Michigan Law Review

Volume 6 | Issue 4

1908

Note and Comment

Henry M. Bates
University of Michigan Law School

Harry B. Hutchins
University of Michigan Law School

Frank B. Fox

John C. Howell

Clyde A. DeWitt

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

THE PROPOSED CODE OF LEGAL ETHICS FOR THE AMERICAN BAR ASSOCIATION. —The effort of the American Bar Association to frame and adopt a code of legal ethics is deserving of more attention from American lawyers than it is receiving. The adoption of such a code has been under consideration for several years. In 1905 the Association at its annual meeting instructed its committee to report at the meeting to be held in the next year upon "the advisability and practicability" of the adoption of such a code. In pursuance of these instructions the committee reported that in its judgment the adoption of such a code was not only advisable, but highly important, and also that it was practicable.

Among the reasons advanced to show the advisability of adopting canons of legal ethics were mentioned: the important part filled by the American lawyer in the government of his country; the fact that members of the bar are officers of the court and hence essential to the processes of justice, and (to quote), "A further reason why we report the advisability of canons of legal ethics being authoritatively promulgated arises from the fact that many men depart from honorable and accepted standards of practice early in their

careers as the result of actual ignorance of, the ethical requirements of the situation. Habits acquired when professional character is forming are lasting in their effects. The 'thus it is written' of an American Bar Association code of ethics should prove a beacon light. * * *" The 1906 report was received, the committee was continued and directed to further report at the 1907 meeting. The 1907 report recommends among other things that the Association reprint Sharswood's Essay on Professional Ethics, and distribute copies thereof to each member of the Association requesting that the members examine the Sharswood reprint and the documents printed in the appendix to said report, and make suggestions to the committee; also that the committee be authorized to have the proposed canons of professional ethics drafted by May 1, 1908, and on or about that date to transmit a copy to each member of the Association.

Under date of November 29, 1907, the committee sent out copies of the Sharswood essay, of its own report to the 1907 meeting, and a letter asking that definite and concrete suggestions as to the proposed code be sent to the secretary, Mr. Lucien Hugh Alexander, 714 Arcade Building, Philadelphia. The documents sent out are a most interesting contribution to this important subject, and it is to be hoped that the efforts of the committee will lead to definite results.

* * * * *

The report of the committee to the Association in 1907 shows that codes of ethics have already been adopted by the bar associations of the states of Alabama, Georgia, Virginia, Michigan, Colorado, North Carolina, West Virginia, Wisconsin, Maryland, Kentucky and Missouri. The bar associations of several other states have the adoption of similar codes under consideration at the present time, and in several states canons of legal ethics have been incorporated into the oath administered upon admission to the bar. The codes referred to have all been adopted since 1887, from which it will be seen that this movement is of comparatively recent origin, and that it is gaining strength rapidly. It seems to the writer of this note that the Alabama Code, the inspiration of which will be found largely in Sharswood's Essay on Professional Ethics, and which was adopted mainly through the effort and energy of Col. Thomas Goode Jones, afterward Governor of Alabama and now United States Judge for the middle and northern districts of Alabama, on the whole, solves the problem more effectively than any of the others. The particular difficulty to be overcome would seem to be to devise a code sufficiently specific and definite to afford an actual guide to conduct without being prolix and too dogmatic. It may be said, indeed, that an explicit compliancé with all that may be fairly said to be included in the oath administered to lawyers in several of the states would keep the lawyer well within proper limits of conduct, but the difficulty is that these oaths are couched in such general terms as unfortunately to seem but mere formalities to many persons, and to throw no light upon the very definite problems which sometimes arise on the borderland between right and wrong. The Alabama Code consists of some sixty-three sections, some of which might perhaps be omitted and others shortened without impairing the usefulness of the code as a whole.

It would be impossible within brief enough compass to summarize this code. Suffice it to say that practically all of the vexed questions, such as defending one whom the advocate believes to be guilty, direct and indirect methods of advertising, testifying for one's client, control of the trial as between lawyer and client, the considerations which may enter into the determination of the amount of the lawyer's fees, contingent fees, and attitude toward the jury, are for the most part concisely and satisfactorily dealt with.

With reference to contingent fees the code reads (Sec. 51): "Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred." Section 50 enumerates six elements which are to be considered in fixing the fee, all of which will readily occur to any lawyer of experience. Section 38 is one which too many lawyers disregard at the present time. It reads as follows: "Attorneys should as far as possible avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from bargaining about the subject-matter of the litigation so long as the relation of attorney and client continues." The substance of Section 10 cannot be too often impressed upon the bar. It reads as follows: "Nothing has been more potential in creating and pandering to public prejudice against lawyers as a class, and in withholding from the profession the full measure of esteem and confidence which belong to the proper discharge of its duties, than the false claim often set up by the unscrupulous in defence of questionable transactions, that it is the attorney's duty to do everything to succeed in his client's cause. An attorney owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability to the end that nothing may be taken or withheld from him save by the rules of law legally applied. No sacrifice or peril, even to the loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator or lessen the duty of obedience to law and the obligation to his neighbor; and it does not permit, much less demand, violation of law or any manner of fraud or chicanery for the client's sake." This certainly is a much better view of the subject than that extraordinary one expressed by Lord BROUGHAM when he said: "The advocate in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to all persons, and among them himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments and destruction he may bring upon others; separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy lot to involve his country in confusion."

