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THE POWER OF MUNICIPAL CORPORATIONS IN MISSOURI TO LICENSE, TAX AND REGULATE TELEPHONE COMPANIES.

I.

The Constitution of Missouri (1875, Article X, Section 1) authorizes the General Assembly to delegate the taxing power to municipal corporations, to be exercised for corporate purposes. That section is as follows:

"The taxing power may be exercised by the General Assembly for State purposes, and by counties and other *municipal corporations,* under authority granted to them by the General Assembly, for county and other corporate purposes."

Pursuant to that authority the General Assembly has, by various acts, granted authority to all cities in Missouri to license, tax and regulate telephone companies.

Cities of the First Class have been invested with that power by section 7674, R. S. Mo. 1919 (8588, R. S. 1909), which provides:

"The mayor and common council shall have the power within the city, by ordinance, not inconsistent with the Constitution or any law of this state or of this article: . . . . XVI. To license and tax telegraph companies, telephone companies, electric light companies, street railway companies, gas companies, conduit companies, subway companies, heating companies, cold storage and refrigeration companies and power companies. . . .

"XVII. To license, tax and regulate telegraph companies, ... poles and wires or conduits and wires of telegraph, telephone, electric light, street railway and electric and power companies; . . . . and to fix the license tax to be paid thereon or therefor; and in the exercise of the foregoing powers, to divide the various occupations, professions, trades, pursuits, corporations and other institutions and establishments, articles, utilities and commodities into different classes; and to impose a separate license tax for each place of business conducted or maintained by the same person, firm or corporation."

Cities of the Second Class are given the power, in section 7975, R. S. Mo. 1919 (Laws Mo. 1917, p. 357), by ordinance, ... "XVII. To license and tax telegraph companies, telephone companies, electric companies, ... and utilities of whatsoever name or character, like and unlike.

"XVIII. To license, tax and regulate . . . . poles and wires, or conduits and wires, of telegraph, telephone, . . . and power companies. . . . . and all . . . . corporations . . . . not heretofore enumerated. . . . The city may charge a separate license tax for each place of business conducted or maintained by the same person, firm or corporation."

Cities of the Third Class. As to these, section 8322, R. S. Mo. 1919 (Laws Mo. 1917, §9253, page 373) provides that "the council shall have power and authority to levy and collect a license tax on . . . . telephone companies. . . ."

For *Cities of the Fourth Class,* section 8497, R. S. Mo. 1919 (§9399 R. S. 1909) provides that "the mayor and board of aldermen shall have power and authority to regulate and to license, and to levy and collect a license tax on . . . . telegraph companies, telephone companies. . . ."

The towns and villages in Missouri have not thus far been given power to license, tax or regulate telephone utilities or other classes of business.

City of St. Louis. The constitution of 1875 authorized the City of St. Louis to adopt, by vote of the electors, its own charter, the provisions thereof to be in harmony with and subject to the State Constitution and the laws of the State, but reserving to the General Assembly the same power over the City of St. Louis that it has over other cities in this State. (Const. Mo., Article IX., sections 20, 23 and 25.)

In pursuance of such authority the City of St. Louis in 1876 adopted a charter which remained in force until August 29, 1914, when the present charter, adopted by the people in June, 1914, took effect. The present charter provides, Article I, section 1, that said City "shall have power . . . . (23) to license and regulate all persons, firms, corporations,

companies, and associations engaged in any business, occupation, calling, profession, or trade.

"(24) To impose a license tax upon any business, vocation, pursuit, calling, animal, or thing. . . ."

And Article XX. thereof provides that "license taxes may be imposed by ordinance upon . . . . telephone companies, telegraph companies; . . . . and a separate license tax may be imposed for each place of business conducted or maintained by the same person, firm or corporation."

In view of the broad grants of power by the General Assembly to municipal corporations to impose license taxes, or to license, tax and regulate public utilities, as above set forth, and the manner in which such municipal corporations have exercised those powers, the question presents itself whether this taxing power, which the Constitution says the General Assembly may thus delegate, has reference only to the ad valorem taxes to be collected by cities for maintenance of the city governments, over and above all other state taxes, or did the framers of the Constitution also intend thereby that the General Assembly might grant municipal corporations the right to license, tax and regulate trades, professions, vocations, etc., not merely for the purpose of police regulation, but for the purpose of raising revenue as well.

At the time the Constitution was adopted it is not believed that in using the words "taxing power," it was ever contemplated that license taxes would be imposed by cities upon various trades and professions. What they did contemplate was that municipalities would have to be supported by some tax and they, therefore, made another provision that cities might collect ad valorem taxes on property over and above such taxes as were imposed by the State.

This was particularly true prior to 1875. The Constitution does provide in Section 22, Article X. for a special road and bridge tax and for the manner of its assessment, but that is a later provision, adopted by amendment in 1908. Section 21, Article X, was adopted in 1875 and provides for

a fee to be paid into the treasury upon organizing a corporation and the fee is to be graduated according to the amount of capital stock.

Another section of the Constitution of 1875, (Art. X, Section 5) provides for taxing railroad corporations in following terms:

"All railroad corporations in this state or doing business therein shall be subject to taxation for state, county, school, municipal, and other purposes, on the real and personal property owned or used by them and on their gross earnings, their net earnings, their franchises, and their capital stock."

With this provision in the Constitution, it is clear that the General Assembly may grant to a municipal corporation the right to tax railroad corporations upon their gross earnings, their net earnings, their franchises, and their capital stock.

