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THE BILLBOARD SITUATION

By H. S. Fairbank

As Mr. Macey said, "there's allays two 'pinions; there's the 'pinion a man has of himsen, and there's the 'pinion other folks have on him. There'd be two 'pinions about a cracked bell, if the bell could hear itself."

There are two opinions about highway billboards - the one held by the billboard owners and advertisers and those who profit directly from the placement of the boards, and - the one held by most of the rest of us.

The advertisers think well of their signs. Hear them as they echo, in a bulletin of the Outdoor Advertising Association of America, the praise of their proponents. Hear them:

"The poster makers who make interesting pictures, who suggest the arts and facts that lift us out of the commonplace in our machine-driven lives, these artists are angels in disguise. They have found the secret of the fine arts, that spirit of inspiration glorifying the commonplace."

"Certainly few journeys through the United States offer so much diversity or grandeur that the traveler's eye does not rest with relief upon some work of art after the unutterable boredom offered by nature."

And now I ask you to turn from the contemplation of the poster maker's art as he and his friends see it to consider for

a moment what the ladies of the General Federation of Womens' Clubs think of that same art. I quote them:

"The General Federation of Womens' Clubs is of the opinion that bill-board advertising in the public highways, either in the city, suburb or country, is inartistic and unsightly, and should be prevented by all lawful means."

Listen further to the language of the resolution adopted by the thirty-eighth continental congress of the Daughters of the American Revolution:

"In the interest of safety and for the promotion of scenic beauty and protection of property, we urge the enactment of suitable legislation in all States to bar all advertising signs from the highways both within and without the right of ways thereof, with the possible exception of signs on private property which advertise or indicate either the person occupying the premises in question or the business transacted or which advertise the property itself."

And to the official utterance of the Chief of the United States Bureau of Public Roads: "They (the highway advertising signs) are unneeded by the public and of doubtful value to the advertisers. Their disfigurement of the landscape is a national disgrace. It is hoped that means may be found by suitable legislation to effect their complete elimination upon all roads constructed in part with money appropriated by the National Government."

The Chief hopes for legislation - legislation that will eliminate, not merely regulate, the art of the billboard men, whether it be reared within or without the limits of the highways. He is moved to that hope not solely because he objects to the unneeded and unwanted displays as "blots upon the landscape", but also because he believes them to be potentially dangerous in their distracting demands upon the attention of the drivers of motor vehicles, quite apart from their positive menace when they are erected where they obscure the view of intersecting roads and railroads or of cautionary and danger signals.

I confidently believe that hope will be not long deferred, and that legislators and courts will ere long accept the view that the police power is quite as adequate to restrain assaults upon the sense of sight as it is to prohibit the causing of offensive odors and noises.

Before I undertake to trace very briefly the trend of laws and judicial decisions which appear to warrant such confidence that positive relief will shortly come by force of law, I should like to refer to certain circumstances in connection with the character of the present advertising on rural highways that suggest a means of earlier relief in part.

It has been our general observation that of all the posters now displayed on the main highways, those which advertise motor vehicles, gasoline, tires, and motor accessories, as a class, are

more numerous and more objectionable in point of size than those of any other class of industry. Next in order it has seemed are those which herald the superiorities of certain hotels, inns, and cafes. These two classes of signs have appeared from general observation to constitute at least half of the total number of rural highway signs.

In order to verify these general impressions we have recently made a statistical survey of the signs on more than 200 miles of main highways in Maryland and Virginia adjacent to the National Capital. In counting the signs we included only those that were erected on their own standards or upon structures especially devised for the purpose, and excluded the numerous very small tin and wooden signs that were tacked upon or hung from fences or trees, and all those of larger size which were erected upon the property of the advertiser or painted upon the walls of houses. By so doing we excluded a large number of signs at gasoline filling stations and almost as many at "hot dog" stands and roadside inns.

Notwithstanding these exclusions the billboards advertising lubricating oils and gasoline were found to be more numerous on all the roads than those advertising any other commodity or business. Of the 2,605 signs counted on the 220 miles of main rural highway, 594, or nearly 23 per cent, were advertisements of oil and gas. Adding to these the number of signs advertising automobiles and trucks and tires and motor accessories the number of

boards used by the industries producing or serving motor vehicles was found to be 878 or nearly 34 per cent of the total number counted. It is only fair to say, however, that the advertisements of the vehicles themselves constituted less than a fifth of the number of the group.

