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Jerry B. Crockett

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vided for a conviction of grand larceny under the consolidated statute.[30] Hence a defendant suspected of obtaining property by false pretenses is subject to the whim of the prosecutor, who may now prosecute under either statute.

In conclusion, the provision for a general charge under the consolidated statute is in keeping with the modern trend toward streamlining indictments and informations in order that the trial may proceed speedily to a decision on the merits. In keeping with the purpose for which the statute was enacted, Florida prosecutors should be able to employ the general charge to the same advantage as is done in California, Louisiana, and Massachusetts, the states chiefly responsible for the position that a general allegation with respect to any one of the crimes embodied in the statute is sufficient for pleading purposes.

HENRY F. MARTIN, JR.

GOVERNMENTAL REGULATION OF BILLBOARD ADVERTISING

Outdoor advertising is a big business, firmly entrenched and well organized. It has unquestionably made a real contribution to the opening of mass markets, upon which our economy is dependent. Like other behemoths of commerce, however, its development has not been hailed by everyone. The very number of billboards is bound to offend some; there are hundreds of thousands in the nation, ranging in size from Burma Shave jingles to the multi-thousand-dollar sparkling displays on the Miami bay front.

There is an attempt, fairly successful among members of the organized industry, at self-regulation. One of the rules in the Outdoor Advertising Association code of ethics[1] is "to refuse to display any misleading, indecent or illegitimate advertising or any advertising which savors of personal animosity." Bylaws of the association are rigid on the subject of location. Members are not permitted to place billboards

[30]FLA. STAT. §811.021 (1955) (offense divided into petit and grand larceny. Maximum punishment for former, 6 months in county jail or fine not exceeding $300; for latter, 5 years in state penitentiary or fine not exceeding $1,000).

[1]OUTDOOR ADVERTISING: THE MODERN MARKETING FORCE 209 (1928).

"(1) so as to create a hazard to traffic,
(2) on rocks, posts, trees, fences, barricades or daubs,
(3) on streets or portions of streets which are purely residential in their nature, or in other locations where the resentment of reasonably minded persons would be justified,
(4) on streets facing public parks where the surrounding streets are residential,
(5) on any locations except property either owned or leased,
(6) in locations that interfere with the view of natural scenic beauty spots."

Even assuming strict compliance with the code of ethics and bylaws, however, the "reasonably minded persons" of (3) above might differ as to the definition of "natural scenic beauty spots" of (6). Is the Everglades of Florida a river of grass, flush with exotic flora and fauna, or is it a dreadfully monotonous stretch of saw grass to be traversed before arrival at a winter playground? Legislative bodies have attempted to resolve some of the conflicts that have arisen with the development of this vast industry.

The Legal Basis

The regulation of billboards by a municipality or a state is historically based upon the promotion of public safety, convenience, and morals – a legitimate exercise of the police power to regulate the use of public ways.[2]

In *Cusack Co. v. Chicago*[3] the United States Supreme Court decided that an ordinance requiring the erector of a billboard to get the permission of all property owners in the block was not offensive. The Supreme Court struck down the contention that this was an improper delegation of legislative authority to private individuals; it reasoned that an absolute prohibition of billboards would have been constitutional, and hence the owner was benefited in being allowed to erect the noxious structures under any circumstances. The police power supporting this decision was based on the following rather tenuous ground:[4]

"[T]he Supreme Court finds that fires had been started in the

[2]McQuillin, Municipal Corporations §24.380 (3d ed. 1949).
[3]242 U.S. 526 (1916).
[4]*Id.* at 529.

accumulation of combustible material which gathered about such billboards; that offensive and insanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals."

Aesthetic Considerations

The hornbook rule is that aesthetic considerations are not enough to uphold billboard regulation.[5] This rule is based on the supposition that, since there is a right to devote one's property to reasonable use, a regulation not based on the police power deprives one of property without just compensation and is thus a denial of due process. The authority cited for this hornbook statement, however, is less than satisfactory.

