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Validity of Parking Meter Ordinances in Kentucky

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VALIDITY OF PARKING METER ORDINANCES IN KENTUCKY.

In 1942, the Kentucky Court of Appeals in *City of Louisville* v. *Louisville Automobile Club*[1] held that a city ordinance providing for the installation and operation of parking meters was a valid exercise of police power. The Court, in arriving at its decision, recognized and followed the clear majority of opinion in cases of this nature as shown by decisions in other states. The cases holding contrary were cited but the Court stated that it was not inclined to follow the reasoning and conclusions of those cases.

The public has a right of free and unobstructed passage in a street, but this right is subject to reasonable regulation.[2] Parking, however, is a privilege and may be prohibited altogether.[3] The right to stop when occasion demands, as a temporary stopping for loading and unloading, is generally looked upon as an incident of the right of travel and is not considered as parking.[4]

Although control over streets and highways rests in the state, it is well recognized that not only by express statutory authority, but by statutes which allow the exercise of reasonable police power, cities may regulate the use of their streets by motor vehicles, which includes regulation over parking vehicles on the street.[5]

The Auto Club did not seriously challenge the general authority of the city to regulate parking but based their unsuccessful attack on the following objections: (1) the ordinance constituted a revenue measure and could not properly be classified as an exercise of police power; (2) it authorized a nuisance and an unreasonable obstruction interfering with the use of sidewalks and streets and violated the constitutional rights of an abutting property owner; (3) it was an unauthorized abandonment of the deed of dedication of said land for use as a public street; and (4) it worked a discrimination against abutting property owners in the regulated zone and car owners parking in the regulated zone in favor of property owners and those who park outside the zone.

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[1] 290 Ky 241, 160 S.W 2d 663 (1942).

[2] Henkel v City of Detroit, 49 Mich. 249, 13 N.W 611 (1882) *see* Chicago, B. & Q. R. Co. v City of Quincy, 136 Ill. App. 563, 27 N.E. 192, 194 (1891) 3 DILLON, MUNICIPAL CORPPOPRATIONS (5th ed. 1911) sec. 1163.

[3] Pugh v. City of Des Moines, 176 Iowa 593, 156 N.W 892 (1916), *see Ex parte* Duncan, 179 Okla. 355, 65 P 2d 1015, 1017 (1937), Village of Wonewoc v. Taubert, 203 Wis. 73, 233 N.W 755, 756 (1930).

[4] American Co. of Arkansas v. Baker, 187 Ark. 492, 60 S.W 2d 572 (1933) Lowell v Pendleton Auto Co., 123 Ore. 383, 261 Pac. 415 (1927).

[5] Whyte v. City of Sacramento, 65 Cal. App. 534, 224 Pac. 1008 (1924), Johnson Oil Refining Co. v Galesburg Railway, Lighting and Power Co., 200 Ill. App. 392 (1916) City of Ashland v. Ashland Supply Co., 225 Ky. 123, 7 S.W 2d 833 (1928).

The first two of these objections will be briefly discussed, as they have been the principal ones made in litigation on this subject and have been upheld in the few cases holding such an ordinance invalid.[6]

With reference to the first objection, a municipality cannot, under the guise of a police regulation, impose a revenue tax where it has no authority to impose a revenue tax.[7] Cooley, in *The Law of Taxation,* states that the distinction between a demand of money made under the police power and one made under the power to tax is not so much one of form as of substance and if the purpose is evident there is no difficulty in classifying the case and referring it to the proper power.[8] He further states that if the primary purpose of the legislative body in imposing the charge is to regulate, the charge is not a tax even if it produces revenue for the public.[9]

Kentucky has long applied the doctrine that under the exercise of the police power it is competent for the sovereignty to demand and collect fees and charges which in the aggregate will pay the expenses of administering the regulatory law plus an additional amount sufficient to pay costs which are attributable to and produced by the activities of the thing regulated.[10] In view of this doctrine, it would seem exceedingly difficult in a parking meter case to show an amount so excessive as to constitute the ordinance a revenue measure instead of a police regulation if the full amount of the fees collected were spent on traffic regulation expenses.[11] Al-

[6] City of Birmingham v Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114 (1937) (deprived abutting property owner of property in violation of due process clause) Brodkey v. Sioux City, 229 Iowa 1291, 291 N.W 171 (1940) (revenue measure), M. H. Rhodes Inc. v City of Raleigh, 217 N.C. 627, 9 S.E. 2d 389 (1940) (revenue measure)

[7] Borough of Kittanning v. America Natural Gas Co., 239 Pa. 210, 86 Atl. 717 (1913), *see* Viquesney v Kansas City, 305 Mo. 488, 266 S.W 700, 702 (1924) State *ex rel* City of Bozeman v Police Court of City of Bozeman, 68 Mont. 435, 219 Pac. 810, 811 (1923).

