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H. Church Ford
Bourbon Circuit Court

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NOTES

MAY A CITY BUILD A MUNICIPAL LIGHT PLANT AND REFUSE TO OFFER FOR SALE A FRANCHISE TO A PUBLIC UTILITIES CORPORATION?

AN INTERPRETATION OF SECTION 2741M-1, KENTUCKY STATUTES*

BOURBON CIRCUIT COURT

KENTUCKY UTILITIES COMPANY . . . . . *Plaintiff*

**VS.—OPINION

GEORGE DOYLE, & ETC. . . . . *Defendant*

The plaintiff, Kentucky Utilities Company, was the owner of an electric light franchise in the City of Paris, which expired in November 1929. No franchise of a similar nature has since been granted by the city and no action has been taken toward advertising or selling such a franchise. The plaintiff has continued to maintain and operate its electric lighting system in the streets and public ways of the city. No effort has been made by the city to eject the plaintiff or to interfere with its continuance, so far as this record shows.

The plaintiff, by this action, seeks a writ of mandamus directing the legislative body of the city to offer for sale to the highest and best bidder, upon reasonable terms, a franchise of a similar nature to the one which has expired, basing its cause of action upon Section 2741 m-1 of the Kentucky Statutes, which is as follows:

"That at least eighteen months before the expiration of any franchise, acquired under, or prior to, the present Constitution, it shall be the duty of the proper legislative body or board of all cities and towns of this Commonwealth, except cities of the first class, to provide for the sale of a similar franchise to the highest and best bidder on terms and conditions which shall be fair and reasonable to the public, to the corporation, and to the patrons of the corporation, and which shall specify the quality of service to be rendered.

Provided, that if there is no public necessity for the kind of public utility in question and if the municipality shall desire to dscontinue entirely the kind of service in question, then this section shall not apply."

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*This is one of a series of opinions by Kentucky Circuit Court Judges. In many instances these opinions will discuss questions and the constitutionality of statutes not yet passed on by the Court of Appeals of Kentucky. Judge H. Church Ford, who presides over the Courts of the Fourteenth Judicial District, is the author of this opinion.

The plaintiff's petition alleges that both before and since the expiration of its franchise it has importuned the the legislative body of the city to advertise and offer for sale such a franchise and that in case such action be taken it will become a bidder therefor in good faith.

The answer of the defendants, the Mayor and Commissioners of the city, who now constitute its legislative body, admits that no such franchise has been advertised or offered for sale and seeks to justify the action of the city in failing so to do upon several grounds which may be summarized as follows:

1. That the section of the Kentucky Statutes above referred to is void for the reason that it violates several Sections of the Constitution of Kentucky and Section 10 of Article 1, of the Constitution of the United States.

2. That in the manner authorized by law the City of Paris, pursuant to the will of the citizens, evidenced by vote, has issued and sold its bonds and contracted for the erection of a municipal electric lighting plant for the purpose of providing electric light and power facilities to the city and its inhabitants and as a consequence thereof there is now no public necessity for and the city does not desire the kind of service in question, and that under the express terms of the statute it is not applicable to this case.

3. That the plaintiff has been guilty of such laches in seeking to assert its rights under said statute that it is now estopped to do so.

The plaintiff has filed a demurrer to the answer and to each paragraph thereof. This case is now before me upon the questions of law raised by this demurrer.

It is not disputed that the terms of the Statute are mandatory in so far as they prescribe a positive duty to provide for the sale of a similar franchise and if the Statute is applicable to this case and the legislature, under our constitution, had the power to enact it, the city has no discretion but to act as the legislature has commanded.