* * * * *

The Bar Association especially invites suggestions upon the recent development of the question as to how far a lawyer may go in protecting his client's interest, in that new kind of service resulting from the recent enormous growth of the power of corporations and trusts, and the efforts of nation and

state to control and curb that power. Some of the difficult questions thus raised will readily occur to all lawyers. For example, what may the loyal citizen-lawyer do to reduce the tax-roll of his corporation clients operating in many states? May he properly circumvent the Sherman and other anti-trust statutes, or the Inter-State Commerce Act? The honest lawyer may well think that with the Northern Securities decision, which it is his duty as an officer of the court to obey in letter and spirit, on the one hand, and his duty to his client, who cannot escape the irresistible tendency of modern business toward consolidation, on the other hand, he is placed in a most perplexing position. The committee's request on that head is as follows: "We also earnestly request * * * you to give us the benefit of your advice crystallized into specific canons concerning the principles which should ever guide the lawyer true to his country, his client and himself, in accepting the retainers of individuals and corporations, and in representing or advising them, knowing that by virtue of the establishment of the relation of counsel and client it will be his duty within the scope of the retainer to guard by every honorable means and to the best of his ability and learning the legal rights of the client."

* * * * *

While the committee asked that suggestions be made to it through its secretary before January 15, 1908, it is hoped that those who have not already examined the report of the committee and made their suggestions may do so at once. Doubtless any suggestion of importance could still be incorporated into the committee's report. It can scarcely be doubted that the adoption of the Code would do much to reverse the direction of the stream of public opinion concerning our profession, an opinion which unfortunately, and perhaps not wholly without justification, has been increasingly unfavorable in recent years. True it is that rules and law cannot make bad men good, but no one of experience can doubt for a moment the force of the committee's argument that many lawyers almost imperceptibly grow into unethical practices through sheer ignorance as to what is right. Every teacher of law can recall many interviews with students about to enter practice, in which the student, with entire ingenuousness, assumes that sharp practice, amounting even to trickery, is a common and accepted means of attaining the lawyer's ends in the service of his client. The establishment of the code of conduct by an association carrying the great moral influence which the American Bar Association should have, would unquestionably afford guidance to young men about to enter or just entering the practice of their profession, and prevent many of them from going astray. That this whole matter is regarded as of vital importance by the best men at the bar may be reasonably inferred from the makeup of the American Bar Association's committee. It includes such names as Henry St. George Tucker, Chairman; Justice Brewer, of the United States Supreme Court; Judge J. M. Dickinson, President of the American Bar Association for the present year; William Wirt Howe, of Louisiana; James G. Jenkins, of Wisconsin, formerly judge of the United States Circuit Court; Judge Thomas Goode Jones, of Alabama; the Hon. Alton B. Parker, of New York; George R. Peck, of Illinois, formerly president of the American Bar Association, and Francis Lynde Stetson, of New York.

It is a pleasure to record the fact that the present reprint of Sharswood's Professional Ethics was published at cost by the publishers of the regular edition, Messrs. T. & J. W. Johnson Co., of Philadelphia, and that that cost was generously borne by General Thomas H. Hubbard, of New York, a valued member of the committee. H. M. B.

THE POWER OF A COURT OF EQUITY TO ORDER THE EXHUMATION OF A DEAD BODY FOR EXAMINATION IN AID OF THE DEFENSE OF A CIVIL ACTION AT LAW.—The case of *Mutual Life Ins. Co. of New York* v. *Griesa, et al.*, 156 Fed. 398, decided by the First Division of the United States Circuit Court for the District of Kansas, September 14, 1907, presents a state of facts that at once challenges attention and at least one question of equity jurisdiction that is novel, and in regard to which there will probably be a difference of opinion in the profession. One Lucius H. Perkins, a lawyer of ability and standing at the Kansas bar, who at the time of his death was, and for some years previous thereto had been, a member of the state board of law examiners and its secretary, as well as a very active man in the promotion of movements for raising the standards of the legal profession, took out a policy of life insurance in the complainant company in December, 1906, for $100,000, payable to his estate. The first of the annual premiums was paid to the company in cash, not by the insured, but by the agent of the company, who took the note of the insured for the amount advanced. This note fell due a few days after the death of Perkins. About the time of the application of the insured for the policy in question, he applied to other companies for insurance to the amount of more than $1,000,000. Some of these applications were made before the application to complainant, and it appears that a part of them were refused, while others, the number not appearing, were allowed and later the allowance canceled. But these facts were concealed from complainant when negotiations were in progress for the issuing of the policy in suit. It seems that deceased succeeded in securing policies for large amounts, for at the time of his death there were policies outstanding and apparently in force aggregating $540,000. The annual premiums on these were about $30,000, an amount very much greater than his income, and which, according to the opinion, "he could not pay without converting his estate into money, and then only for a few years."

It seems that about the time deceased was negotiating for the policy in suit, he was in correspondence with a chemist as to the uses and effects of poisons, and that this fact had come to the knowledge of some of the companies that had denied his applications, but it did not come to the knowledge of the complainant company until after the death of the insured. On the day of his death, Perkins bought morphine, giving, as the opinion states, an insufficient reason for the purchase. Toward evening, going to the roof of his house for an apparently legitimate purpose, although warned not to go on account of the danger of falling, he fell to the ground, was taken up in an unconscious condition, and a few hours thereafter died, without having regained consciousness. The eyes of deceased gave some evidence of morphine poisoning, and it is the claim of complainant that the case was one

of suicide. It seems that when deceased accepted the policy in suit he objected to the suicide clause.

