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MUNICIPAL GRANTS OF MONOPOLIES; THE PHILADELPHIA GAS LEASE; BAILY V. PHILADELPHIA, 184 PA. 594. In *Baily* v. *Philadelphia*, decided by the Supreme Court of Pennsylvania, where the question under consideration was the power of the City of Philadelphia, as a municipal corporation, to grant to a private company the exclusive right to supply and distribute gas within the municipal boundaries for a period of years, the court seems to admit that, in the absence of express legislative authority to make such exclusive grant, the city has, nevertheless, the power so to do. It is true that the court did not expressly decide that grants of monopolies may be made by municipalities. They seem to hold that the city did not directly confer a monopoly, but simply made the well-known trade restricting covenant by agreeing to do nothing by ordinance or otherwise which would in any way interfere with or

limit, restrict or impair the exclusive rights granted by the lease in question, which covenant the court upheld. It is, perhaps, somewhat difficult to appreciate the difference in effect between the direct grant of a monopoly and the result of the enforcement of the covenant above mentioned. If the city has the power to make such covenant, a contract is thereby created between it and its grantees, the specific performance of which may be enforced in equity, and even the legislature may not thereafter be enabled to modify the contract thus made without offending against the Constitution of the United States. It would seem, therefore, that the Supreme Court of Pennsylvania has in effect decided that the city of Philadelphia may indirectly, at least, grant a monopoly in the supply and distribution of gas. It is, moreover, probable that the court is of opinion that a direct grant of the monopoly might have been made by the city. To the objection urged by the appellants, that the lease under consideration conferred a monopoly, the learned Justice who delivered the opinion, replied as follows: "To this objection it would be a sufficient answer that, as already held, the city in this matter is acting in its business, not its governmental capacity, and the owner of business property, even though a municipal corporation, may in dealing with it make such terms as in its discretion it deems best for its interest. When the owner of a business sells it with its good will, etc., he may agree as part of the consideration to the purchaser, not to go into the same business again as a rival within an agreed territory or for an agreed time. The city of Philadelphia selling its gas making plant and good will may do the same thing." Even if this statement be considered as *obiter dictum* it is, nevertheless, entitled to great weight as emanating from one of the ablest jurists in Pennsylvania. If such be the law, then a municipal corporation in Pennsylvania can indirectly do that which the legislature itself may not have the right to do, and may even confer rights and privileges contrary to public policy as defined by the legislature.

The Constitution of Pennsylvania provides that the General Assembly shall not pass any local or special law "granting to any corporation, association or individual any special or exclusive privileges or immunities." In construing this section of the constitution the Supreme Court held, in 1881, that a city ordinance is not a local or special law within the meaning of the prohibition. In a more recent case (1892), however, in considering an ordinance of the borough of Norristown, the same court holds by affiirming the judgment of the lower court, as follows: "By the Constitution of this Commonwealth the legislature is prohibited from passing any local or special law regulating the affairs of counties, boroughs, etc., or providing or changing methods for the collection of debts or the enforcing of judgments. . . . It is clear that the borough councils could not do what the legislature is forbidden to do. . . ." *Norristown* v. *Ry. Co.*, 148 Pa. 87.

It appears, therefore, that some ordinances are not to be con-

sidered local or special laws within the meaning of the constitution, and other ordinances are to be so considered. The principle underlying the difference may be that in matters of pure municipal administration, ordinances are not to be considered local or special laws; but is the grant of exclusive privileges to a private corporation for a long term of years a matter of pure municipal administration? If the General Assembly is prohibited from passing any special law, granting to any corporation special or exclusive privileges, may it not be reasonably asked if Common Councils can indirectly do what the legislature is prohibited from doing? If so, there is here presented, "a new and rather novel way of enlarging the power of municipal corporations and of securing for them the prerogatives of sovereignty."

The Act of Assembly of Pennsylvania of June 24, 1895 (P. L. 256), sets forth in plain terms the public policy that should govern the legislature in granting exclusive rights under general laws to gas companies. The preamble of the Act recites that "the true policy of the grant of exclusive rights to gas companies is the encouragement and establishment of such companies for the supply of gas where no such supply was previously furnished, and the real consideration for such public rights is the new public service thus secured." The city of Philadelphia had managed and operated its own gas works for more than sixty years prior to the execution of the lease of the work to the United Gas Improvement Company. That company had no exclusive right granted to it by the legislature to supply gas to the city of Philadelphia. Yet by the lease in question, the city of Philadelphia has been enabled to grant an exclusive right to a company that had no such privilege vested in it by the legislature, and to make such grant where no new public service required it.

