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Constitutional Law--Regulation of Filling Station Price Signs (State v. Hobson, 83 A.2d 846 (Del. 1951))

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ever, may be considered a step in the right direction, guiding state courts to a more vigilant protection of personal liberties.

CONSTITUTIONAL LAW — REGULATION OF FILLING STATION PRICE SIGNS.—Defendant, owner and operator of a retail gasoline station, was arrested and charged with the violation of a Delaware statute regulating the location and maximum size of motor fuels price signs.[1] Specifically, the information charged him with the display of signs with dimensions in excess of the statutory maximum. Defendant moved to quash the information, asserting that the regulatory statute was an unlawful infringement on the right of free speech, unconstitutionally burdened interstate commerce, and was a deprivation of property without due process of law.[2] *Held,* the subject statute does not offend the constitutional guarantee of free speech, nor does it constitute an unlawful burden on interstate commerce.[3] It does, however, effect a deprivation of property without due process of law, and is therefore unconstitutional. *State v. Hobson,* 83 A. 2d 846 (Del. 1951).

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ought not to reject it merely because it comes late.' Similarly, one should not reject a piecemeal wisdom, merely because it hobbles towards the truth with backward glances." Wolf v. Colorado, 338 U. S. 25, 47 (1949); see Mann, *Rutledge and Civil Liberties,* 25 IND. L. J. 532, 551 (1950).

[1] "Every retail dealer in motor fuel shall publicly display and maintain on each pump or other dispensing device, from which motor fuel is sold by him, at least one sign and not more than two signs stating the price per gallon of the motor fuel sold by him from such pump or device, which price shall be the total price for such motor fuel, including all State and Federal taxes. Said sign or signs shall be of a size not larger than four inches by six inches . . . .

"No signs stating or relating to the prices of motor fuel, and no signs designed or calculated to cause the public to believe that they state or relate to the price of motor fuel, other than the signs referred to in the preceding paragraph, shall be posted or displayed on or about the premises where motor fuel is sold at retail." 48 LAWS OF DELAWARE c. —, § 1 (1951), quoted in State v. Hobson, 83 A. 2d 846, 849-50 (Del. 1951).

[2] The defendant asserted two other defenses which were not sustained, and which will not be treated here. The first was a contention that the act conflicted with the ceiling price regulations of the Office of Price Stabilization, and hence was invalid under the Supremacy Clause of the Federal Constitution. The other contention was grounded on a supposed formal deviation from that requirement of the Delaware Constitution, which provides that no bill shall embrace more than one subject which shall be expressed in its title. State v. Hobson, 83 A. 2d 846, 850 (Del. 1951).

[3] The court disposed of this contention with the assertion that retail sales of gasoline are intrastate rather than interstate in character. It further opined that even if the sales were to be considered as interstate in nature, they were nevertheless subject to regulation in the absence of a showing of discrimination. *Id.* at 852-53.

Statutes similar to the one considered in the instant case have been enacted in twelve states,[4] and have been the subject of appellate consideration in six of them.[5] In Massachusetts [6] and New York,[7] the provisions have been sustained over constitutional objections, while in Connecticut,[8] Michigan,[9] and New Jersey,[10] they have been struck down as inconsistent with federal and/or state organic laws.

Contestants have generally predicated their objections to this type of legislation on the ground that the statute effects a deprivation of property without due process of law.[11] In evaluating these objections, the courts, in these cases, have generally proceeded on the assumption that sign-posting, a lawful incident to the conduct of business, is a property right.[12] Moreover, all courts have recognized the state's power to regulate this right, subject to the requirements of due process as set forth in *Nebbia v. New York*.[13] There it was said that the guaranty of due process ". . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected

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[4] Alabama (provides that price signs shall be of a certain minimum size); California (minimum and maximum); Connecticut (maximum); Iowa (minimum); Massachusetts (maximum); Michigan (maximum); Nebraska (minimum); New Jersey (minimum and maximum); Pennsylvania (minimum and maximum); Rhode Island (maximum); Utah (minimum); Wisconsin (minimum). AMERICAN PETROLEUM INSTITUTE, MIMEOGRAPH TC 108 (March 4, 1952).

[5] State v. Miller, 126 Conn. 373, 12 A. 2d 192 (1940); Commonwealth v. Slome, 321 Mass. 713, 75 N. E. 2d 517 (1947); Merit Oil Co. v. Director, 319 Mass. 301, 65 N. E. 2d 529 (1946); Slome v. Godley, 304 Mass. 187, 23 N. E. 2d 133 (1939); Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80 (1951); Regal Oil Co. v. State, 123 N. J. L. 456, 10 A. 2d 495 (Sup. Ct. 1939); People v. Arlen Service Stations, Inc., 284 N. Y. 340, 31 N. E. 2d 184 (1940); People v. Bluestein, 284 N. Y. 796, 31 N. E. 2d 924 (1940).

[6] Commonwealth v. Slome, 321 Mass. 713, 75 N. E. 2d 517 (1947); Merit Oil Co. v. Director, 319 Mass. 301, 65 N. E. 2d 529 (1946); Slome v. Godley, 304 Mass. 187, 23 N. E. 2d 133 (1939).

[7] People v. Arlen Service Stations, Inc., 284 N. Y. 340, 31 N. E. 2d 184 (1940); People v. Bluestein, 284 N. Y. 796, 31 N. E. 2d 924 (1940).

[8] State v. Miller, 126 Conn. 373, 12 A. 2d 192 (1940).

[9] Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80 (1951).

[10] Regal Oil Co. v. State, 123 N. J. L. 456, 10 A. 2d 495 (Sup. Ct. 1939).

