

CONSTITUTIONALITY OF PARKING METER ORDINANCES

During the last several years the increased complexity of city traffic has resulted in the appearance of parking meter ordinances in many American cities, including several in Ohio. A meter, authorized by an ordinance of this type, is placed at the side of each parking space and automatically indicates, upon the deposit of a five-cent coin by the motorist, the duration of the period of legal parking. These meters serve the dual function of efficiently aiding police officers in relieving congestion in the downtown areas and at the same time of offering a substantial source of revenue for city treasuries.

Two courts of last resort¹ and an appellate court² have upheld the validity of an ordinance of this type. One supreme court³ has declared such an ordinance to be unconstitutional. Several advisory opinions on this question have also been rendered.⁴

What are the constitutional questions that arise in connection with these ordinances? They may be said to be four in number. 1. Does the ordinance constitute a proper exercise of the taxing power? 2. May the collection of the five-cent fee be justified as a police regulatory measure? 3 and 4. Are the rights of the traveling public or the abutting property owner improperly restricted or appropriated?

TAXING POWER

By virtue of the Home Rule provision in the Ohio Constitution⁵ it may be said at the outset that cities in this state possess much broader legislative powers than cities in many other jurisdictions. Under this provision it has been held that the charter cities have full power of taxation in those fields not already occupied by the state.⁶ This includes the authority to levy excise taxes.⁷

The license fee collected from the operator of a motor vehicle is held to be an excise tax.⁸ If the exaction authorized by the parking meter ordinances is held to be an excise tax it does not appear objectionable on the ground that it is an entrance by the municipality into a field

¹ *State ex rel. Harkow v. McCarthy*, 126 Fla. 433, 171 So. 314 (1936); *Ex parte Duncan*, 179 Okla. 355, 65 Pac. (2d) 1015 (1937).

² *Harper v. City of Wichita Falls*, (Tex. Civ. App.), 105 S.W. (2d) 743 (1937).

³ *Birmingham v. Hood-McPherson Realty Co.*, 233 Ala. 352, 172 So. 114 (1937).

⁴ *In re Opinion of the Justices*,—Mass.—, 8 N.E. (2d) 179 (1937); *Opinion of the Attorney General of Ohio*, No. 5750 (1936).

⁵ Art. XVIII, s. 3.

⁶ *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 124 N.E. 134 (1919); *Marion Foundry Co. v. Landes*, 112 Ohio St. 166, 147 N.E. 302 (1925); *Cincinnati v. Amer. Tel. & Tel. Co.*, 112 Ohio St. 493, 147 N.E. 806 (1925); *Firestone v. City of Cambridge*, 113 Ohio St. 57, 148 N.E. 470 (1925).

⁷ *Idem*.

⁸ *Saviers v. Smith*, 101 Ohio St. 132, 128 N.E. 269 (1920).

that is already occupied by the state. Although a city may not levy an excise tax on motor vehicles because of this objection⁹ yet a tax of the nature under discussion is apparently a tax on the privilege of parking.

If it is a tax the requirement that there be reasonable classification must be met. Although this problem is present in practically all taxation legislation yet the courts have enunciated but vague standards.¹⁰ That automobile operators may be taxed as a class is well settled in Ohio.¹¹ Whether the sub-classification of taxing only those who enjoy the parking privilege is proper would seem to admit of no doubt. In the case of *Allen v. Pullman's Palace Car Co.*¹² the statement is made that, "Any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege." The most serious objection in this case is that not all those who park are subject to the tax. It is only those who do so in the downtown areas. In the fourth edition of Cooley on Taxation it is said, "The rules as to classification are the same without regard to whether the imposition is a tax or is a mere exercise of the police power."¹³ It must be admitted that a city, under its police regulatory powers, may deal with parking and traffic in downtown areas to the exclusion of that in the outlying districts.¹⁴ Thus, if the above quoted statement be correct, it must be conceded that no attack of "unreasonable classification" could be made on these ordinances. This appears reasonable. Although no authority was cited in support of the statement, an argument may be made in its favor. The police power of the state may only be exercised in those fields bearing in some substantial degree on the health, morals, safety, or general welfare of the public. This is not true of tax legislation and the latter, although it may include in its operation the subjects of the former field, is not restricted thereby and may enter into other areas that clearly would not be proper subjects of police regulation. It is only in the area where the taxation and the police power may both be exercised that the statement by Mr. Cooley in his work on taxation would be valuable. The test for determining the proper classification of subjects over which the police power may be exercised are fairly well defined. It appears that as the resulting groups do clearly affect the public in a peculiar fashion this fact should bear strongly on the question whether the state, in selecting them for taxation