Although no provision is contained in the Constitution authorizing the General Assembly to grant to cities the right to use the power of taxation to impose license taxes generally upon various trades, professions and vocations, it must be conceded that the General Assembly has the power without such a provision, because it is well settled that State Constitutions are restrictions of power and the General Assemblies have the power to pass any laws that are not in derogation of provisions of the State constitutions and the Constitution of the United States. In considering the Constitution of the United States the very reverse of this proposition is true as it is a delegation of power, and Congress can only pass such laws as may be expressly authorized or implied from the Constitution.

The only question that might arise is whether a license tax is a tax upon property. The law is well settled that it is a tax upon a privilege connected with property and is not a direct tax upon property. This is so well settled that no decisions are being quoted. Therefore, provisions of the Constitution with reference to ad valorem taxes do not apply when license taxes are in question.

II.

Provisions in the constitution of Missouri with reference to the uniformity of taxation do not apply to license taxes, and the license tax is not a tax upon property but upon privileges connected with property.

Section 3, Article X of the Constitution of Missouri, is as follows:

TAXES FOR PUBLIC PURPOSES MUST BE UNIFORM.

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

In *City of St. Louis v. Green*, 7 Mo. App. 468, the Court said, l. c. 474:

"It is therefore a mistake to suppose that the constitutional provisions in question include every species of taxation. These provisions as to equality and uniformity of taxation apply to property alone, not to taxes on privileges or occupations, or on the exercise of a civil right.

"The substance, not the form of the tax, is to be regarded in ascertaining whether the tax is upon property or upon a privilege connected with property. The tax under consideration is a license tax. The imposition of such a tax may be referred to the taxing power or to the police power of the State,—to either or to both; to the police power alone if the object is merely to regulate, and the amount received merely pays the expense of enforcing the regulations, and to the taxing power alone if its main object is revenue."

That case was affirmed by the Supreme Court in 70 Mo. 562, and the above language fully approved.

In *Glasgow v. Rowse*, 43 Mo. 479, the Court, on page 491, said:

"The Constitution enjoins a uniform rule as to the imposition of taxes on all property, but does not abridge the power of the Legislature to provide for a revenue from other sources. It was intended to make the burdens of government rest on all property alike—to forbid favoritism and prevent inequality. Outside of the constitutional restriction, the Legislature must be the sole judge of the propriety of taxation, and define the sources of revenue as the exigency of the occasion may require. The income tax was uniform and equal as to the classes upon whom it operated; it did not come within the meaning of the term 'property' as used and designated in the Constitution, and I think it was not in conflict with any provision of that instrument."

This was also upheld in *City of St. Louis v. Sternberg,* 69 Mo. 301.

In *Kansas City v. Richardson,* 90 Mo. App. 451, the Court said on pages 456-7:

"The defendant insists that the license tax required by the present ordinance is a tax upon personal property. To this insistence we can not yield our assent, for the reason that we think the law is now well settled, at least as far as we are concerned, that it is a license tax on a privilege connected with property, and not upon the property. *And though imposed for revenue, it is a tax in the nature of a license, because it is a permission to do that which, after the passage of the ordinance, it became unlawful to do without having first obtained the permission.* (St. Louis v. Green, 7 Mo. App. ante; s. c. 70 Mo. ante.) *And since the said license tax is upon a privilege connected with property and not upon property, the argument that the ordinance is violative of section 4, article 10 of the Constitution, is without force.*"

In *St. Louis v. United Railways,* 263 Mo. 387, the Court said in speaking of the mill tax imposed by an ordinance of of the City of St. Louis, at pages 448-9:

"Defendant also contends that the ordinance violates section 3, article 10, Constitution of Missouri, requiring uniformity of taxation. This question was directly before the Supreme Court of the United States in the hearing upon the bill in equity, made so not only by the agreed statement of facts between the parties, but in the allegations of the bill. In passing upon this question the court (p. 279) said: (210 U. S. 279).

" 'In the fixing of a license tax upon all companies alike for the privilege of using cars in the city, it is exerting other charter powers. It makes provision uniformly applicable to all persons or companies using street cars. It is a *revenue measure* equally applicable to all coming within its terms. We do not perceive that the exercise of the power to grant privileges in the streets in making terms with companies seeking such rights, in the absence of plain and unequivocal terms to that effect, excludes the city's right to impose the license tax under the power conferred for that purpose.'

"The United States Supreme Court's language is, without comment, a sufficient answer to the futility of this contention. If it were not, it has been held in St. Louis v. Green, 7 Mo. App. 468, which case has been affirmed as to this point in 70 Mo. 562, that the constitutional provision as to uniformity of taxation does not include license taxes. This doctrine has also been approved in Glasgow v. Rowse, 43 Mo. 489; St. Louis v. Sternberg, 69 Mo. 302. These cases hold that the purpose of the constitutional provision claimed by defendant to be violated by this ordinance, was to prevent discrimination between objects belonging to the same class; that this organic provision was not intended to include every species of taxation, and that it is restricted in its application to property alone, and has not, and was not intended to have, any application to licenses or taxes on privileges or occupations or on the exercise of civil rights. (Kansas City v. Richardson, 90 Mo. App. l. c. 455."

