

G. A. CUUNJIENG, PLAINTIFF AND APPELLEE, VS. FRED L. PATSTONE, ENGINEER OF THE CITY OF MANILA, DEFENDANT AND APPELLANT.*G. R. No. 16254. February 21, 1922*

Ponente: OSTRAND, J.

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This is a petition for a writ of mandamus to compel the city engineer of Manila to issue a building permit. There is no dispute as to the facts. The plaintiff desires to erect a warehouse on Azcarraga Street but is denied a building permit until he shall have made provision for the construction of an arcade over the sidewalk in front of the building and until he shall have further complied with section 1 of Ordinance No. 301 of the city of Manila, which reads as follows:

"Whenever the owner, person in charge, or any other person or entity having a right in any property located on the principal streets and avenues of the city of Manila, such as Legarda, R. Hidalgo, Carriedo, Echague, Moriones, Azcarraga, Rizal, Taft, San Miguel, and others which may, by ordinance, hereafter be designated by the Municipal Board, desires to erect or reconstruct a building or any other construction on said property, the same shall pay, once the plan of the work has been approved by the city engineer, one-half of the assessed value of the city land located within the arcades of said building or construction, as a license fee for the use and occupation of said land: Provided, That the construction of arcades on streets having a width of twenty or more meters, not hereinbefore mentioned in this section, shall not be carried out, until after the plan of the work has been approved by the city engineer, and half of the assessed value of the city land located within said arcades has been paid for by the owner, person in charge or any other person or entity having a right in the building which is to be erected or constructed, as a license fee for the use and occupation of said land."

The plaintiff refuses to construct the arcade and to comply with the ordinance in question on the grounds that the arcade is unnecessary and unsuitable for his warehouse and that the city has no power to require its construction; and that the ordinance in exacting the payment of a fee of one-half of the assessed value of the city land covered by the arcade is in excess of the legislative powers of the Municipal Board and, therefore, unconstitutional. It seems, however, to be conceded that under the climatic conditions here existing, arcades are both useful and desirable from the standpoint of public convenience and that the Municipal Board, under its general powers to regulate the construction of buildings and their alignment with the streets, and also under the general welfare of the city charter, has power to provide for the construction of arcades on certain streets. In any event, the question has not been raised by assignment of error and the discussion may, therefore, properly be limited to two points: First, whether the question of the constitutionality of statutes or city ordinances may be raised in mandamus proceedings and second, whether under its charter, the city of Manila may, under the guise of a license fee and as a prerequisite for the issuance of a building permit, exact the payment of one-half of the assessed value of the portion of the side-walk covered by the arcade.

Upon the first point the authorities are not entirely in harmony, but in modern practice it has been generally held that the writ will lie where, as in the present case a question of constitutionality is raised by the petitioner. (See *State ex rel., Fooshe vs. Burley*, 16 L. R. A. [N. S.], 266, with its case note.) The rule is different where the

respondent relies on the unconstitutionality of a statute as a defense in mandamus proceedings. In such cases the courts have generally declined to consider questions of constitutionality. (See State ex rel., New Orleans Canal & Banking Co. vs. Heard, 47 L. R. A., 512, and the case note thereto.) The reason for this is obvious: It might seriously hinder the transaction of public business if ministerial officers were to be permitted in all cases to question the constitutionality of statutes and ordinances imposing duties upon them and which have not judicially been declared unconstitutional. The same reasons do not exist where the validity of the statutes is attacked by the petitioner.

There being no other adequate remedy and there appearing to be no reason in principle why we should not consider the validity of the city ordinance here in question in mandamus proceedings, we are of the opinion, and so hold, that the present action has been properly brought.

The second point above-mentioned merits a more extended consideration. In discussing it we must bear in mind that legislative powers in regard to taxes and licenses are not inherent in municipal corporations but must be granted by statute either expressly or by necessary implication. Like other delegated powers, they are subject to strict construction.