[8] 1 COOLEY, THE LAW OF TAXATION (4th ed. 1924) sec. 27.

[9] *Ibid; see* State *ex rel* City of Bozeman v. Police Court of City of Bozeman, 68 Mont. 435, 219 Pac. 810, 812 (1923) cited *supra* note 7· Littlefield v. State, 42 Neb. 223, 60 N.W 724, 725 (1894).

[10] City of Newport v French Bros. Bauer Co., 169 Ky. 174, 183 S.W 532 (1916) (proceeds of a vehicle license tax used to repair city streets) McGlone, Sheriff v Womack, 129 Ky. 274, 111 S.W 688 (1908) (dog license fund created for purpose of remunerating the owners of sheep killed by dogs) *see* Blue Coach Lines v. Lewis, 220 Ky 116, 121, 294 S.W 1080, 1082 (1927)

[11] *See* Clarck v. City of New Castle, 32 D & C 371, 30 Mun. 65 (Pa. 1939) (held, fact that proceeds totaled $12,000 in 9 months was not sufficient to constitute a revenue measure where the original cost of the parking meter system was $25,000), Atkins v. State Highway Dept., Tex. Civ App. 1918, 201 S.W 226 (1918) (vehicle license act produced a sum 12 times amount necessary for administration of the law—held, fact that excess is to be used in constructing roads does not render it a tax).

though some states have invalidated such ordinances on the ground that they were revenue measures, as a general rule the courts have refused to do so.[12] The Kentucky Court, in the principal case, stated that if it should develop that the proceeds from the fees collected were "so excessive as to actually constitute 'revenue' as the word is applied, the court would have the power to require a reduction so as to remove the objectionable feature."[13]

In overruling the second objection the courts have stated that to class a parking meter as a nuisance or unreasonable obstruction would be to condemn fire hydrants, mail boxes, waste boxes, and public utility poles.[14] Whether the fee to a city street is in the adjacent landowner or in the city, there is no material difference in principle with regard to the extent of the rights of the public.[15] The abutter does have a right of ingress and egress to and from his property arising from the contiguity of his property to the street,[16] but the public interest is superior to this property interest, and due process of law is not violated where this right is reasonably regulated.[17] As stated above, temporary stopping for loading and unloading is generally considered an incident of the right of travel, and though a person will not be denied this right, even it may be regulated.[18] The parking meter ordinance does not deny one an opportunity to load and unload passengers or merchandise near his property any more than permitting free parking by the public would do; it merely denies him the right to leave his vehicle parked on a public street without paying a fee. In view of the fact that a person, as an abutting owner, has a right of access to his property and as a member of the public has the right to stop for temporary loading and unloading, it seems that a well drawn ordinance should provide

[12] Hendricks v. City of Minneapolis, 207 Minn. 151, 290 N.W 428 (1940), *Ex parte* Duncan, 179 Okla. 355, 65 P 2d 1015 (1937) cited *supra* note 3.

[13] 290 Ky. 241, 245, 160 S.W 2d 663, 665 (1942) (It would be interesting to see how the court would go about effecting such a reduction without declaring the entire ordinance invalid.)

[14] *Id.* at 246, 160 S.W 2d at 665; *In re* Opinion of the Justices, 297 Mass. 559, 8 N.E. 2d 179 (1937)

[15] *See* Barney v. Keokuk, 94 U.S. 324, 340, 24 L. ed. 224, 229 (1876).

[16] *See* Hughes v. New York El. R. Co., 130 N.Y. 14, 28 N.E. 765, 767 (1891).

[17] Andrews v City of Marion, 221 Ind. 422, 47 N.E. 2d 968 (1943), Gilsey Buildings Inc. v. Incorporated Village of Great Neck Plaza, 170 Misc. 945, 11 N.Y. Supp. 2d 694 (1939) City of Columbus v. Ward, 65 Ohio App. 522, 31 N.E. 2d 142 (1940).