Signs advertising hotels, inns, tea rooms, lunch rooms, and lunch stands, excluding those erected upon the property of the advertisers, numbered 702, or about 27 per cent of the total number; and the two major groups together accounted for over 60 per cent of the number of signs counted.

These actual counts on a limited mileage of main roads in one locality confirming, as they do, the general observations of engineers of the Bureau of Public Roads throughout the country, suggest the probability that a very considerable improvement of the present conditions could be obtained by moral suasion properly directed.

It may be assumed that the motor vehicle and associated industries, and the hotels, inns, and cafes, are of all present advertisers, the most responsive to the wishes of the road-traveling public. If, as we believe, the wayside billboards are really offensive to the great majority of road users, a strong demonstration of the objection of that class, expressed through the associations of motor-vehicle users, should be effective in inducing many, at least, of these two groups of advertisers to

abandon their policy of roadside advertising.

As an indication of the popular acclaim with which such a change in policy would be received I need only refer to the chorus of praise which greeted the action of the Standard Oil Company of California when, in 1924, it tore down some 1,200 signs on Pacific Coast highways.

But, although a considerable measure of relief can doubtless be obtained without legislative action or appeal to the courts, we are not permitted to hope that a complete eradication of the nuisance can be effected by such means. The ultimate relief must come through prohibition enforced by law; and, as I have previously remarked, there is now at last, after years of darkling prospect, more than a glimmer of the approaching dawn of legislative and juridic support for propositions to eradicate the highway signs by legal means.

This much of public right and authority is already well established:

Commercial signs of all descriptions may be rooted out of the highway right of ways. The authority to do so is conferred by law upon the State highway departments or local government authorities either by express provision or under the general powers with which they are vested in nearly all of the States; and the right so to control the uses of the public right of ways is not likely to be successfully contested in any State.

The courts will also sustain the right of the proper public officials to refuse to permit the erection of signs at points outside of the highway limits in the vicinity of highway curves and intersections or at other places where the signs so placed will interfere with the free view of the highway ahead to a degree which will make them in fact a source of danger to the users of the road. For this purpose the police power is clearly adequate when applied on the grounds of public safety and the general welfare.

For the purpose of defining those places on private property at which the erection of signs would constitute a traffic hazard and would therefore be prohibited, a number of States have enacted laws specifically prohibiting the placing of boards outside the limits of the highways on private property at various distances from cross-roads or intersections of highways with railways.

Colorado prohibits the erection of signboards upon or along any public highway, outside an incorporated town or city, within 300 feet from intersecting corners, or upon or along any sharp curve in such manner as to obstruct the full view of such curve or intersecting highway by travelers on the highways.

Nebraska also prohibits the placing of signs along or upon any public highway within 300 feet of a railroad crossing or the intersection of two cross roads at grade.

Michigan has a similar law with change of the distance to 500 feet. In North Dakota it is a misdemeanor to place or maintain a billboard on private property within a thousand feet of a grade highway crossing, in such place or manner as to interfere with a free and clear view of the crossing.

Beyond the corporate limits of cities or villages, the Wisconsin statute declares the triangular areas bounded by two intersecting highways and the line drawn between points in their center lines 1,000 feet from the center of the intersection to be prohibited ground for any danger-producing sign.

Washington forbids the erection of view-obstructing signs within 500 feet of a railroad-highway grade crossing, and the Kansas Highway Commission, under authority of the recently revised highway laws of the State, has prohibited the erection of signs on private property within 1,000 feet of road crossings where such signs would "be an obstruction to the sight distance of any vehicle traveling upon the highway." The State highway engineer reports that the resolution of the commission has not been contested in the courts, and is being complied with by a large majority of the advertising firms.

All these laws and regulations aim to prohibit the erection of sign boards on private property at certain places where their erection would create a definite traffic hazard. So far as I have been able to ascertain, none of them has been contested.

But, with the exception of the Nebraska statute, it should be noted that all of them, in addition to establishing a prohibited zone, also limit the application of the law to signs within such zones which "obstruct the view". When so limited it is highly probable that the establishment of such zones would be upheld by the courts.