The foregoing and other facts tending to show fraud were, according to the opinion, set out in the bill of complaint, which was filed by the company apparently for the purpose of securing a cancellation of the policy that it had issued to deceased. To this bill a demurrer and a plea to the jurisdiction were filed, the defendants contending that the company had a plain, adequate and complete remedy at law in the defense that it could interpose on the ground of fraud to any action upon the policy.

The bill in the case was not filed until after the death of insured, and the court held that "whatever the rule may be in the several states and in England, the rule now is in the United States courts that where a policy is for the payment of money, and is obtained by fraud, the cause is not cognizable in equity when the bill is not filed until after the death of the insured," citing *Cable* v. *Insurance Company,* 191 U. S. 288, 24 Sup. Ct. Rep. 74; *Riggs* v. *Insurance Company,* 129 Fed. 207, 63 C. C. A. 365, but that such a bill "can be maintained if brought in the lifetime of the insured, and that his subsequent death will not abate the action," citing *Life Insurance Company* v. *Blair,* 130 Fed. 971. To the contention that as the policy by its terms gave an option to the beneficiary to take, upon the maturity of the contract, either bonds provided for in the contract or the equivalent in money, the estate would have a right to compel the delivery of the bonds by a decree for specific performance, and that as this could only be obtained by an action in equity, the company should have the right to seek a determination of the controversy in an equity tribunal, the court said "that the estate does not have the right to coerce the delivery of the bonds by a decree for specific performance. The estate has the right of election either to take the bonds, or, in lieu thereof, money calculated as * * * * in the policy set forth. But, aside from that, the facts are that the company repudiates the policy, and refuses to deliver the bonds. And when the company refused to deliver the bonds, a mere naked money demand was created, if the poilcy is valid," citing *Roehm* v. *Horst,* 178 U. S. 1, 20 Sup. Ct. Rep. 780. As an additional answer to the contention, the court suggested the familiar doctrine that equity will not ordinarily compel the specific performance of a contract in regard to personalty, as the remedy at law is adequate. To the further contention that as the bonds provided for in the policy had been specifically bequeathed by the insured, and thereby assigned, to several different parties, in a will that had been admitted to probate, equity should assume jurisdiction in order to prevent a multiplicity of suits, the court replied that, according to the general rule and under a special statute in Kansas, the executors would be the proper parties to bring a suit at law upon the policy; therefore, there could be no multiplicity of suits.

But notwithstanding the fact that, upon the case as apparently made by the bill and limited by the pleadings, the court decided, as hereinbefore indicated, that equity had no jurisdiction, it retained the case for the purpose of ordering a discovery that is out of the ordinary and for which probably an exact precedent is not to be found in the books. Soon after the filing of the

bill in this case, the executors of the insured instituted, in the same court in which the equity suit was pending, an action at law upon the policy, they alone, and properly so, as the court suggests, being plaintiffs. An application from the insurance company in each case for an order directing that the body of the insured be exhumed and examined by experts with a view of ascertaining the cause of death, followed. Both applications were heard together upon the same evidence. In the law case the application was denied for the reasons, first, "that a court of law has no power to order the production or inspection of inanimate objects in the possession or control of a party in advance of the trial," and, second, because the widow who, under the law, has control of the body of her deceased husband as the executors have not (see *Larson* v. *Chase,* 47 Minn. 307, 50 N. W. Rep. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; *Young* v. *College,* 81 Md. 358, 32 Atl. Rep. 177, 31 L. R. A. 540; *Pettigrew* v. *Pettigrew,* 207 Pa. 313, 56 Atl. Rep. 878, 64 L. R. A. 179, 99 Am. St. Rep. 795, cited by the court, and the following: *Foley* v. *Phelps,* 1 App. Div. [N. Y.] 551, 37 N. Y. Supp. 471; *Hackett* v. *Hackett,* 18 R. I. 155, 26 Atl. Rep. 42, 19 L. R. A. 558), was not a party to the suit at law and could not be made a party. But she was a party to the equity suit, and, therefore, could be represented therein upon the hearing of the question.

This, then, was the situation: In an equity suit brought primarily and, as the opinion seems to indicate, solely for the cancellation of a life insurance policy, the court, although denying the complainant's right to the relief sought, retains the suit for the purpose of allowing a special application therein for an order that the body of the insured be exhumed for examination. And the court holds that such an order should be made in aid of a defense at law to a suit upon a life insurance policy, where the circumstances indicate the presence of fraud and one of the defenses is that the insured committed suicide by poison. "The order will be," said the court, "that the marshal of this district will exhume the body. The court will appoint a pathologist to examine the body, to the end that the evidence may be had as to whether the fall killed the insured. A chemist will be appointed to determine whether he died by morphine poison. The results of their efforts ought to materially aid the court in arriving at the truth. And such an order is made because this court is of the opinion that it cannot be made in the action at law, but holding that it is within the general powers of a court of equity, and that such an order is in the furtherance of justice."