[11] See Note, 20 B. U. L. REV. 345 (1940), where the student author was of the opinion that the divergent conclusions reached by the Massachusetts and New Jersey courts on similar statutes could be explained by resort to an examination of their differing constitutional backgrounds. The Massachusetts courts, he asserted, have always given approval to a liberal concept of police power to be exercised by the legislature, while the New Jersey courts have never allowed rights of private property to be infringed upon except in cases of extreme necessity. In 28 GEO. L. J. 1130 (1940), another writer assayed that the true intent and purpose of these statutes is to regulate competition (an assumption somewhat justified by a reading of *Regal Oil Co. v. State, supra* note 10), and his discussion was accordingly channeled into a consideration of legislation designed to regulate competition.

[12] *See* State v. Miller, 126 Conn. 373, 12 A. 2d 192, 193 (1940); State v. Hobson, 83 A. 2d 846, 855 (Del. 1951).

[13] 291 U. S. 502 (1934).

shall have a real and substantial relation to the object sought to be attained." [14]

In the main, these statutes have been designed to prevent fraud on the consumer—an admittedly legitimate goal for legislative action.[15] Thus the principal inquiry in all these cases has been whether or not the limitations on the number and size of price signs to be displayed bears a reasonable relation to the prevention of fraud. The courts of Massachusetts and New York, as noted above, have been unwilling to disturb the legislative finding that they are reasonable; those in Connecticut, Michigan and New Jersey have accorded less respect to the legislature's pronouncement.

The divergent conclusions reached as to the validity of the sign-posting laws stem, therefore, not from a disparity of opinion as to the basic constitutional doctrines, but rather are the result of differing views as to the weight to be given to the legislative conclusion that such statutes will accomplish the desired purpose.

It is submitted that those courts which require the state to establish the relation of the means employed to the end intended have voiced a better rule. The right to property is federally guaranteed; when the state seeks to limit that right, it should bear the burden of establishing the reasonableness of its act.[16] Nevertheless, it is impossible to ignore those decisions of the Supreme Court which seem to indicate a contrary trend. Indeed, it would seem to be the rule that "[T]he extent to which, as means, they [state regulations] conduce to that end, the degree of the efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not that of the court. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end." [17] So tested, the subject statutes would seem to meet the test of federal due process.

This is not to imply that the decision in the instant case was erroneous. Regulations which accord with the Fourteenth Amendment's command of due process, may nevertheless fail the test when challenged under the comparable provision of a state's constitution. Due process has a variable meaning; the courts of one state may justifiably impose more stringent standards of legislative conduct than do those of another.[18]

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[14] *Id.* at 525.

[15] Schmidinger v. City of Chicago, 226 U. S. 578 (1913).

[16] So opined Mr. Justice McReynolds, dissenting in Nebbia v. New York, 291 U. S. 502, 548 (1934).

[17] Stephenson v. Binford, 287 U. S. 251, 272 (1932); United States v. Carolene Products Co., 304 U. S. 144 (1938); *see* South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U. S. 177, 190-91 (1938); Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192, 201-2 (1912).

[18] See note 11 *supra.*

In the instant case, the defendant advanced the further contention that the limitation on the size of signs to be displayed violated the constitutional right to free speech. This contention was rejected by the Delaware court on the simple assertion that the guarantees of the First Amendment were not intended to protect such commercial activities as are here involved.[19] Although some state courts have taken a contrary position,[20] reference to the utterings of the Supreme Court [21] would seem to support the conclusion reached in the instant case.

The decision on this latter point is an important one. Ordinarily, the presumption of constitutionality, which attends regulatory legislation affecting commercial interests, is greatly weakened when the contested measure threatens to transgress a specific prohibition of the Bill of Rights.[22] If this limitation on the presumption of constitutionality could be applied to the subject statutes, via a free speech objection, the onus of proving their substantial relation to their avowed purpose would be shifted to those who would sustain them. While it is possible to conjure up instances where the sign-posting regulations might aid in preventing fraud [23] and thus satisfy the test of due process (the instant holding *non obstante*),[24] it is doubtful whether these mental explanations would suffice as substitutes for proof when confronted by the objections posed by the demands of free speech.

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[19] *See* State v. Hobson, 83 A. 2d 846, 851 (Del. 1951).

[20] Needham v. Proffitt, 220 Ind. 265, 41 N. E. 2d 606 (1942); *see* McKay Jewelers v. Bowron, 49 Cal. App. 739, 122 P. 2d 543, 548 (1942). *Contra:* People v. Skottedal, 104 N. Y. S. 2d 583 (County Ct. 1951).

[21] *See* Breard v. City of Alexandria, 341 U. S. 622, 641 (1951); Valentine v. Chrestensen, 316 U. S. 52, 54 (1942).

[22] Mr. Justice Stone, delivering the majority opinion for the court, stated that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." United States v. Carolene Products Co., 304 U. S. 144, 152, n. 4 (1938); *see* West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639 (1943); Stapleton v. Mitchell, 60 F. Supp. 51, 54 (D. Kan. 1945).

[23] *E.g.*, suppose a station owner displays a large sign reading "save four cents"; a motorist purchases gasoline thinking he is saving four cents per gallon. After the gasoline is in his tank, he is informed that the saving applies to the purchase of tires, and not gasoline. A recent case (unreported) before a Justice of the Peace in Pennsylvania involved those very facts. The defendant was convicted. Compare the provision of the Delaware statute to the effect that ". . . no signs designed or calculated to cause the public to believe that they state or relate to the price of motor fuel . . . shall be posted or displayed . . . ." 48 LAWS OF DELAWARE c. —, § 1 (1951).

[24] Cases cited note 17 *supra*.