It is also well established that a permit may be required for the erection of a billboard on private property at any place, without reference to distance from the road, and that a fee may be charged for such a permit. Laws of this kind are on the books of a number of States and have been adopted as ordinances by many cities. There is strong probability that the courts would sustain the right of the State to charge for such a permit or license a fee which would be in fact prohibitive in amount, or one which would discriminate, by a sliding scale, between small and large signs, or one which would require a payment in greater amount for a sign to be erected close to a road than for one to be erected at a greater distance.

For this view there is strong support in the decision of the United States Supreme Court in the case of St. Louis Advertising Co. v. City of St. Louis, et al, decided March 24, 1919. In this case it was contended by the appellant that:

"The cost of building-permits, in the case of billboards is several hundred times what is required for other structures.

This discrimination, apparent on the face of the ordinance, must be condemned as unconstitutional. The whole ordinance so far as it deals with billboards, is based on no public policy, but on hostility to a legitimate business."

To this contention the Court replied, as follows:

"If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in the Cusack Co. Case." This decision of the highest Court of the land would seem to be conclusive as to the right to lay a tax upon sign boards, wherever placed, even though the tax is several hundred times that which is levied upon other property, and of such amount as actually to discourage the erection of the signs.

This much, then, would appear to be definitely established:

That the State can prohibit all advertising signs of whatever kind within the highway right of ways.

That the State can impose a tax upon signs erected upon private property which will have the effect of discouraging the erection of such signs; and

That it can prohibit the erection of signs on private property within specified areas where the signs do, in fact, constitute a danger to the public safety by obstructing the full view of intersecting highways.

From this latter position Connecticut has gone a step further. Its law, enacted in 1927, provides that: "Advertisements and signs shall not be displayed within one hundred feet of any public park, State forest, playground or cemetery, or within fifteen feet from the outside line of any highway outside of the thickly settled or business parts of a city or town, * * *." In this act there is no reference to safety as the basis of the prohibition; and, on the contrary, one may infer from the restrictions with respect to parks, forests, play-grounds, and cemeteries that the purposes are aesthetic in character, but they are not so defined, probably because it was assumed that, in view of the long line of adverse judicial decisions, the police power could not be employed to such ends.

In Great Britain the Advertisements Regulation Act of 1907 authorizes any local authority to make by-laws "for regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape."

In the Philippine Islands a statute enacted in 1914 levied a tax upon billboards and also gave the Collector of Internal Revenue the power to remove any sign or billboard exposed to public view which, after due investigation, he decided was "offensive to the sight or otherwise a nuisance."

The enforcement of both of these laws has been attacked and their validity has been sustained by the highest courts; but in the United States the courts for many years have refused to support applications of the police power to accomplish a merely aesthetic purpose. The general tone of such rulings is indicated by the decision in the case of Passaic v. Paterson Bill Posting Co. (1905) in New Jersey, in which it was said: "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

As stated by Professor Freund of Chicago in his treatise on "The Police Power," written in 1904:

"It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent), is entirely beyond the police power, and an unconstitutional interference with the rights of property."

But Professor Freund went on to add, even at that early date that:

"Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive odors and noises. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further applications."

The tendency of the courts in recent years to incline to Professor Freund's view is illustrated by the decision of the United States Supreme Court in the St. Louis Poster Advertising case.

The plaintiff in error and appellant contended that certain regulations of the city requiring conformity to the building line in the erection of sign boards could rest only on aesthetic considerations and did not warrant exercise of the police power.

Mr. Justice Holmes, delivering the opinion of the Court, March 24, 1919, said:

"Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary."

Of later date and greater point is the decision in the case of People v. Sterling (1927) in which the New York trial judge, holding that whether billboards constitute a nuisance in the Adirondack State Park, portions of which are still privately owned, was a question of fact to be decided on the evidence, said:

"We have reached a point in the development of the police power where an aesthetic purpose needs but little assistance

from a practical one in order to withstand an attack on constitutional grounds."

Two years before the last-quoted decision was rendered the Nevada legislature had placed upon the statute books of the State a law which seems to go as far in the direction of applying the police power to the suppression of signs on aesthetic grounds as either the British or Philippine statutes.