The argument upon which the court bases its conclusion is that such an order is simply the exercise of the old-time right of compelling discovery, which, though not often invoked, is, nevertheless, not obsolete. "If such disclosure cannot be made," said the court, "it is because of the right of one party to disclose the truth, if believed advantageous, and to conceal it if believed harmful, and that ought not to be a rule for the guidance of courts. And the only objection aside from that as to the power of the court is one of sentiment, as if sentiment should control in the administration of justice. * * * * Can anyone doubt but that all sentiment would dissipate, and all objection would vanish, if it were necessary for the estate to make the showing in order to recover the large sum of money involved? And why should it

be optional with one party to say what part of the truth shall be made known, and what part kept from the court"? The court finds support for its order in the cases that sustain the right of a court to compel the exposure of the person for a physical examination (See the opinion for a practically complete list of such cases as well as of those which deny the right; see, also, 1 MICH. LAW REV. 193, 277, where the subject is exhaustively considered, and 2 Id. 321, 477; 3 Id. 160; 4 Id. 71 for notes), and it disposes of the case of *Union Pacific Railroad Company* v. *Botsford,* 141 U. S. 250, 11 Sup. Ct. Rep. 1000, in which a majority of the court held that a physical examination of a party could not be coerced, on the ground that such coercion would be equivalent to an assault without lawful authority, by saying that while the Botsford case is an authority, it is only so as to a living person.

While it is quite apparent that the object of the court was by its order to promote the ends of justice, and while it is probable that its efforts will result in material aid to the court of law in finding out the truth, the practice followed is undoubtedly subject to criticism, if, as one would gather from the opinion, the bill was not filed for discovery, or the suit launched for that purpose, and the suit was retained simply for the purpose of granting the application for the order of exhumation. H. B. H.

THE CONSOLIDATION OF MUNICIPAL CORPORATIONS AND THE FEDERAL CONSTITUTION.—Matters arising out of the annexation of smaller municipal corporations to larger adjoining ones have given rise to considerable litigation. But in most of the cases federal or constitutional questions have not been involved. The consolidation of the cities of Pittsburgh and Allegheny in June, 1906, has recently been before the Supreme Court of the United States in the case of *Hunter* v. *Pittsburgh* (1907), 28 Sup. Ct. Rep. 40. The General Assembly of Pennsylvania, in extraordinary session, passed an act relating to the union of contiguous cities by the annexation of the smaller to the larger. It provides that, after a petition has been filed in the court of quarter sessions, and a hearing had upon it, the court shall order an election if the petition and the proceedings come within the requirements of the act. At the election a majority of the votes cast in both cities determines whether or not the court shall enter a decree consolidating the lesser with the greater. Following this procedure an election was held in Pittsburgh and Allegheny. A majority of all the votes were in favor of the union, but the majority in the smaller city were opposed. The reasons for this opposition lay in the increased burden of taxation which must surely follow, without any apparent benefit to Allegheny or its citizens. Successive appeals were taken from the decree of the court of quarter sessions directing the consolidation, and finally the case was carried, on writ of error, to the Supreme Court of the United States.

Under consolidations of this character serious questions often arise regarding the title to lands or other municipal property, the burden of debts or other obligations, the right to outstanding claims and the rights of citizenship. The Pennsylvania act carefully provided for these matters, and left, for the consideration of the courts, the bare question of the state's control

over its municipal corporations, and their rights under the state or Federal Constitution. That the state, in the absence of constitutional restrictions, has complete control over its municipalities cannot be questioned. Thus the Supreme Court of Pennsylvania, when the principal case was before it, *In re City of Pittsburgh* (1907), — Pa. —, 66 Atl. Rep. 348, held that the matter was one of legislative discretion and the courts could not interfere, for the act did not violate the state constitution as local or special legislation, although Pittsburgh and Allegheny were the only two cities to which it could apply, nor was it in conflict with the Federal Constitution in the mode of election prescribed.

In their assignment of errors before the Supreme Court of the United States, the plaintiffs, of which the city of Allegheny was one, raised two points under the Federal Constitution: first, that the act in question impaired the obligation of contract between the citizens, taxpayers and voters of Allegheny and the municipality; second, that it deprived both the city and its citizens of their property without due process of law. The first was summarily overruled on the ground that no such contract could exist. Also, at the outset, the court, speaking through Mr. JUSTICE MOODY, denied that it had anything to do "with the policy, wisdom, justice, or fairness of the act under consideration," those being questions for the legislature; nor "with the interpretation of the constitution of the state and the conformity of the enactment of the assembly to that constitution," those being questions for the courts of the state. The Federal Constitution, the very nature of the Supreme Court, and numerous decisions forbid any other view. It would appear, then, that the legislature, in its discretion, may act toward its municipal corporations and their citizens with any degree of oppression or injustice, provided only its enactments are not in direct conflict with the state or Federal Constitution.

The exact question presented by the remaining assignment of error had not been passed upon by the court before. It was contended, on behalf of the city and its citizens, that the method of voting required by the act allowed the voters of the more populous city to overpower the voters of the smaller, forcing the consolidation upon them against their will, and so depriving them of property without due process of law. In the course of its decisions the Supreme Court has laid down certain definite principles as to municipal corporations, their rights and contracts, their citizens, and their relation to the state. The municipality is a portion of the governmental power of the state creating it. It is simply a political subdivision, existing through the exercise of legislative powers, and subject entirely to legislative control. "The city is the creature of the state." *United States* v. *Baltimore & Ohio R. Co.*, 17 Wall. 322, 329; *Worcester* v. *Worcester Consol. St. R. Co.*, 196 U. S. 539. The powers, rights, charters, franchises, and privileges granted it are held at the will of the legislature. A state law which provides for the payment of a penalty to a county may be repealed, and the county has acquired no separate or private interest of which it is deprived. *Washington County* v. *Baltimore & Ohio R. Co.*, 3 How. 534. The state may force its corporations to refund taxes or to pay claims against it which are unenforceable at law. *Tippecanoe County* v. *Lucas*, 93 U. S. 108; *New Orleans* v. *Clark*, 95 U. S. 644. Being