Though the United States Supreme Court has never held that billboard regulation may not be upheld on aesthetic considerations alone, the point is probably moot; it is likely that the Supreme Court would avoid the issue by finding a reasonable exercise of the police power if the state court were wise enough to place its holding on alternative grounds. The Supreme Court has upheld an ordinance that entirely excluded billboards from certain zoned areas.[6]

One of the leading cases stressing aesthetic considerations is *General Outdoor Advertising Co. v. Indianapolis.*[7] The Indiana court in upholding a billboard ordinance, although primarily relying on the police power, stated:[8]

"But aesthetic considerations enter in to a great extent, as an auxiliary consideration, where the regulation has a real or reasonable relation to the safety, health, morals, or general welfare, . . . ; and, where a regulation of billboards does not apply to an entire city, but merely applies to billboards in close proximity to public parks and boulevards, it may properly have a relation to the public health, comfort, and welfare which it would not otherwise possess."

In a case that went even further the Massachusetts Supreme Judicial

[5]McQUILLIN, MUNICIPAL CORPORATIONS §24.382 (3d ed. 1949).
[6]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[7]202 Ind. 85, 172 N.E. 309 (1930).
[8]*Id.* at 95, 172 N.E. at 312.

Court stated that "grounds of fitness and taste" constituted sufficient reason to forbid renewal of a license to erect billboards in certain areas.[9] In an exhaustive review of the aesthetic considerations angle, Professor Gardner, of Harvard Law School, praised the Massachusetts decision and encouraged those states in which the problem is still unsettled to sustain billboard regulation on aesthetic grounds alone.[10]

FLORIDA REGULATION

The earliest case involving billboard regulation in Florida, and one of the leading cases in the country, is *Anderson v. Shackelford.*[11] A Lake City ordinance forbade the erection of any billboard more than six feet high or within ten feet of the sidewalk without permission of the city council. The city authorities tried to apply the regulation to a sign painted on the side of a building, but the Florida Supreme Court refused to uphold the regulation:[12]

> "In so far as the city undertakes to regulate the erection or construction of billboards that might be dangerous to the public by falling or being blown down, or constructed of such material and in such manner as to endanger life or property, or to increase the danger of loss by fire, or to have printed or displayed upon them obscene characters and words tending to injure and offend public morals, it has the power; but to attempt to exercise the power of depriving one of the legitimate use of his property merely because such use offends the aesthetic or refined taste of other persons is quite another thing, and cannot be exercised under the constitution forbidding the taking of property for a public use without compensation."

The issue of billboard legislation was again before the Florida Supreme Court in the companion cases of *John H. Swisher & Son, Inc. v. Johnson*[13] and *Hav-A-Tampa Cigar Co. v. Johnson.*[14] The plaintiffs attacked the constitutionality of an act[15] that forbade the erection of

[9]General Outdoor Advertising Co. v. Department of Public Works, 389 Mass. 149, 193 N.E. 799 (1935).

[10]*The Massachusetts Billboard Decision,* 49 HARV. L. REV. 869 (1936).

[11]74 Fla. 36, 76 So. 343 (1917).

[12]*Id.* at 43, 76 So. at 345.

[13]149 Fla. 132, 5 So.2d 441 (1941).

[14]149 Fla. 148, 5 So.2d 433 (1941).

[15]Now FLA. STAT. §479 (1955).

a billboard within fifteen feet of any highway outside the corporate limits of a city or town. The primary basis for attack was that the statute constituted an unreasonable taking not related to the police power. The majority of the Court upheld the statute as a reasonable exercise of police power:[16]

> "A purpose and intent of the statute is to prevent commercial and other advertising signboards being maintained near the public highways so as to attract the attention of drivers of rapidly moving motor vehicles and others on the public highways of the state . . . . Such signboards obviously increase the hazards and risks of public travel on the highways and clearly justify the statutory regulations under the police power which are here challenged."

In a concurring opinion Mr. Chief Justice Brown stated that the regulation had no real relation to public safety and made a sensible appraisal of the statute's function:[17]

> "Can the act be upheld upon the ground that the legislature has the right to protect the traveling public from artificial obstructions to the view of the scenic beauties of Florida, which otherwise might be seen and enjoyed, not only by tourists visiting our State, but also by our own citizens, where such obstructions are not an absolute necessity and are erected for business reasons, such as the signs and sign boards dealt with in this act? I strongly suspect that, although no mention is made of it in the act, this was one of the main purposes of this statute. . . . I think the time has come to make a candid avowal of the right of the legislature to adopt appropriate legislation based on these so called aesthetic, but really very practical, grounds."