That the city does not possess such an extraordinary power as that of compelling property holders to lease the portions of the public sidewalks which adjoin their lands requires no argument. The charge of one-half of the assessed value imposed on applicants for building permits can, therefore, not be considered as rent, and to be valid must either be a tax or a license fee. The legislative powers of the city in regard to taxes and license fees are enumerated in the following subsections of section 2444 of the Administrative Code, as amended by section 8 of Act No. 2774, and in section 2507 of the Administrative Code:

"SEC. 2444. General powers and duties of the Board.—Except as otherwise provided by law, and subject to the conditions and limitations thereof, the Municipal Board shall have the following legislative powers:

"(a) To provide for the levy and collection of taxes for general and special purposes in accordance with law.

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"(b) To fix the tariff of fees and charges for all services rendered by the city or any of its departments, branches, or officials.

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"(h) To establish fire limits, determine the kinds of buildings or structures that may be erected within said limits, regulate the manner of constructing and repairing the same, and fix the fees for permits for the construction, repair, or demolition of buildings and structures.

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"(j) To regulate the use of lights in stables, shops, and other buildings and places, and to regulate and restrict the issuance of permits for the building of bonfires and the use of firecrackers, fireworks, torpedoes, candles, sky-rockets, and other pyrotechnic displays, and to fix the fees for such permits.

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"(l) To regulate and fix the amount of the license fees for the following: Hawkers, peddlers, hucksters, not including hucksters or peddlers who sell only native vegetables, fruits, or foods, personally carried by the hucksters or peddlers; auctioneers, plumbers, barbers, embalmers, collecting agencies, mercantile agencies, shipping and intelligence offices, private detective agencies, advertising agencies, massagists, tattooers, jugglers, acrobats, hotels, clubs, restaurants, cafes, lodging houses, boarding houses, livery garages, livery

stables, boarding stables, dealers in large cattle, public billiard tables, laundries, cleaning and dyeing establishments, public warehouses, dance halls, cabarets, circus and other similar parades, public vehicles, race tracks, horse races, bowling alleys, shooting, galleries, slot machines, merry-go-rounds, pawnshops, dealers in second-hand merchandise, junk dealers, brewers, distillers, rectifiers, money changers and brokers, public ferries, theaters, theatrical performances, cinematographs, public exhibitions, circuses and all other performances, and places of amusement, and the keeping, preparation, and sale of meat, poultry, fish, game, butter, cheese, lard, vegetables, bread, and other provisions.

"(m) To tax, fix the license fee for, regulate the business, and fix the location of match factories, blacksmith shops, foundries, steam boilers, lumber yards, ship yards, the storage and sale of gunpowder, tar, pitch, resin, coal, oil, gasoline, benzine, turpentine, hemp, cotton, nitroglycerin, petroleum, or any of the products thereof, and of all other highly combustible or explosive materials, and other establishments likely to endanger the public safety or give rise to conflagrations, or explosions, and, subject to the provisions of ordinances issued by the Philippine Health Service in accordance with law, tanneries, renderies, tallow chandleries, bone factories, and soap factories.

"(n) To tax motor and other vehicles and draft animals not paying the public vehicles license fee or any other Insular tax.

"(o) To regulate the method of using steam engines and boilers, other than marine or belonging to the Federal or Insular Governments; to provide for the inspection thereof, and for a reasonable fee for such inspection, and to regulate and fix the fees for the licenses of the engineers engaged in operating the same.

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"(q) To prohibit, or regulate and fix the license fees for, the keeping of dogs, and to authorize their impounding and destruction when running at large contrary to ordinances, and to tax and regulate the keeping or training of fighting cocks.

