Michigan Law Review

Volume 32 | Issue 4

1934

MUNICIPAL CORPORATIONS - POWER TO LICENSE - DISCRETIONARY POWER IN ADMINISTRATIVE OFFICERS

MUNICIPAL CORPORATIONS — POWER TO LICENSE — DISCRETIONARY POWER IN ADMINISTRATIVE OFFICERS — The City Council of Philadelphia enacted an ordinance requiring as many officers or firemen as the Director of Public Safety should deem necessary to be present at all athletic contests for profit, and further provided that the officers or firemen so stationed should be compensated at the rate of $5.50 per day by those persons requiring or demanding such service. The plaintiff brought this suit in equity to declare invalid and restrain the enforcement of the ordinance. The lower court held that the ordinance was invalid, but the supreme court reversed this decision and *held* that this was a valid exercise of the municipal police power to license those businesses requiring

special service. The court further pointed out that the classification made by the ordinance was in no manner unconstitutional, and indicated that there was no delegation of legislative power to an administrative official since the pay for each officer was fixed by the ordinance. *American Baseball Club of Philadelphia (Philadelphia National League Baseball Club, Intervener) v. City of Philadelphia*, (Pa. 1933) 167 Atl. 891.

In the exercise of its police power, a State or municipality may impose a license tax on shows, places of amusement, and places of entertainment, and such a statute or ordinance is valid even though it segregates a separate class if based on reasonable grounds and if it is not discriminatory or unequal in its application within the class it reaches.[1] It is a well settled rule in many jurisdictions that a license fee may be of sufficient amount to include the expense of issuing the license and the cost of police surveillance and inspection.[2] In fact, many cases hold that the distinguishing feature between a license and a tax is that the former should at least approximate the cost of service involved, while the latter is limited only to the quantity of revenue validly required.[3] In view of this distinction, the court in the principal case seems correct in the conclusion that this was an exercise of the municipality's power to license, *if we accept their finding that a special service was actually rendered*, a point which the dissenting justice vehemently denies.[4] A decided majority of courts hold that the constitutional provi-

[1] Charity Hospital v. De Bar, 11 La. Ann. 385 (1856) (theatres); Mahanoy City Borough v. Hersker, 40 Pa. Super. Ct. 50 (1909) (theatrical exhibitions); Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417 (1912) (motion picture shows); Curdts v. South Carolina Tax Commission, 131 S. C. 362, 127 S. E. 438 (1925), aff'd 273 U. S. 669, 47 Sup. Ct. 471, 71 L. ed. 831 (1926) (places of amusement); Hale v. State, 217 Ala. 403, 116 So. 369 (1928) (transient vaudeville shows); Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 47 Sup. Ct. 630, 71 L. ed. 1115 (1927) (pool rooms); State v. Loomis, 75 Mont. 88, 242 Pac. 344 (1925) (dance halls); Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882 (1914) (dance halls); Metropolis Theater Co. v. Chicago, 246 Ill. 20, 92 N. E. 597 (1910), aff'd 228 U. S. 61, 33 Sup. Ct. 441, 57 L. ed. 730 (1913) (theatres).

[2] 17 R. C. L. 539 (1917); State v. Anderson, 144 Tenn. 564, 234 S. W. 768 (1921); Standard Chemical etc. Oil Co. v. Troy, 201 Ala. 89, 77 So. 383 (1918); State v. Osborne, 171 Iowa 678, 154 N. W. 294 (1917); Provo City v. Provo Meat & Packing Co., 49 Utah 528, 165 Pac. 477 (1917); State v. Long Branch Commissioners, 42 N. J. L. 364, 36 Am. Rep. 518 (1880); Vansant v. Harlem Stage Co., 59 Md. 330 (1882); Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69 (1890). *Cf.* also 30 L. R. A. 415 n. at 426 (1896); Delaware & Atlantic Tel. & Tel. Company's Petition, 224 Pa. 55, 73 Atl. 175 (1909).

[3] 3 McQUILLIN ON MUNICIPAL CORPORATIONS, 2d ed., 462, 483 (1928); 17 R. C. L. 539 (1917); State v. Osborne, 171 Iowa 678, 154 N. W. 294 (1917); State v. Anderson, 144 Tenn. 564, 234 S. W. 768 (1921); State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1917); Korth v. Portland, 123 Ore. 180, 261 Pac. 895 (1927); Metropolis Theater Co. v. Chicago, 246 Ill. 20, 92 N. E. 597 (1910), aff'd 228 U. S. 61, 33 Sup. Ct. 441, 57 L. ed. 730 (1913).