Providing for the taxation of all sign boards, wherever erected, and making it unlawful to erect a sign without first securing a permit from the county Clerk, the law further provides that:

"No permit shall be granted for the erection of any billboard sign or other form of notice on any location which may measurably destroy the natural beauty of the scenery * * *."

So far as I have been informed this Nevada law has not been contested; and the next test of the validity of the aesthetic ground is likely to come in the case of the injunctions temporarily granted in Massachusetts where it is contended that certain regulations adopted and enforced by the State Department of Public Works are in contravention of the Federal Constitution. Among other restrictions, these regulations provide, "that no outdoor advertising shall be painted or affixed upon any fence or pole within fifty feet of any public way, nor upon any rock or tree nor directly upon any wall; and that no permit will be granted near certain

public ways where, in the opinion of the division of highways of the department, having regard to the usual scenic beauty of the territory, signs would be particularly harmful to the public welfare. Evidence in these cases is now being heard before a master. The decisions, when given, will doubtless be reviewed by the Supreme Court of the United States; and whether the time is yet ripe for an unqualified extension of the police power to cover offenses against the sense of sight will depend upon the outcome.

However, the regulation prohibiting the placing of signs within 50 feet of the highway, and the laws in Connecticut and Nevada imposing similar restrictions upon road-bordering zones of 15 and 20 feet respectively, do not rest entirely or even to any considerable extent upon considerations of aesthetics. There are involved here several considerations, among them:

1. The proposition that any advertising sign adjacent to a highway is potentially dangerous because it may distract the attention of the driver of a motor vehicle and so contribute to an accident.
2. The possibility that a billboard erected close to a highway may be blown onto it by force of the wind and so cause injury to persons traveling on the road or form an obstruction to traffic; and
3. The fact that sign boards erected close to the highway in regions of heavy snow fall may cause the formation of traffic-blocking snowdrifts.

In view of the decision of the Supreme Court in the St. Louis case, it would seem probable that such practical considerations would be deemed sufficient to sustain the validity of prohibited zones of moderate width. In this case one of the regulations complained of was that which required that the billboards should be 15 feet from the street line. The appellant asserted that there was nothing to justify the requirement, since it could only have relation to the danger of their being blown down, a danger in this case very remote as the boards in question had been built to withstand a windstorm of 83 miles an hour, a greater velocity than any known in St. Louis. To this contention the Court replied:

"It is true that according to the bill the plaintiff has done away with dangers from fire and wind, but apart from the question whether those dangers do not remain sufficient to justify the general rule, they are or may be the least of the objections adverted to in the cases."

Here then, is the decision of the highest Court, upholding the validity of a set-back requirement as a general rule, even though it was proved that in the particular case the danger of a blow-down, admittedly the principal reason for the requirement, was so slight as to be negligible. Enforcement of similar set-back requirements on the rural highways would probably be likewise upheld.

But there is a reasonable limit beyond which a set-back could not be defended. Fifteen feet would doubtless be held reasonable; a hundred feet might be; it is exceedingly doubtful that a thousand feet could be. And the set-back requirement at best is but a form of regulation. It is not elimination; and elimination utter and absolute is the goal we are striving for.

Toward the attainment of that end taxation - a taxation designed to discourage the objectionable practice and ultimately to stamp it out - would seem to be the most practicable of the various means thus far proposed.

I have but one further suggestion to offer. It is this: That in the interval since the first court held the aesthetic purpose alone to be insufficient ground for the exercise of the police power there has been a material change in the public attitude toward things of beauty and particularly toward the preservation and development of the natural beauty of the countryside. We see the evidence of that change in the setting aside of such areas as the park in which this meeting is held. We see it in the proposals that gain increasing support to establish road-bordering parks extending the entire distance between some of our cities. We see it in the plans, now fast maturing, to beautify the roadsides by the planting of trees, shrubs, and perennial flowers. In several States large sums of public money has already been expended in

furtherance of these plans; and the Congress has authorized the expenditure of Federal funds for the same purpose in connection with any road in the Federal-aid highway system.

As an object of public expenditure the merely aesthetic has become respectable. I submit that the beauty which is created and fostered at public expense is worthy of protection; and I incline to the belief that anti-billboard legislation would be upheld by the courts if framed specifically to prohibit the erection of signs on private property along roads beautified by the expenditure of public funds, providing that the signs are erected in such manner as measurably to defeat the desired object of beautification.