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"(u) Subject to the provisions of sections nineteen hundred and four and nineteen hundred and five of this Code, to provide for the laying out, construction, and improvement, and to regulate the use, of streets, avenues, alleys, sidewalks, wharves, piers, parks, cemeteries, and other public places; to provide for lighting, cleaning, and sprinkling of streets and public places; to regulate, fix license fees for, and prohibit the use of the same for processions, signs, signposts, awnings, awning posts, the carrying or displaying of banners, placards, advertisements, or hand bills, or the flying of signs, flags, or banners, whether along, across, over, or from buildings along the same; to prohibit the placing, throwing, depositing, or leaving of obstacles of any kind, offal, garbage, refuse, or other offensive matter or matter liable to cause damage, in the streets and other public places, and to provide for the collection and disposition thereof; to provide for the inspection of, fix the license fees for, and regulate the openings in the same for the laying of gas, water, sewer, and other pipes, the building and repair of tunnels, sewers, and drains, and all structures in and under the same, and the erecting of poles and the stringing of wires therein; to provide for and regulate cross-walks, curbs, and gutters therein; to name streets without a name and provide for and regulate the numbering of houses and lots fronting thereon or in the interior of the blocks; to regulate traffic and sales upon the streets and other public places; to provide for the abatement of nuisances in the same and punish the authors or owners thereof; to provide for the construction and maintenance, and regulate the use, of bridges, viaducts, and culverts; to prohibit and regulate ball playing, kite flying, hoop rolling, and other amusements which may annoy persons using the streets and public places, or frighten horses or other animals; to regulate the speed of horses and other animals, motor and other vehicles, cars, and locomotives within the limits of the city; to regulate the lights used on all such vehicles, cars, and locomotives; to regulate the locating, constructing and laying of the track of horse, electric, and other forms of railroad in the streets or other public places of the city authorized by law; to provide for and change the location, grade, and crossings of railroads, and to compel any such railroad to raise or lower its tracks to

conform to such provisions or changes; and to require railroad companies to fence their property, or any part thereof, to provide suitable protection against injury to persons or property, and to construct and repair ditches, drains, sewers, and culverts along and under their tracks, so that the natural drainage of the streets and adjacent property shall not be obstructed.

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"(w) To fix the charges to be paid by all water craft landing at or using public wharves, docks, levees, or landing places: Provided, That the provisions of this subsection shall not apply to the public wharves, docks, levees, or landing places constructed within the breakwater, on the banks of the canal connecting the Pasig River with the inner basin, and on both sides of said river below the Jones Bridge.

* * * * *

"(z) Subject to the provisions of ordinances issued by the Philippine Health Service in accordance with law, to provide for the establishment and maintenance and fix the fees for the use of, and regulate public stables, laundries, and baths, and public markets and slaughterhouses, and prohibit the establishment or operation within the city limits of public markets and slaughterhouses by any person, entity, association, or corporation other than the city.

"(aa) To regulate, inspect, and provide measures preventing any discrimination or the exclusion of any race or races in or from any institution, establishment, or service open to the public within the city limits, or in the sale and supply of gas or electricity, or in the telephone and street-railway service; to fix and regulate charges therefor where the same have not been fixed by Act of Congress or of the Philippine Legislature; to regulate and provide for the inspection of all gas, electric, telephone, and street- railway conduits, mains, meters, and other apparatus, and provide for the condemnation, substitution or removal of the same when defective or dangerous.

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"(ee) To enact all ordinances it may deem necessary and proper for the sanitation and safety, the furtherance of the prosperity, and the promotion of the morality, peace, good order, comfort, convenience, and general welfare of the city and its inhabitants, and such others as may be necessary to carry into effect and discharge the powers and duties conferred by this chapter; and to fix penalties for the violation of ordinances which shall not exceed a two hundred peso fine or six months' imprisonment, or both such fine and imprisonment, for a single offense."