[4] *Cf.* Chicago v. Weber, 246 Ill. 304 at 310, 92 N. E. 859 at 862 (1910):

"If there is power to charge the expenses of performing that public duty [fire protection] to the owner of a theater there is also power to do the same thing with respect to other owners, and the members of the fire department could be parceled out and stationed in private buildings, so that practically the whole expense of the

sion which imposes equality and uniformity of taxation has no application to an occupation or license fee,[5] although a few cases have indicated that the provision should apply to either a tax or license.[6] As to the question of classification, the courts have permitted the legislative bodies to exercise the greatest amount of discretion as long as the fee imposed is reasonable within the class upon which it falls, and there is no manifestation of arbitrary discrimination.[7] The validity of an ordinance requiring the owners of property to provide or pay compensation for fire, police, or health protection has apparently not been considered very frequently by the courts. When the question has been before them, the issue has been confused by other considerations. Of those cases reaching the courts, the numerical weight of authority seems to be in favor of the validity of these ordinances.[8] But the few cases holding a contrary view are found to be based upon extraneous considerations, not present in the principal case.[9] One doubtful element in this case, as pointed out in the dissenting opinion, seems to be whether the municipality actually rendered any special service, any more than that rendered by the ordinary patrolman assigned to a station where the traffic problem is unusually acute. If we adopt this view of the case, the ordinance is reduced

fire department would be paid by individuals or corporations. If the city has authority to do that it could accomplish the same result with policemen, who are in the direct exercise of the police power, and they might be stationed in every building where disorder or violation of the law might occur, and the expense charged to the owner. That the city cannot perform its duties to the public in that way is manifest."

[5] 17 R. C. L. 483 (1917); In re Kessler, 26 Idaho 764, 146 Pac. 113 (1915); State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1918); State v. Shapiro, 131 Md. 168, 101 Atl. 703 (1918); Ind. State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540, 75 L. ed. 1248 (1931); State v. Mirabal, 33 N. M. 553, 273 Pac. 928 (1928). *Cf.* also 17 L. R. A. (N. S.) 898 n. (1909); 30 L. R. A. 415 n. at 417 (1896).

[6] *Cf.* cases in 30 L. R. A. 415 n. at 419 (1896).

[7] 17 R. C. L. 508 (1917); 37 C. J. 169-170 (1925); In re Gross Production Tax of Wolverine Oil Co., 53 Okla. 24, 154 Pac. 362 (1916); State v. Shapiro, 131 Md. 168, 101 Atl. 703 (1918); Rast v. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, 60 L. ed. 679 (1916); Armour & Co. v. Virginia, 246 U. S. 1, 38 Sup. Ct. 267, 62 L. ed. 547 (1918); Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U. S. 132, 38 Sup. Ct. 444, 62 L. ed. 1025 (1918). *Cf.* also Ann. Cas. 1917B 631 *et seq.*; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923 (1885); Metropolis Theater Co. v. Chicago, 246 Ill. 20, 92 N. E. 597 (1910), aff'd 228 U. S. 61, 33 Sup. Ct. 441, 57 L. ed. 730 (1913).

[8] Morgan's L. & T. R. Steamship Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. ed. 237 (1886) (quarantine of vessels); Harrison v. Mayor & Council of Baltimore, 1 Gill (Md.) 264 (1843) (quarantine and disinfecting vessels); Nashville, C., & St. L. Ry. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352 (1888) (examination of locomotive engineers); New Orleans v. Hop Lee, 104 La. 601, 29 So. 214 (1901) (laundry inspection); Tannenbaum v. Rehm, 152 Ala. 494, 44 So. 532 (1907) (fire protection); Hartford v. Parsons, 87 Conn. 412, 87 Atl. 736 (1913) (fire protection, dictum).

[9] Waters v. Leech, 3 Ark. 110 (1840) (police protection); Chicago v. Weber, 246 Ill. 304, 92 N. E. 859 (1910) (fire protection); O'Neil v. Providence Amusement Co., 42 R. I. 479, 108 Atl. 887 (1920) (fire protection).

either to a mere sale of the services of the police or to a general but non-uniform taxing ordinance, and in either case it is clearly invalid for obvious reasons.[10] As to the question of the discretionary power conferred upon the Director of Public Safety, it may be said that the validity of the grant of discretionary power to public officials depends largely upon the nature of the business or the thing with respect to which the discretion is to be exercised. It is generally held that if such discretion is granted, the ordinance should establish tests or standards to guide their judgment,[11] the real conflict appearing in the adjudications of a proper and sufficient standard. However, it is recognized by many cases that some discretion must, of necessity, be vested unaccompanied by a specific standard when in the interest of public health, morals, safety and general welfare.[12] The standard established in the ordinance seems to meet the requirements as set forth by the more recent liberal cases,[13] although the older cases in Pennsylvania were rather conservative in this view of the matter.[14] The practical effect of the ordinance in the principal case is that the amount of the fee is left entirely to the discretion of the public official — a practise which has been whole-heartedly condemned by many cases.[15] On the other hand, if the standard as set forth in the ordinance is to be sanctioned, the amount of the fee must vary as an incident to the cost of service involved, otherwise any amount fixed in advance by the city council would be purely arbitrary. Unfortunately, if this type of ordinance is upheld and arbitrary enforcement is leveled solely against certain persons, they can obtain no relief from the courts. Mandamus will not lie since the duty of the Director of Public Safety is discretionary,[16] and it is doubted if they possess any legal right