The cases *Brookfield v. Tooey,* 141 Mo. 619, *Kansas City v. Grush,* 151 Mo. 128, and *State ex rel. v. Ashbrook,* 154 Mo. 375, have been cited as holding that a license tax to raise revenue must conform to this section of the Constitution. However, that is not true of *Brookfield v. Tooey, supra,* in which the Court said (page 625):

"In a word, can this tax of one per cent *upon the cash value of the goods on hand be upheld as an occupation or privilege tax?* After a careful investigation of the question mooted and most ably discussed by counsel, it seems palpable that this is a property tax, pure and simple. It is an obvious misnomer to call it a tax upon occupation. While cities of the third class may exact a license tax upon occupations or callings, the tax thus enacted must be upon the privilege itself, and not a plain ad valorem tax upon property as this ordinance levies. We are firmly convinced that this tax cannot be held to be other than a direct tax upon property. It is therefore in direct disobedience of sections 3 and 11 of article X of the Constitution of Missouri, because it is not uniform upon all the personal property in said city, * * *."

In *Kansas City v. Grush, supra,* the Court said on page 134, in passing on a Kansas City ordinance requiring meat shops in one section of the city to pay $100.00 license tax and meat shops in another part of the city to pay a $25.00 license tax:

"That the license fee which the city seeks to compel defendant to pay is a tax does not admit of doubt. On its face it is perfectly apparent that the purpose of the ordinance is to raise revenue and when this is the case it is a tax and must conform to the requirement of section 3, article X of our Constitution, which provides that taxes 'shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.'"

In *State ex rel. v. Ashbrook, supra,* the Court held that an Act requiring merchants in various cities to pay license fees was a tax for the purpose of raising revenue and was unconstitutional because it violated the provision of uniformity in the Constitution.

The distinction has been made that when a license tax is for the purpose of raising revenue and not a regulatory fee, the constitutional provision as to uniformity will apply; but when it is simply a regulatory tax, the constitutional provision does not apply. The Court further held that a license tax may be a regulatory tax, or a tax for raising revenue, or a combination of both at the same time. At best it seems to be a decidedly mixed question of law. The last decision on the question by the Supreme Court of Missouri is *St. Louis v. United Railways, supra.* Note language quoted. In the first paragraph the United States Supreme Court is quoted as holding the tax a *revenue measure,* and the second paragraph holds the constitutional provision does not apply as to uniformity. The United States Supreme Court said the mill tax ordinance was uniform upon those who were to pay the tax, but it did not say that it complied with the provision of the Constitution or that it must comply with the uniform provision.

The weight or authority seems to be that it is not a tax upon property but a license tax upon privileges connected with property and that the provision as to uniformity does not apply. However, if a license tax were imposed by ordinance for some purpose which was not a *public purpose,* and the matter came up before the Supreme Court as to whether the first sentence of that section of the Constitution applied, the Court would in all probability find itself in an embarrassing position.

III.

The rental theory must not be confused with license or privilege taxes. The authority to rent portions of the street to a telegraph or telephone company or other public utility

for the purpose of placing poles, is not derived from the taxing power, but is an inherent right which the city has and exercises in the same way that a public building owned by the city is rented. It is a regulation of the use, the use being in the city. Such a right is exceptional and extraordinary and applies only to the city of St. Louis by reason of the peculiarities of its charter. The power to rent portions of the streets in the case of a telephone or telegraph corporation applies strictly to foreign corporations, since domestic telephone and telegraph companies are given the right by statute to place their poles along and across the public streets and highways of the state.

In *City of Plattsburg v. People's Telephone Co.*, 88 Mo. App. 306, the Court said on page 312, with reference to a license tax of two per cent assessed upon the gross receipts of the defendant telephone company:

"We regard our views of this question as sustained by the Supreme Court in the case of State ex rel. v. St. Louis, 145 Mo. 551. That case concerned the making of ways and the laying of wires beneath the surface of the streets, but the discussion of the principles of law involved embrace this case. By the terms of section 1251, article 6, Revised Statutes 1899, telephone and telegraph companies are given the right to set their poles and string their wires in the streets of cities, to place their wires beneath the surface. While it is necessary to obtain the consent of a city to place wires under the surface at all and is not necessary (unless as to which particular street) to obtain such consent above the surface, it might be thought that a charge could well be made for the use where consent is necessary and could not be made where the right exists without such consent. But in the latter instance, while the right exists without consent, it is a right (like many others) subject to regulation, and the power to regulate includes the power, not to prevent, but to impose conditions such as a money charge. And so it was held in

St. Louis v. Telegraph Company, 148 U. S. 92; s. c., 149 U. S. 465.

"The sum agreed upon in this case, viz., two per cent of the gross earnings of the plant, is not a tax on the property of defendants. *It is a sale or rental of necessary portions of the streets of the city for a specified time,* for the purpose of carrying on a business in which defendants had a right to engage. And it makes no practical difference what the contract of sale or rental may be called by the parties, whether a franchise or other name, so long as its scope does not reach outside and beyond the power of the municipality."

It is interesting to note in connection with this case that the Peoples' Telephone Company was a partnership and Section 3326, of the Revised Statutes of Missouri, 1909, which starts out "companies organized under the provisions of this article," would not apply to the Peoples' Telephone Company because they are not organized under the provisions of the article.