Mr. Chief Justice Brown's persuasion bore fruit in 1953 in *Merritt v. Peters*.[18] The Legislature had passed a special act giving the Dade County Commission power to zone generally; in exercising this power the Commission had provided that commercial signs should be limited to forty square feet. The appellant-petitioner sought a

[16]149 Fla. 148, 161, 5 So.2d 433, 438 (1941).
[17]*Id.* at 165, 5 So.2d at 439.
[18]65 So.2d 861 (Fla. 1953).

determination that the regulation was invalid, basing his attack on the fact that none of the familiar elements that warrant zoning – public health, morals, safety, and welfare – were present. Mr. Justice Thomas stated the somewhat revolutionary principle of the case as follows:[19]

> "We have no hesitancy in agreeing with him [the petitioner] that the factors of health, safety and morals are not involved in restricting the proportions of a sign board, but we disagree with him in his position that the restriction cannot be sustained on aesthetic grounds alone . . . . All in the area are regulated alike in the use of their property in constructing signs; all will profit if all obey; all will suffer if none is restricted."

Mr. Justice Barns dissented, citing *Anderson v. Shackelford* and the weight of authority elsewhere as against the decision. The *Merritt* case can thus be regarded as overruling the *Anderson* case and aligning Florida with the progressive minority allowing billboard regulation for aesthetic reasons.

Merritt v. Peters has been cited[20] as the first American case upholding billboard regulation on aesthetic grounds alone, and the decision is saluted as forward for recognizing that aesthetic considerations have as much meaning as most of the police power labels courts have used in upholding such regulation. Though a revolutionary decision, it has not had a revolutionary effect on billboard regulation in Florida. One case decided after *Merritt v. Peters* in an inferior court apparently failed to recognize the new importance of aesthetic considerations in billboard regulation. In *Surfside v. McGlynn*[21] the defendant was acquitted in municipal court of violating an ordinance forbidding certain signs, since the sign in issue was inside defendant's building. The court stated that the ordinance could not affect interior signs and cited at great length from *Anderson v. Shackelford* in ruling that aesthetic considerations alone would not sanction unreasonable restrictions relating to the erection and maintenance of billboards. The decision is especially poor in light of the fact that Surfside is a town of some scenic beauty and a sign visible from the street is no less obnoxious because it is in a window.

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[19] *Id.* at 862.
[20] 29 N.Y.U.L. REV. 1017 (1954).
[21] 5 Fla. Supp. 194 (1954).

The *Merritt* case was cited in *Scoville v. Miami Springs*,[22] in which a limitation on the size of gasoline signs was held invalid and unconstitutional. The decision can be explained by the additional facts that the gas station owner's income was substantially reduced, and the city failed to show that aesthetic considerations justified the regulation; in the regulated commercial area there were many signs larger than the one the defendant was convicted of displaying. Hence to sustain a regulation on aesthetic grounds it may be necessary to show that the regulation bears some relation to the intrinsic beauty of the surroundings.

The aesthetic ground is not vital to the continued regulation of billboards; the police power could have been used even in the *Merritt* case on the specious ground that a larger sign is more dangerous in a high wind. All of the regulations in the city and county codes of Florida can be sustained as a valid exercise of the police power.

Sample Regulations

The outstanding characteristic of municipal billboard regulation in Florida is its lack of uniformity. Although the applicable ordinances vary widely from city to city, there is a fairly high incidence of regulation. Of sixteen codes examined only four have no billboard regulation whatever.