but a public instrumentality, instituted for the administrative purposes of the state, neither its charters, nor any act of the legislature, exempting its public property from taxation, constitute a contract. The legislation may be repealed and the property taxed. *Covington* v. *Kentucky*, 173 U. S. 231. Part of one county may be taken and annexed to another. *Comm'rs of Laramie County* v. *Comm'rs. of Albany County*, 92 U. S. 307. Similarly portions of one or more school districts may be taken and incorporated in another, and there is no deprivation of property without due process of law. There is no contract with the state under which the property is held. *Att'y Gen. ex rel. Kies* v. *Lowery*, 199 U. S. 233. One or more towns may be legislated out of existence, or five towns may be organized into a single corporation. The question of their territories and boundaries is one peculiarly within the domain of state control and beyond federal control. *Mount Pleasant* v. *Beckwith*, 100 U. S. 514; *Williams* v. *Eggleston*, 170 U. S. 304; *Forsyth* v. *Hammond*, 166 U. S. 506, 518. The legislature may annex agricultural lands to a city, making them bear the increased burden of purely municipal taxes, for the state has the power to determine what portions of her territory shall be within the limits of a city and can prescribe the rate of taxation. "How thickly or how sparsely the territory within a city must be settled is one of the matters within the legislative discretion." Nor is a party deprived of his property without due process of law because increased taxes work hardship or impose unequal burdens in individual cases. *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Forsyth* v. *Hammond*, 166 U. S. 506; *Davidson* v. *New Orleans*, 96 U. S. 97. But while the legislature can alter or destroy its corporations at will, yet if the corporation has entered into contracts, as, for example, issued bonds or incurred other indebtedness, legislation cannot be used to defeat contracts already entered into. *Mobile* v. *Watson*, 116 U. S. 289; *Shapleigh* v. *San Angelo*, 167 U. S. 646; *Graham* v. *Folsom*, 200 U. S. 248. With this limitation it would appear that the legislature has almost unlimited power under the Federal Constitution. In view of the complete control it thus has over all the property of the municipality, and even over its rights and obligations, it is difficult to see how the general assembly, under a general law, could deprive the citizens of Allegheny of property without due process of law in the manner prohibited by the Constitution. It is through the municipality that they must claim most of their rights.

But the property owned by the city is of two kinds. There is a well recognized distinction between property owned by the corporation in its governmental capacity as an administrative agent of the state, and that owned in its proprietary capacity for private benefit or for its own use. The legislature has not the same broad powers of control over the latter. The corporation, in respect to it, stands in the same position as a private corporation or an individual, and is protected in the same way. *Patterson* v. *Society, etc.*, 24 N. J. L. 385; *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509; *Detroit* v. *Detroit & H. Pl. Road Co.*, 43 Mich. 140; *Montpelier* v. *East Montpelier*, 29 Vt. 12. This distinction has never been directly before the Supreme Court, and unfortunately it was not presented by the record in the principal case. A recital of the facts to the effect that Pittsburgh intended to expend large

sums in purchasing a water plant and constructing a lighting plant, while Allegheny had already established its system of lighting and water supply, was all that appeared. But the court has recognized the existence of the distinction in several decisions. *Tippecanoe County* v. *Lucas*, 93 U. S. 108, 115; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 91; *Covington* v. *Kentucky*, 173 U. S. 231, 240. Mr. JUSTICE MATTHEWS, for the court, in *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 172, says: "Whatever powers the municipal body rightfully enjoys over the subject [wharves and levees] is derived from the legislature. They are merely administrative, and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration." And Mr. JUSTICE PECKHAM, in *Worcester* v. *Worcester Consol. St. R. Co.*, 196 U. S. 539, 551, says: "In general it may be conceded that it can own private property, not of a public or governmental nature, and that such property may be entitled, as it is said, 'to constitutional protection.' Property which is held by these corporations upon conditions or terms contained in a grant and for a special use, may not be diverted by the legislature." The distinction was also recognized in the *Dartmouth College Case*, but whether legislation which destroys a municipality and annexes it to another offends against the Federal Constitution with regard to this class of property remains, as yet, undecided by the Supreme Court. F. B. F.

THE SCALPER IN LAW AND IN EQUITY.—By virtue of the very recent decree of the Supreme Court in the suit of *Marcus K. Bitterman et al.* v. *The Louisville and Nashville Railroad Co.* (1907), 28 Sup. Ct. Rep. 91, the railroads appear to have won a complete victory in their fight against the scalpers.

Ordinary railroad tickets, issued without restrictions or limitations, have generally been held transferable and any holder entitled to transportation thereon. *Sleeper* v. *Railroad Co.*, 100 Pa. St. 259; *Carsten* v. *Railroad Co.*, 44 Minn. 454, 47 N. W. 49; *Nichols* v. *Railroad* Co., 23 Ore. 123, 31 Pac. 296; *Railroad* v. *Ing*, 29 Tex. Civ. App. 398, 68 S. W. 722; *Gleason* v. *Willamette Valley*, 71 Fed. 712. But where the ticket itself shows that, in consideration of a reduced rate of fare, it is expressly agreed that it shall not be transferable, or shall be void in the hands of other than the first purchaser, such ticket is a valid contract. *Railway Co.* v. *Frank*, 110 Fed. 689; *Post* v. *Railroad Co.*, 14 Neb. 110; *Way* v. *Railroad Co.*, 64 Ia. 48; *Walker* v. *Railroad Co.*, 15 Mo. App. 333; *Drummond* v. *Railroad Co.*, 7 U. 118; *Davis* v. *Railroad Co.*, 107 Ga. 420; *Dangerfield* v. *Railroad Co.*, 62 Kan. 85; also in point, *Mosher* v. *I. M. and S. R. Co.*, 127 U. S. 390, 32 L. Ed. 249, and *Boylan* v. *Hot Springs R. Co.*, 132 U. S. 146, 33 L. Ed. 290.