[10] 17 R. C. L. 543 (1917); 3 McQUILLIN ON MUNICIPAL CORPORATIONS, 2d ed., 483 (1928).

[11] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220 (1886); Ploner v. Standard Oil Co., (C. C. A. 7th, 1922) 284 Fed. 34; Tarpey v. McClure, 190 Cal. 593, 213 Pac. 983 (1923); Chicago v. Mathies, 320 Ill. 352, 151 N. E. 248 (1926); Tulsa v. Thomas, 89 Okla. 188, 214 Pac. 1070 (1923); Klein v. Barry, 182 Wis. 255, 196 N. W. 457 (1923); People ex rel. Lieberman v. Vandecarr, 81 App. Div. 128, 80 N. Y. S. 1108 (1903), aff'd 175 N. Y. 440, 67 N. E. 913 (1903), aff'd 199 U. S. 552, 26 Sup. Ct. 144, 50 L. ed. 305 (1905). *Cf.* also cases in O'Neil v. American Fire Ins. Co., 166 Pa. 72, 30 Atl. 943 (1894).

[12] Consolidated Coal Co. v. Illinois, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. ed. 872 (1902); Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. ed. 128 (1911), affirming (C. C. S. D. N. Y. 1910) 182 Fed. 365; Ex parte Whitley, 144 Cal. 167, 77 Pac. 879 (1904); Leach v. Daugherty, 73 Cal. App. 83, 238 Pac. 160 (1925); People v. Harley, 230 Mich. 676, 203 N. W. 531 (1925); Gorieb v. Fox, 145 Va. 554, 134 S. E. 914 (1926).

[13] *Cf.* cases cited in 12 A. L. R. 1435 (1921) and 54 A. L. R. 1104 n. (1928).

[14] *Cf.* O'Neil v. American Fire Ins. Co., 166 Pa. 72, 30 Atl. 943 (1894) and cases cited therein.

[15] 1 COOLEY ON TAXATION, 4th ed., sec. 78 (1924); 17 R .C. L. 540 (1917); State Center v. Barenstein, 66 Iowa 249, 23 N. W. 652 (1885); Bills v. City of Goshen, 117 Ind. 221, 20 N. E. 115 (1889); Mount Clemens v. Sherbert, 122 Mich. 674, 81 N. W. 926 (1900); Trenton v. Clayton, 50 Mo. App. 535 (1892); State ex rel. Wyatt v. Ashbrook et al., 154 Mo. 375, 55 S. W. 627 (1899); Van Cleve et al. v. Passaic Valley Sewerage Com'rs, 71 N. J. L. 574 at 583, 60 Atl. 214 at 217 (1905).

[16] United States v. District of Columbia, (App. D. C. 1921) 271 Fed. 370; Reese

to compel other athletic contests to be licensed in this manner.[17] Furthermore, an injunction would hardly be available since there is no injury to the plaintiffs inasmuch as they are merely assessed the actual cost involved, which would in no way be reduced by requiring others to maintain a similar police protection.[18]

R. M. C.

v. Board of Mine Examiners, 248 Pa. 617, 94 Atl. 246 (1915); Schlaudecker v. Marshall, 72 Pa. 200 (1872); Deehan v. Johnson, 141 Mass. 23, 6 N. E. 240 (1886).

[17] Constam v. Darby, 95 N. J. L. 318, 112 Atl. 498 (1921); State v. Bonnell, 119 Ind. 494, 21 N. E. 1101 (1889); Harrison v. People, 123 Ill. App. 388 (1905), aff'd 223 Ill. 540, 79 N. E. 164 (1907).

[18] Mutual Electric Light Co. v. Ashworth, 118 Cal. 1, 50 Pac. 10 (1897); Klinesmith v. Harrison, 18 Ill. App. 467 (1886); Soper v. Conly, 108 N. J. Eq. 370, 154 Atl. 852 (1931); Ferguson Coal Co. v. Thompson, 343 Ill. 20, 174 N. E. 896 (1931); Triangle Mint Corporation v. Mulrooney, 257 N. Y. 200, 177 N. E. 420 (1931).