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THE POWER OF THE MUNICIPALITY TO OBSTRUCT ABANDON OR VACATE A PUBLIC WAY IN KENTUCKY.

INTRODUCTION

Dillion in his works on Municipal Corporations\(^1\) says, "Municipal Corporations in this country sustain most important relations to streets and highways within their limits. By statute or by charter they are usually authorized to open, establish, alter and vacate streets... The authorities of these corporations are usually vested with the capacity to acquire property for streets for the public use and convenience." Easements in a public way may be acquired in one of several modes: (1) by prescription, (2) by dedication, (3) by exercise of right of eminent domain. Streets when dedicated and accepted by the corporation, or acquired by purchase or otherwise are usually placed under the control of the corporation with the power to improve, grade, pave, regulate, etc. In some states there are statutes that the fee in the streets shall be in the municipality in trust for the public, while in other states the fee is considered to be in the adjoining proprietor, the public only having an easement (so called) therein. The latter is the law in Kentucky.

It is the purpose of this article to deal with some phases of the law relating to the obstruction and abandonment of streets and the grant of franchises for their use. Before doing so, however, it is necessary to determine what is meant by public streets or public ways and to note the constitutional provisions affecting them.

STREETS AND HIGHWAYS DISTINGUISHED

In the use of the term "public way," we mean, so far as municipal corporations are concerned, the public streets. A street is defined as a public highway within a municipality, Sachs v. Sioux City, 109 Iowa 224. The urban character of streets is sufficient, in the judicial construction of statutory provisions, to limit the term "street" to the public highway of incorporated municipalities.\(^2\) but when a question arises whether a statutory provision applying to its term simply to "highways"

\(^1\) Section 1120 (5th Ed.).
\(^2\) Duval County v. Jacksonville, 36 Flo. 196.
extends to include the "streets" on an incorporated municipality much greater difficulty is experienced.

"The practice has grown up in the Legislature of some of the states of referring to rural ways as 'highways' as distinguished from 'street,' the thoroughfares of cities, towns and villages;" but this practice is by no means uniformly adopted and followed. When, therefore, the courts have been obliged to construe the term 'highway' for determining its applicability to the 'streets' of a city, town or village, they have been compelled to fall back upon a consideration of the nature of the statutory enactment, the evil sought to be remedied, the public benefit to be achieved, and other circumstances which may throw light upon the legislative intent."

**Constitutional Provisions**

There are two important constitutional provisions in Kentucky which deal with the public control of the streets of cities and towns. It has been held that both of these sections must be read together, and such reading indicates the safeguards thrown by the Constitution about the use of streets for the benefit of the public. These sections are:

**Section 163** of the Kentucky Constitution provides:

"No street railway, gas, water, steam, 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, parts or other apparatus along, 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 first being obtained; but when charters have heretofore been granted, conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

**Section 164** of the Kentucky Constitution provides:

"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. Before granting such a franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefore publicly, and award the same to the highest and best bidder; but it

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3 Streets and alleys distinguished, State v. Harrison, 162 Ind. 542. See also Pace v. Iona, 90 Mich. 104.


7 L. & N. R. R. Co. v. Bowling Green, 110 Kentucky 700.
shall have the right to reject any and all bids. This section shall not apply to a trunk railway."

**Obstruction**

In the case of *Dudley v. Trustees of Frankfort*, the court said, "Though the trustees of Frankfort have the right to keep the streets and alleys open, they have not, under the pretext of removing obstructions from the street, the right to tear down the inclosure and take possession for public use of the lands and lots of citizens." See also *Trustees of Augusta v. Perkins*.

In 1874 Judge Lindsey in delivering the opinion of the court in the case of *Crosby & Et. v. Owensboro & Russellville R. R. Co.*, said, "The right of the authorities of the city, within Legislative warrant, to permit the construction and operation through its streets of railroads upon which trains of cars propelled by steam may be operated is not now an open question in this state."

It was held in the case of *Clark v. Commonwealth* that, "A legislative act authorizing the county to lay off such public roads within the county as are deemed proper, does not give authority to lay off or establish streets in an incorporated town (against the will of the municipality) because, say these decisions, a highway is not a street, either technically or in common parlance." It has also been decided that a statute in relation to public highways does not apply to incorporated towns or cities.

