

12-1-1949

Municipal Corporations – Scope of Highway Easement Extended By Use of Police Power to Include Underground Parking

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Municipal Corporations – Scope of Highway Easement Extended By Use of Police Power to Include Underground Parking, 4 U. Miami L. Rev. 119 (1949)

Available at: <https://repository.law.miami.edu/umlr/vol4/iss1/19>

This Case Noted is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

**MUNICIPAL CORPORATIONS—SCOPE OF HIGHWAY EASEMENT
EXTENDED BY USE OF POLICE POWER TO INCLUDE
UNDERGROUND PARKING**

Plaintiff brought suit to enjoin the defendant, a municipal corporation, from erecting, leasing and operating an automobile parking garage under street surface of boulevard adjoining plaintiff's realty. Plaintiff contended it was not a proper highway use¹ and therefore beyond the use contemplated in the original grant to the municipality, i.e., an additional servitude. From an adverse decree the City of Detroit appeals. *Held*, use of subsurface for parking was a proper highway use. *Cleveland v. City of Detroit*, 38 N. W.2d 625 (Mich. 1949).

The principle is established that the owner of the land over which a highway is laid does not lose all his rights in the remainder of the fee.² However, these rights may decrease as the public needs grow, but at all times he retains all the rights that are not taken for public purposes by the exercise of the police power.³ For example, he may use the subsurface to build a tunnel or basement,⁴ nevertheless he is bound to withdraw from the occupation of the street below the surface, whenever the public requires such space for the purpose of travel.⁵

Actually it may be said that the owner of land subject to a highway easement has only three absolute rights: first, to be unobstructed in the reasonable use and enjoyment of his property; second, not to have injury inflicted upon his light and air; and third, to have convenient ingress and egress. Any other use of the easement which promotes the purpose for which highways are constructed gives him no cause for complaint.⁶

The owner may not validly contend that an easement acquired for highway purposes is limited to the particular methods in use at the time the easement was acquired, for such an easement includes all new methods which may thereafter be discovered in the aid of travel. In addition, it has been held that an extension of such uses to purposes, municipal in nature, but not connected directly with the right of passage, does not impose an undue burden

1. *Richards v. Citizens Water Supply Co.*, 140 App. Div. 206, 125 N. Y. Supp. 116, 119 (2d Dep't 1910) (a "street use" is one which is connected with the right of passage, and tends in some way to preserve or make more secure and easy its exercise).

2. *Breinig v. County of Allegheny*, 332 Pa. 474, 2 A.2d 842 (1938).

3. *Allen v. City of Boston*, 159 Mass. 324, 34 N. E. 519 (1893).

4. *Breinig v. County of Allegheny*, *supra*.

5. *Lincoln Safe Deposit Co. v. City of New York*, 210 N. Y. 34, 103 N. E. 768 (1913).

6. *McCandless v. City of Los Angeles*, 214 Cal. 67, 4 P.2d 139 (1931).

on the land.⁷ Thus water pipes,⁸ oil pipes,⁹ subways¹⁰ and traffic tunnels¹¹ placed under the highway have been held to be a proper highway use and not an unwarranted extension of the highway easement.

The court in the instant case has once more extended the use to which an easement for highway purposes may be subjected. This was accomplished by holding that it is within the police power¹² of a municipality to include underground parking, which though not travel, is an aid toward making surface traffic safer. It is reasoned that the use of the subsurface for a parking facility is actually not an additional servitude, but merely an additional level for parking, which has been held to be an appropriate highway use.¹³ This addition of subsurface parking as a proper highway use is a logical and helpful advance. Once the owner of property has been properly compensated, there is no reason why he should be allowed to prevent the use of new aids to transportation as our cities grow and traffic problems become more complex.

PROCEDURE—CERTIORARI—SCOPE OF REVIEW BY SUPREME COURT

Defendant was charged with a breach of the peace in violation of a municipal ordinance¹ which was interpreted by the trial court, in the instruction to the jury, to have five disjunctive meanings.² Upon a general verdict of guilty the court passed judgment of conviction. The defendant did not take exception to the correctness of the instruction, either in the trial court or upon appeal in the state courts which affirmed the judgment.³ In the petition for certiorari to the Supreme Court of the United States, the defendant did

7. *Cater v. Northwestern Tel. Exch. Co.*, 60 Minn. 539, 63 N. W. 111 (1895); *Dalcota Central Telephone Co. v. Spink County Power Co.*, 42 S. D. 448, 176 N. W. 143 (1920).

8. *Richards v. Citizens Water Supply Co.*, *supra*.

9. *Okmulgee Producers and Manufacturers Gas Co. v. Franks*, 177 Okla. 456, 60 P.2d 771 (1936).

10. *Land Title Guaranty Co. of New Jersey v. Delaware River Joint Commission*, 117 N. J. Law 113, 187 Atl. 371 (1936). *Contra*: *Matter of Rapid Transit Railroad Commissioners*, 197 N. Y. 81, 90 N. E. 456 (1909).

11. *Hayes v. Handley*, 182 Cal. 273, 187 Pac. 952 (1920).

12. *White's Appeal*, 287 Pa. 259, 263 *et seq.*, 134 Atl. 409 (1926) (all property is held in subordination to right of its reasonable regulation by the government clearly necessary to preserve health, safety or morals of the people).

13. *In re Widening of Fulton Street*, 248 Mich. 13, 226 N. W. 690, 691 (1929).

1. Chap. 193, § 1(1), Revised Code of 1939, City of Chicago, Illinois: "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, *breach of peace or diversion tending to a breach of the peace*, within the limits of the city . . . shall be deemed guilty of disorderly conduct . . ." (emphasis added).

2. "The misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." *Terminiello v. Chicago*, 69 Sup. Ct. 894, 895 (1949).

3. *Chicago v. Terminiello*, 396 Ill. 41, 71 N. E.2d 2 (1947); 332 Ill. App. 17, 74 N. E.2d 45 (1947); 400 Ill. 23, 79 N. E.2d 39 (1948).