"SEC. 2507. Power to levy special assessments for certain purposes.—The Municipal Board may, by ordinance duly approved, provide for the levying and collection, by special assessments of the real estate comprised within the district or section of the city especially benefited, of a part not to exceed sixty per centum of the cost of laying out, opening, constructing, straightening, widening, extending, grading, paving, curbing, walling, deepening, or otherwise establishing, repairing, enlarging, or improving public avenues, roads, streets, alleys, sidewalks, parks, plazas, bridges, landing places, wharves, piers, docks, levees, reservoirs, waterworks, water mains, water courses, esteros, canals, drains, and sewers, including the cost of acquiring the necessary land. Within the meaning of this article, all real estate comprised within the district benefited, except lands or buildings owned by the United States of America, the Government of the Philippine Islands, or the city of Manila, shall be subject to the payment of the special assessment, based upon the valuation of such real estate as shown by the books of the city assessor and collector, or its present value as fixed by said officer in the first instance if the property does not appear of record in his books according to the valuation whereof the special tax has to be made, computed, and assessed."

Conceivably, there may be other instances where the police power to regulate carries with it impliedly the power to prescribe fees, but they have no relation to the issues here involved.

Examining the provisions quoted, it is clear that the only one which can possibly be applied to the present case is subsection (h) of section 2444 authorizing the fixing of fees for building permits and that if the charge in question possesses any validity whatever it must be as a license fee under that subsection.

The allowable amount of a license fee or tax depends so much on the special circumstances of each particular case that it is difficult to harmonize the numerous decisions on the subject and to formulate definite rules; but, generally speaking, the adjudications appear to recognize three classes of licenses, each with its distinct characteristic, which have been taken into consideration in determining the reasonableness of the license fee: First, licenses for the regulation of useful occupations or enterprises; secondly, licenses for the Regulation or restriction of non-useful occupations or enterprises, and thirdly, licenses for revenue only.

(1) The first two of these classes is based on the exercise of the police power and, though there is some conflict of authority on this point, the better rule seems to be that the conferred power to regulate and to issue such licenses carries with it the right to fix a license fee. It is well settled that in the absence of special authority to impose a tax for revenue the fee for this class of licenses may only be of a sufficient amount to include the expense of issuing the license and the cost of the necessary inspection or police surveillance, taking into account not only the expense of direct regulation but also incidental consequences.

Cooley on Constitutional Limitations, 6th ed., at page 242, says:

"A right to license an employment does not imply a right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of officers and other expenses thereby imposed. (Davis vs. Petrinovich, 112 Ala., 654; 21 So., 344; 36 L. R. A., 615; Ft. Smith vs. Hunt, 72 Ark., 556; 82 S. W., 163; 105 A. S. R., 51; 66 L. R. A., 238; Waters-Pierce Oil Co. vs. Hot Springs, 85 Ark., 509; 109 S. W., 293; 16 L. R. A. [N. S.], 1035; Ex parte Dickey, 144 Cal., 234; 77 Pac, 924; 103 A. S. R., 82; 1 Ann. Cas., 428 and note; 66 L. R. A., 928; Morton vs. Macon, 111 Ga., 162; 36 S. E., 627; 50 L. R. A., 485; State vs. Ashbrook, 154 Mo., 375; 55 S. W., 627; 77 A. S. R., 765; 48 L. R. A., 265; St. Louis vs. Grafeman Dairy Co., 190 Mo., 492; 89 S. W., 617; 1 L. R. A. [N. S.], 936; Johnson vs. Great Falls, 38 Mont, 369; 99 Pac, 1059; 16 Ann. Cas., 974; Rosenbloom vs. State, 64 Neb., 342; 89 N. W., 1053; 57 L. R. A., 922; State vs. Boyd, 63 Neb., 829; 89 N. W., 417; 58 L. R. A., 108; Hughes vs. Snell, 28 Okla., 828; 115 Pac, 1105, Ann. Cas. [1912D] 374; 34 L. R. A. [N. S.], 1133; Ellis vs. Frazier, 38 Ore., 462; 63 Pac., 642; 53 L. R. A. 454; Laurens vs. Anderson, 75 S. C, 62; 55 S. E., 136; 117 A. S. R., 885; 9 Ann. Cas., 1003; Seattle vs. Dencker, 58 Wash., 501; 108 Pac, 1086; 137 A. S. R., 1076; 28 L. R. A. [N. S.], 446.)"