⁹ *Firestone v. City of Cambridge*, *supra*, note 6.

¹⁰ Thomas Reed Powell, "Supreme Court Condonations and Condemnations of Discriminatory State Taxation, 1922-1925" 12 Va. L. Rev. 441 and 546 (1926).

¹¹ *Supra*, note 8.

¹² 191 U.S. 171, 24 Sup. Ct. 39, 48 L.Ed. 134 (1903).

¹³ 4 Cooley, Taxation, sec. 1685.

¹⁴ *In re John Corvey*, 220 Mo. App. 602 (1926); *Pepole's Rapid Transit Co. v. Atlantic City*, 105 N.J.L. 286, 144 Atl. 630 (1929); *State v. Carter*, 205 N. Car. 761, 172 S.E. 415 (1934).

purposes has acted arbitrarily. It is significant that the subject of parking does fall within this class.¹⁵

POLICE POWER

If it were held that this fee is not justifiable under the taxing power of the municipality there is still open the avenue of its being valid as an exercise of the police power. It is upon this ground that the measure has been upheld in the three jurisdictions to which reference has already been made.¹⁶ It is well recognized that under the police regulatory powers fees may be exacted from individuals who themselves are, or who own property that is, subject to the regulation imposed.¹⁷ The sum collected, however, must be for the purpose of and must not, to an unreasonable extent, exceed the amount necessary to properly inspect and regulate. The rule is stated in the case of *Prudential Co-operative Realty Co. v. Youngstown*.¹⁸

“Where the authority is lodged in the municipality to inspect and regulate, the further authority to charge a reasonable fee to cover the cost of inspection and regulation will be implied. The fee charged must not, however, be grossly out of proportion to the cost of inspection and regulation; otherwise it will operate as an excise tax, * * *. It is not to be expected that fees can be charged which will exactly balance the cost and expense, and a reasonable excess will not operate to invalidate the ordinance.”

In an excellent note appearing in 22 Iowa Law Review 713 (1937) entitled “Parking and the Constitutionality of ‘Parking Meter’ Ordinances”, in which the whole problem is critically discussed, several salient figures appear. It is there stated that in a survey made in 1936 of the 26 cities using the traffic meter, the average income per meter was between 40 and 50 cents a day; the number of meters in a given city ranging up to 2000. This would indicate that in a city using 1000 meters the yearly revenue from them would total approximately \$150,000. What are the expenses incidental to their operation? Witchita Falls, Texas, paid \$58.00 per meter completely installed and placed in operation.¹⁹ This initial cost of operation is large but, as can be seen, does not approach the amount annually collected. The amount expended to properly supervise the operation of the meters would necessarily be small. Indeed, it may be added, although perhaps without legal

¹⁵ See, however, Sholley, “Equal Protection in Tax Legislation,” 24 Va. L. Rev. 229 (1938).

¹⁶ *Supra*, notes 1 and 2.

¹⁷ *Daily v. City of Owensboro*, 257 Ky. 281, 77 S.W. (2d) 939 (1935); *Aberdeen-Franklin Coal Co. v. Chicago*, 315 Ill. 99, 145 N.E. 613 (1924); *Lee v. State*, 163 Ga. 239, 135 S.E. 912 (1926).

¹⁸ 118 Ohio St. 204, 160 N.E. 695 (1928).

