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Constitutional Law--Police Power--"The Kentucky Junkyard Act"

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SECONDLY, the federal test, like that of Kentucky, has all but let the witness invoke the privilege to any question automatically and, without any statement as to why it was invoked, have it accepted by the court. Even though this test provides greater protection, there remains the fear that this privilege may be misused and the general duty to testify when subpoenaed will be greatly hampered.

_Hunter Durham_

**Constitutional Law—Police Power—“The Kentucky Junkyard Act.”**

—Appellants, junk yard operators, instituted this action in the Franklin Circuit Court seeking a declaration of rights and attacking the constitutionality of Ky. Rev. Stat. 177.905-177.990, commonly known as “The Junk Yard Act.” The lower court upheld the act as a valid exercise of the police power of the State, and not arbitrary, discriminatory, nor unreasonable. Held: Affirmed. “The State may constitutionally invoke its police power to regulate businesses where the principal objective is based upon aesthetic considerations.” Jasper v. Commonwealth, 375 S.W.2d 735 (Ky. 1964).

State regulation of trades and businesses under the police power has been extended over the past fifty years to practically all forms of business activity. In the litigation thus produced by this extension, the laws are attacked as violative of the due process of law clauses of the federal constitution and various state constitutions.

The basic assumption of these attacks is that such regulation is valid only when in the interest of public health, safety, or welfare, and that where such a relationship between the regulation and the interest of the public is lacking, the regulation becomes an unconstitutional interference with the rights of the individual. As a practical matter, the question of validity turns on the extent to which a court will regard the legislative enactment as determinative or indicative of the public interest supporting it.

In Supreme Court cases, where the attack is based on the due process and equal protection clauses, there is a broad presumption of validity for state economic regulation through its police power. However, where the basis for attack is racial discrimination, violation of the first amendment, or undue restraint on interstate commerce, no such far-reaching presumption supports the state regulation. In

these last three instances, the presumption is usually one of unconstitutionality. In the due process area, the property interest of the attacking party stands alone, unsupported by a constitutional policy favoring freedom of enterprise analogous to policies found by the Supreme Court in other areas.³ Where the Court once said, "nothing is more settled than that it is beyond the power of the State under the guise of protecting the public, arbitrarily to interfere with private business... or impose unreasonable and unnecessary restrictions..."⁴ it now says, "the concept of public welfare is broad and inclusive... the values it represents are aesthetic as well as monetary... it is within the power of the legislature to determine that the community should be beautiful as well as healthy... and nothing in the Fifth Amendment stands in the way."⁵

The new attitude of the Supreme Court is thus seen: an enlarged recognition of social interdependence and the legitimate sphere of legislative experiment. No longer must states bring their legislative enactments under the conventional heads of health, safety, and welfare.⁶

In analyzing the Kentucky Court's decision in the Jasper case, one looks for traditional justifications, that junk yards are unsafe, unsanitary, or offend the public morals, but one looks in vain. The court of appeals has made little attempt to place this decision on any of the traditional grounds. The court says that while there may be safety interests involved, aesthetic considerations are the principal bases for the statute, and holds that such considerations justify exercise of the police power.

Although not a complete departure from previous decisions, neither is the Jasper decision an affirmation of Kentucky case law on the subject of business regulation under the police power. It is more in the nature of an extension—an unwarranted extension—of the dignified and respected doctrine of police power of the government. The court of appeals has always been careful to base decisions on tangible areas of public welfare, but today it approves regulation of one's business when that business offends another's sense of beauty. The court cites Turner v. Peters,⁷ a 1959 Kentucky case, as precedent for legislative control of businesses which offend the aesthetics of the community. The court fails to point out that the Turner case, in fact, held an ordinance unconstitutional for lack of expressed standards.

³ Id. at 229.
⁶ Berman, TALKS ON AMERICAN LAW 81 (1961).
⁷ 327 S.W.2d 958 (Ky. 1959).
While the *Turner* case did mention, by dicta, that there could be a legitimate public interest in businesses which offend the community's aesthetics, the court hastened to point out that the junk business has a potential danger to public peace, safety, and health—the traditional justifications for use of police power. It is urged that the *Turner* case affords no authority for the step taken by the court in the *Jasper* case.