In *City of St. Louis v. Western Union Telegraph Company,* 148 U. S. 93, 37 L. Ed. 383, the defendant, a foreign corporation, had refused to pay a license tax of five dollars per pole on all poles in the City of St. Louis. The Supreme Court said:

"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.* * * * If, instead of occupying the streets and public places with its telegragh

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 nor 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.*"

Upon a rehearing in the same case, the Court said, 37 L. Ed. 810, 145 U. S. 465:

"And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contribuiting something towards the expense it has been to in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the state. The law in force in Missouri from 1866 gives certain rights in streets to 'companies or-

ganized under the provisions of this article.' *Of course, the defendant, a corporation organized under the laws of the state of New York, can claim no benefit of this.*"

It seems the Supreme Court in the first instance upheld the license tax as being a rental charge for use of the street and was relying on section 10 of the scheme authorized by the Constitution, in addition to the charter for enlarging the boundaries of the city and adjusting the relations between the city and the county. The section was quoted by Judge Brewer in his opinion and is as follows:

"Sec. 10. All the public buildings, institutions, public parks, and property of every character and description, heretofore owned and controlled by the county of St. Louis within the limits as extended, including the court house, the county jail, the insane asylum, and the poor house, are hereby transferred and made over to the city of St. Louis, *and all the right, title, and interest of the county* of St. Louis in said property, *and in all public roads and highways within the enlarged limits,* is hereby vested in the city of St. Louis, and divested out of the county; and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, the city hereby assumes the whole of the existing county debt and the entire park tax." 2 Mo. Rev. Stat. 1879, p. 1565.

It has been noted by several textbook writers and it seems to be a very just criticism that the County of St. Louis never had a fee in the streets. It only had an easement for the use of a road or street and a transfer of all the right, title and interest would only pass such right, title or interest as the County of St. Louis had, or, in other words, an easement. Further along in the opinion, 37 L. Ed. 813, the Supreme Court said:

"The power of the city to devote the streets or public grounds to purely private uses was denied; but in the cases

of *Julia Bldg. Asso. v. Bell Teleph. Co.*, 88 Mo. 258, and *St. Louis v. Bell Teleph. Co.*, 2 L. R. A. 278, 96 Mo. 623, it was expressly held that the use of the streets for telephone poles was not a private use (and of course telegraph poles stand on the same footing) and that a private corporation carrying on the public service of transportation of messages might be permitted to use the streets for its poles. Counsel rely strongly upon the latter of these cases, in which the power of the city to regulate the charges for telephone service was denied. But obviously that decision does not cover this case. The relations of a telephone or telegraph company to its patrons, after the use of the streets has been granted, does not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons; *but what the company shall pay to the city for the use is directly involved in a regulation of the use. The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles.*"

In *Julia Building Ass'n v. The Bell Telephone Company*, 88 Mo. 258, in addition to holding that telephone poles were not an additional servitude upon the streets and highways, it was held that the abutting owners were owners in fee of the streets. The Court said on page 267:

"Under the above state of facts it may be conceded that inasmuch as the plaintiff is the owner in fee of the land abutting on Sixth street, that it is under the laws in force in 1816, also the owner in fee to the centre of said street. While this is so, such ownership is subject to all the uses to which such street can be properly devoted under the dedication made by Chouteau and Lucas in 1816. 'When one claims land as being part of a street adjoining the premises described in his deed, he cannot also insist that the land is not subject to a servitude as such street. It is only by as-

suming that it is a street, that he acquires any title to the land therein. And being a part of the street his title is subject to the easement over it.' "

Since poles are not an additional servitude to the streets, it cannot be seen how they could interfere with the easement possessed by the city and it should only be a question of time until the rental theory is overruled. It must be admitted that a license fee can be collected in the nature of a regulatory measure but when the courts attempt to base a license fee upon a rental theory, it is beset with difficulties.

It is observed that the Judge in rendering his opinion stated that the Western Union is a foreign corporation and has not the same rights as possessed by domestic corporations to occupy streets *under Section* 3326, *of the Revised Statutes of Missouri,* 1909, (R. S. Mo. 1919, Sec. 10132), which provides:

"Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires, and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters: *Provided,* any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof."

This section was first enacted in 1866, or prior thereto, as it appears in the General Statutes of 1866, Chapter 65, Section 5. The section as there found ends with the word "waters" and does not contain the word "telephone," and it applied originally only to telegraph companies and did not confer any authority upon cities to permit or deny the use of city streets to telephone companies.

Since the opinion of the Supreme Court applies to foreign corporations and does not apply to domestic corporations, no precedent is established binding upon telephone corporations spoken of in Section 3326. The decision in the case City of Plattsburg v. Peoples' Telephone Company, supra, was based entirely upon the decision rendered in the case of St. Louis v. Western Union, and it is plainly apparent the facts were such that the decision in the Western Union case did not apply because—

First, there is absolutely no basis upon which to predicate an assumption that the city of Plattsburg owned a fee in the streets. The Supreme Court of Mississippi, in the case of Hodges, City Tax Collector of Meridian, v. Western Union Teleg. Co., 72 Miss. 912, has expressly pointed out that the decision of the U. S. Supreme Court can apply to the city of St. Louis alone by reason of the peculiarities of its charter. The language, as used by the Court, was as follows:

"The ground upon which the ordinance of the city of St. Louis, of which the one in this case is said to be a copy, is placed in 148 U. S. 92, and 149 U. S. 465, is that the city of St. Louis is the absolute owner of fee in its streets; and the charter powers of the city are 'self appointed.' It is expressly declared that St. Louis occupies a 'unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the state given in the constitution,' and again it is said, 'this charter is an organic act, so defined in the constitution, and is to be construed as organic acts are construed. The city is in a very just sense an imperium in imperio. The powers are self-appointed and the reserve control existing in the general assembly does not take away this peculiar feature of the charter.' Treating the city, therefore, as an absolute and uncontrolled proprietor of its streets, rent which is, like toll, a demand of proprietorship, and not like a tax a 'demand of sovereignty'

—was declared to be within the power of the city to exact. Meridian occupies a different attitude as to its streets and its power over them. All the power which it has over its streets is derived from the legislature, whose power over them is 'supreme and transcendent.' ''

Second. The Supreme Court said, in the Western Union case, that the Western Union Telegraph Company was a foreign corporation and could not claim advantages under Section 3326, giving telegraph and telephone companies the right to use the public highways and streets of the state.