(2) Licenses for non-useful occupations are also incidental to the police power and the right to exact a fee may be implied from the power to license and regulate, but in fixing the amount of the license fees the municipal corporations are allowed a much wider discretion in this class of cases than in the former, and aside from applying the well-known legal principle that municipal ordinances must not be unreasonable, oppressive, or tyrannical, courts have, as a general rule, declined to interfere with such discretion. The desirability of imposing restraint upon the number of persons who might otherwise engage in non-useful enterprises is, of course, generally an important factor in the determination of the amount of this kind of license fee. Hence license fees clearly in the nature of privilege taxes for revenue have frequently been upheld, especially in cases of licenses for the sale of liquors. In fact, in the latter cases the fees have rarely been declared unreasonable. (Swarth vs. People, 109 Ill., 621; Dennehy vs. City of Chicago, 120 Ill., 627; 12 N. E., 227; United States Distilling Co. vs. City of Chicago, 112 Ill., 19; Drew County vs. Bennett, 43 Ark., 364; Merced County vs. Fleming, 111 Cal., 46; 43 Pac, 392; Williams vs. City Council of West Point, 68 Ga., 816; Cheny vs. Shellbyville, 19 Ind., 84; Wiley vs. Owens, 39 Ind., 429; Sweet vs. City of Wabash, 41 Ind., 7; Jones vs. Grady, 25 La. Ann., 586; Goldsmith vs. City of New Orleans, 31 La. Ann., 646; People ex rel., Cramer vs. Medberry, 39 N. Y. S., 207; 17 Misc. Rep., 8; McGuigan vs.

Town of Belmont, 89 Wis., 637; 62 N. W., 421; Ex parte Burnett, 30 Ala., 461; Craig vs. Burnett, 32 Ala., 728, and Muhlenbrinck vs. Long Branch Commissioners, 42 N. J. L., 364; 36 Am. Rep., 518.)

(3) The fee in the third class of cases, those for revenue purposes, is, perhaps, not a license fee properly speaking but is generally so termed. It rests upon the taxing power as distinguished from the police power, and the power of the municipality to exact such fees must be expressly granted by charter or statute and is not to be implied from the conferred power to license and regulate merely. Judge Cooley, citing numerous authorities, says:

"A license is issued under the police power; but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation; and the charter must plainly show an intent to confer that power, or the municipal corporation cannot assume it." (Cooley, Constitutional Limitations, 6th ed., pp. 242-243. See also Mayor vs. Beasly, 34 Am. Dec, 646, and Kip vs. City of Paterson, 26 N. J. L., 298.)

License taxes for revenue on useful occupations fall within this class.

When the power to license for revenue has been clearly granted, the rule as to the amount of the tax or fee laid down in *Fire Department vs. Stanton* (159 N. Y., 225), is applicable the municipality as much as to the state:

"The legislature of the state is not without power to impose a tax on a business in the form of a license fee, when it deems such to be warranted by considerations of public interest and for the general welfare, and the only limitation upon its exercise of power, in that respect, is that there shall be no discrimination or oppression, and that the burden shall be equally charged upon all persons in similar circumstances."

Applying the legal principles above stated to the case at bar, we are constrained to hold that in imposing a fee equal to one-half of the assessed value of the portion of the sidewalk covered by the arcade in question, the Municipal Board of the city of Manila exceeded its powers. The construction of buildings is a useful enterprise and the amount of the license fee should therefore be limited to the cost of licensing, regulating, and surveillance. It appears that without the arcade the normal fee for the building permit would have been about P31, with the arcade the fee exacted is P525.60. It does not appear that the cost of licensing, regulating, and surveillance would be materially increased through the construction of the arcade, and it is therefore clear that the excess fee is imposed for the purpose of revenue.