[18] *See* Village of Wonewoc v. Taubert, 203 Wis. 73, 233 N.W 755, 757 (1930) cited *supra* note 3.

for loading zones in each block of a congested area for the purpose of allowing business to be conducted without undue hardship.[19]

Shortly after the decision in the principal case, the Kentucky Legislature passed an act authorizing cities of the second class to provide for the installation and operation of parking meters.[20] As no such express power was given cities other than those of the second class, there was some doubt as to the power of lesser cities to install and operate parking meters,[21] though all of these lesser cities have statutory power to enact police regulations,[22] and in addition the cities of the third and fourth class have express power to regulate vehicles[23] and to exercise exclusive control over public ways.[24]

Despite this doubt, many of these smaller cities proceeded to adopt parking meter ordinances, which in addition to aiding in the regulation of traffic have been of inestimable aid to the small town treasuries.[25] These ordinances have usually brought a storm of protest from the merchants in the area affected, who in some cases have obtained injunctions against the city from the circuit court, but it appears that these injunctions have generally been dissolved on a hearing.

Doubt as to the power of these smaller cities to enact such ordinances seems dispelled by two recent cases. The Kentucky Court in 1945, in *Miller* v *City of Georgetown*,[26] stated that the above act conferring authority upon cities of the second class to install and operate parking meters, and another act conferring authority upon such cities to provide for off street parking facilities, did not show an intent of the legislature to withhold such authority from cities of other classes. It should be noted, however, that the direct holding of this case applied only to the acquisition of off street parking facilities. But in *Graves County* v *City of Mayfield*,[27] decided in

[19] *See* Gilsey Buildings Inc. v Incorporated Village of Great Neck Plaza, 170 Misc. 945, 11 N.Y. Supp. 2d 694, 702 (1939) cited *supra* note 17· City of Columbus v Ward, 65 Ohio App. 522, 31 N.E. 2d 142. 143 (1940) cited *supra* note 17.

[20] KY. R. S. (1946) sec. 94.740.

[21] For application of the rule of express mention and implied exclusion in construing statutes, see Goebel v Goebel, 201 Ky 819, 823, 258 S.W 691, 693 (1924) Boswell's Ex'x v Senn's Adm'r, 187 Ky 473, 478, 219 S.W 803, 805 (1920).

[22] KY. R. S. (1946) sec. 85.120 (6) (third class) sec. 86.110 (11) (fourth class) sec. 87.070 (fifth class) sec. 88.080 (sixth class)

[23] KY. R. S. (1946) sec. 85.150 (1) (third class) sec. 86.120 (1) (fourth class)

[24] KY. R. S. (1946) sec. 94.360.

[25] *See* THE LEXINGTON LEADER, July 17, 1947, p. 13, col. 3 (receipts from parking meters in Winchester, Ky., a city of the third class, averaging $100 a day) THE LEXINGTON LEADER, Aug. 22, 1947, p. 8, col. 1 (receipts from parking meters in Mount Sterling, Ky., a city of the fourth class, averaging about $60 a day)

[26] 301 Ky 241, 191 S.W 2d 403 (1945).

[27] 305 Ky 374, 204 S.W 2d 369 (1947).

June, 1947, the Court apparently held that Mayfield, a city of the fourth class, had the right to install parking meters on a public way.[28]

What about fifth and sixth class cities? It is significant that in the principal case the Court rested its decision, not on the special circumstance that Louisville was a city of a particular class but on the general police powers of the municipality. In view of this and the decision in the *Georgetown* case, it would follow that a city of any class which can exercise general police power would have the power to install and operate parking meters, subject to the test of reasonableness which is always applied to an exercise of police power. Fifth and sixth class cities have such police power.[29]

In conclusion, it may be stated that parking is not a right but a privilege. Kentucky cities of all classes have been given power by the state to provide for reasonable police regulations. A Kentucky city of any class may therefore enact a parking meter ordinance provided such enactment is not an abuse of such power. The ordinance will not be declared invalid as an unauthorized revenue measure merely because it takes in an amount in excess of the expenses needed to administer the ordinance. An additional amount may be collected to provide for other traffic regulation expenses. If the fees collected should be so excessive as to constitute "revenue" as the word is applied by the court, it has been stated that a reduction would be made to remove the objectionable feature. A person owning abutting property does have the right of ingress and egress to and from his property and as a member of the public has the right to stop for temporary loading and unloading, but an ordinance requiring him to pay a fee to park his car on a public street does not deny him either of these rights and is not a violation of the due process clause.

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[28] On Feb. 27, 1948, after this note was approved for publication, this question was conclusively settled by Stephens v. City of Russell, 306 Ky. 727, 209 S.W 2d 81 (1948)

[29] KY. R. S. (1946) sec. 87.070 (fifth class) sec. 88.080 (sixth class) cited *supra* note 22.