IV.

The power to license, tax and regulate may be exercised in two separate and distinct ways; first, under *police power* for the purpose of police regulation; and a license tax under this power is generally known as a *regulatory tax;* second, under the taxing power, for the purpose of raising revenue. The tax is usually an occupation tax or for the privilege of doing business within a community. Whether a given tax is a regulatory tax or a tax for the purpose of raising revenue, cannot always be determined from the particular ordinance assessing the tax.

In *City of Lamar v. Adams* (1901), 90 Mo. App. 40, the Court said:

"It has been seen that the tax required by said ordinance is a license tax. The imposition of such a tax may be referable to the taxing power, the police power, or both; to the police power alone if the object is merely to regulate and the amount received merely pays the expense of enforcing the regulations, and to the taxing power alone if its main object is revenue. * * * We are bound to know that the license fee of fifteen dollars exacted of each insurance company is far in excess of the reasonable expense of enforcement of any regulation, and hence we must conclude

that the main object of the tax was revenue. * * * Such license fee is nothing more nor less than an occupation tax imposed for revenue. * * * It is thus seen that by the express terms of the plaintiff's charter the power is conferred to not only license but to tax. And under this power the plaintiff was authorized to levy and collect a tax for revenue by way of a license, unless the exercise of that authority is taken away or forbidden by some other provision of law. Collections of words to be found in other statutes similar to that employed in plaintiff's charter have been held to confer the power to tax for revenue."

In *City of St. Louis v. Green,* 7 Mo. App. 474, affirmed 70 Mo. Sup. Ct. 562, the Court said:

"The substance, not the form of the tax is to be regarded in ascertaining whether the tax is upon property or upon a privilege conected with property. The tax under consideration is a license tax. The imposition of such a tax may be referred to the taxing power or to the police power of the State,—to either or to both; to the police power alone if the object is merely to regulate, and the amount received merely pays the expenses of enforcing the regulations, and to the taxing power alone of its main object is revenue."

The United States Supreme Court has repeatedly made the same assertions in considering license tax cases arising out of interstate commerce. This question is taken up in another part of this note, but the following additional authorities are cited in support of the statement made:

Springfield v. Smith, 138 Mo. 645; *St. Louis v. Weitzel,* 130 Mo. 600; *St. Joseph v. Ernst,* 95 Mo. 360; *St. Louis v. Sternburg,* 69 Mo. 289; *St. Louis v. Spiegel,* 8 Mo. App. 478; *St. Louis v. Boatmen's Ins. & Tr. Co.,* 47 Mo. 153; *Kansas City v. Corrigan,* 18 Mo. App. 206; *Postal Tel. & Cable Co. v. Charleston,* 153 U. S. 692; *Williams v. Talladiga,* 226 U. S. 404; *W. U. Tel. Co. v. Seay,* 132 U. S. 472; 2 Inter. Com. Rep.

726, 10 Sup. Ct. Rep. 161; 4 Inter. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Postal Tel. & Cable Co. v. Richmond,* 249 U. S. 252.

V.

License taxes for the purpose of *raising revenue* and as *regulatory measures* can be imposed upon property used in interstate commerce, but such a tax will not be upheld where it constitutes a serious burden upon interstate commerce.

(a) Where a carrier is engaged in interstate commerce, all business done locally within a state is subject *to a license tax for the purpose of raising revenue* where the business is of such a substantial amount that it does not appear as a disguised attempt to burden interstate commerce.

In *Postal Teleg. & Cable Co. v. Richmond,* 249 U. S. 257, 63 L. Ed. 594, a license tax of $300 a year was imposed upon the company for the privilege of doing business in the city of Richmond. The Court said:

"The principle of these cases, and of many others cited in the opinions, is that, as against Federal constitutional limitations of power, a state may lawfully impose a license tax, restricted, as it is in this case, to the right to do local business within its borders, where such tax does not burden, or discriminate against interstate business, and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce. Such a tax is not, as is argued, an inspection measure, limited in amount to the cost of issuing the license or supervising the business, but is an exercise of the police power of the state for revenue purposes, restricted to internal commerce, and therefore within the taxing power of the state."

In *Postal Teleg. & Cable Co. v. Charleston et al.,* 38 L. Ed. 873, the Court said:

"We do not deem it necessary to discuss the contention that the ordinance imposing the license tax in question is invalid by reason of its disregard of provisions of the constitution of South Carolina. The Supreme Court of that state has, in several cases, judicially settled that the power to raise revenue by a license tax on business, given by statute to the city council of Charleston, does not violate any provision of the state constitution. State v. Hayne, 4 S. C. 413; Information v. Jager, 29 S. C. 443."

In *Williams v. Talladega,* 226 U. S. 419, 57 L. Ed. 281, an ordinance had been passed imposing upon the company a license tax of $100 annually and declared that it had been enacted in exercise of the police power of the city as well as for the purpose of raising revenue. The Court said:

"We have, then, an ordinance which taxes without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the public business,—communication between the officers and departments of the Federal government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole, and makes the tax unconstitutional and void."

Additional authorities cited are:

Western Union Teleg. Co. v. Alabama Board of Assessment, 132 U. S. 372, 33 L. Ed. 409; *Allen v. Pullman Palace Car Co.,* 191 U. S. 171, 48 L. Ed. 134; *Leloup v. Mobile,* 127 U. S. 640, 32 L. Ed. 311.