There is nothing in the charter of the city of Manila indicating an intention on the part of the Legislature to confer power on the Municipal Board to impose a license tax for revenue on the construction of buildings. The power conferred in relation to such construction is considered merely as police power from which, as we have seen, taxing power is not inferred. Under the circumstances, to hold the fee in this case valid would amount to judicial legislation, particularly undesirable in the present instance where the Legislature, upon its attention being called to the matter, would no doubt willingly grant as much power as could wisely be placed in the hands of the municipality.

The judgment of the Court of First Instance holding that the city of Manila has the power to require the construction of arcades in certain circumstances but that the license fee prescribed by city Ordinance No. 301 is illegal, is therefore hereby affirmed. No costs will be allowed. So ordered.

Street, Avanceña, Johns, and Romualdez, JJ., concur.

Araullo, C. J., did not take part.

DISSENTING

MALCOLM, J., with whom concurs VILLAMOR, J.,

It is to be regretted that the court has not seen fit to follow in the same road which was so well cleared of encumbering rubbish in the pioneer decision of this court known as the Billboard Case (Churchill and Tait vs. Rafferty [1915], 32 Phil., 580), and to resolve such doubt as exists in favor of the validity of Ordinance No. 301 of the city of Manila.

The question in which I am interested in this case is as above indicated, and relates to the determination of whether or not Ordinance No. 301 of the city of Manila is valid. For purposes of reference, and without burdening this dissent with the facts and the provisions of law which appear in the majority decision, I copy this ordinance, reading as follows:

"Whenever the owner, person in charge, or any other person or entity having a right in any property located on the principal streets and avenues of the city of Manila, such as Legarda, R. Hidalgo, Carriedo, Echague, Moriones, Azcarraga, Rizal, Taft, San Miguel, and others which may, by ordinance, hereafter be designated by the Municipal Board, desires to erect or reconstruct a building or any other construction on said property, the same shall pay, once the plan of the work has been approved by the city engineer, one-half of the assessed value of the city land located within the arcades of said building or construction, as a license fee for the use and occupation of said land: Provided, That the construction of arcades on streets having a width of twenty or more meters, not hereinbefore mentioned in this section, shall not be carried out, until after the plan of the work has been approved by the city engineer, and half of the assessed value of the city land located within said arcades has been paid for by the owner, person in charge or any other person or entity having a right in the building which is to be erected or constructed, as a license fee for the use and occupation of said land."

No one would seriously contend that the construction of arcades in the city of Manila is not for the public good. Under the conditions as they actually exist in the metropolis, the congestion on the narrow public streets is relieved and the health of pedestrians is protected, by walking beneath covered ways. The beautification of the city is effected by requiring the construction of uniform projections beyond the first stories above the public streets. One has only to walk down Rizal Avenue in this city to realize the great benefit derived from arcades. To assist the municipal authorities in making of Manila a better and more beautiful city, should consequently be our purpose.

It must be frankly admitted that in its effort to accomplish a good purpose, the Municipal Board has complicated matters by making use of a nearly impossible procedure. It is, however, not for the courts to condemn legislative action, but rather to look behind the verbiage to the intent, and then to enforce this intent. Awkward as are the expressions used in the ordinance, yet, having in mind the apparent purpose, which is to advance the public welfare, it should not be so difficult as the majority decision would make it appear, to validate the ordinance.

Where, in my opinion, the majority decision makes a mistake is in dismissing the real issue of the case with this observation: "That the city does not possess such an extraordinary power as that of compelling property holders to lease the portions of the public sidewalks which adjoin their lands requires no argument." If the proposition so disdainfully dismissed were modified slightly, I would unhesitatingly advocate the affirmative. In other words, conceded that the construction of arcades over portions of the public streets is for the public good, the question in reality reduces itself to one of the power of the city authorities to require the adjoining property owner who desires to build, to pay a portion of the expenses of constructing the arcade in front of his property.

It is common knowledge that abutting owners cannot ordinarily erect and maintain permanent structures

encroaching on the street, such as awnings, bay windows, stairways, porches, and arcades, without municipal permission which is in effect a license. Ordinances authorizing or regulating or prohibiting such structures have been held valid.

