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Constitutional Law—Applications of Sections 86-a and 87(2) of the Membership Corporation Law to Existing Contracts

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decision to allocate the gross receipts, was actually less than it would have been had the proper classification been applied to the receipts without allocation. This allocation by the comptroller, while lawful, was not required. They held that the two classifications were relevant only in determining the ceiling on the amount of the one tax which could be imposed. This dissenting opinion maintained that there was nothing to litigate unless the tax had been improperly assessed in an amount in excess of that authorized by the enabling legislation.[39]

The majority opinion indicated that where the classification is improper, the constitutional question is reached and it refused to consider whether or not the comptroller's determination could be upheld on the broader grounds introduced by the minority opinion.

The dissent cited the federal case of *Lewis v. Reynolds*,[40] wherein a refund was claimed for a tax paid to the Internal Revenue Department. The fact situation there arose out of a tax determination negating the petitioner's claim of over-payment and the effect of the statute of limitations as a bar to a new assessment. The minority noted that the refund there was denied because it was held that even though no new assessment could be made after the statute had run, the tax-payer, nevertheless, was not entitled to a refund because he had failed to show that he had over-paid his tax. The analogy applicable to the instant case is found in the plaintiff's failure to show that the comptroller could not levy the tax without allocation.

To support this supposition that allocation was not required by the defendant, the minority noted the decision in *Steinbeck v. Gerosa*,[41] which held that even though the petitioner's business activities may induce or occasion interstate commerce, the relationship must be a close and direct one to escape the gross receipts tax. There the petitioner received royalties, from out of state publishers under contracts negotiated in New York. That court held that the payment did not directly result from interstate commerce.

The apparent analogy drawn by the dissent was that United States Steel, as a holding company by the nature of its supervisory and financing role, was doing business which was distinguishable from the direct operations of its subsidiaries outside of the state. The likening of the petitioner and his publishers in the *Steinbeck* case as being more akin to a creditor and debtor than to a partnership or joint venture seemed to suggest a further application of this reasoning by the dissent to the holding company and its subsidiaries.

APPLICATION OF SECTIONS 86-A AND 87(2) OF THE MEMBERSHIP CORPORATION LAW TO EXISTING CONTRACTS

In 1910, the Grove Hill Realty Co. sold and conveyed certain land to the Ferncliff Cemetery Association. The parties entered into an agreement wherein

39. Nash v. Lynch, 253 N.Y. 564, 171 N.E. 784 (1930).
40. 284 U.S. 281 (1931).
41. 4 N.Y.2d 302, 175 N.Y.S.2d 1 (1958).

it was agreed, that in consideration of the said conveyance, Ferncliff would pay to Grove Hill one-half of the proceeds from each sale of burial plots to the public. This agreement was carried out for a number of years until the Cemetery Board of the State of New York notified Ferncliff, that by reason of an amendment to Section 87 of the Membership Corporation Law and the enactment of a new section, namely Section 86-a to the Membership Corporation Law, both effective September 1, 1949, it would be illegal for the parties to continue the mode of payment under the 1910 agreement.[42] The Cemetery Board stated that by virtue of Sections 86-a and 87(2), it was necessary for Ferncliff to maintain (1) a "permanent maintenance fund" into which must be deposited not less than 10% of the gross proceeds of any sale of a burial plot, and (2) a "current maintenance fund" into which must also be deposited an additional 15% of such gross proceeds. Under this ruling, Grove Hill would only be entitled to receive one-half of the net proceeds remaining after the sales price had been reduced by the deposits for the two funds.

Grove Hill instituted an action in which it attacked the interpretation given to Sections 86-a and 87(2) of the Membership Corporation Law by the Cemetery Board, claiming that such interpretation unconstitutionally impaired the obligation of the contract between Grove Hill and Ferncliff, and also deprived it of its property without due process of law. The lower court found for the defendant Board and Ferncliff.[43] On appeal, the Appellate Division,[44] and the Court of Appeals,[45] in a 4-3 decision, affirmed, holding that Sections 86-a and 87(2) of the Membership Corporation Law were valid and constitutional in so far as they affected the agreement between Grove Hill and Ferncliff.

Even though Grove Hill's rights as to payment are reduced by the application of Section 87(2), it does not follow that it is unconstitutional as to Grove Hill. The courts must determine whether the right of private contract

42. § 86-a:
(1) Every cemetery corporation shall maintain and preserve the cemetery, including all lots, plots and parts thereof. For the sole purpose of such maintenance and preservation, every cemetery corporation shall establish and maintain (a) a permanent maintenance fund; and (b) a current maintenance fund. At the time of making sale of a lot, plot or part thereof, the cemetery corporation shall deposit not less than 10 per centum of the gross proceeds of the sale into the permanent maintenance fund. An additional 15% of the gross proceeds of the sale shall be deposited in the current maintenance fund.

Section 87(2):
"Where a corporation has agreed with a person from whom any such lands were purchased to pay therefor a specified share not exceeding ½ of the proceeds of sales of lots therein or the use thereof, such corporation may continue to make payments as so agreed, *provided however that there be first deducted from said proceeds of sales the amount required to be deposited in the permanent maintenance fund and current maintenance fund as aforesaid together with the expenses of sale.*" (Emphasis supplied.)

43. Grove Hill Realty Co. v. Ferncliff Cemetery Assoc. 9 Misc. 2d 47, 167 N.Y.S.2d 675 (Sup. Ct. 1957).

44. 7 A.D.2d 736, 180 N.Y.S.2d 767 (2d Dep't 1958).