The railway companies, finding that their right to refuse to honor such tickets in the hands of transferees was largely defeated through the ingenuity of brokers and scalpers, sought aid of congress and the state legislatures. So far, congress has not acted in this matter, though urged to do so by the Interstate Commerce Commission in its report in 1900 and subsequent years. The state legislatures have quite generally enacted statutes restricting the sale

of railway tickets, known as special or non-transferable tickets, to authorized agents of the companies issuing them. Such statutes have been held constitutional in *Fry* v. *State*, 63 Ind. 552; *Burdick* v. *People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152; *State* v. *Corbett*, 57 Minn. 345, 59 N. W. 317; *Commonwealth* v. *Keary*, 198 Pa. St. 500, 48 A. 472; *State* v. *Bernheim*, 19 Mont. 512, 49 Pac. 441; *In re O'Neill*, 41 Wash. 174, 83 Pac. 104; *State* v. *Manford*, 97 Minn. 173, 106 N. W. 907; *Jannin* v. *State*, 42 Tex. Crim. R. 631, 51 S. W. 1126. These acts are not directed against commerce and affect it only incidentally. *Nashville, etc., Ry.* v. *Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352. The courts of New York held a similar statute to be void in *People ex rel. Tyroler* v. *Warden of Prison*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264. Brokers were permitted to deal in tickets of all kinds in Louisiana and also in Missouri, with the result that the legal victories of the railways were of little consequence.

The struggle was transferred to the federal courts in equity. The first cases decided were those of the *Louisville & Nashville Ry. Co.* v. *Duckworth* and *Chicago & St. Louis Ry. Co.* v. *McConnell* (1897), 82 Fed. 65, in which the defendants were enjoined from selling the return portion of round-trip tickets issued on account of the Tennessee Centennial Exposition. It was insisted that there were no precedents for such exercise of equity jurisdiction. and none was cited; the court held that such an objection was not fatal to the assumption of jurisdiction by a court of equity; the restraining order was based on the principle that one who wrongfully interferes in a contract between others and, for purposes of gain to himself, induces one of them to break it, is liable to the party injured, and his continued interference may be a ground for injunction when the injury resulting is irreparable. The same principle was announced in *Delaware, etc., Ry. Co.* v. *Frank* (1901), 110 Fed. 689, though here an injunction was refused because the railroads concerned were pooling passenger earnings contrary to law. In two cases decided in 1904, complainants prayed that the restraining order be made to include tickets issued and *to be issued* in the future. This prayer was refused in so far as it related to future tickets in *Louisville & Nashville R. Co.* v. *Bitterman*, 128 Fed. 176, but was granted in *Louisville & Nashville R. Co.* v. *Caffrey; Baltimore, Ohio & Southwestern R. Co.* v. *same; Illinois Central R. Co.* v. *same*, 128 Fed. 770. On appeal, the circuit court of appeals for the fifth circuit held it was error to deny the prayer of complainant in the case of *Louisville, etc., R. Co.* v. *Bitterman*, supra, and directed that the restraining order be modified so as to include tickets to be issued in the future. *Louisville & N. R. Co.* v. *Bitterman et al.*, 144 Fed. 34. Later in the same year, in a suit brought in the northern district of Illinois, a restraining order was granted which included non-transferable tickets to be issued from time to time as the needs of business might require. *Penn. R. Co.* v. *Bay*, 150 Fed. 770.

The scalpers won a partial victory in *Baltimore & Ohio R. Co.* v. *Hamburger et al.*, 155 Fed. 849, decided in 1907. Here an injunction to restrain the purchase and sale of certain non-transferable excursion tickets was refused because the regulation as to non-transferability was not filed with

the Interstate Commerce Commission at the time of filing the schedule of rates and fares, as required by the Act of June 29, 1906—the neglect to file making this feature of the tickets illegal and void and its violation no basis for an injunction. The case of *Railroad Co.* v. *Bitterman* was appealed to the Supreme Court, where it was affirmed without reservation. *Marcus K. Bitterman et al., petitioners,* v. *Louisville & Nashville Railroad Co.* (1907), 28 Sup. Ct. Rep. 91. The business of dealing in non-transferable reduced-rate excursion tickets for profit, to the injury of the railroad, is held to be an actionable wrong. The wanton disregard of the rights of the carrier constitutes legal malice on the part of the scalper, who stands in the position of one who maliciously induces a breach of contract. J. C. H.

