

1950

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Recommended Citation

William T. Jacobson, Limitations on Municipal Use of Parking Meters, 40 J. Crim. L. & Criminology 601 (1949-1950)

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CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

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Limitations on Municipal Use of Parking Meters

The parking meter has become as familiar a sight in urban business districts as the hitching post was at the turn of the century. The device has been installed in over 1,115 cities to help meet the problem of inadequate parking facilities in congested business areas.¹ While a policeman is still necessary to issue traffic tickets to violators, the parking meter has a clear edge in efficiency over the older method of marking tires with chalk and then checking later to see if any chalk marked cars have exceeded the posted parking limit.²

Although desirable from an administrative standpoint, parking meter ordinances have been attacked vigorously, and sometimes successfully, in the courts.³ The usual arguments advanced are that: (1) the municipality has no power under its charter to install parking meters; (2) the ordinances are "revenue measures" under the guise of "police regulation"; (3) the public right to free use of the highway is infringed; (4) the right of an abutting landowner to reasonable access to his property is denied; and (5) parking meters have no reasonable relation to traffic control. However, after twelve years of litigation,⁴ the validity of such ordinances as reasonable police regulations has been established, with limitations, by appellate decisions in twenty-seven states.⁵

¹ 1949 Municipal Year Book 437. The figure includes only cities over 5,000 in population. In 1935 only four cities had installed parking meters while in 1948 they were newly installed in 188 municipalities. *Ibid.*

² Parking turnover in the metropolitan area of Portland, Oregon increased fifty per cent after the installation of parking meters. *Hickey v. Riley*, 177 Ore. 321, 340, 162 P. (2d) 371 (1945). See also *City of Decatur v. Robinson*, 251 Ala. 99, 108, 36 So. (2d) 673 (1948).

³ Parking meter ordinances have been held invalid in five states. *City of Birmingham v. Hood-McPherson Realty Co.*, 233 Ala. 352, 172 So. 114 (1937) (violation of deed dedicating streets to the public, due process, revenue measure); *Brodkey v. Sioux City*, 291 N.W. 171, modified in 229 Iowa 1291, 296 N.W. 352 (1941) (lack of authority); *City of Shreveport v. Brister*, 194 La. 615, 194 So. 566 (1939) (lack of authority); *Rhodes v. Raleigh*, 217 N.C. 627, 9 S.E. (2d) 389 (1940) (revenue measure, no relation to parking control); *In re Opinion to House of Representatives*, 62 R.L. 347, 5 A. (2d) 455 (1939) (lack of delegated authority). However, the Birmingham case was recently overruled in *City of Decatur v. Robinson*, 251 Ala. 99, 36 So. (2d) 673 (1948) and the various legislatures have at least partially overcome the cases in the other states. *Infra*, note 8.

⁴ The first reported case concerning the validity of parking meters is *State v. McCarthy*, 126 Fla. 433, 171 So. 314, decided December 10, 1936.

⁵ Alabama, Arizona, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, North Dakota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Washington, West Virginia. Leading cases: *State v. McCarthy*, 126 Fla. 433, 171 So. 314 (1936); *Owens v. Owens*, 193 S.C. 260, 8 S.E. (2d) 339 (1940); *Kimmel v. City of Spokane*, 7 Wash. (2d) 372, 109 P. (2d) 1069 (1941). For general discussion see *Grimes, Legality of Parking Meter Ordinances* (1947). 35 Calif. L. Rev. 235; *Conrad and Aberg, Validity of Parking Meter Ordinances* (1943) 29 Va. L. Rev. 617.

Delegation of Power to Municipalities

In legal contemplation a municipal corporation exists as an instrument of the state and can exercise only the powers expressly granted by the state legislature or those necessarily incident to such a specified power.⁶ Typical municipal charters usually include authority to regulate the use of streets, traffic or parking, and to enact general police regulations but do not expressly authorize the municipality to install and maintain parking meters.⁷ Most courts have been liberal in reading authority to enact parking meter ordinances in the general language of the statutes. Nevertheless, a few states have removed doubts by passing enabling acts specifically authorizing municipalities to install parking meters.⁸ Although not necessary in the usual case, such statutes are advisable where municipal powers are unusually narrow or there is a possibly conflicting state statute. Direct appeal to the electorate, as opposed to legislation, is not without risk, however, as illustrated by the North Dakota experience. There the voters approved a disabling statute⁹ after the state supreme court had upheld the validity of a parking meter ordinance.¹⁰