The power of the legislatures of the different states to grant monopolies has been upheld by the Supreme Court of the United States in many adjudicated cases, notably in what are known as the Slaughter House cases. This power, however, has never been conceded to municipalities by any court of the United States Government. The distinction is always clearly drawn between the power of the legislature in such cases and the power of the municipality, in the absence of express authority derived from the legislature. In *Grand Rapids Co.* v. *Grand Rapids Edison Co.*, 21 Amer. & Eng. Corp. Rep. 270, the distinction is very clearly stated.

"It is urged on behalf of complainant, that to enable the city to execute and carry into effect this authority conferred and duty imposed upon it, of providing for and regulating the lighting of the streets and public lamps, there should be implied the power and right of so using the streets as to secure that important object, and that if the grant of the exclusive privilege of using the streets is necessary to obtain the benefit, convenience, and advantage of an improved system of lighting, such as electric lights afford, the

common council could lawfully confer such exclusive right; or, to state the proposition in another form, it is this: that under its powers upon the subject of lights, the city or common council could adopt a system of electric lights for the streets and public lamps; and having so determined, if it becomes necessary, in order to secure such improved light, to grant the exclusive privilege of using the public streets to the party who is to supply the same, the common council would have the implied power of conferring such exclusive right. This presents a new and rather novel way of enlarging the power of municipal corporations and of securing for them the prerogatives of sovereignty. First, imply from the powers granted the right to adopt a new system of lighting the city's streets (which may be a proper and legitimate implication), then, when the common council has determined to procure such improved system, if difficulties arise, such as a demand for exclusive rights and privileges on the part of the company controlling the system, make another implication, from what is called the necessity of the case, and assume the right to confer sovereign franchises. The proposition is not only unsound, but dangerous in the extreme, and wholly unsupported by authority. Obstacles and difficulties, in the way of exercising powers fairly and reasonably implied from those expressly granted, can never operate to enlarge the original grant of authority. A private corporation is chartered by the State without exclusive rights; it demands exclusive privileges and sovereign franchises in and over a city's streets as a condition of supplying it with electric light; that demand, it is said, creates the necessity in the common council to grant or concede such exclusive privileges, and that necessity warrants an enlargement, by implication, of the city's charter powers, and confers upon it authority which clearly did not exist prior to such necessity.

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"Is such exclusive control necessarily implied in or incident to the powers expressly granted, or essential to the declared objects and purposes intrusted to the city government? Is not the granting of sovereign franchises in the public highways of the State a 'matter extra municipal or unusual in its nature'? In confining the inhabitants of the city for the period of fifteen years to one company for their supply of the improved light, are they not deprived of the benefit of all competition during that period, and is there not thus imposed upon them the burden of a *quasi* monopoly, while they are at the same time prevented from availing themselves of any and all improvements which may be made in the systems of lighting? There can be but one answer to these questions, unless we disregard well-established principles and ignore the authority of judicial decisions on the subject. The rights and beneficial user which the public or the inhabitants of cities have and are entitled to enjoy in the streets of a populous place are much more enlarged and various than with respect to ordinary highways, and there is a corresponding presumption against the intention to

restrict or curtail such rights by conferring exclusive privileges therein."