¹⁹ *Supra*, note 2.

significance, that if the meters efficiently register the parking irregularities that fewer officers are thus needed in this line of work than was the case before the meters appeared. It cannot be supposed that these expenses would, to any considerable degree, devour the sum produced by the meters. One could argue that since these parking ordinances are so intimately tied up with the traffic situation in all of its phases that the amount collected could be expended on traffic regulation in general, although it is doubtful whether such a view would be sustained.

Assuming, for purposes of argument, that the municipality had no thought of revenue in mind when it passed the ordinance but that the parking meters actually became a very lucrative enterprise, would this latter fact in itself render the ordinance invalid? In the great majority of cases involving fees imposed under the police power there are no facts to show the relation between the amount collected and the amount needed to cover the cost of administration. Under these circumstances it is the universal attitude, unless the fee is unreasonable or prohibitory *per se*,²⁰ to uphold the ordinance.²¹ This is on the ground of lack of evidence, however, and does not answer our question. Two arguments are submitted in support of the exaction of this fee in spite of its profit making character.

The first is that the fee could arguably be said to be *reasonable per se*. To the person paying the fee, the very fact that it is but five cents might be entitled to some weight. The most important point, however, is that a five-cent piece is, practically speaking, the lowest amount that can be collected with convenience and at the same time successfully accomplish the purpose in view. The purpose, of course, is to relieve congestion and to keep traffic moving in the downtown areas. A one-cent exaction, in addition to perhaps being too small to raise the incidental expenses, might be the means of providing all day parking for some persons. It seems, therefore, that if the city must choose between having parking meters with the accompanying five-cent fee and retaining the old system of marking tires with chalk it should be allowed the former choice in spite of the facts that large sums are collected.

It must be remembered that the above arguments were all advanced on the assumption that the city had no thought of revenue in mind when the ordinance was passed. However, statements contained in the case of *Harper v. City of Wichita Falls*²² would indicate that the revenue

²⁰ *Bryan v. Malvern*, 122 Ark. 379, 183 S.W. 957 (1916); *Moffitt v. City of Pueblo*, 55 Colo. 112, 133 Pac. 754 (1913); *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 109 S.W. 293, 16 L.R.A. (N.S.) 1035 (1908); *Gaynor v. Roll*, 79 N.J.L. 402, 75 Atl. 179 (1910); *Condon v. Forest Park*, 278 Ill. 218, 115 N.E. 825, L.R.A. 1917E, 314 (1917); *Margolies v. Atlantic City*, 67 N.J.L. 82, 50 Atl. 367 (1901).

²¹ The best examples of this attitude are found in the cases upholding the parking meter ordinances. *Supra*, notes 1 and 2.

²² *Supra*, note 2.

feature of the plan is a real motivating factor in its installation. The fact that gains are to be made and that this is anticipated by the city officials should not invite the holding that the ordinance is invalid. As stated in 1 Cooley on Taxation, 67 (4th Ed.): "So far as states are concerned, impositions or charges for the primary purpose of regulation rather than revenue are held to be an exercise of the police power rather than the power to tax." In the cases involving the parking meters the courts have assumed and stated that the validity and the reasonableness of the fee must be determined by the total amount collected. This view may be questioned if it may be found that the fee itself is reasonable and that the ordinances actually are primarily for regulatory purposes. To determine the purpose of this ordinance by its effect, which is presumed to be the production of large revenues, is to overlook the fact that it also provides for regulation and that there perhaps is no choice between the two.

RIGHTS OF THE TRAVELING PUBLIC

In the decision of the Alabama court in which a parking meter ordinance was held invalid²³ it was said: "We have indicated that the municipality holds the locus in quo, not only for the municipality and its citizens, *but in trust for the public at large*, whose rights are not dependent upon acts of omission or commission of the city—that is, that nothing done or omitted to be done in the allowance of the unlawful obstructions on the street, which interfere with the use within the dedication of that highway, will estop the public or those with special interest from having the same removed as a nuisance."

In view of this statement it seems necessary, in this connection, to determine the rights that the traveling public may assert in the highways.