In the few cases invalidating parking meter ordinances, lack of delegated authority has been a principal factor.¹¹ However, in those cases, except for one case involving a special restrictive statute,¹² the courts regarded the ordinances as primarily revenue measures and therefore subject to the strict construction given municipal taxing power.¹³ If the ordinances had been considered as primarily concerned with the regulation of parking and thus referable to the police power, different conclusions might have resulted. Many of the courts upholding parking meter ordinances have assumed that if the ordinance was a revenue measure it would be invalid for lack of a specific grant of power to levy the tax.¹⁴

⁶ *City of Bloomington v. Wirrick*, 381 Ill. 347, 352, 45 N.E. (2d) 852 (1943); *Salt Lake City v. Bennion Gas and Oil Co.*, 80 Utah 530, 534, 15 P. (2d) 648 (1932). General rules for implying municipal powers are set forth in 2 McQuillin, *Municipal Corporations* (3d ed. 1949) §10.12.

⁷ *Bowers v. City of Muskegon*, 305 Mich. 676, 9 N.W. (2d) 889 (1943); *Kimmel v. City of Spokane*, 7 Wash. (2d) 372, 109 P. (2d) 1069 (1941). For home rule see *Harper v. City of Wichita Falls*, 105 S.W. (2d) 743 (Tex. Civ. App. 1937).

⁸ 20 Iowa Code Anno. (1949) §390.7; Ky. Rev. Stat. (1949) §94.740; La. Stats. Anno. (Dart 1949 Supp.) §5220.5; Mo. Rev. Stat. §8395 (as amended 1943); North Carolina Stats. (1943) §160-200, subs. 31; N.H. Laws, 1947, c. 74; 62A McKinney, *Laws of N.Y.* §54 (as amended 1940). In Rhode Island the practice is to authorize parking meters for particular cities. Rhode Island Laws, 1947, chapters 1830, 1889, 1904.

⁹ Initiative measure, Laws 1948, c. 357, approved at election of June 29, 1948. Held constitutional in *City of Fargo v. Sathre*, ___ N.D. ___, 36 N.W. (2d) 39 (1949).

¹⁰ *State ex rel Dryer v. Brekke*, 75 N.D. 468, 28 N.W. (2d) 598 (1947).

¹¹ Cases cited *supra* note 3.

¹² *City of Shreveport v. Brister*, 194 La. 615, 194 So. 566 (1939). The statute restricted municipal power to levy taxes or licenses under the police power to those activities taxed by the state.

¹³ “. . . the meter charge is, in reality, an excise tax for the privilege of using the parking space and, hence, a revenue measure.” *Rhodes v. Raleigh*, 217 N.C. 627, 9 S.E. (2d) 389, 392 (1940). See 2 Cooley, *Taxation* (4th ed. 1924) §507 on strict construction of the power to tax.

¹⁴ “The ordinance must stand if a regulation and fall if a tax.” *Hendrick's v. City of Minneapolis*, 207 Minn. 151, 154, 290 N.W. 428 (1940). See also *Cassidy v. City of Waterbury*, 130 Conn. 237, 33 A. (2d) 142 (1943); *Wilhoit v. City of Springfield*, 237 Mo. App. 775, 171 S.W. (2d) 95 (1943).

Regulation or Revenue

The main point of argument in the cases has been whether parking meter ordinances are in fact primarily police regulations or revenue measures. Actually parking meters have appealed to municipalities both as a means of regulating and increasing the fluidity of automobile traffic in congested areas and as a substantial source of revenue.¹⁵ The majority of the courts considering the problem have probably been influenced by a desire to uphold the measures on policy grounds and have emphasized the regulatory aspects. It is often stated that a recitation in the ordinance that the municipality is exercising its police power, although not conclusive, is entitled to great weight, and the burden is on the party challenging the ordinance to prove that it is primarily a revenue measure.¹⁶

According to the regulatory view, the public has a primary right to free travel on the streets, but this does not carry with it the right to store a vehicle on the street.¹⁷ Parking is not an incident to travel; it is a privilege granted by the municipality and subject to reasonable police regulation.¹⁸ The parking meter is considered a reasonable means of accomplishing a permitted end, parking regulation, and the meter charge is merely an incidental license fee sufficient to cover the expense of maintaining the regulation.¹⁹

As a revenue measure, the meter charge becomes a tax for the use of the streets, subject to attack on the basis of lack of municipal power to levy the particular tax and the constitutional requirement that all members of the same class be taxed alike.²⁰ Furthermore, although the rights and privileges of the public and of abutting land owners yield to reasonable police regulation, it does not necessarily follow that the exercise of those rights and privileges is subject to taxation. Whether such an exercise of the taxing power is valid, assuming authority

¹⁵ In *City of Fargo v. Sathre*, ___ N.D. ___, 36 N.W. (2d) 39, 50 (1949), upholding the constitutionality of a disabling measure, *supra* note 12, the court stated: "Though the [parking meter] ordinance purports to be a purely regulatory measure it requires no legal Sherlock Holmes to penetrate the disguise and discern that it is also a revenue producing measure." See also *Harper v. City of Wichita Falls*, 105 S.W. (2d) 743 (Tex. Civ. App. 1937).

