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Constitutional Law--Police Power--Aesthetic Nuisance

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data for all types of outside competition may be impossible or impractical to obtain.

Since difficulties may arise when total asset, loan and deposit ratios are used, perhaps a better test may be constructed by utilizing an inherent requirement of commercial banks—liquidity. Because of the nature of the liabilities of commercial banks, their loans are, for the most part, of a short term nature. In addition, this type is subject to less outside competition.¹⁷ Again utilizing the broad categories provided by the federal reserve, most of the short term type would appear to be contained in commercial and industrial loans, loans for securities, and loans to individuals.¹⁸ These three account for over sixty per cent of total commercial bank loans, and coupled with competitive-free demand deposits would result in an asset/liability test, considering both borrower and depositor, that would generally yield a more accurate measurement of competition between inherent functions of commercial banks. This in turn would provide a much more realistic picture of concentration among commercial banks. Although this test would not lead to ratios with the high degree of consistency now enjoyed, it would appear reasonable to expect some type of correlation between the loan and deposit sectors because of the similarity in the degree of liquidity. Even with this drawback, this test, in the majority of cases, would appear more likely to test competition among commercial banks, which, after all, is the essence of the problem.

Stephen H. Johnson

CONSTITUTIONAL LAW—POLICE POWER—AESTHETIC NUISANCE.—Appellants challenged the constitutionality of the Billboard Act.¹ With minor exceptions, the act prohibits the erection of any “advertising device” within 660 feet of the right-of-way of any interstate highway, limited access highway, or turnpike. *Held*: The act is a constitutional exercise of the state police power. *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964).

Appellants contended there was a procedural error in the refusal of the circuit court to admit evidence indicating no relationship exists

¹⁷ Steiner, *op. cit. supra* note 7, at 139-43.

¹⁸ *Ibid.*; 50 Fed. Reserve Bull. 1558 (1964).

¹ Ky. Rev. Stat. 177.830-.990 (1960) [hereinafter cited as KRS].

between outdoor advertising and traffic safety,² the purpose of such evidence being to impeach the judgment of the legislature and, ultimately to show the arbitrariness of the act as a safety regulation. The Kentucky Court of Appeals upheld the exclusion and said:

In passing upon the constitutionality of a statute the court takes judicial notice of matters of common knowledge. . . . The court may not examine the validity of reasons which impelled the legislature to act, nor may it reappraise those reasons.³

The court cited *Kohler v. Benckart*⁴ which relied on 11 *American Jurisprudence* "Constitutional Law" section 145 (1937). The court also cited the *American Jurisprudence* section.

The grounds given for excluding evidence so vital to appellants' case are open to skepticism. In *Kohler v. Benckart*, the court merely stated the general rule that *many* courts do "not consider evidence aliunde to show the invalidity of a statute."⁵ *American Jurisprudence* severely qualifies and limits the rule in the section cited⁶ and many exceptions exist.⁷

Indeed, the Kentucky law is that the means adopted by the legislature in the exercise of its police power must have more than an "ascertainable" relevancy to the object; the relevancy must be "substantial."⁸ It would seem this higher standard carries with it a correlative duty to scrutinize contested legislation to determine its fundamental purposes. In *Tolliver v. Blizzard*,⁹ the court was explicit in holding that although the state may impose regulations through its police power:

The individual may pursue without let or hindrance from any one, all such callings or pursuits as are innocent in themselves and not injurious

² Several studies have been made on this question. See, e.g., Price, *Billboard Regulation Along the Interstate Highway System*, 8 Kan. L. Rev. 81, 88 (1959). In commenting on these studies, Judge Davison, in *Ghaster Properties, Inc. v. Preston*, 184 N.E.2d 552 (Ohio 1962), concluded: "If any such relation is shown at all, it is to the effect that such devices are beneficial to safety in that they tend to alert drivers, to keep them actively attentive to roadway conditions and tend to prevent 'highway hypnosis.'"

³ *Moore v. Ward*, 377 S.W.2d 881, 883 (Ky. 1964).

⁴ 252 S.W.2d 854 (Ky. 1952).

⁵ *Id.* at 856.

⁶ 11 Am. Jur. *Constitutional Law* § 145 (1937). It is further limited in 39 Am. Jur. *Nuisances* § 13 (1942).

⁷ See *Weaver v. Palmer Bros.*, 270 U.S. 402 (1926); *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141 (1920); *Barker v. State Fish Comm'n.*, 88 Wash. 73, 152 P. 537 (1915).