THE BASIS OF EQUITABLE JURISDICTION IN CASES OF FRAUD.—The case of *Beaton* v. *Inland Township et al.* (1907), — Mich. —, 113 N. W. 361, suggests the discussion as to the source of the jurisdiction of courts of equity in cases of fraud. An outgoing township treasurer induced the incoming treasurer, who was the petitioner in the case, to sign a receipt for a sum of money greater than that actually turned over to him, by representing that certain vouchers which were among the papers turned over were uncanceled, whereas as a matter of fact he had already received credit for them in an accounting with the township board. The trial court decreed the cancellation of the receipt, and this was affirmed on appeal by a divided court, the majority holding that the case was governed by *Hancock Life Ins. Co.* v. *Dick* (1897), 114 Mich. 337, 43 L. R. A. 566; *Ins. Co.* v. *Blaine* (1906), 144 Mich. 218, *Macey* v. *Macey* (1906), 143 Mich. 138, 5 L. R. A. (N. S.) 1036. There were three dissenting judges, and their dissent was based on the ground that the petitioner was only liable to the township for the amount turned over to him, that the receipt was only evidence of that amount, which might be contradicted by parol, and "the mere fact that a receipt is given at the conclusion of an alleged fraudulent transaction relating to personal property is not enough to establish the jurisdiction of a court of equity to investigate the transaction for the purpose of canceling or refusing to cancel the receipt."

A reference to the Michigan cases on which the majority relied *seems* to indicate that the Michigan court regards fraud as of itself an independent ground of equitable jurisdiction.

In England the rule seems firmly established that courts of equity always *have* jurisdiction in a case of fraud, except in cases of fraudulent wills, and the jurisdiction is there considered as existing, not because of anything peculiar in the nature of fraud itself, but for historical reasons. The doctrine is that, inasmuch as the only relief to be had in cases of fraud prior to the invention of the special action on the case, and its offshoots, assumpsit and trover, was in equity, that the gradual acquisition by law courts of jurisdiction to grant relief against fraud through these actions merely gave a concurrent remedy, and, in accordance with familiar principles, could not operate to deprive the equity courts of their ancient jurisdiction. The question which presents itself to an English court of equity under this doctrine is not whether or not jurisdiction *exists,* but rather, whether or not it will be

exercised. These views are upheld in *Colt et al.* v. *Woollaston et al.* (1723), 2 P. Wms. 154; *Ramshire* v. *Bolton* (1869), L. R. 8 Eq. 294; *Evans* v. *Bicknell* (1801), 6 Vesey 174, 182; *St. Aubyn* v. *Smart* (1868), L. R. 3 Ch. App. 646; *Blair* v. *Bromley* (1846), 5 Hare 542, 2 Phill. Ch. 354; *Burrowes* v. *Lock* (1805), 10 Ves. 470; *Green* v. *Barrett* (1826), 1 Sim. 45; *Cridland* v. *Lord De Mauley* (1847), 1 De Gex & S. 459; and in *Slim* v. *Croucher* (1860), 1 De Gex F. & J. 518, which, although overruled on other points by *Derry* v. *Peek* (1889), 14 App. Cas. (H. L.) 337, is still regarded as authority on the question of the basis of equity jurisdiction in cases of fraud. In that case the rule is expressed in the apt phraseology of TURNER, L. J., as follows (p. 528): "I am also of opinion that this decree is right, and I think that, if we were to grant any relief on this appeal, we should be very much narrowing an old jurisdiction of this court, by confining it to cases in which the jurisdiction has been exercised. We should, I think, be taking the cases as the measure of the jurisdiction, instead of as examples of that jurisdiction."

In America the influence of constitutional provisions guarantying the right of trial by jury, of federal and state statutes limiting equitable jurisdiction to cases where there is no adequate remedy at law, and of mistaken notions as to the true basis of equitable jurisdiction in cases of this class, has made the question a much vexed one. In some of the older decisions the English view seems to have been adopted. *Bacon* v. *Bronson* (1823), 7 Johns. Ch. (N. Y.) 194; *People* v. *Houghtaling* (1857), 7 Cal. 348; *Lewis* v. *Tobias* (1858), 10 Cal. 574; *Butler* v. *Durham* (1847), 2 Ga. 413; see, also, *Eggers* v. *Anderson* (1901), 63 N. J. Eq. 264.

But the prevailing American rule seems to be, as expressed by POMEROY, in his EQUITY JURISPRUDENCE (Vol. II, § 914), that "the exclusive jurisdiction to grant purely equitable remedies, such as cancelation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, complete and certain." Some of the courts reach this conclusion on the erroneous assumption that courts of law always had jurisdiction to give relief in some cases of fraud, and that it is only in those cases in which the legal remedy was inadequate that the equity courts had jurisdiction. Other courts reach the same conclusion by interpreting the constitutional guaranty of right to trial by jury as an inherent limitation on the exercise of what would otherwise be a concurrent equitable jurisdiction. In the following cases this rule has been either expressly enunciated or has controlled the court in its assumption or rejection of jurisdiction:

Waddell v. *Lanier* (1878), 62 Ala. 347; *Tillison* v. *Ewing* (1888), 87 Ala. 350; *Merritt* v. *Ehrman* (1896), 116 Ala. 278; *Sherwood* v. *Salmon* (1813), 5 Day 439; *Skinner* v. *Bailey* (1829), 7 Conn. 496; *Buxton* v. *Broadway* (1878), 45 Conn. 540; *Hoey* v. *Jackson* (1893), 31 Fla. 541; *County of Ada* v. *Bullen Bridge Co.* (1897), 5 Ida. 188; *Gore* v. *Kramer* (1886), 117 Ill. 176; *Black* v. *Miller* (1898), 173 Ill. 489; *Schack* v. *McKey* (1901), 97 Ill. App. 460; *Vannatta* v. *Lindley* (1902), 198 Ill. 40; *Schenehon* v. *Life Ins. Co.* (1902), 100 Ill. App. 281; *Fitzmaurice* v. *Mosier* (1888), 116 Ind. 363; *Hogue-*