For federal support the court of appeals relies on *Berman v. Parker*, a 1954 Supreme Court decision involving urban renewal in Washington, D.C. Although the Supreme Court held the use of police power for condemnation to be constitutional in that particular instance, the *Berman* case is not authority for the *Jasper* decision. In *Berman*, compensation was awarded the property owners, all classes of business were equally affected, and zoning laws were involved. In *Jasper*, there was and will be no compensation to these junk yard owners, the Kentucky statute does not affect all businesses equally, and most junk yards in the state are located outside the areas affected by zoning laws.

While the general intention of the legislature and the court of appeals may be good, this does not justify the use of unreasonable means to achieve that intention. Moreover, there are many questions unanswered by the court and not decided by the *Jasper* case. Does this constitute denial of equal protection of laws, since only junk yards are regulated, while coal tipples and saw mills, to name only a few, are not included? Are aesthetics alone adequate justification for legislation of this tenor in an economic climate so desperately needing new industry as Kentucky? Does legislation of this type constitute an unreasonable restraint on the interstate flow of scrap iron? Clarification on these and many other points is badly needed.

The *Jasper* decision could and undoubtedly will pave the way for more legislative enactments that had been beyond the scope of the police power of the state. The question of urban renewal could now be entirely out of the hands of the people affected, and once it is found to be "aesthetically desirable," it would be done. The ultimate impact of this decision may not be seen for many years, too late to remedy the situation.

The statute is discriminatory in its result. Junk yards must be screened while saw mills and stone quarries need not be hidden. Stockyards and coal tipples may offend the eye of the travelling public, but junk yards must be hidden from view. Moreover, the statute discriminates against the small operator, whose inventory of six cars

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requires him to build an expensive fence or sell out. At this point, it is urged that in this age of planned obsolescence by automotive manufacturers, junk yards perform a service indispensable to the public. Why burden either the small junkman or the large operator with such unreasonable restrictions? We are told it is for aesthetic objectives alone.

May a business or a class of businesses be arbitrarily declared to be a public nuisance, as a matter of law, when in fact not a nuisance? Michigan\(^9\) and Ohio\(^10\) courts say no.

The punitive hand of this statute falls too heavily. The statute provides: "and upon conviction shall be punished by a fine of not less than one hundred dollars and not more than one thousand dollars. Each day of violation of the provisions of KRS 177.905 to KRS 177.950 shall constitute a separate offense."\(^{11}\) (Emphasis added.) It is submitted that this expressly violates section 17 of the Constitution of Kentucky and amendment eight of the Constitution of the United States, which provide that excessive fines shall not be imposed. It was urged by counsel for the state that these provisions were necessary to put teeth into the statute.\(^{12}\) "Teeth" is grossly inadequate to describe a 1,000 dollar a day penalty for offending such a nebulous concept as "beauty." It is submitted that the criminal penalties are much too excessive and are violative of the Kentucky and the United States Constitutions.

Reasonable regulation in many areas is not only desirable, but necessary. We must not confine ourselves to regulating one class of business while allowing others, more ugly and more dangerous than junk yards, to operate openly and without regulation. We cannot allow regulation to become confiscatory, nor should the regulation bear more heavily than conditions require, for this is when regulation becomes unreasonable and unconstitutional.

Harry M. Snyder Jr.

**Tort—Municipal Tort Immunity Doctrine.**—A seven-year-old child drowned in a municipal swimming pool. The administratrix of her estate filed suit against the City of Lexington, Kentucky, alleging that the child’s death was caused by the negligent operation of the pool by

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\(^{10}\) City of Washington v. Thompson, 160 N.E.2d 568 (Ohio 1959).
\(^{12}\) Brief for Appellee, p. 21, Jasper v. Commonwealth, 375 S.W.2d 735 (Ky. 1964).