The extent of the power of the legislature to exercise compulsory control and authority over municipal corporations in regulating municipal affairs, under our constitution, has been a source of considerable litigation. Whether a municipal corporation, in the exercise of its purely municipal powers, for the benefit and convenience of its local citizens, and relating to matters which are not of a governmental nature and in which the state at large has no concern, may act in its own discretion without the power of the State to exercise compulsory control over it, is not a new question in this state. An interesting discussion of

this question is to be found in that line of cases dealing particularly with Section 181 of our constitution. In 1900 the legislature of Kentucky passed an act mandatorily directing the City of Louisville to create a pension fund for disabled firemen, their widows and dependents. In the case of *McDonald vs. the City of Louisville,* 113 Ky. 425, in which the court held the act to be unconstitutional, the court quoted with approval the following editorial comment by the editor of L. R. A.:

"Considered as mere agencies of government, municipal corporations are undoubtedly subject to the absolute control of the legislature, except, perhaps, as to their property rights. Many of the cases, however, have recognized the twofold character in such corporations, the one public, as regards the state at large, in so far as they are its agent in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens, and have denied the absolute control of the legislature over matters referable to the private, as distinguished from the public, character of such corporations. The difficulty in placing a limit to the legislative control over municipal corporations, at least where their property rights are concerned, is to find any constitutional restriction upon it.

"This difficulty was obviated by Justice Cooley, in *People, ex rel. Le Roy* v. *Burlbut,* 24 Mich., 44, by resorting to the doctrine of an implied constitutional guaranty to municipal corporations of the right of self-government in respect to purely local affairs. He based this doctrine upon the fact that the Constitution was adopted in view of, and recognized the existence of, a system of local government well understood and tolerably uniform in character, existing from the early settlement of the country. The opinion says that the question, broadly and nakedly stated, is 'whether local self-government in this State is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure.' As already shown, he regarded it as a constitutional right and not merely 'as a legislative privilege.'"

A more extended discussion of the same question is found in the case of *City of Lexington* v. *Thompson,* 113 Ky. 540, from which we take the following quotations:

"But a municipal corporation is not merely a public agency of the State. Its governmental functions are not all the functions which it possesses or exercises. It is, in part, a corporation possessed of private franchises and rights, which it may exercise for its private corporate advantage, for the benefit of the community, as distinct from the State government. It may hold and manage property, not for the benefit of the State, but to supply local needs and conveniences, and in respect thereto it acts as a private corporation, and in that capacity may sue and be sued."

"A municipality has a dual character. In its character as a State agency it exercises governmental, political, public and administrative powers and duties. In its capacity as a private corporation it exercises rights and powers inherent in the people of the community, which have never been surrendered to any department of the government, and which are property rights within the protection of the Constitution."

"Mr. Dillon thus states the distinction: 'The administration of justice, the preservation of public peace, and the like, although confided to local agencies, are essential matters of public concern, while the enforcement of municipal by-laws proper, the establishment of gasworks and waterworks, the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the State at large.'"

In the recent case of *Campbell* v. *Board of Trustees,* 31 S. W. 2nd, 620, decided on October 3, 1930; the court expressly approved the McDonald and Thompson cases, and in the case of *Fox* v. *Louisville & Jefferson County Children's Home,* 244 Ky. 10, decided March 8, 1932, the court made the following statement relative to the twofold character of a municipal corporation:

"The power and capacity of the one is exercised for purely municipal purposes for the benefit of its citizens, and, in the exercise of such power or capacity, it does not depart in any substantial degree from a private corporation organized under the laws of the state with which the state at large has only incidental concern, such as it may have in the acts of other private corporations". . .

"In its political or governmental capacity, it has no discretion but to act as the state which has created it has commanded or required within constitutional limits. In its capacity as a private corporation, it may act in its own discretion as any other private corporation, for the benefit of its citizens, without the power of the state to make it move and act.". . .

The language of Section 2741 m-1 seems to make it plain that it was the intention of the legislature that this Statute should be applicable in all cases except where the use of the commodity furnished under the franchise is totally abandoned and discontinued and that if such complete abandonment of use has not taken place the city is deprived of all discretion in the matter of renewing or not renewing the franchise. Such being the case we are faced squarely with the question as to whether the legislature has the constitutional power to thus deprive the municipality of all discretion in the matter of renewing a franchise.

Section 163 of our constitution provides as follows:

"No street, railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, *without the consent of the proper legislative bodies or boards of such city or town being first obtained.*"

Section 164 of the constitution prescribes the term of

twenty years as the limit of the authority of a municipality to grant any franchise as follows:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years."