It is commonly stated that when land is dedicated by grant to the public for highway purposes or is taken by the public under its right of eminent domain that the owner retains the fee; the public acquiring a mere easement or right of way on the land over which it passes with the powers and privileges incident to that right.²⁴ In jurisdictions or under circumstances where it is held that the fee vests in the public it is also stated that this fee is held by the public in trust to answer the purposes of the use.²⁵ The uses that may be made of the highway by the public are the same in each case.²⁶

²³ *Supra*, note 3.

²⁴ *Palative v. Krueger*, 121 Ill. 72 (1887); *Phifer v. Cox*, 21 Ohio St. 248 (1871); *State ex rel. v. Drainage District*, 269 Mo. 444 (1916); *State ex rel. v. N. Y. Ry. Co.*, 217 N.Y. 310 (1916); *Railroad Co. v. Williams*, 35 Ohio St. 168 (1878); *McClelland v. Miller*, 28 Ohio St. 488 (1876).

²⁵ *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6 (1883); *Cincinnati and S. Ry. Co. v. Cummingsville*, 14 Ohio St. 523 (1863).

²⁶ *Cincinnati and S. Ry. Co. v. Cummingsville*, *supra*, note 25.

Parking has been defined as the "permitting a vehicle to stand in the street longer than necessary to receive or discharge passengers or load or unload merchandise."²⁷ Generally, as against other members of the traveling public, this parking right is an incident of the right to travel as long as it is exercised in a reasonable manner.²⁸ Although many statements can be found to the effect that the right and easement of the public in the highway is to a free and unobstructed use of the full width of the street yet the point under consideration has been obstructions placed in the street by third parties or an unreasonable use of the highways by vehicles attempted to be justified under the parking privilege.²⁹ Thus, if parking ordinances, of which the parking meter ordinances are a type, are said to be a grant by the city of permission to the motorist to park, then as against the traveling public, the city is only allowing the motorist to do that which is already his privilege or right. In a sense, the terms of the ordinance become the standard for the determination of the existence of a nuisance. There is no longer any dispute concerning the power of the municipality, in the exercise of its police power, to limit the legal time of parking in congested areas or even to prohibit parking entirely.³⁰ The only requirement is that the ordinance must be reasonably calculated to promote safety or relieve congestion. If, under the parking meter ordinances, the exaction of the five-cent fee is recognized as being *incidental* to the exercise of the police power, as discussed above, then it seems logical to conclude that no valid objection may be made by members of the traveling public.

RIGHTS OF ABUTTING PROPERTY OWNER

The right of the abutting property owner in the street is generally held to include the right to air, light, view, ingress and egress; the latter commonly being called the right to access to the premises. Parking meter ordinances do two things that at least arguably could be the legal basis for complaint by the owner. (1) They might be said to *permit* parking in front of one's property and (2) also because of the fee charged the public is encouraged to park elsewhere, thus indirectly tending to harm an owner's business.

The incorporeal right which an abutting owner has in the street next his property is best explained by the words of the court in the case of *Reining v. N. Y., L. & W. Ry Co.*³¹ There it was said: "What then,

²⁷ *Decker v. Goddard*, 251 N.Y.S. 440, 233 App. Div. 139 (1931).

²⁸ *Pugh v. City of Des Moines*, 176 Iowa 593, 156 N.W. 892 (1916); *Decker v. Goddard*, *supra*, note 27; *Allen and Reed v. Presbrey*, 50 R.I. 53, 144 Atl. 888 (1929).

²⁹ *Mann v. Groom*, 231 N.Y.S. 342, 133 Misc. Rep. 260 (1927); *Pugh v. City of Des Moines*, *supra*, note 28; *City of Neenah v. Krueger*, 206 Wis. 473, 240 N.W. 403 (1932).

³⁰ Cases cited *supra*, note 14.

