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Constitutional Law--Due Process and Equal Protection--License for Massage Operators (Wormsen, et al. v. Moss, 177 Misc. 19 (1941))

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is necessarily *obiter dictum.* The decision is noteworthy insofar as it declines to follow the rule of *In re Perkins*[16] but rather lends judicial weight to the precedent of *Munz* v. *Harnett.*[17]

M. F.

CONSTITUTIONAL LAW—DUE PROCESS AND EQUAL PROTECTION —LICENSE FOR MASSAGE OPERATORS.—The plaintiffs, Jenny Wormsen and Dagmar Larsen-Bak, have applied for an order directing the Commissioner of Licenses of New York City to accept their applications and to permit them to take the prescribed examination for massage operators. Plaintiffs allege that they filed proper applications for licenses in November, 1940, and that these applications complied with all the rules and regulations relating to such. On March 21, 1941, the applications were denied on the sole ground that the applicants had not been citizens of the United States for at least two years.[1] When the applications were filed the Administrative Code provided that the granting of licenses as massage operators is limited to citizens or to those who have regularly declared their intention to become citizens.[2] Before the applications had been accepted, the Administrative Code was amended to restrict the granting of licenses to those who had been citizens two years.[3] Petitioners urge that such a provision is an arbitrary, unreasonable and discriminatory exercise of police power, violative of the Constitution of the United States and the State of New York.[4] *Held,* application granted. *Wormsen, et al.* v. *Moss,* 177 Misc. 19, 29 N. Y. S. (2d) 798 (1941).

A person's business or occupation is property within the constitutional provisions as to due process of law.[5] The guaranty of due

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L. 1941, c. 872, § 1, eff. Jan. 1, 1942) which, no doubt, was influenced by the decisions in the *Reitz* and *Perkins* cases.

[16] 3 F. Supp. 697 (N. D. N. Y. 1933).

[17] 6 F. Supp. 158 (S. D. N. Y. 1933).

[1] Petitioner Wormsen had acquired citizenship in February, 1941, and petitioner Larsen-Bak had been examined for admission to citizenship in May, 1941, and was awaiting her final papers at the time of trial.

[2] ADMINISTRATIVE CODE § 773a—1.0.

[3] ADMINISTRATIVE CODE § B32—195.0, as amended by Loc. Laws 1941, No. 15 and § 773a—1.0.

[4] U. S. CONST. AMEND. XIV, § 1. "* * * nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N. Y. CONST. art. I, §§ 6, 11. "No person shall be deprived of life, liberty, or property without due process of law." "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

[5] Angelopoulos v. Battorff, 76 Cal. App. 621, 245 Pac. 447 (1926); Lasdon v. Hallihan, 377 Ill. 187, 36 N. E. (2d) 227 (1941); Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853 (1916); Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931).

process, however, does not abridge the right of a state to exercise its police power. The legislature has the power to license and regulate certain vocations dependent upon a necessity to protect health, morals or the general welfare of the state.[6] Due to the fact that the very nature of the profession of a massage operator requires contact with the human body, it can be readily seen that such profession is properly subject to regulation under the police power. But in order to be sustainable under the police power, the legislation must tend to prevent some evil and the means selected must have a real relation to the object sought to be attained.[7] In the instant case, the purpose of the legislation was the protection of public health, but the requirement of two years' citizenship bore no relationship to that purpose and was therefore violative of the due process clause. Although laws enacted pursuant to the police power have a strong presumption of validity,[8] where the conflict between the legislative enactment and the Constitution is plain and unmistakable, the courts will act to declare the enactment unconstitutional.[9] The equal protection clause does not prohibit reasonable classification.[10] However, since the classification in the instant case was clearly arbitrary and discriminatory, the legislation, as plaintiff contends, was also violative of the equal protection clause of the Constitution. The due process and equal protection clauses apply to all persons within the jurisdiction whether citizens or aliens.[11] Therefore, both petitioners are entitled to the relief sought.[12]

C. McC.

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[6] People v. Ringe, 197 N. Y. 143, 90 N. E. 451 (1910).

[7] People v. Saltis, 328 Ill. 494, 160 N. E. 86 (1927); Moore v. Northern Kentucky Independent Food Dealers Ass'n, 286 Ky. 24, 149 S. W. (2d) 755 (1941); Noyes v. Erie and Wyoming Farmers Co-operative Corp., 281 N. Y. 187, 22 N. E. (2d) 334 (1939); Ives v. South Buffalo Ry., 201 N. Y. 271, 94 N. E. 431 (1911).

[8] People v. Henry, 131 Cal. App. 82, 21 P. (2d) 672 (1933); *Ex parte* Ruppe, 80 Cal. App. 629, 252 Pac. 746 (1927); People v. Monroe, 349 Ill. 270, 182 N. E. 439 (1932).

[9] State v. Childs, 32 Ariz. 222, 257 Pac. 366 (1927); Van Camp Sea Food Co. v. Newbert, 76 Cal. App. 445, 244 Pac. 946 (1926); Talbott v. Thomas, 286 Ky. 786, 151 S. W. (2d) 1 (1941).

[10] Whitney v. People of the State of California, 274 U. S. 357, 47 Sup. Ct. 641 (1927); Little v. American State Bank of Dearborn, 263 Mich. 645, 249 N. W. 22 (1933); Lowry v. City of Clarksdale, 154 Miss. 155, 122 So. 195 (1929); State v. First State Bank of Alliance, 122 Neb. 109, 239 N. W. 646 (1931); Barns v. Dairymen's League Co-operative Ass'n, 220 App. Div. 624, 222 N. Y. Supp. 294 (4th Dep't 1927).

[11] Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7 (1915); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N. E. 152 (1933).

[12] Commissioner of Licenses, Moss, was directed by the court to accept the applications of petitioners and to allow them to take the examination for licenses.