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CONSTITUTIONAL LAW - HIGHWAYS - BILLBOARD REGULATIONS-APPLICATION OF EASEMENT PRINCIPLES

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COMMENTS

CONSTITUTIONAL LAW — HIGHWAYS — BILLBOARD REGULATIONS — APPLICATION OF EASEMENT PRINCIPLES — In *Kelbro, Inc. v. Myrick*,[1] where the license and setback requirements of the Vermont outdoor advertising law were sustained together with provisions for summary removal of nonconforming advertisements, the Vermont Supreme Court declared that the commercial billboard companies have no common-law right to the privilege of visibility on which their business depends. Their exploitation of this privilege, it held, is a commercial use of the public thoroughfares which has been permitted only by sufferance and has always been subject to prohibition or regulation by the legislature.

[1] (Vt. 1943) 30 A. (2d) 527.

The court used the law of easements to test the outdoor advertiser's rights. This had never before been done where the constitutionality of a billboard regulation was in question. But it is not to be described as a radical departure—it is rather the end of a long and perplexing detour.

In connection with the visibility of business premises the application of easement principles has long been familiar. For the owners of such premises the advantage of visibility afforded by the adjoining streets and highways is of course a right, and in actions brought to prevent the view of business signs, store windows or showcases from being obscured by obstructions placed in the street, this right is customarily called the easement of view and is regularly discussed as one of the easements of the abutting owner, i.e. one of the private uses to which public thoroughfares are subject for the benefit of the abutting land.[2]

But when questions of billboard regulation first came up, the part that the streets and highways play in this form of advertising was overlooked. As the basis for their constitutional objections the outdoor advertising companies always urged that the right to use private property was being curtailed and the courts fell into the habit of dealing with the constitutional question on that basis. It was assumed that billboard advertising was simply one of the ways of using privately owned land,[3] and that from the standpoint of legislative control the billboard was no different from any other structure.[4]

The corrective observation that billboards, apart from the audience that the public street or highway brings, would be useless, began as early as 1911,[5] when in holding that they belong in a class by themselves and that singling them out for structural regulation does not violate the equal protection clause, the Missouri Supreme Court remarked on this functional peculiarity:[6]

> ". . . Buildings and fences are erected for the purpose of inclosing grounds and excluding therefrom strangers and trespassers . . . billboards . . . rarely, if ever, inclose the grounds upon which they stand. That is not the purpose of their erection. . . . The end of the lot fronting upon an alley is almost invariably left open, for the simple reason that the alley is not conspicuous in the public

[2] Cases of this type are cited in the Kelbro opinion, 30 A. (2d) 527 at 530 and are collected in 90 A. L. R. 793 (1934) and 40 A. L. R. 1321 (1926).

[3] Crawford v. Topeka, 51 Kan. 756, 33 P. 476 (1893); Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N. E. 601 (1905).

[4] People v. Green, 85 App. Div. 400, 83 N. Y. S. 460 (1903).

[5] St. Louis Gunning Adv. Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), writ of error dismissed 231 U.S. 761, 34 S.Ct. 325 (1914).

[6] Id., 235 Mo. at 154-155.

eye, and for that reason it would be useless to display advertisements at such places where they could not be seen."

In 1915 this idea was elaborated by Judge Trent in his famous opinion sustaining the regulation of outdoor advertising in the Philippine Islands.[7] He conclusively demonstrated that the essential thing in billboard advertising is not the structure on which the commercial propaganda is displayed, but its visibility from the public thoroughfares, and he drew the conclusion that this form of advertising is essentially a method of using the public streets and highways. Its success, he said,

> ". . . depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of private property, who so vigorously objects to the restriction of this form of advertising, should require the advertiser to paste his posters upon the billboards so that they should face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive that the regulation of billboards is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares."