The form of the tax just discussed is in the nature of an occupation tax and is enacted for the privilege of doing business within a municipality. The amount of this tax apparently depends on the discretion of the city councils, and it

further sems obvious it will only be set aside when it can be established to the satisfaction of the court that the tax in question is a serious burden on interstate commerce.

(b) A license tax as a *regulatory* tax imposed under local government supervision upon property used in interstate commerce.

A license tax may be imposed upon the mainteance or poles and wires within a city, although the poles are used entirely to transmit messages in interstate commerce.

In *Mackay Teleg. & Cable Co. v. Little Rock,* 250 U. S. 99, 100, 63 L. Ed. 869, the Court said:

"That a reasonable tax upon the maintenance of poles and wires erected and maintained by a telegraph company within the limits of a city, pursuant to authority granted by its ordinances, is not an unwarranted burden upon interstate or foreign commerce, or upon the functions of the company as an agency of the government, and does not infringe rights conferred by the Act of Congress, is so thoroughly settled by previous decisions of this court that no further discussion is called for."

In *Postal Teleg. & Cable Co. v. Richmond,* 249 U. S. 258, 63 L. Ed. 594, the Court said:

"There remains to be considered the fee, as it is called in the ordinance imposing it, of $2 for each pole maintained or used in the streets of the city of Richmond. This character of tax has also been the subject of definite decision by this court, and has been sustained where not clearly shown to be a direct burden upon interstate commerce or unreasonable in amount, having regard to the purpose for which it may lawfully be imposed."

In *Western Union Teleg. Co. v. New Hope,* 187 U. S. 426, 47 L. Ed. 244, the Court said:

"This license fee was not a tax on the property of the com-

pany, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on."

Other cases sustaining regulatory license taxes are:

Postal Teleg. & Cable Co. v. Baltimore, 156 U. S. 210, 39 L. Ed. 399; *Atlantic & Pacific Tel. Co. v. Philadelphia,* 190 U. S. 160, 163, 47 L. Ed. 995, 999; *Western Union Teleg. Co. v. Pa. R. R. Co.,* 195 U. S. 540, 566, 49 L. Ed. 312, 321.

It is, however, to be noted in the case of *Postal Teleg. & Cable Co. v. Richmond,* supra, that while the Court states that "Even interstate commerce must pay its way," it says further along in the opinion:

"There is no disposition on the part of this court to modify in the least the law as it has been stated in many cases, that 'neither licenses, nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are to that extent unconstitutional and void.' Crutcher v. Kentucky, 141 U. S. 47, 62, 35 L. Ed. 649, 654, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190."

(c) It must clearly appear that the license tax is imposing a serious burden upon interstate commerce and where it is in the nature of an *occupation tax* under the exercise of the taxing power for the purpose of raising revenue, it will be held invalid where the evidence is clear and convincing that the receipts from intrastate business are insufficient to pay the tax and resort must be had from receipts from interstate business if the payment is compelled.

In *Postal Teleg. & Cable Co. v. Richmond,* supra, the Court said:

"This requirement that the appellant shall engage in intrastate business, construed with the ordinance imposing the license tax, results, it is argued, in imposing a burden upon its interstate business, for the reason that the net receipts from its intrastate business are insufficient to pay the tax, and therefore payment, if compelled, must be made from interstate receipts. If the facts were as thus asserted, it well might be that this tax would be invalid."

The following authorities are cited as further sustaining this proposition:

Pullman Co. v. Adams, 189 U. S. 420, 47 L. Ed. 877; *Williams v. Talladega,* 226 U. S. 404, 57 L. Ed. 275, 280.

Whether the *license* tax imposed by a municipality upon the maintenance of poles and wires will be valid, depends upon whether (to use the language of the Court in Postal Teleg. & Cable Co. v. Richmond) under the conditions prevailing in a given case the charge made is reasonably apportionate to the services to be rendered and the liabilities involved, or whether it is an attempt to impose a burden on interstate commerce.

VII.

The reasonableness of the license tax.

(a) The reasonableness of a *regulatory tax* is determined by the cost of local government supervision, and can only be determined from a study made to show the cost the city is put to in making inspections, supervising the placing of construction, issuing permits and giving police protection generally. The following decisions indicate the amounts of regulatory license taxes which have been sustained in various localities:

Postal Teleg. & Cable Co. v. Richmond, supra. For each pole maintained in the streets of Richmond, $2.00 payable annually.

Mackey Tel. & Cable Co. v. Little Rock, 64 L. Ed. 863. For each pole maintained in the city limits, whether on railroad right of way or not, 50 cents payable annually.

Western Union Teleg. Co. v. Richmond, 56 L. Ed. 710. A license tax of $2.00 per pole and $2.00 per wire mile, payable annually, was found not an unreasonable tax.

Western Union Teleg. Co. v. Borough of New Hope, 47 L. Ed. 240. A license tax of $1.00 per pole and $2.50 per wire mile was sustained as not obnoxious, but reference should be made to *Postal Teleg. & Cable Co. v. New Hope,* 48 L. Ed. 339, where the same license tax was submitted to a jury and found unreasonable in the lower court and affirmed by the Supreme Court.

Chester City v. Western Union Teleg. Co. (Pa.), 25 Atl. 1134. A license tax of $1.00 per pole payable annually found reasonable.

Allentown v. Western U. Teleg. Co. (Pa.), 143 Atl. 1070. A license tax of $1.00 per pole found reasonable.