¹⁶ *Hendricks v. City of Minneapolis*, 207 Minn. 151, 290 N.W. 428 (1940); *Laubach & Sons v. City of Easton*, 347 Pa. 542, 32 A. (2d) 881 (1943). The general rule is that the court will not look behind the ordinance and inquire into motives in the absence of fraud, corruption, oppression or gross abuse. 2 *McQuillin*, *Municipal Corporations* (3d ed. 1949) §§10.35, 10.37.

¹⁷ *Harper v. City of Wichita Falls*, 105 S.W. (2d) 743 (Tex. Civ. App. 1937); *Owens v. Owens*, 193 S.C. 260, 8 S.E. (2d) 339 (1940).

¹⁸ *Andrews v. City of Marion*, 221 Ind. 422, 47 N.E. (2d) 968 (1943); *Glodt v. City of Missoula*, ___ Mont. ___, 190 P. (2d) 545 (1948). It is difficult to understand why courts subjugate the individual's entire interest by referring to parking on the streets as a privilege. If parking is truly only a privilege there would seem to be no reason why parking regulations must be reasonable and logical extension of the idea is not satisfying. Perhaps it has not been realized that if parking on the street is regarded as an incident of travel and a right it would still be subject to reasonable regulation for the public good.

¹⁹ Cases cited *supra* notes 17 and 18.

²⁰ The fourteenth amendment to the United States Constitution provides that no state shall deny "... to any person within its jurisdiction the equal protection of the laws." This has been interpreted to mean that a tax classification must not be arbitrary and the tax must not discriminate between persons or property in the same class. *Kansas City So. Ry. v. Road Improvement District No. 6*, 256 U.S. 658 (1921). See generally 1 *Cooley*, *Taxation* (4th ed. 1924) §§330-350.

to tax would depend on the scope of due process²¹ and whether automobiles parked in a business area represent a reasonable classification justifying discrimination against that group as compared to automobile owners generally. While it has been suggested that approval under the police power of a license tax limited to such a class implies that it meets these constitutional requirements,²² such a conclusion is very tenuous at best.²³

The advantage of justifying parking meter installation under a revenue theory is that it releases the municipality from the various restrictions on the amount of the meter charges and use of the revenue obtained which are imposed under the police regulation approach. However, due to the liberal attitude of the courts in their interpretation of expenses of maintaining the regulation, to be discussed, together with the political implications,²⁴ the revenue theory will probably not be pressed upon the courts. No city has tried to date and the ordinance usually recites that it is passed to regulate parking.²⁵

Judicial Limitations

Inasmuch as parking meter ordinances are regarded as police regulations, with the meter charge as merely an incidental fee, they are subject to the appurtenant limitation of reasonableness.²⁶ Although the allowable area of municipal use of parking meters has not been established with exactness, certain general restrictions are apparent from the decisions. The principal limitations are: (1) receipts must be used to further some aspect of traffic control; (2) the meter charge must be reasonable; (3) the parking meter zone selected must bear a legitimate relation to traffic control; and, (4) the ordinance must, expressly or impliedly, exclude stops for actual loading or unloading of vehicles.

The accepted doctrine that the power to regulate implies a power to charge a fee sufficient to meet the expense of maintaining the regulation²⁷ has been broadly applied to parking meter ordinances. The receipts may be used to install, maintain, and police the parking meters,²⁸ and it has been held that expenditures for street cleaning, general traffic control, and street construction within the municipality

²¹ Due process of law is constantly raised in tax cases and rarely discussed except where notice and hearing are involved. 1 Cooley, *Taxation* (4th ed. 1924) 331. However, "due process" is readily available if the court wants to use it. See *City of Birmingham v. Hood McPherson Realty Co.*, 233 Ala. 352, 172 So. 114 (1937).

²² Comment (1938) 4 Ohio St. L.J. 198.

