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Municipal Corporations-Constitutionality of Parking Meters

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MUNICIPAL CORPORATIONS—CONSTITUTIONALITY OF PARKING METERS—Action by the owner of property adjoining a street to enjoin the installation and maintenance of parking meters in front of the plaintiff's premises. The village proposed to install the meters by virtue of express authority conferred by state statute. Plaintiff contends that the statute is an unconstitutional deprivation of his rights as abutting owner, and an improper and invalid exercise of the police power. Held: injunction denied. The statute is a proper exercise of the police power for the regulation of traffic. *Gilsey Buildings, Inc. v. Village of Great Neck Plaza* (N. Y. 1939), 11 N. Y. S. (2d) 694.

The spread of the parking meter device has produced considerable controversy over the constitutionality of meter legislation. Search has revealed seven cases (one an advisory opinion) on the subject; with but one exception, the validity of the acts has been upheld.¹

Analysis of the opinions shows that three essential problems are raised, to-wit: (1) whether the ordinance is a reasonable exercise of the police power of the municipal corporation with respect to the rights of the traveling public; (2) whether it is a reasonable exercise of the police power with respect to the rights of abutting owners; and (3) whether it is an improper use of the police power for revenue purposes.

The public has a primary right to use the streets for travel which does not include the "right" to park.² The primary right is often called the "right to the free use of the street" or "a right of free and unobstructed passage."³ Even this right of passage is subordinate to reasonable regulations of the municipality for the public good.⁴ Secondary to this right of passage is the privilege of each citizen to use the street for individual purposes, subject to reasonable regulations for the benefit of the public.⁵ Parking is included within this category. Being but a matter of privilege and not of right, it may be entirely prohibited in the regulation and control of traffic⁶ and the prevention of congestion.⁷ However, it must be remembered that not every stopping of a car can be considered as parking; there are certain additional rights called "rights incidental to public travel" inherent to the primary right of passage. The most common of these are the rights to load or unload merchandise or the stopping at the curb to take in or let out passengers.⁸ Unless a

¹ Constitutional: *State v. McCarthy* (1936), 126 Fla. 433, 171 So. 314; *Ex Parte Duncan* (1937), 179 Okla. 355, 65 P. (2d) 1016; *Harper v. City of Wichita Falls* (Texas 1937), 105 S. W. (2d) 743; *Ex Parte Harrison* (Texas 1939), 122 S. W. (2d) 314; *Clark v. City of Newcastle* (1939), 32 D. & C. 371, 30 Mun. 65 (Pa. Com. Pl.); *In re Opinion of the Justices* (Mass. 1937), 8 N. E. (2d) 179.

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

² Willis, *Constitutional Law*, p. 748: "The free use of streets does not include the privilege of parking autos on the streets."

³ Dillon, *Municipal Corporations* (5th ed. 1911), Sec. 1163.

⁴ McQuillin, *Municipal Corporations* (2d ed. 1928), Sec. 1496.

⁵ *Harper v. City of Wichita Falls* (Texas 1937), 105 S. W. (2d) 743.

⁶ *Pugh v. Des Moines* (1916), 176 Iowa 593, 156 N. W. 892; *Welsh v. City of Morris* (1928), 98 N. J. L. 630, 121 A. 699; *Chicago v. McKinley* (1931), 344 Ill. 297, 176 N. E. 261; *Ex Parte Corvey* (1926), 220 Mo. App. 602, 287 S. W. 879.

⁷ *Ex Parte Duncan* (1937), 179 Okla. 356, 65 P. (2d) 1016.

⁸ *In re Corvey* (1926), 220 Mo. App. 602, 287 S. W. 879; *Lowell v. Pendle-*

meter ordinance excepts these it may fall afoul of constitutional difficulties. Since the city may pass measures to prevent congestion to carry out the primary function of the street, it is submitted that a meter ordinance is not an unreasonable interference with the public's right to use the street.

Whether there is a reasonable exercise of the police power with respect to the rights of abutting owners is our next question. An abutter has the right of access or ingress and egress to his property;⁹ he has the right regardless of whether the fee of the street lies in the municipality or in the abutting owner.¹⁰ His rights do not depend upon any express grant of power from the municipality but arise by operation of law.¹¹ This right is a right to use the street as a means of ingress and egress; it does not include the privilege of parking.¹² Like other members of the public, the right of an abutting owner to use the street is subject to regulatory measures for the public good.¹³ He cannot object to reasonable regulations carrying out the primary purpose of the streets¹⁴ nor is any regulation unreasonable because it restrains his rights or may result in incidental loss to him.¹⁵ True, the Alabama court in invalidating a meter ordinance held that an abutting owner had the right to keep his property free of physical obstruction;^{15a} but the cases show that there may be placed upon an abutter's property light poles¹⁶ and lines,¹⁷ telegraph and gas lines¹⁸ and recently it was held that a fire alarm box was not an unreasonable burden of the right of the abutter.¹⁹ The Alabama contention does not seem well taken.

A meter ordinance then would not be an unreasonable infringement of the rights of an abutting owner. Our noted case so holds.^{19a}

The last possible basis of successful attack is that a meter ordinance is really an improper use of police power to raise money. So much money is taken in from the meters above operating cost and initial expense that the issue is a troublesome one. In Florida revenues in ten months were \$55,000 with expenses of \$4,000;²⁰ in Oklahoma City the cost ran about eight per

ton Auto Co. (1927), 123 Ore. 383, 261 P. 414; *Wonewoc v. Taubert* (1930), 203 Wis. 73, 233 N. W. 756.