45. 7 N.Y.2d 403, 198 N.Y.S.2d 287 (1960).

has been unduly interfered with and this must be done on the basis of each individual fact situation.[46] Neither property rights nor contract rights are absolute, and both must give way to a proper exercise of police power.[47] If police regulation is necessary to preserve the welfare of the public, the only requirement is that the limit placed on the contract rest on some reasonable basis and not be arbitrarily exercised.[48]

As a public corporation, Ferncliff was particularly amendable to the exercise of the police power of the State where, as here, it was necessary to assure purchasers of burial lots of adequate maintenance. In New York, funds derived from the sale of cemetery lots are regarded as dedicated to a public use and held in trust and their disposal is subject to statutory regulation under the State's police power.[49]

The interdiction of statutes impairing the obligations of contract does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the good of the public; though contracts previously entered into between individuals may thereby be affected.[50] "The question is not whether the legislative action affects contracts incidentally, or directly, or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."[51]

The principal evil sought to be corrected by Sections 86-a and 87(2) was the misuse of funds by cemetery corporations, including their failure to apply a sufficient portion of the sales proceeds towards preserving and maintaining the cemetery. Certainly it can be said the setting up and prior deductibility of the maintenance funds were reasonably related to the evils to be overcome.

On the other hand, the dissent felt that to construe the statute as the majority did would clearly render it unconstitutional. "Reducing plaintiff's contractual share in the sales proceeds from 50% of 100% to 50% of 75% is pure confiscation; it has no relation to the evil sought to be cured and is, therefore, not a proper exercise of the police power."[52]

There would appear to be merit in this argument. Since the principal evil sought to be remedied was the misuse of funds by the cemetery corporations, including their failure to apply a sufficient portion of the 50% sales proceeds retained towards preserving and maintaining the cemetery. The majority's holding puts one-half of this burden on the person selling the land to the cemetery association; a burden which does not seem to have been intended by the Legislature.

46. Erie Ry. Co. v. Williams, 233 U.S. 685 (1914).
47. Manigault v. Springs, 199 U.S. 473 (1905).
48. Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927).
49. Matter of Lyons Cemetery Assoc., 93 App. Div. 19, 86 N.Y. Supp. 960 (4th Dep't 1904); Whittemore v. Woodlawn Cemetery, 71 App. Div. 257, 75 N.Y. Supp. 847 (1st Dep't 1902); Matter of Norton, 97 Misc. 289, 161 N.Y. Supp. 710 (Sup. Ct. 1916).
50. Supra note 47.
51. Matter of People (Tit. & Mtge. Guar. Co.), 264 N.Y. 69, 83, 190 N.E. 153, 157 (1934).
52. Supra note 45 at 414, 198 N.Y.S.2d 296 (1960).

Under the dissent's interpretation, the plaintiff should receive 50% of the original sales proceeds, and the 25% to be deducted should be taken entirely from the cemetery association's share, for it is they who should have the entire burden of maintenance of the cemetery.

However, if this were to be so, the phrase from Section 87(2), "provided however that there be first deducted from said proceeds . . ." would have no meaning. Thus, it can be said that in reading the Section in its entirety, the Legislature did intend to put part of the burden of maintenance on the seller and that in order to give effect to all the words of the section, the 25% is to first be deducted before any shares are made and that the seller's 50% is to be that of 75% rather than 100%.

STATUTES CERTIFYING PSYCHOLOGISTS HELD VALID

In an action for declaratory judgment as to the validity of Article 153 of the New York Education Law,[53] a statute which provides for the certification of all those who use the title "psychologist" or its derivatives, the validity of the law was upheld through the courts from Special Term,[54] to the Appellate Division,[55] to the Court of Appeals in *National Psychological Association for Psychoanalysis, Inc. v. University of the State of New York*.[56]

This statute was passed to protect the public from unscrupulous or unqualified people who attempt to cash in on the public's confidence in psychology or who profess to be skilled in applying its theories.[57]

The statute is a certifying law rather than a licensing law. It does not prohibit anyone from rendering psychological services, but rather prohibits anyone not certified from accepting money while holding himself out to be a psychologist. By establishing a certification procedure, the Legislature hoped to protect the public against charlatans and quacks who, despite inadequate training and professional experience, guarantee easy solutions to psychological problems.

The Legislature has in the past regulated and protected certain professions with licensing laws, e.g., lawyers and medical doctors, or with certifying laws, e.g., accountants, plumbers, architects.[58]

Plaintiffs real objection to this statute was the fact that the University of the State of New York in administering the statute refused to certify certain graduates of European colleges whom the Association wished to be certified.

53. §§ 7601-7617.
54. 18 Misc. 2d 722, 188 N.Y.S.2d 151 (Sup. Ct. 1959).
55. 10 A.D.2d 688, 199 N.Y.S.2d 423 (1st Dep't 1960).
56. 8 N.Y.2d 197, 203 N.Y.S.2d 821 (1960).
57. For an interesting discussion of the selling power of the term "psychologist" and its use by non-professionals see Note, Regulation of Psychological Counseling and Psychotherapy, 51 Colum. L. Rev. 474 (1951).
58. Roth v. Hoster Realty Co., 119 Misc. 686, 197 N.Y. Supp. 220 (Sup. Ct. 1922), commented that what is now N.Y. Education Law §§ 7301-7307 was directed solely against the assumption of the title architect or registered architect and did not forbid the practice of the profession or occupation generally.