In 1932 the question whether billboard advertisers have the *right* to make use of the public thoroughfares for this commercial purpose was raised in the New York Court of Appeals.[8] It was found unnecessary to answer it in that case. But Chief Judge Pound's phrasing of the question—

> ". . . whether the highway, created by public money, is controlled in part by those who desire to thrust upon the notice of the public the ostentatious display of private advertising from the adjoining premises for their own profit wherever they see fit"—

shows that he had in mind the practice of renting billboard sites, the increased use of the privilege that results, and the difficulty of reconciling this commercial practice with the law of easements. Evidently

[7] Churchill v. Rafferty, 32 P. I. 580 at 609, appeal dismissed 248 U.S. 591, 39 S.Ct. 20 (1918).

[8] Perlmutter v. Greene, 259 N.Y. 327 at 332, 182 N.E. 5 (1932).

he would have been well satisfied with the answer the Vermont Supreme Court has now given.

In the 1935 Massachusetts billboard decision,[9] Chief Justice Rugg emphasized these ideas we have noted in earlier opinions—that "The only real value of a sign or billboard lies in its proximity to the public thoroughfare within public view"; that without the privilege of visibility the right to use private land and all the other rights that the advertising companies urge would "have no utility" for their peculiar purpose; that these companies are using the streets and highways for personal profit—and made the additional point that the public highways were *not intended* for this purpose. The commercial advertising concerns, he said,

> "are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways. . . ."

Following through the line of reasoning thus initiated, the Vermont Supreme Court has now met and answered squarely the question of the outdoor advertiser's legal rights. We quote from Judge Buttle's forthright opinion:[10]

> ". . . In its essence the right that is claimed is to use the public highway for the purpose of displaying advertising matter. . . .
>
> "The plaintiff avers that its property rights, for which it claims the protection of the national and state constitutions are derived by contract from the abutting land owners, Wood and Seymour. We will consider the rights that these abutters had which they could convey. . . .
>
> "The rights of an abutting owner in an adjacent street or highway are of two kinds, public rights which he enjoys in common with all other citizens, and certain private rights which arise from the ownership of property contiguous to the highway which are not common to the public in general, and this irrespective of whether the fee to the highway is in him or in the public. . . .
>
> "These private property rights are usually termed easements. Even if it can be questioned whether they are true easements in the strictest sense they are at least rights in the nature of appurtenant easements, the abutting property being the dominant and the highway the servient tenement, and they are governed by the law of easements. An important right of this nature is the abutter's right of view to and from the property, from and to the

[9] General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149 at 168, 169, 193 N.E. 799 (1935).

[10] Kelbro, Inc. v. Myrick, (Vt. 1943) 30 A. (2d) 527 at 529.

highway; that is his right to see and to be seen. This right of reasonable view has been generally recognized by the weight of authority and has been protected in numerous cases where encroachments on streets or sidewalks obscured the visibility of signs, window displays or show cases. . . .

"It is said in Goddard on Easements[11] . . . that 'a right of way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement. It cannot be used for any purpose unconnected with the enjoyment of the dominant tenement, neither can it be assigned by the dominant owner to another person and so be made a right in gross, nor can he license any one to use the way when he is not coming to or from the dominant tenement.' . . . While this principle has been applied most frequently to rights of way it is applicable to other appurtenant easements and should, in our opinion, be applied in the present case where the servient tenement is the public highway, built with public funds, designed for public use, and under the exclusive regulation and control of the Legislature. Especially is this so since it is a principle which underlies the use of all easements that the owner of the easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden. . . .

"The result, as to the claim here made, is that the right of view of the owner or occupant of the abutting property is limited to such right as is appurtenant to that property and includes the right to display only goods or advertising matter pertaining to business conducted thereon. His appurtenant easement does not include the right to display advertising matter foreign to a business conducted on the property, and he could not convey to this plaintiff a right that he did not himself possess."

The *Kelbro* decision thus finally ends the illogical divergence between the law of billboard control and the law of easements and puts the law of billboard control back on the right track. For it is only by easement principles that this private use of public streets and highways can be understood and tested.[12]

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[11] 8th ed., 383 (1921).

[12] On the regulation of billboards, see also the author's comment in 30 GEO. L. J. 743 (1942); 29 MICH. L. REV. 381 (1931); 36 MICH. L. REV. 666 (1938).

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