land v. *Arts* (1901), 113 Ia. 634; *Hardwick* v. *Forbes's Adm.* (1808), 1 Bibb. (Ky.) 212; *Blackwell* v. *Oldham* (1836), 4 Dana (Ky.) 195; *Woodman* v. *Freeman* (1846), 25 Me. 531; *Farmington* v. *Bank* (1892), 85 Me. 46; *Sugar Refining Co.* v. *The Campell & Zell Co.* (1896), 83 Md. 36; *Negley* v. *Co.* (1898), 86 Md. 692; *Hubbell* v. *Currier et al.* (1865), 10 Allen 333; *Fickett* v. *Durham* (1875), 119 Mass. 159; *Fuller* v. *Percival* (1879), 126 Mass. 381; *Anthony* v. *Valentine* (1881), 130 Mass. 119; *Teft* v. *Stewart et al.* (1875), 31 Mich. 367; *Turnbull* v. *Crick* (1895), 63 Minn. 91; *Garrett* v. *R. R. Co.* (1844), 1 Freeman (Miss.) 70; *Learned* v. *Holmes et al.* (1873), 49 Miss. 290; *Miller* v. *Scammon* (1873), 52 N. H. 609; *Krueger* v. *Armitage* (1899), 58 N. J. Eq. 357; *Bradley* v. *Bosley* (1845), 1 Barb. Ch. 125; *Allerton* v. *Belden* (1872), 49 N. Y. 373; *Springport* v. *Bank* (1878), 75 N. Y. 397; *Ins. Co.* v. *Reals* (1879), 79 N. Y. 202; *Trimble* v. *Mfg. Co.* (1901), 10 Okla. 578; *Smith* v. *Griswold* (1877), 6 Ore. 440; *Benson* v. *Keller* (1900), 37 Ore. 120; *Edelman* v. *Latshaw* (1894), 159 Pa. St. 644; *Rogers* v. *Rogers* (1892), 17 R. I. 623; *Glastenbury* v. *MacDonald* (1872), 44 Vt. 450; *Johnson* v. *Hendley* (1816), 5 Munf. (Va.) 219; *Green* v. *Spaulding* (1882), 76 Va. 411; *Buck* v. *Ward* (1899), 97 Va. 209; *Johnson* v. *Swanke* (1906), 128 Wis. 68. The situation in the federal courts is controlled by statute. Rev. Stat., § 723, *Buzard* v. *Houston* (1886), 119 U. S. 347.

In its recent decisions, especially those on which the majority rely in the principal case, the Michigan court has departed, in spirit at least, from the reasoning of GRAVES, C. J., in *Teft* v. *Stewart*, supra, in which the prevailing American rule was indorsed. That court seems now to regard itself as almost bound to grant purely equitable relief, such as cancellation, whenever fraud is present and such relief is prayed for, notwithstanding the entire adequacy of the legal remedy. Whenever the exclusive equitable jurisdiction is thus invoked, fraud of itself is regarded as the jurisdictional fact. The same doctrine has been more or less clearly enunciated in other American cases, among them the following:

Brittin v. *Crabtree* (1859), 20 Ark. 309; *Myrick* v. *Jacks* (1878), 33 Ark. 425; *Bush* v. *Ry. Co.* (1905), 76 Ark. 497; *Mason* v. *Jones* (1848), 7 D. C. 247; *Tripp* v. *Lowe's Adm.* (1847), 2 Ga. 304; *Griffin* v. *Sketoe* (1860), 30 Ga. 300; *Markham* v. *Angier* (1876), 57 Ga. 43; *Arnold* v. *Grimes* (1849), 2 Greene (Ia.) 77; *Mershon* v. *Bank* (1831), 6 J. J. Marsh. (Ky.) 438; *Taymon* v. *Mitchell* (1849). 1 Md. Ch. Dec. 496; *McFarland* v. *Ry.* (1894), 125 Mo. 253; *Crane* v. *Conklin* (1831), 1 N. J. Eq. 346; *Ins. Co.* v. *Hutchinson et al.* (1870), 21 N. J. Eq. 107; *La Guen* v. *Gouverneur* (1800), 1 Johns. Cas. (N. Y.) 436; *Miller* v. *Hughes* (1890), 33 S. C. 530; *Appleton* v. *Harwell et al.* (1812), 1 Cooke (Tenn.) 241; *Bank* v. *Ry. Co.* (1856), 28 Vt. 470; *Wampler* v. *Wampler* (1878), 30 Grat. 454; *Kelly* v. *Riley et al.* (1883), 22 W. Va. 247; *Goss* v. *Lester* (1853), 1 Wis. 43.

A comparison of the three doctrines shows the following results:

(a) In England the jurisdiction of the court of equity in cases of fraud always *exists*, even to grant such relief as might be obtained in a court of law, but whether or not it will be exercised is another question.

(b) In America the prevailing rule is that a court of equity *cannot*

grant such relief as may be obtained in the law courts, and *will* not grant those peculiar remedies lying within its own exclusive jurisdiction in those cases of fraud in which the legal remedy is entirely adequate and complete.

(c) In those American courts in which the doctrine of the principal case is recognized, while the existence of fraud is not regarded as conferring jurisdiction on the equity courts to grant such remedies as may be obtained at law, yet purely equitable relief will not, perhaps must not, be denied if asked for, even where the legal remedy is entirely complete, adequate and certain.

In conclusion we may say that the true basis of equitable jurisdiction in cases of fraud, according to the English and prevailing American views, is the inadequacy of the legal remedy. C. A. D.