Dillon, in his work on Municipal Corporations, and other text-book writers, cite the Grand Rapids case with marked approval, and the compilers of the Amer. & Eng. Ency. of Law quote it as containing the consensus of judicial thought upon the subject. Many other cases are also cited in the text-books in which the law is set down in accord with the decision in the Grand Rapids case. It is somewhat of a disappointment to not a few, to find the old Commonwealth of Pennsylvania swung into line against the growing conviction of many of the best thinkers and apparently against the current of modern ideas. There is no form of corporate aggressiveness that is being criticized with greater effectiveness than that which has been aptly characterized as paternal industrialism. *Baily* v. *Philadelphia* would seem to give municipalities in Pennsylvania power to surrender almost all their public functions to private corporations. A very learned essay was at one time printed in the forefront of Purdon's Digest, wherein the Constitution of the United States was solemnly dissected, construed, interpreted and subjected to the same treatment as would be applied to the construction of any common contract between individuals. Experience has shown the essay to have been somewhat in error. *Baily* v. *Philadelphia* is, of course, declaratory of existing law, but if the performance of municipal functions is to be governed by the same rules that are applied to a tradesman who sells his coffee route and enters into a covenant not to sell within a certain prescribed area, experience will in all probability show that the legislature may be called upon to modify the law in this respect. That we are not left without some hope is evident from a very suggestive expression in the opinion in that case, to wit: "Whether the legislature may hereafter impose upon the city a municipal duty in regard to lighting, which may conflict with its present contract, is a question we need not consider until the case shall arise with proper parties in interest to such a question." Of course, if the city had the power to make the contract, very heavy damages might fall upon it if a modification of the same should be attempted even by the authority of the legislature. If, however, all parties who contract with a municipality contract with the knowledge that such contracts are always subject to the paramount power of the legislature to modify, rescind or annul them, then it may be in the power of the legislature to protect its citizens against corporate aggressiveness in the same manner as it appears now to be within their power to confer upon private corporations monopolies and exclusive privileges.

LIFE INSURANCE; SUICIDE BY INSURED; EFFECT ON RECOVERY. The Supreme Courts of the United States and of Pennsylvania have been called upon recently to consider two unusually interesting cases. Each of these involved as a preliminary point the admissibility of the application for the policy under the Pennsylvania

Statute of 1881; there was then presented the question of the effect of suicide in the absence of a provision in the policy to cover it. As these matters were brought up squarely for decision, the cases must prove leading authorities in their respective courts.

Ritter v. *Mutual Life Insurance Company*, 169 U. S. 139 (1898), was an appeal from the decision of the Circuit Court of Appeals, reported 28 U. S. App. 612. The policy read "In consideration of the application for this policy *which is hereby made a part of this contract*, etc.," but no copy of the application was attached to the policy. The court held that the Pennsylvania Statute of 1881 precluded the offering of the application in evidence, as such, nor could the application be offered to prove, as "an independent, collateral, contemporaneous agreement," the undertaking it contained, that the insured would "not die by his own act, whether sane or insane, during the period of two years." This left the naked question of the effect of suicide on a policy payable to the insured's estate.

The trial judge charged the jury substantially that if the insured understood the moral and physical consequences and effects of his act, both to himself and to others, he was sane and his suicide would be a defence to the action—otherwise, it would not. (That he killed himself to procure the means to meet overwhelming obligations was not controverted.) The Supreme Court approved the charge as to insanity, citing several authorities, and treated the verdict for the defendant as establishing the insured's suicide while sane.

The consequent avoidance of the policy is maintained on two grounds. (a) There must be a condition implied in every policy that the insured shall not, while sane, by his own act intentionally precipitate the event insured against; otherwise the happening of the event would be left to his option, which is opposed to the very essence of the contract. (b) Public policy would certainly not permit recovery on a policy taken out by the insured and expressly made payable to his estate, when, or if he took his own life while sane; equally it should not allow recovery on a policy silent as to suicide, for the result would be the same.

The second ground especially is sustained by decisions of courts both in this country and in England; indeed, the reasoning is an application of that of Lord Chancellor Lyndhurst in the analogous case of the death of the insured at the hands of justice: *Amicable Society* v. *Bolland* (Fauntleroy's Case), 4 Bligh, N. S. 194.

The other case is *Morris* v. *Life Assurance Company.*, 183 Pa. 563 (1898). In this instance the application was in two parts. Of these, the first was set forth in a copy attached to the policy, and the second, the medical examiner's report, was incorporated in the first by reference; moreover, the first contained a stipulation, signed by the insured, that the answers in both parts were true and full, and that they were offered as the consideration for

the policy. The policy, too, sought to incorporate in itself the application by language equivalent to that used in *Ritter* v. *Insurance Company*, but the court held that a copy of both parts of the application should have been attached to the policy. Neither part, therefore, could be received in evidence, and the only stipulation against suicide was thus excluded. From this part of the opinion two members of the court dissent, considering it an unwarranted extension of the application of the statute.