⁸ *City of Covington v. Sanitation Dist. No. 1*, 301 S.W.2d 885 (Ky. 1957); *Bond Bros. v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 307 Ky. 689, 211 S.W.2d 867 (1948).

⁹ 143 Ky. 773, 137 S.W. 509 (1911).

to the public. These are fundamental rights of every citizen living under this government.¹⁰

In view of the obvious due process issue in the principle case, it is doubtful such evidence should have been excluded. Where a specific constitutional prohibition is involved to require a state to refute evidence that its safety statute does not, in fact, promote safety is not an unreasonable burden.¹¹

It was further contended by the appellant property owners that even granting some public interest is promoted by the act as a safety regulation, the interest is so slight and nebulous, in comparison with the rights restricted, as to brand the legislation unreasonable.¹² The court answered with the argument that since the property interests impaired have value only in the exploitation of a public highway, that therefore the public property rights in the highway may impose a servitude upon them, *i.e.*, to the point of abolishing them in places deemed necessary by the legislature.¹³

The argument is particularly weak. Taken in the broad sweep proclaimed in the *Moore* case, any person, who, by improving his own property, also causes an appreciation in the value of surrounding properties, has the right to charge for, or restrict the use of, all improvements. Surely it is false logic that a mere proximity to other buildings and establishments, public or private, entitles the entity causing the proximity to capture for itself a resulting increase in property values. By the same token, neither should such a situation entitle the one creating the improvements to prohibit surrounding owners from enjoying and profiting by their new locale.¹⁴ This is artificial reasoning. It is a "dog-in-the-manger" argument.

The weakness of the opinion is particularly regrettable in light of the fine precedent available in *Jasper v. Commonwealth*¹⁵ of which the court so sparingly availed itself. The opinion scatters its shot in an inconsequential pattern when it suggests that where the constitutionality of a statute involves many intangible factors, it is not within

¹⁰ *Ibid.* For a vivid illustration of the superiority of constitutional rights even where the demand for social improvements is very great, see Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹¹ The United States Supreme Court has consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appears on its face to violate a specific prohibition of the Constitution. *Ex parte Ende*, 323 U.S. 283 (1944); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

¹² *Moore v. Ward*, 377 S.W.2d 881, 887 (Ky. 1964).

¹³ *Ibid.*

¹⁴ *Chaster Properties, Inc. v. Preston*, 184 N.E.2d 552, 560 ().

¹⁵ 375 S.W.2d 709 (Ky. 1964). The case held constitutional the act requiring screening of junk yards (KRS 177.905-990 (1962)).

the province of the court to hold the statute invalid by reaching a conclusion contrary to that of the legislature.¹⁶ The "intangible factors" of which the court speaks can easily be combined to two very tangible ones; safety and convenience in interstate travel, and preservation of the natural scenic beauty.

Apparently, in spite of its holding in the *Jasper* case, the court is still reluctant to affirm a clear stand in favor of aesthetic zoning when the opinion can be based on other grounds. Presumably, this is because a legislative power to declare a thing a nuisance for purely aesthetic reasons is pregnant with possibilities for abuse.¹⁷ One judge commented that:

Authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Rembrandt, and limericks than for Keats. . . . The world would be in a continual seesaw if aesthetic considerations were permitted to govern the use of police power.¹⁸

It is because of these historical betes noires that the courts have strained for years to sustain regulatory or prohibitory ordinances on traffic safety.¹⁹ Although, in most instances contorted reasoning seems to have produced the right results, it is time the courts squarely faced the issue and sustained the legislation solely on aesthetic grounds. With the greatly enhanced importance of the tourist dollar to state welfare,²⁰ coupled with the natural depletion of the scenic resources *via* urbanization and industrialization, the long tradition of near absolute sanction to clutter one's property with commercial advertising passed the bounds of unlicensed freedom. The tort of aesthetic nuisance can now stand alone.²¹ The make-weight arguments of traffic safety and wrongful exploitation of the public highway by private property interests in the *Moore* case do not do justice to the court.

John Lackey

¹⁶ *Moore v. Ward*, 377 S.W.2d 881, 884 (Ky. 1964).

¹⁷ Cochran, *Esthetic Zoning—The Trend of the Law*, 7 W. Res. L. Rev. 171, 179 (1956).

¹⁸ *Youngstown v. Kahn Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925).

¹⁹ 156 A.L.R. 586 (1945).

²⁰ See *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762, 764 (1961).

²¹ *Commonwealth v. Trimmer*, 53 Dauph Co. Rep. 91 (Pa. 1942), 156 A.L.R. 586.