The Federal Circuit Court of Appeals considered the constitutionality of an Act similar in terms to the Statute herein involved, in the case of *City of Louisville* v. *Louisville Home Telephone Company,* 279 Fed. 949, and declined to declare it unconstitutional. The Court said:

"It may be conceded, for the argument, that the Legislature would have no power to compel the council to permit a new and additional use of the streets, and to do so by requiring a new and second franchise to be sold when there was one in existence and satisfactory operation. Such concession does not reach this case. To compel the city to permit burdening the streets with a new easement is one thing, but it is quite another thing merely to require that the council, when it has once consented to such burden, shall be reasonable, and not arbitrary, in its treatment of the property which has been dedicated to public use under that consent, and shall not insist that such property be practically destroyed while it still desires public service of that character, and while the company continues willing to render it upon reasonable conditions. We do not doubt that the protection of invested property, to that extent, continued to be within the reasonable discretion of the legislature, without impairment by Section 163."

"This statute has been in force 17 years. So far as the reported Kentucky decisions show, its constitutionality has never been questioned; on the contrary, in the Gathright Case its validity was assumed. It is a familiar rule, particularly when federal courts are considering a state statute, in the absence of state decisions, that it should not be found unconstitutional, unless such a conclusion cannot be avoided. Particularly in view of this rule, we would not be justified in holding now that this section is in violation of the Kentucky Constitution."

It is insisted by the plaintiff that not only the case of *Gathright* v. *Byllesby,* 154 Ky. 106; but also the cases of *City of Ludlow* v. *Union Light & Heat Company,* 231 Ky. 813, and *Norris* v. *Kentucky State Telephone Company,* 235 Ky. 234, clearly assumed the constitutionality of the act. Let us examine these cases.

In the Gathright case it is recited as a matter of history leading up to the questions at issue that the Kentucky Heating Company owned a franchise for the furnishing of artificial gas to the City of Louisville which had expired, and the court merely refers to the fact that in an entirely different case previously pending in the Jefferson Circuit Court the lower court adjudged

that under a like provision contained in the charters of cities of the first class the City of Louisville must offer for sale a franchise of a similar character before it would be permitted to exclude that company from the use of the streets. I am unable to find any language from which it may be reasonably inferred that the court intended to express either approval or disapproval of this holding of the lower court. It was merely a recital of certain facts which took place in Louisville prior to the litigation under consideration and nothing more. Later in the opinion it appears however, that some question was raised as to whether the offering of a natural gas franchise after the expiration of a franchise for artificial gas satisfies the requirement of the term "a similar franchise," but the consideration of this point did not in any way involve a decision as to the constitutionality of the act in question.

In the Ludlow case the City of Ludlow was seeking to compel the light company to continue in operation within the city and to continue to furnish light to the city and its inhabitants upon terms prescribed by the city ordinance after the franchise under which it had previously operated had expired and had not been renewed. In the course of the opinion the court referred to the fact that the city did not follow the procedure of offering a similar franchise in accordance with Section 2741 m-1 of the statutes. The city also asked a declaration of rights as to whether under certain statutes the railroad commission of Kentucky had the authority to fix rates. After discussing the numerous statutes referred to the court said:

> "This court does not think it necessary here to pass on the constitutionality of the acts of the legislature referred to, for we are of the opinion that they have no application to the facts of this case."

This quotation probably refers in particular to the statute relative to the power of the railroad commission, but it seems clear that it was not the Court's intention in this case to assume the constitutionality of any of the acts to which it referred in the opinion.

In the Norris case the sole question involved was whether a city council after advertising a franchise for sale may arbitrarily or corruptly reject all bids. The court incidentally commented upon the mandatory provisions set out in Section 2741 m-1 but neither the construction of this statute nor its

constitutionality was in any way involved in the issue of the case.