²³ The argument is based on the statement in 4 Cooley, *Taxation* (4th ed. 1924) §1685 that the same rules as to classification apply to license taxes under the police power as to regular taxes. The statement is not supported by citations and the courts have not discussed the subject in parking meter cases.

²⁴ As a public relations matter many motorists probably resent the present nickel parking meters. Their attitude would not be improved by admitting that parking meters are primarily revenue devices.

²⁵ *Andrews v. City of Marion*, 221 Ind. 422, 47 N.E. (2d) 968 (1943).

²⁶ An ordinance may be valid as to its general purposes but unreasonable in a particular application. 5 McQuillin, *Municipal Corporations* (3d ed. 1949) 395 and cases cited.

²⁷ *Salt Lake City v. Bennion Gas & Oil Co.*, 80 Utah 530, 15 P. (2d) 648 (1932).

²⁸ *City of Louisville v. Louisville Automobile Club*, 290 Ky. 241, 160 S.W. (2d) 663 (1942); *Owens v. Owens*, 193 S.C. 260, 8 S.E. (2d) 339 (1940).

are permissible.²⁹ In a recent case the city's contention that it should be able to charge off against parking meter funds part of the expense of maintaining the various departments of city government including depreciation on city buildings was upheld under an ordinance specifying income was to be used for general traffic regulation.³⁰ Generally, however, the courts have said that expenditures unrelated to some aspect of traffic control would not be sanctioned.³¹

Theoretically there is a limit to the meter charge which may be exacted; it must be reasonably related to the cost of the automobile and thing to be accomplished.³² As no case has come before the appellate courts involving a charge of more than five cents for one hour of parking, it is not settled whether a greater charge is permissible, but the determination by the municipality of a proper fee is entitled to a presumption of reasonableness.³³ The most substantial danger, from a municipal point of view, is that overall receipts will be so great that the ordinance will be deemed a revenue measure and not a parking regulation.³⁴ However, receipts of \$1,145,305.81 over a six year period with a parking meter purchase and maintenance expense of \$221,810.73 have been approved where the surplus was spent or earmarked for general traffic control.³⁵

In addition, a parking regulation must bear a reasonable relation to the evil which is to be corrected.³⁶ By the weight of authority parking meter zones in business areas of a municipality are reasonable because of the recognized lack of downtown parking space and need for rapid turnover in the available street parking facilities.³⁷ The relationship to traffic control becomes obscured in less congested areas and several courts have indicated placement of parking meters in more outlying areas would be unreasonable.³⁸ Probably the high cost of meters will act as a self deterring force to prevent any such action on the part of municipal authorities.

The fourth limitation arises from the doctrine that a property owner fronting on a public street has a right to reasonable ingress and egress to his property and, as a member of the public, has the right to load or unload a vehicle as a necessary incident to the right

29 Hickey v. Riley, 177 Ore. 321, 162 P. (2d) 371 (1945); Opinion of the Justices, 94 N.H. 501, 51 A. (2d) 836 (1947).

30 De Aryan v. City of San Diego, 75 Cal. App. (2d) 292, 170 P. (2d) 482 (1946).

31 Cases cited *supra* note 29.

32 Fosters' Inc. v. Boise City, 63 Idaho 201, 118 P. (2d) 721 (1941); Hickey v. Riley, 177 Ore. 321, 162 P. (2d) 371 (1945).

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

34 Wilhoit v. City of Springfield, 237 Mo. App. 775, 171 S.W. (2d) 95 (1943). The amount of the license fee is evidence whether the measure is in reality a regulatory or a revenue measure, 4 Cooley, Taxation (4th ed. 1924) §1786. The argument is made in virtually all of the parking meter cases.

35 Hickey v. Riley, 177 Ore. 321, 162 P. (2d) 371 (1945).

36 Haggenjos v. Chicago, 336 Ill. 573, 168 N.E. 661 (1929); Pugh v. City of Des Moines, 176 Iowa 593, 156 N.W. 892 (1916).

37 Andrews v. City of Marion, 221 Ind. 422, 47 N.E. (2d) 968 (1943); Kimmel v. City of Spokane, 7 Wash. (2d) 372, 109 P. (2d) 1069 (1941). The court took judicial notice of parking conditions in Harper v. City of Wichita Falls, 105 S.W. (2d) 743 (Tex. Civ. App. 1937).

38 State v. McCarthy, 126 Fla. 433, 440, 171 So. 314 (1936); Webster County Court v. Roman, 121 W. Va. 381, 387, 3 S.E. (2d) 631, 634 (1939) (concurring opinion).