It is also common knowledge that under varying procedure contiguous property owners have been compelled to bear the expense of paving the street in front of their lots, in the construction of sidewalks along the line of their property, and otherwise to pay large sums of money, which to an extent benefit the property of the owner, but which to a greater extent benefit the public. That in this instance the city has denominated the method by which the property owners are to be relieved of a sum equal to one-half of the assessed value of the city land located within the arcades as a license fee for the use and occupation of the land, does not change the nature of the case.

It is true both under the civil law and the common law, that public property such as streets are held in trust for the use of the public and, on principle, that such trust property cannot be disposed of by the municipality. On the other hand, it would be preposterous to suppose that a municipality could not require the payment of money in the nature of rental for the use of public streets by benefited property owners.

In conclusion, attention is earnestly invited to a decision of the United States Supreme Court (*City of St. Louis vs. Western Union Telegraph Co.* [1892], 148 U. S., 92), which seems to the writer of this opinion to be conclusive. If, as against the authority of the decision of the higher court it be argued that the ordinance therein in question related to a public service corporation, let the answer be that no difference can be seen in the requirement of an ordinance that a public service corporation shall pay the city for the use of the street and that an abutting owner shall pay the city for such use.

In the cited case it appears that on February 25, 1881, the City of Saint Louis passed an ordinance known as Ordinance No. 11604, authorizing any telegraph or telephone company duly incorporated according to law, doing business or desiring to do business in the City of Saint Louis, to set its poles and other fixtures along and across any of the public streets of the city, subject to certain prescribed regulations. On March 22, 1884, another ordinance, known as Ordinance No. 12733, was passed. This ordinance amended Ordinance No. 11604 by providing that thereafter all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes, shall pay to the City of Saint Louis for the privilege of using the streets, the sum of 5 dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets in said city. The ordinance was incorporated into the Revised Ordinances of the City of Saint Louis as section 671.

The Western Union Telegraph Co., one of the companies designated in section 671, having failed to pay the sum of 5 dollars per annum for each telegraph pole, a suit was instituted to recover from the telegraph company the sum of \$22,635. The company denied the validity of the ordinance and the authority of the city to pass it. The case was tried by the Federal Court and a judgment was entered in favor of the defendant. On appeal to the United States Supreme Court, this judgment was reversed in a decision delivered by Mr. Justice Brewer, with Mr. Justice Brown dissenting. Pertinent portions of the majority decision are as follows:

"And, first, with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed' for the privilege of using the streets, alleys, and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city-that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.' (*Philadelphia & R. R. Co. vs. Pennsylvania* [State Freight Tax Case] 82 U. S.,-; 15 Wall., 232, 278.) If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals,

and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the City of St. Louis should find its city hall too small for its purposes, or too far removed from the center of business, and should purchase or build another more satisfactory in this respect; it would not thereafter be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinance are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge, or make that a tax which would otherwise be a matter of rental. Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. While we think that the Circuit Court erred in its conclusions as to the character of this charge, it does not follow therefrom that the judgment should be reversed, and a judgment entered in favor of the city. Other questions are presented which compel examination.

"Has the city a right to charge this defendant for the use of its streets and public places? And here, first, it may be well to consider the nature of the use which is made by the defendant of the streets, and the general power of the public to exact compensation for the use of streets and roads. The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. This use is common to all members of the public, and it is a use open equally to citizens of other States with those of the State in which the street is situate. But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects, its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages.

"We do not mean to be understood as questioning the right of municipalities to permit such occupation of the streets by telegraph and telephone companies, nor is there involved here the question whether such use is a new servitude or burden placed upon the easement, entitling the adjacent lot owners to additional compensation. All that we desire or need to notice is the fact that this use is an absolute, permanent and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of

the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental. We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the City of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto."

Ordinance No. 301 of the city of Manila should be held to be valid and the judgment should be reversed.

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