The court held in the case of *Rowe v. Reneer*, that a town ordinance prohibiting the standing of a team in the public street unattended and unhitched was not invalid but was reasonable under police regulations, the court saying, "The safety and the convenience of travel in congested and obstructed streets demand reasonable regulations." From this we gather that the city may

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8 *Keith v. Johnson*, 109 Ky. 421.
10 12 B. Mon. (Ky.) 610.
11 13 B. Mon. (Ky.) 427.
12 10 Bush 288.
14 *Cowan's Case*, 1 Overton (Tenn.) 311; *Lafayette v. Jenners*, 10 Ind. 74.
15 *Board of Council of Danville v. Fiscal Court of Boyle*, 106 Ky. 608.
16 99 S. W. (Ky.) 250.
prevent even a temporary obstruction so long as it is within reason. See also Wells v. Town of Mt. Olivet.17

Chief Justice Hobson said in the case of Labry v. Gilmour,18 (A case testing the power of a city to lease a street) that authorities of a municipal corporation held the public ways of the street in trust for the use of the public and cannot sell or lease them for private use. A lease by the city to an individual of the street or public way of the city for private use confers no authority upon the lessee to appropriate them to his use.”19

In a very recent case, Alsip v. Hodge.20 the Court of Appeals decided that when one interested in the removal of obstructions of a public street on the ground of a public nuisance must show ownership of property in the particular block; the court saying: “Where the nuisance complained of is alleged to be the obstruction of a street or alley in the limits of a city whose area is laid off in city blocks bounded by streets, this court has uniformly held that none, save those owning lots in the particular block in question can be said to suffer any injury distinct from that suffered by the general public.”21

A very common obstruction in the streets—and one that has caused much litigation—is that caused by property owners using the public way, with municipal authority, to place building material thereon in building on or improving the abutting property. In the case of De Garmo v. Vogt and City of Louisville,22 the court held that the city might give a permit to one for the use of the street, placing building material thereon, in building or repairing the premises. In City of Georgetown v. Goff,23 the rule is thus laid down: “It is the duty of the city when obstructions are placed in the streets, to use such means as are reasonably necessary to warn those using the streets of the presence of the obstruction; and it is a question of fact for the jury, under the particular facts of each case, to determine whether or not the means used for this purpose were reasonably sufficient.” The case of Maxwell v. Fayette National Bank,24 says that the one

17 126 Ky. 131.
18 121 Ky. 367.
19 1 A. K. Mar. 9, 28 Cyc. 850, 864.
20 283 S. W. (Ky.) 392.
21 143 Ky. 162.
22 151 Ky. 857.
23 136 Ky. 622.
24 136 Ky. 625.
seeking a remedy must show a special or peculiar injury to be entitled to injunctive relief or abate a nuisance.

The fourth held in the case of the *City of Louisville v. Vaughn*, that a municipal corporation is charged with notice of presence of obstruction in the streets when it allows wagons to remain in the streets overnight, and is liable to a traveler injured when stumbling over such obstructions. A case that goes much further is *City of Paducah v. Simmins*, where the city was charged with notice and held liable for damages to the injury of one tripping over a wire which was hidden in the grass between the sidewalk and the street.

Perhaps the most common obstruction of the public way comes from closing the way to repair. In the case of *Tigtmier v. City of Covington* the court, speaking through Judge Sampson, said, "A municipality has power and authority while building or rebuilding a street or any part thereof to blockade and close the same to travel." From a review of all the cases cited, it appears that the municipality may obstruct the public way, divert traffic in such a way as to work hardships upon individuals without liability so long as it is not unreasonable and arbitrary.

**Vacation or Abandonment**

As early as 1830 the Kentucky legislature incorporated the Lexington & Ohio Railroad with authority to construct a road from Lexington to "Some one or more points on the Ohio river." It was held in a case testing the authority of the city of Louisville to extend the railroad over the city streets that, "An ordinary public way may be discontinued or applied to some other purpose than that to which it was first established without any legal liability or pecuniary compensation to the local public because they have no right or legal interest that is not common to all." *L. & N. R. R. Co. v. Applegate.* However, the court in the same opinion put this qualification upon the preceding quotation by saying, "If the construction of this railroad and the use made by it were not inconsistent with those

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25 180 Ky. 681.
26 144 Ky. 640.
27 183 Ky. 312.
28 138 Ky. 749.
29 8 Dana (Ky.) 289.
public objects, or with the private rights, the Mayor of the city of Louisville had an unquestionable right to authorize such construction and use of it without any *ad quod damunn*. All of which apparently means simply this, that the municipality has a wide discretion in saying what is a proper use of its public ways.

As a general proposition we find that a municipality has the power to vacate or abandon existing streets and avenues; such power generally being discretionary with the municipality, and such discretion will not be interfered with except when abused or the act is fraudulent. The procedure to vacate must be in strict compliance with the statutory provisions relating thereto. In the case of *Bohemiser v. Bohemiser*, 90 Ky. 48, the court held an act of the legislature closing an alley unconstitutional. The court said, "If the right of ingress and egress is taken, wholly or partially, so as to work an injury, it is taking private property without first making compensation." Of course it follows that if the legislature cannot close a street by an act it cannot delegate it to the municipality; however, this is a case of getting to and from abutting property over a way that, tho unimproved, has been in use for some time but not formally dedicated. The particular facts of the case save it, perhaps.