St. Louis v. Western U. Teleg. Co., 37 L. Ed. 380, 37 L. Ed. 812. A charge of $5.00 per pole was held to be in the nature of a rental charge and not a privilege or license tax. On a new trial ordered in the case the ordinance was held void for unreasonableness because enormously greater than the rental value of abutting property and greatly disproportionate to the value of the poles and wires. See case of *St. Louis v. Western U. Teleg. Co.,* 63 Fed. 68.

Postal Teleg. & Cable Co. v. Baltimore, 39 L. Ed. 399. A license tax of $2.00 per pole payable annually was sustained.

THE FOLLOWING REGULATORY LICENSE TAXES HAVE BEEN FOUND UNREASONABLE.

Postal Teleg. & Cable Co. v. Borough of New Hope, 48 L. Ed. 339. License tax held unreasonable and void where evidence was introduced showing the charges were ten times more

than all kinds and character of expense and liability which might have been incurred by the Borough. The amount of the tax was $1.00 per pole and $2.50 per wire mile payable annually. The question was submitted to a jury.

Postal Teleg. & Calle Co. v. Borough of Taylor, 48 L. Ed. 342. Evidence showed license tax was twenty times more than the amount incurred by the city by reason of such maintenance and was held void. The question was submitted to a jury. The amount of the license tax was $1.00 per pole and $2.50 per wire mile payable annually.

Atlantic & Pacific Tel. Co. v. Philadelphia, 47 L. Ed. 1002. A license tax of $1.00 per pole and $2.50 per wire mile was found unreasonable.

Saginaw v. Swift Elect. Co. (Mich. Sup. Ct.), 72 N. W. 6, An ordinance making an inspection charge of 50 cents per annum for each pole was unreasonable where actual cost of inspection was about 5 cents per pole.

In every case where a license tax of this nature has been found unreasonable, evidence showing that the license tax was greatly in excess of local government supervision was introduced, and the question of the reasonableness of the tax submitted to a jury, or it was found that the license tax was made oppressive for the purpose of forcing a company with overhead wires to go underground, and therefore, unreasonable.

(b) The reasonableness of license taxes for the purpose of *raising revenue.*

Where the license tax is in exercise of the taxing power of the state for revenue purposes, the decisions do not indicate a mathematical basis upon which to predicate the reasonableness of the tax. One difficulty is that in a large number of cases the ordinances levying the license tax state that it is both for the purpose of local government supervision and for the purpose of raising revenue. The tax for revenue pur-

poses is usually found to be an occupation tax and can be distinguished in this manner from license taxes or fees for police regulation.

(1) The tax must not be so large that it amounts to prohibition as it has been repeatedly held the power of prohibition cannot be used to supress useful occupations.

In Missouri, the rule as expressed in the *City of Springfield* v. Jacobs, 101 Mo. App. 339, is that the courts will refuse to enforce and will declare the ordinance void when it is clearly shown that it is unjust, oppressive or unreasonable. The Court said:

"Among the powers specifically delegated to a city of the third class is, authority to levy and collect a license tax on traveling and auction stores; it is worthy of remark, however, that the measure of control over such callings is expressly restricted to the imposition and collection of a license tax and is not extended to the broader prerogatives of regulation and suppression conferred and possessed, respecting the numerous callings enumerated in the succeeding paragraph of the statute, by which the authority of regulation or suppression may be exercised additional to licensing and taxing. The bounds within which a municipal corporation can lawfully enforce such delegated powers, as well as the limits within which the courts will interfere with such civic legislation, and refuse to enforce such enactments, are now well defined, and while courts will not disturb the legitimate exercise of the legislative power accorded a municipality, they will avert its abuse. A city ordinance is to be deemed prima facie valid, but the discretion of a city council is not absolute and its authority must be properly exercised. While the subject of the enactment may be within the statutory powers, courts will refuse to enforce it and will declare it void where it is *unjust, oppressive* or *unreasonable,* but whether the ground upon which the assault is made be that the ordinance impugned would operate unreasonably or oppressively, a clear case must be presented to warrant a court in annulling its effect."

Further along in the opinion the Judge said:

"The purpose aimed at in its enactment was not to require the amount of the license as a fair share of the public burdens to be borne by those engaged in the callings named, but the actual object of this piece of civic legislation was evidently the absolute prohibition from and annihilation within the limits of Springfield of all such transient or traveling establishments or means of livelihood, by requiring as a prerequisite to their lawful existence the payment of an extravagant and exorbitant per diem under the pretext of a license tax. Such arbitrary exercise and abuse of the authority delegated can not be countenanced, and the judgment of the lower court is affirmed."

In *McCray v. United States,* 49 L. Ed. 94, the Court said, in speaking of the license tax of 10 cents per pound imposed for revenue purposes by an act of Congress on the manufacture of oleomargarine:

"Whilst it is true—so the argument proceeds—that Congress, in exerting the taxing power conferred upon it, may use all means appropriate to the exercise of such power, a tax which is fixed at such a high rate as to suppress the production of the article taxed is not a legitimate means to the lawful end, and is therefore beyond the scope of the taxing power."

But it was further stated, in the instance of taxing oleomargarine:

"That the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights."

In *Western U. Teleg. Co. v. Seay,* 33 L. Ed. 409, a license tax of 2% had been levied by the state of Alabama on the gross receipts of the company payable annually. Since the tax was placed on revenue from interstate business as well as

intrastate, the act creating the tax was held invalid, but the right to assess a 2% license tax on gross receipts by the state on intrastate business alone, was not questioned.