⁹ *McQuillin, Municipal Corporations* (2d ed. 1928), Sec. 1426; other rights of the abutter include: (2) right to light and air; (3) right of view; (4) right to have a street kept open as a public street; (5) whatever adds to the value of the street to the abutter. *Elevated Railway cases*; *Street Railway v. N. Y. Elev. Ry.* (1881), 90 N. Y. 122; *John v. Metropolitan Elev. Ry.* (1882), 104 N. Y. 268, 10 N. E. 528.

¹⁰ *In re Olinger* (1914), 160 App. Div. 96, 145 N. Y. S. 174; *Davis v. Spragg* (1913), 72 W. Va. 672, 79 S. E. 652.

¹¹ *Dillon, Municipal Corporations* (5th ed. 1911), Sec. 1125.

¹² *State v. Burkett* (1913), 119 Md. 609, 87 A. 514.

¹³ *Dillon, Municipal Corporations* (5th ed. 1911), Sec. 1429.

¹⁴ *Park Hotel Co. v. Ketchum* (1924), 184 Wis. 182, 199 N. W. 129.

¹⁵ *Lombardo v. Dallas* (1934), 124 Tex. 1, 73 S. W. (2d) 476.

^{15a} *Birmingham v. Hood-McPherson Realty Co.* (1937), 233 Ala. 352, 172 So. 114.

¹⁶ *People v. Williams* (1917), 100 Misc. Rep. 569, 166 N. Y. S. 560.

¹⁷ *Fox v. City of Hinton* (1919), 84 W. Va. 239, 99 S. E. 478.

¹⁸ *Sorg v. Village of Oak Harbor* (1925), 20 Ohio App. 313, 151 N. E. 800.

¹⁹ *Centebor v. Watertown* (1929), 268 Mass. 121, 167 N. E. 303.

^{19a} *Gilsey v. Great Neck Plaza* (April 1, 1939), N. Y. Sup. Ct. Nassau City.

²⁰ *American City*, Aug. 1936, p. 59.

cent. of the intake.²¹ However, a court desiring to uphold the acts can adopt the attitude and language of the court in *Florida v. McCarthy*,²² where it refused to say that the meter act was a tax measure under guise of the police power. It explained away the over plus as "incidental revenue."

The black-letter rule is of course that the police power is the power to regulate and may not be used for the purpose of raising revenue.²³ The broad proviso is made, however, that the fact that incidental revenue arises will not invalidate a police measure; so long as revenues exceed costs by only a reasonable margin the act is valid.²⁴ Cooley says that under a police measure a fee may be exacted which is not more than the (1) necessary or probable expense of supplying the privilege and (2) of inspecting and regulating the business it covers.²⁵ Unless there can be included the cost of marking lanes, cleaning the space, and generally maintaining the curb and pavement it is quite difficult to get any semblance of balance between revenues from and costs of meters. Our Indiana court allowed in one police regulation case²⁶ recovery of a license fee which brought great revenues to the city; the court counted as expenses all costs resulting from the nature of the activity itself; excess money from license fees for wagons was used to repair the streets.

Upon this last feature will probably arise the tremendous struggle. If the court desires to invalidate the acts the writer submits that there is sufficient authority for bringing about the desired result; on the other hand if there is the desire to uphold the meter acts then the theory of "incidental revenue" may well be employed. So far, only the Alabama court has given ear to this attack;²⁷ the Florida court hurdled the barrier.²⁸ What our court will do remains to be seen upon the first test case being brought before it. W. E. O.

SUBSTITUTIONARY RULE—FUTURE INTERESTS—LIFE ESTATE WITH GIFT OVER ON DEATH WITHOUT ISSUE—Testator devised all his realty to his wife for her life, and subject to the wife's life estate to his adopted daughter, Olive, to have and to hold the same for and during her natural life time only. Subject to the aforesaid life estates, he devised the property absolutely and in fee simple to the children of Olive, should she have any; but should she die without children then the property is devised to his brothers and sisters or their descendants. The widow elected to take under the law, and filed suit for partition. The adopted daughter claims that having survived the testator, and although she is unmarried and has no children, she takes a fee subject only to defeasance in favor of her children upon their birth. The brothers and sisters claim as contingent remainderman subject to the life estate of Olive

²¹ 22 Iowa L. R. 731, n. 91.

²² *Florida v. McCarthy* (1936), 126 Fla. 433, 171 So. 314.

²³ 1 Cooley, Taxation (4th ed. 1929), Sec. 27.

²⁴ Laundry License Case (1885), 22 F. 701; *Stull v. Demattos* (1900), 23 Wash. 71, 62 P. 451; *State ex rel. City of Bozeman v. Police Ct. of Bozeman* (1923), 68 Mont. 436, 219 P. 810; *State v. Caplan* (1927), 100 Vt. 140, 135A. 705.

²⁵ 4 Cooley, Taxation (4th ed. 1929), Sec. 1806, n. 66.

²⁶ *Tomlinson v. Indianapolis* (1896), 144 Ind. 142, 43 N. E. 9.

²⁷ *Birmingham v. Hood-McPherson Realty Co.* (1937), 233 Ala. 352, 172 So. 114.

²⁸ *Florida v. McCarthy* (1936), 126 Fla. 433, 171 So. 314.