part of a statute which prohibited the making of a burial association contract wherein a particular undertaker or a particular group of undertakers, was designated to perform the required services and which directed that any qualified undertaker be permitted to do so. The Court held:

It [that portion of the act] must be deemed as an unjustifiable interference with the constitutional right of contract and to be an attempt to exercise arbitrary power, which is understood to be any act which does not accord with reason and which has no adequate determining principle. A legislative act must bear something more than a remote or fanciful relation to the realities.<sup>3</sup>

The question thus presented is whether in this instance the Legislature exceeded its power to limit, by the exercise of its police power, the right of contract guaranteed by the Kentucky Constitution.<sup>4</sup>

The Kentucky Court has defined police power as “ the right on the part of the legislature, or on proper occasions on the part of the courts, to regulate, deal with, curtail, or even prohibit certain engagements, conduct, or acts tending to suppress or injuriously affect movements, measures or schemes in furtherance of a permissible and authorized public policy ”<sup>5</sup> However, the concept of police power is incapable of being translated into words with exactness at any particular time. As Freund points out, the police power is not a fixed quantity but is the expression of social, eco-

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<sup>1</sup> 304 Ky 233, 200 S.W. 2d 120 (1947).

<sup>2</sup> Ky. R.S. (1946) sec. 303.123.

<sup>3</sup> *Kenton & Campbell Benevolent Burial Ass'n. v. Goodpaster*, 304 Ky. 233, 241-242, 200 S.W. 2d 120, 125 (1947).

<sup>4</sup> “Section 1. All men are, by nature, free and equal, and have certain inalienable rights, among which may be reckoned: Fifth: the right of acquiring and protecting property

Section 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”

*Kenton & Campbell Benevolent Burial Ass'n. v. Goodpaster*, *supra*, note 3 at 239, 200 S.W. 2d 120, 123.

<sup>5</sup> *Workmens' Compensation Board v. Abbott*, 212 Ky 123, 129, 278 S.W. 533, 536 (1925).

conomic and political conditions, and as long as such conditions continue to vary of necessity defies definitive boundaries.<sup>6</sup> The classic example of the impact of such conditions upon the thought of the bench is the metamorphosis which the police power underwent in the decade of 1929 to 1939.<sup>7</sup> That the elastic concept of the police power has been recognized by the Kentucky court, is demonstrated by the following statement from *Potter v. Dark Tobacco Growers Assn.*: "That all law, even Constitutional law, is not static but progressive and in step always with sound economic conditions and an enlightened public policy, recently has come to be recognized clearly, if it may have ever been thought otherwise, as is attested by highest judicial and lay utterances."<sup>8</sup>

Having considered the nature of the police power, it is necessary to determine within which departmental province or provinces of government it lies. As to this there is no conflict. The right to determine public policy is vested in the legislature subject only to the provision that the laws enacted thereunder must have some reasonable and substantial relation to the interests of public welfare.<sup>9</sup> The courts have the power to review such legislation to see if it lacks such reasonable relation and to declare it unconstitutional if they find that it does. But such is not to be construed as giving the court license to substitute its judgment for that of the legislature. As the Court of Appeals stated in *Commonwealth v. Goldberg*, "Subject to this limitation [right to determine whether violative of the Constitution], the policy of the legislation or the wisdom or the propriety of it, is not for the judicial branch of the government to decide. When the courts have exercised their jurisdiction in restraining the legislature from transgressing constitutional bounds, they have reached the limit of their control."<sup>10</sup>

Keeping in view the elastic concept of the police power and the authority of the legislative and judicial departments with respect thereto, it is appropriate to turn to the reported cases and see what application has been given them under various factual situations involving the right to contract.

One common instance of the exercise of the police power by the state limiting the right to contract, is the enactment of "Blue Sky" laws to protect persons from the purchase of worthless securities. The Kentucky court sustained such a statute as a valid exercise of the police power in *King v. Commonwealth*.<sup>11</sup> With increasing in-

<sup>6</sup> FREUND, POLICE POWER (1904) sec. 3.

<sup>7</sup> Note (1938) 7 GEO. WASH. L. REV. 242, 246-247 and the material cited therein.

<sup>8</sup> 201 Ky 441, 447, 257 S.W. 33, 35 (1923)

<sup>9</sup> *Workmens' Compensation Board v Abbott*, 212 Ky. 123, 278 S.W. 533 (1925).

<sup>10</sup> 167 Ky. 96, 105, 180 S.W. 68, 72 (1915)

<sup>11</sup> 197 Ky 128, 246 S.W. 162 (1922).

dustrial expansion the concept of the police power was proportionately broadened. A workmen's compensation act was sustained by the Kentucky Court<sup>12</sup> and legislation prohibiting the sale of goods by retailers under the cost of such goods when the purpose was to undermine competition, was held to be a valid exercise of the police power.<sup>13</sup>

The business of insurance has long been regarded as one peculiarly susceptible of regulation.<sup>14</sup> As was stated by the Mississippi court, "That a state has the right to regulate the business of insurance and provide the kind and character of insurance contracts which may be made, is beyond controversy. It is one of the most important police powers exercised by the state."<sup>15</sup> An early example of a limitation on the right of an insurance company to contract is to be found in *Equitable Life Assurance Society v. Commonwealth*, wherein it was held that a prohibition against discrimination as to the amount of insurance premiums was valid.<sup>16</sup> The practice of fire insurance companies of overvaluing property and then providing in the insurance contract for liability only for the actual cash value if there was total loss or for an option to rebuild, was curtailed by the state which in the exercise of its police power for the benefit of the policy holders required payment of the value stated in the policy.<sup>17</sup> A similar statute was upheld in the case of live stock insurance policies.<sup>18</sup>

Burial associations are usually held to be insurance companies and subject to regulation as such.<sup>19</sup> In Kentucky such associations have been treated as a separate class from general companies but the court recognizes the fact that the definition of the latter is broad

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<sup>12</sup> Workmens' Compensation Board v. Abbott, *supra* note 9.