Some of the city regulations can be sustained on the basis of safety regulation. For example, Delray Beach prohibits only those billboards within twenty-five feet of an intersection.[23] To a similar prohibition Bradenton adds a proscription against putting signs on the tops of buildings.[24] Pensacola limits only those billboards made of combustible material and those to a height of six feet.[25] Tallahassee[26] and Daytona Beach[27] regulate only signs that dangerously overhang a sidewalk. Sarasota forbids the erection of a sign near a corner or on public property, such as a park or a playground.[28]

West Palm Beach extensively regulates all signs.[29] Billboards are

[22]81 So.2d 188 (Fla. 1955).
[23]Delray Beach City Code, c. 1, §2 (1937).
[24]Bradenton City Code, §3.1 (1951).
[25]Pensacola Code of Ordinances §150 (1920).
[26]Tallahassee Code of Ordinances §249 (1944).
[27]Daytona Beach City Code, c. 2, §9 (1946).
[28]Sarasota City Code, c. 2, §II (1950).
[29]West Palm Beach City Code §§3.36-.40 (1948).

totally prohibited in residential areas, and in blocks where apartments constitute a majority of the buildings. They are further prohibited within 100 feet of hotels and apartments and within 200 feet of schools, parks, playgrounds, and cemeteries. The person maintaining the billboard is kept strictly responsible for keeping the area free from trash and other insanitary accumulations.

Jacksonville and Miami have enacted similar ordinances for the purpose of protecting their respective skylines. Jacksonville prohibits the erection of billboards taller than thirty feet from grade level but allows a roof sign to be erected to a horrendous seventy-five feet above the level of the roof.[30] Miami forbids a sign more than twenty feet over grade and more than twenty-five feet over a roof top.[31]

Miami Beach has perhaps the most stringent and most successful laws regulating billboards.[32] All signs are extensively regulated as to height, construction, and material; a permit must be secured and a license fee paid for each sign erected. No signs at all are permitted in a single-family district, and billboards of the usual type are generally prohibited:

> "No signs of any kind will be permitted except in connection with the advertisement of the particular building or property on which the sign is located or of some merchandise or service dispensed or rendered on the same premises on which the sign is located."

The city ordinances further impose a fine of up to $1,000 or imprisonment not to exceed ninety days, and each day a sign is maintained in violation of an order to remove it constitutes a separate offense. The Miami Beach ordinance is an extreme example of zoning for aesthetic reasons, but apparently no one has tested its constitutionality in court.

Regulation by taxation is apparently the most serious potential threat to the outdoor advertising industry.[33] There is no clear evidence of an attempt by Florida municipalities to regulate billboards by taxation, though several cities fix rates that increase according to the size of the billboard. For example, St. Petersburg charges nothing for a

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[30]Jacksonville City Code c. 10, §100 (1942).
[31]Miami Building Code, c. 47 (1936).
[32]Miami Beach City Code, c. 32 (1950).
[33]AGNEW, OUTDOOR ADVERTISING 234 (1938).

sign under sixty square feet, $5.00 from 60 to 420 square feet, and $30.00 for a sign in excess of 420 square feet.[34] The taxation of billboards is a source of revenue that hard pressed municipalities may have overlooked. The *Miami Herald*[35] pointed out that the city leased space for fifteen signs for an annual rent of $385.00, while the sign company collected a cool $20,972 per year from the signs. In view of the unfavored place billboards seem to hold in the judicial view, it is likely that increased taxation of billboards would be adjudged reasonable.

CONCLUSION

A study of the impact of outdoor advertising on the American economy indicates that both its regulation and the continued performance of its marketing function are matters of public concern. The day is probably past when governments will attempt to destroy billboards by harassing legislation. It is undeniable, however, that excessive commercialism detracts from the beauties of the state and is very offensive to some aesthetically sensitive souls. In enforcing the various laws regulating the industry, the large concerns should not be the primary target. It seems that the most egregious offenders are the one-business advertisers with their profusion of shoddy homemade signs or their monstrosities of peeling paint.

The Legislature should incorporate minimum standards of construction and maintenance of billboards on state highways into the general statute.[36] For those communities without regulation the lead of the Florida Supreme Court should be followed; since aesthetics alone will sustain a billboard regulation, the sun-drenched tourist havens can go all the way in eliminating objectionable outdoor advertising.

JERRY B. CROCKETT

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[34]St. Petersburg Revised Ordinances, c. 2, §§4-16 (1946).
[35]June 25, 1954, p. 1b.
[36]FLA. STAT. §479 (1955).