Doubtless the clearest and most direct case and most elaborate opinion on the point is that of *Henderson v. City of Lexington*. Numerous authorities are cited and commented upon in this case. The case holds: (1) The closing of an alley or street is within section 13 of the Kentucky Constitution; (2) the closing must be necessary for a public purpose; (3) when the private corporation desires to take private property it must affirmatively show that the property is needed for its use in the performance to its duties to the public; (4) but when the municipal corporation desire sand undertakes to exercise the power of eminent domain, it will be presumed that it is in the interest of the public and necessary for public use, and the burden of showing the contrary will be upon those objecting to the proceedings.

29 Atl. 9.
30 Pac. 205.
31 80 N. W. 1101.
32 89 Ky. 2.
33 97 Ky. 30.
34 132 Ky. 390.
In a very recent case, *Davis v. City of Paducah*, the city instituted action to close a street. Davis resisted this and filed his petition to recover damages to his property occasioned by the closing of the street; he was a non-abutting property owner. The Court of Appeals in affirming the lower court in dismissing the petition said, "Davis may have occasion to use this street oftener than others because of its proximity to his property, and for that reason he may suffer more inconvenience than others, but that is a difference in degree, and not in kind. A line must be drawn some where, and in this State it has been drawn, and owners of non-abutting property are not necessary parties to the action to close a street and cannot recover damages for its closing." A review of the authorities will convince one that a municipality may vacate, abandon or close a public way whenever there is a reasonable ground for public use for so doing, and that the courts are inclined to give them a wide range in their discretion in such cases. All the cases hold that the statutes with reference thereto must be strictly complied with. The courts have in all cases attempted to see that there was a public purpose. In the case of the *City of Louisville v. Brannon*, the city attempted to vacate a street for a pecuniary benefit. In the opinion the court remarked, "A mere money consideration, to be paid the government, state or municipality is not a public use for which private property may be taken from one citizen and given to another."  

**Franchises**

There remains to be considered that large class of rights in public streets which are granted in furtherance of public purposes, but which, involving as they do the right to use the streets in various ways, give rise to a series of questions. That the use of the streets in the construction of sewers, water lines, telegraph and telephone lines, gas lines and for general utility purposes is an increased burden and makes travel more dangerous is very evident (though the courts may not agree). The basis of the

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36 281 S. W. (Ky.) 158.
37 *Lewis on Eminent Domain*, 3rd Edit., Sec. 198-199.
38 See Ky. Statutes, Sec. 3094, 3280, 3449 and 3562.
39 *Martin v. City of Louisville*, 97 Ky. 30.
40 99 Ky. 74.
41 But see and compare, 138 Ky. 749.
opposite view is that such modern conveniences as the telephone and telegraph save the roads of travel; this, of course, cannot be disputed, but the fact remains that the increased burden and hazard is there for those who do use the way—those that cannot afford the modern means of communication. The courts have—in every way possible—given a liberal construction to the furtherance of such conveniences and as a general proposition they take the position that these modern appliances simply take the place of the early means of communication and utility. For convenience these rights are described as franchises. A franchise has been described as a particular privilege which does not belong to the individual or corporation as of right, but is conferred by a sovereign or government upon, and vested in individuals or corporations. Blackstone defines it as, "A royal privilege or branch of the king's prerogative subsisting in the hands of a subject."42

Dillion says, "The essential element of a franchise is that it should be a privilege, right or power which the individual cannot exercise as of right and which depends for its lawful existence upon a grant from the government."43 This grant must come from the state to the municipality. Section 164 of the Constitution of Kentucky forbids the franting of a franchise for longer than twenty years by a municipality.45 In the case of City of Somerset v. Smith,46 this was definitely established; however, in Cumberland Telephone and Telegraph Company v. Louisville,47 the court held that under the Constitution existing in 1886, the right to use the city street for telephone purposes, acquired under perpetual charter of the telephone company, empowering it, with and by the consent of the city council, to construct and maintain a telephone system in the city of Louisville was not revocable by the city at will.48

A case of more recent date, and one that has much more force and weight by reason of the facts upon which it is placed, Cumberland Telephone and Telegraph Company v. City of Cal-

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42 11 Bl. Com. 37.
44 Supra, page 3.
45 Keith v. Johnson, 109 Ky. 421.
46 105 Ky. 678.
47 224 U. S. 649.
48 Accord; City of Newport v. Newport Light Co., 84 Ky. 166.
**POWER OF MUNICIPALITY OVER PUBLIC WAY**

... holds that if a public service corporation obtains a franchise except as provided in the Constitution (Section 164) it is a trespasser and cannot invoke in its favor any of the laws enacted for the protection or benefit of corporations that have observed the law.

The abuse of the franchise granted is one of grave concern. It is evident that the courts look to all the circumstances closely with a view to determining if the privilege has in fact been abused. From the line of authorities cited in the preceding case, it is evident that any encroachment or abuse of the franchise privilege will not be tolerated in Kentucky.

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40 151 Ky. 241.

50 See also East Tenn. Co. v. City of Russellville, 106 Ky. 667; E. T. T. & Tel. Co. v. City of Frankfort, 141 Ky. 588.