In *Postal Teleg. & Cable Co. v. Charleston City Council,* 38 L. Ed. 871, a license tax of $500 payable annually was placed by ordinance of the city of Charleston on the company for the privilege of doing business in the city of Charleston. It was contended that the office established by the company was just the initial point for receiving and sending messages and no messages were sent between points within the city. Using Charleston as an originating and terminating point, both an intrastate and interstate business was done. The tax was sustained.

In *Postal Teleg. & Cable Co. v. Richmond,* an annual license tax of $300 was imposed upon the company by ordinance for the privilege of doing business within the city of Richmond. In this case the interstate business was excluded by the ordinance. The tax was sustained.

In *Southwestern Oil Co. v. Texas,* 217 U. S. 114 a 2% annual license tax was imposed by the state on the gross receipts of the company and others handling oils, etc. This tax was for revenue purposes and was held not to be unreasonable and not in contravention of the provisions of the Fourteenth Amendment.

In *Nebraska Tel. Co. v. City of Lincoln,* 82 Neb. 59, an annual license tax of 1% of gross earnings each year for five years, 2% of the gross earnings each year for the next five years, and 3% of the gross earnings annually thereafter during the remaining period granted by the ordinance was upheld.

In addition to this tax, an annual license tax of $500 was imposed and upheld by the court on the theory that it was in the nature of a rental charge.

In *Lincoln Traction Co. v. City of Lincoln,* 84 Neb. 327, an ordinance was upheld as not unreasonable requiring all street

railway companies maintaining a street railway system in the city of Lincoln to pay as an occupation tax annually 5% of their gross receipts.

In *St. Louis v. United Rwys.*, 263 Mo. 457, a license tax of one mill for each pay passenger, or equivalent to 2% upon the gross receipts, was held not to be unreasonable.

(2) Where no provision of the constitution is abridged, the reasonableness of a license tax for revenue purposes is a question for legislative and not judicial determination.

When the license tax for revenue does not amount to a suppression of the business, the law-making power is the sole judge of its reasonableness and it is not a question for judicial interference, since the power to impose license taxes for revenue is derived solely from the taxing power and the taxing power is exercised alone by the law-making bodies. It has become a principle of law that a court will not substitute its judgment of the reasonableness of a revenue tax for that of a legislative body where no restriction is found in the constitution.

In *St. Louis v. United Rwys.*, supra, the Court, with reference to the one mill passenger tax, said:

"If power exists in a municipal corporation to enact an ordinance, as we have shown existed here, the court will be slow to interfere with its operative force. The charter of a city has the force of legislative enactment, and nothing but the most indubitable case of unfairness and oppression in an ordinance will warrant a court in interfering with its enforcement. (Cape Girardeau v. Riley, 72 Mo. 220, 223; Kansas City v. Trieb, 76 Mo. App. 478; St. Louis v. Spiegel, 8 Mo. App. 478, 482; Lamar v. Weidman, 57 Mo. App. l. c. 513.)

* * *

Besides, municipal corporations are primarily the sole judges of the necessity of ordinances, and the courts are, therefore, loth to review their unreasonableness, if passed, as

was the ordinance in question, in strict conformity with an express grant. (Art. 3, sec. 26, subdiv. 11, Charter St. Louis; Art. 10, Charter of St. Louis.) This ordinance having been passed by virtue of express power cannot be set aside by the courts for mere unreasonableness, because questions as to the expediency and wisdom of its enactment rest alone with the law-making power. (Skinker v. Heman, 148 Mo. 349, 355; St. Louis v. Weitzel, 130 Mo. 600; Coal-Float v. Jeffersonville, 112 Ind. 15.)"

In *Pacific Ins. Co. v. Soule,* 7 Wall. 433, 19 L. Ed. 95, referring to the unlimited nature of the power of taxation conferred upon Congress, it was said:

"Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government."

After calling attention to the express limitations as to uniformity and articles exported from any state, the Court continued:

"With these exceptions, the exercise of the power is, in all respects, unfettered."

In *McCray v. United States,* 49 L. Ed. 99, the Court said, in discussing the tax of 10 cents per pound imposed by Act of Congress upon the manufacture of oleomargarine and the applicability of the 5th and 14th Amendments of the Constitution to the Act:

"That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it

seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

The proposition that the reasonableness of a tax imposed for revenue alone is a matter for determination by the legislative branch of the municipal government, is supported by great weight of authority.

Southern Car Co. v. State, 32 So. (Ala.) 235; *John Rapp & Son v. Kiel,* 115 Pac. (Cal.), 651; *U. S. Dis. Co. v. Chicago,* 1 N. E. (Ill.), 166; *Burlington v. Putman Ins. Co.,* 31 Ia. 102; *In re Martin,* 64 Pac. (Kan.), 43; *Mason v. Lancaster,* 4 Bush., 406; *Mason v. Cumberland,* 48 Atl. (Md.), 136; *People v. Grant,* 121 N. W. (Mich.), 300; *St. Paul v. Colter,* 12 Minn. 41; *Springfield v. Jacobs,* 73 S. W. (Mo.), 1097; *Johnson v. Asbury,* 33 Atl. (N. J.), 580; *State v. Robertson,* 48 S. E. (N. C.), 595; *Hirschfield v. Dallas,* 15 S. W. (Tex.), 124; *Odgen v. Crossman,* 53 Pac. (Utah), 985; *State v. Harrington,* 35 Atl. (Ver.), 515; *Stull v. DeMattos,* 62 Pac. (Wash.), 451; *Cooper v. Dist. of Columbia,* 11 D. C. 250.

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