<sup>13</sup> Moore v Northern Ky Ind. Food Dealers Ass'n., 286 Ky. 24, 149 S.W. 2d 755 (1941).

<sup>14</sup> Bell v. Louisville Board of Fire Underwriters, 146 Ky. 841, 143 S.W. 388 (1912). *N. Y. Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410 (1908), *General Accident, Fire and Life Assurance Co. v. Walker*, 99 Miss. 404, 55 So. 51 (1911).

<sup>15</sup> *General Accident, Fire and Life Assurance Co. v. Walker*, 99 Miss. 404, 55 So. 51 (1911).

<sup>16</sup> 113 Ky. 126, 67 S.W. 388 (1902). (That there was a reasonable and substantial relation between the legislation and public welfare cannot be questioned. If discrimination by the reduction of premiums of favored persons were allowed, either there would be an insufficient fund to meet the obligations of the company or the premiums paid by those not so favored were too high)

<sup>17</sup> Horn v. Atlas Assurance Society, 241 Ky. 226, 43 S.W. 2d 675 (1931).

<sup>18</sup> Hartford Livestock Insurance Co. v. Gibson, 256 Ky. 338, 76 S.W. 2d 17 (1934)

<sup>19</sup> *Att'y Gen. v. Wichita Mut. Burial Ass'n.*, 73 Kan. 179, 84 Pac. 757 (1906). *Renschler v State*, 90 Ohio State 363, 107 N.E. 758 (1914), *Oklahoma Southwestern Burial Ass'n. v. State*, 135 Okla. 151, 274 Pac. 642 (1928).

enough to include them.<sup>20</sup> Under such power the legislature had on several occasions previous to the principal case enacted measures to control such businesses. In *Kenton & Campbell Benevolent Burial Ass'n. v. Quin*,<sup>21</sup> the court sustained a requirement that the benefits from such policies be paid in money rather than by services, as it was only by the payment of cash that the relatives of the assured could be positive of receiving the decent burial provided for in the contract, but held that a proposed contract wherein it was provided that the association would retain the money and pay it over to the undertaker, who was named in the policy, was not in violation of the requirements. Here it should be noted that the burial associations in these cases are controlled by a group of undertakers who are those listed as approved in the policy. A previous attempt had also been made by the legislature to prevent the selection by the association of the undertaker to perform. In the first *Goodpaster* case, legislation prohibiting any designation, differing from the legislation in the second case only in that in the latter case any undertaker who qualified according to the statute was authorized to perform, was declared to be unconstitutional.<sup>22</sup> In construing a law the court does not look to the words alone, but also to previous laws on the subject, the interpretations given them by the courts, the public policy and "all other prior and contemporaneous facts and circumstances that throw intelligent light on the intention of the lawmaking body."<sup>23</sup> If this is done in interpreting the series of legislative acts concerning burial associations, it will be seen that the purpose throughout has been to protect the policy holders or their representatives from being placed in a position where they are unable to bargain, but must accept the terms and services of a particular undertaker. Under the present system the association collects the premiums and limits the selection to one of its own number to whom it pays the benefits. The representative of the policyholder who is prevented from selecting on the open market and who cannot control the payment is required to accept whatever service is offered for the amount of the benefits or pay whatever sum is demanded to secure the type of service desired. In the principal case the court centered its attention on the fact that undertakers who are not members of the association would profit by the act, but it is submitted that such benefit is incidental and that the true purpose of the act

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<sup>20</sup> *Newport Benevolent Burial Ass'n. v. Clay*, 170 Ky. 633, 186 S.W. 658 (1916).

<sup>21</sup> 244 Ky. 260, 50 S.W. 2d 554 (1932).

<sup>22</sup> 279 Ky. 92, 129 S.W. 2d 1033 (1939).

<sup>23</sup> *Schultz v. Ohio County*, 226 Ky. 633, 637, 11 S.W. 2d 702, 704 (1928).

is that set out above and the more desirable result would have been to have sustained it as a valid exercise of the police power.<sup>24</sup>

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<sup>24</sup> Another element involved in this case was that of restraint of trade. The court states that such must be determined under principles of common law as Kentucky has no anti-trust statutes, seemingly oblivious to the attempts of the legislature to enact such a statute by the one they were then construing. The court cites as controlling the dictum in *Kenton & Campbell Benevolent Burial Ass'n. v. Quinn*, 244 Ky. 260, 265-6, 50 S.W. 2d 554, 556 (1932), the decision of which was rendered before the passage of this act and *Union Labor Hospital Ass'n. v. Vance Redwood Lumber Co.*, 158 Cal. 551, 112 Pac. 886 (1910), wherein no statute was involved.