The opinion of the Federal court above referred to seems to uphold the constitutionality of the Act in question upon the theory that Section 163 of our constitution, which vests in the legislative boards of cities exclusive discretion in granting franchises in the streets, applies to the original granting of a franchise, but is without equal effect in its application to the renewal thereof. Hence the court holds that the city having once consented to the use of its streets, the legislature may compel it, for the protection of the investment of the franchise holder, to offer a renewal franchise regardless of the city's wishes in the matter, for the reason, as the court points out, that no new easement is thereby created. This appears to overlook the provision of the statute in question requiring that the new franchise be awarded to the "highest and best bidder," which may result in creating an entirely new easement in the street in favor of new parties. However, there is no doubt but that the more frequent effect of this statute would be, and probably its real purpose is as the Federal court points out, to compel a perpetual continuation of the original franchise for the benefit of the investor, rather than the granting of a new easement.

If, by such an act as is here involved, the legislature may perpetuate a franchise, at the option of the holder, of what effect or of what use is the provision of Section 164 limiting franchises to a term of twenty years?

If this construction of Section 163 of the constitution is correct, then in cities where a franchise has been once consented to what is to prevent the legislature from thereafter taking full control of the matter or delegating it to some other body created by the legislature, thus depriving such municipalities of all power and discretion in thereafter controlling the use of their streets.

In the case of the *City of Ludlow* v. *Union Light, Heat & Power Company,* 231 Ky. 813, 22 S. W. 2nd, 909, the Court clearly defines the relations of the parties after the expiration of a franchise. The Court said:

"The grant and acceptance of a franchise is but a contract and its obligations are binding on both parties. A contract expires according to its terms. In accordance with the constitutional limitation, the contract entered into between appellant and appellee in 1909 expired at the end of twenty years. There was no contractual relations between

the parties after that period. *Board of Education of Somerset* v. *The Kentucky Utilities Company*, (decided November 12, 1919), 21 S. W. 2nd, 817. It is universally held that, when a franchise contract terminates, the mutual rights and liabilities are at an end. The property used by the franchise owner does not cease to be its property, and it has the right to remove it from the streets, and upon failure to exercise that right, may be compelled to do so. However, the courts in the interest of justice and equity have held that a reasonable time should be given for the removal of the physical properties, for, obviously, there could be no instant removal on a discontinuance of the service; also under some circumstances courts of equity have interposed their powers to prevent a discontinuance of service for the time being, as has been done in this very case, until the rights of the parties could be fully adjudicated."

In the case of the Board of Education of the *City of Somerset* v. *the Kentucky Utilities Company*, 21 S. W. 2nd, 817, it appears that the city agreed with the franchise holder to permit it to continue to operate after the expiration of its franchise under the terms of the expired franchise. The Court said:

"It is apparent that such an agreement would have no binding effect whatsoever, as it would clearly contravene Sections 163 and 164 of the constitution. These provide that such rights can be acquired only through the purchase of a franchise as therein described. So the abortive contract, as well as the original franchise, as presently shown, are removed from the picture and may not be resorted to for any purpose except to show the origin of the situation.

"After the expiration of the franchise the company had only the right to remove its property within a reasonable time. The city might have compelled that removal."

The latter case seems to clearly recognize that Sections 163 and 164 are fully applicable to a renewal of a franchise.

Not only the constitutional provisions as to the manner of granting a franchise, but also the exclusive discretion vested by these provisions in municipalities seem to be applicable both to the original granting of a franchise and to all subsequent grants or renewals thereof. I am unable to agree with the contention of the plaintiff that these provisions of our constitution which plainly make secure these valuable rights to municipalities in respect to the original grant of franchises for use of streets, should be so construed as to surrender them at the expiration of the first limited grant. I am of the opinion that the legislature is precluded from exercising compulsory authority over municipalities of this state, both as to the original and all subsequent franchises for the use of streets and public ways of the cities, and that in declining to advertise and sell a new franchise after having been directed by the votes of the people of the city to

construct a municipally owned electric plant, the defendants exercised the discretion vested in them by the constitution. Section 2741 m-1 by which the legislature seeks to mandatorily control that discretion seems to me to be in direct contravention of Sections 163 and 164 of the constitution.

H. CHURCH FORD,
Judge Bourbon Circuit Court.