³¹ 13 N.Y.S. 238 (1891).

is the quality, and what are the dimensions, of that peculiar proprietary right which belongs to him by virtue of his ownership of the abutting lot of land? It would seem to be something given from necessity of justice for the sake of continual beneficial enjoyment of his estate. * * * That easement of access cannot be the mere right of going out from his home or place of business upon the street and returning therefrom upon his own land, which he may do by virtue of his personal liberty. But does not the right of access mean a certain convenience in the use of property with respect to the rest of the world? If the land owner is a trader, an hotel keeper, a manufacturer, is not his easement somewhat commensurate with the uses to which his property is devoted. * * * Public roads are created for the business and social reciprocity of all those whose dwellings and establishments everywhere border upon them. The easement or right of access would seem to include the opportunity for a man's customers to come to his place of business without unreasonable hindrance or interference."

The question that necessarily follows is whether the parking meter ordinances deprive an abutting owner of the rights mentioned above. The only apparent distinction between this type of an ordinance and ordinary parking regulations is the exaction of a five-cent fee. If by the paying of this fee a motorist is entitled by the city, as of right, to park as against the abutting owner then difficulty is met in justifying this action in view of the language of the court quoted above. The attitude of the courts in relation to this problem is well summarized by statements made in the case of *Allen & Reed v. Presbrey*.³² "If the public understands these signs to be an invitation to park for the maximum time printed thereon, that is because of a misinterpretation of the ordinance. The purport of the ordinance and the traffic signs is to announce that the city, in the exercise of its power to regulate traffic, will not punish stopping for a time longer than the maximum limit. A parking ordinance is nothing more than a police regulation which settles the matter between the owner of the automobile and the city."

That was a case instituted by the owner of abutting property who claimed that the creation of parking zones gave the public the right to park in front of his premises and thus was contrary to the common law rule mentioned above. The exaction of the five-cent fee, being but an incident to the ordinary type ordinance, could hardly be argued to be an attempt to enlarge the substantive right of the motorist.

Does the placing of the meters themselves on the curbline constitute an unauthorized use of the highway of which the abutting owner could complain? Inasmuch as this individual holds the fee, or an easement

³² 50 R.I. 53, 144 Atl. 888 (1929).

in the street, in strict subordination to the rights of the traveling public it would seem to follow that if the ordinances themselves were reasonable exercises of the police power then the placing of the meters would be a reasonable means of effectuating the objects sought. Reference may be made to markers of state or national highway systems,³³ or even purely ornamental pieces.³⁴ It is doubtful whether the Alabama Court would disagree with this reasoning although its reference to the right of the owner not “* * * to have his property defaced by superimposed obstructions, barriers, or parking meters placed alongside” encouraged the mention herein made.³⁵

PHILIP J. WOLF

RIGHT OF PRIVATE ELECTRIC UTILITY TO ATTACK THE CONSTITUTIONALITY OF A GRANT OF FUNDS TO A LOCAL SUBDIVISION TO BE USED TO CONSTRUCT A COMPETING POWER PLANT

The Alabama Power Company brought suit against Harold L. Ickes, as Federal Emergency Administrator of Public Works, to enjoin the loan and grant of federal funds to a municipality to be used for the erection of an electric plant which would operate in competition with petitioner's electric system. The Supreme Court, in affirming decisions of the Circuit Court of Appeals of the District of Columbia and the District Court, held that the loss to the petitioner was the result of lawful competition by the municipality and as such, *damnum absque injuria* giving petitioner no standing in court to contest the constitutionality of the loan and grant. *Alabama Power Company v. Harold L. Ickes, et. et. al.*, 301 U.S. 681, 82 L. Ed. 263 (1938), U.S. Law Week., Jan. 4, 1938, p. 3, affirming 91 Fed. (2d) 303 (1937).

The important question raised by this decision may be simply stated. When A is injured by the lawful acts of B does A have an action against C who was the instigator of B's acts? Several different situations are possible.

First: If C's action in inducing B to act is lawful and unaccompanied with an intention to injure A, it is apparent that A would have no recourse against C. The owner of a grocery would have no legal rights against the bank that loaned money to his competitor whereby he was forced out of business. Second: Where C's action is intended to

³³ *Scars v. Hopley*, 103 Ohio St. 46, 132 N.E. 25, 16 A.L.R. 925 (1921).

³⁴ *Thomkins v. Hodgson*, 2 Hun. (N.Y.) 146 (1874).

³⁵ *Supra*, note 3.