BOARD OF EMBALMERS AND FUNERAL DIRECTORS:
Constitutional Law: Constitutionality of law prohibiting licensed embalmers to become members of burial associations.

June 27, 1941.

Board of Embalmers and Funeral Directors,
Mr. Robert E. Kirby, Secretary,
1901 North Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have your request for an official opinion upon the constitutionality of the following quoted language contained in Section 63-727 Burns' Ind. Statutes Ann. Supp. 1940 (Acts 1939, Chapter 165, Section 11, p. 764):

"The board may refuse to grant or renew a license or may revoke a license for the following reasons:

* * * (d) If the holder thereof * * * has promoted or is promoting or has participated in or is participating in any scheme or plan in the nature of a burial association or a burial certificate or membership certificate plan."

The above quoted language is a part of the 1939 Act establishing a State Board of Embalmers and Funeral Directors and providing for the licensing of embalmers and funeral directors. (Sections 63-717 to 63-731, Burns, etc., supra, Acts 1939, Chapter 165, p. 764.)

It has long been recognized by the courts that the Legislature possesses the authority under the police power of the state to license those who would engage in embalming and funeral directing. In the case of People v. Ringe (1910), 197 N. Y. 143, 90 N. E. 451, the New York Court of Appeals said:

"The care of dead human bodies, and the disposition of them by burial or otherwise, is so closely related to the health and general welfare of a community that the business of caring for and disposing of such bodies may be regulated by license and special regulations under the general police power of the state."

After considering the necessity of adequate protection to public health and the general welfare through the proper handling of dead human bodies the court added:
"The opportunity which undertakers frequently have to aid in covering up or uncovering the evidences of crime also constitutes a reason why they should be selected with reference to their character and integrity * * * ."

"The Legislature can properly determine that undertakers bear such a relation to the public health and welfare that they should be subject to regulation and license. Such authority and power has been quite generally recognized, and statutes prohibiting persons from engaging in the business of undertaking except as provided thereby have been enacted, and are now in force, in a majority of the states of the Union."

A similar conclusion was reached in upholding the licensing power of the Legislature by the Supreme Court of Rhode Island in the case of Prata Undertaking Company v. State Board of Embalming (1936), 55 R. I. 454, 182 A. 808, 104 A. L. R. 389. The interests sought to be served through the exercise of such police power are considered to be public health, safety, morals and general welfare. That the Indiana General Assembly had such considerations in mind is evident from Section 1 of the 1939 Act (Section 63-717 Burns, etc., supra) wherein the purposes of the Act were set forth.

The methods of operation of burial associations or burial certificate or membership certificate plans have been described in various court decisions, and a majority of the courts have concluded that the contract thus evolving for the payment of burial expenses is in the nature of an insurance contract. See Annotation in 63 A. L. R. 711 at 723.

In the case of State v. Willett (1908), 171 Ind. 296, the Court considered a contract whereby an undertaker was to receive the proceeds accruing at death pursuant to dues paid in by members and in return was to furnish burial service for the deceased member. Such an arrangement was regarded as a life insurance contract. Constituting insurance business, such a scheme or plan is subject to the provisions of our state insurance laws.

Willett v. State, supra.
The effect of the provision above quoted from the 1939 Act is to deny an undertaker's or embalmer's license to one who promotes or participates in any such scheme or plan even though it would be subject to the provisions of our state insurance laws.

The constitutionality of such a provision depends upon its being a reasonable exercise of the police power rather than an arbitrary, oppressive and capricious use of that power without substantial relation to public health, safety, morals and general welfare.

The mere fact that promotion of or participation in a burial association may under certain circumstances be legitimate and licensed under insurance statutes, does not render invalid the prohibition of such conduct by one who would be licensed under the embalmers and funeral directors statute.

"In the exercise of the police power, citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right."


"When put to the choice by the practical necessities of the case, the Legislature may exercise its power to suppress an evil by prohibiting entirely a stated practice out of which that evil largely grows, even though by so doing, innocent acts may be forbidden and long-established customs of the people thenceforth made unlawful."

L. Maxcy, Inc. v. Mayo (1932), 103 Fla. 552, 139 So. 121.

"It is within the legislative power to regulate, license, or discourage business enterprises legitimate in themselves, but tending to affect the welfare of the state or the public as a whole, and if any reasonable theory may be found to support the view that an injury or impediment to the public welfare is involved, the constitutionality of the legislation will be sustained notwithstanding there may be cogent arguments supporting the view that no injury is, in fact, to be anticipated, or that there are benefits which may outweigh the injury, or that the legislative policy is unwise."

Midwestern Petroleum Corp. v. State Board of Tax Commissioners (1934), 206 Ind. 688.
In view of the Court's description in the Willett and other cases of the method of operation of the burial association plan, it will be readily seen that in the enactment of the above-quoted grounds for refusal to grant or renew a license the General Assembly had recognized a situation contrary to public welfare resulting from the association of an embalmer or funeral director with a burial association plan. Therefore the statute was enacted to prohibit that association.

The legislative determination that such a situation was contrary to the public welfare and should be prohibited is entitled to great weight and should not be disturbed.

In my opinion the provision quoted in your letter from the 1939 Act is constitutional.

DEPARTMENT OF PUBLIC WELFARE: Constitutional Law—The question of validity of Sec. 1, Chap. 179, of the Acts of 1941 discussed.

Constitutional Law—Sec. 1 of Chap. 179 of the Acts of 1941 is unconstitutional.

June 27, 1941.

Mr. T. A. Gottschalk, Administrator,
State Department of Public Welfare,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Mr. Gottschalk:

I have your letter of the 27th instant in which you ask as to the validity of Section 1, Chap. 179 of the Acts of 1941 when the same becomes effective. Your question is as follows:

"Is any part of this section valid, or is the section so based on the appointing power of the Lieutenant Governor and his privilege to sit and vote as a member of the State Board of Public Welfare that the section as a whole is invalid under the decision in the case of Tucker et al. v. State of Indiana et al., decided yesterday by our Supreme Court?"

The original Welfare Act of 1936 provided that the State Board of Public Welfare shall consist of five members who are to be appointed by the Governor. Section 1 of Chapter 179 also provides for a Board of five members. It is true that in the first