The distinguishing feature of the case is that the policy was payable, not to the insured's estate, but to his wife. This, the court held, presented a question altogether different from that in *Ritter* v. *Insurance Company*. The decision of the Circuit Court of Appeals is referred to, but no opinion is expressed with regard to it. The insured cannot, in Pennsylvania, defeat the gift to his wife either by a fraud upon her, or by collusively forfeiting his policy and then having a new one issued to another beneficiary. The court concludes, therefore, that he cannot defeat her by killing himself. The decision is sustained by two New York cases directly in point.

Yet we may ask wherein the case really differs from *Ritter* v. *Insurance Company*. The rights of the wife exist only under the contract with the insurer, and the protection afforded her should not be allowed to infringe the insurer's rights.

If a condition against suicide is to be implied in a policy, since an insurer would inevitably refuse to take that specific risk, the condition should not be disregarded merely because a husband cannot defeat his wife's rights by other means which do not affect the insurer. The question of public policy is equally to be considered in the two cases. Certainly a man will commit suicide to provide for his wife as readily as he will to provide for his creditors. The case appears, therefore, to be another of the unsatisfactory attempts to regulate policies for the benefit of married women. *Erskine Hazard Dickson.*

TRADE COMPETITION BETWEEN MANUFACTURER AND RETAIL DEALERS. As a general rule any person may sell or offer for sale at any price whatsoever any goods, including goods of another's manufacture, which he either has in stock or expects to acquire. It is obvious that the owner of any property is entitled to sell or dispose of it for such consideration as he may see fit, either at a profit or at a loss. And it is settled by *Allen* v. *Flood*, [1891] A. C. 1, that the motives of the owner for so acting cannot be inquired into.

In the case of *Azello* v. *Woesley*, [1898] Ch. 274 (Jan. 18, 1898), the contention was that a limitation should be placed on a dealer's power to sell "future goods." There the defendant was a general dealer in household goods and advertised pianos of the plaintiffs manufacture at less than wholesale price. It was shown not only that the defendant had no such pianos in

stock at that time, but that the plaintiffs on learning of the advertisement had refused to fulfil his order, and that even after such refusal the defendant had continued the advertisement. The plaintiff asked the court for an injunction to restrain the defendant from maliciously, or for the purpose of injuring the plaintiffs in their trade, advertising or otherwise offering for sale, goods of the plaintiffs manufacture at less price than the wholesale rate, or misrepresenting the quality of the goods; and alleging damage and severe loss, in that no other dealer who bought from the plaintiff to sell again was able to dispose of the goods thus purchased.

The plaintiffs rested their case upon the *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598 (1889); [1892] A. C. 25, where Bowen, L. J., said: "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation." Counsel for the plaintiffs inferred from the judgments and speeches in that case that, where an act of competition is attended by misrepresentation or other circumstances of illegality, and damage flows from it, a right of action is given. They contended that the advertisement of the defendant, which was an act of competition, amounted to a representation that the defendant had in his possession at the date when the advertisement was issued a new instrument of the plaintiff's manufacture of the character therein specified, whereas in fact he had not.

The court found that the description of the goods in the advertisement was generally correct, and that there was no misrepresentation of the character of the pianos. On the power of a dealer to sell future goods, Stirling, J., said: "I further think that, as a general rule, any person may sell or offer for sale at any price whatsoever goods of which he is not the owner, but which he expects or hopes to acquire." He shows that the Sale of Goods' Act expressly provides that "future goods" may be the subject of a contract of sale, and he continues: "If a seller may contract to sell future goods, he must be at liberty, as the first step to such a contract, to offer them for sale, and I see nothing to prevent him from making the offer by advertisement, or in any other lawful way. Again, it seems to me that he is entitled to make the offer at any price he chooses, whether remunerative or not; it may be worth a trader's while to sell some goods at a loss so long as he is able to sell other goods at a countervailing or more than countervailing profit.

The court concludes that the action must fall because the act of the defendant is *damnum absque injuria*, but in the last paragraph of the opinion the defendant's conduct is severely scored.

CREDIBILITY OF EVIDENCE; QUESTION FOR JURY. The credibility of the evidence of a plaintiff who has materially altered his statements in the interval between a nonsuit and a new trial, is a question for the jury: *Williams* v. *Delaware, L. & W. R. Co.*, 49 N. E. 672 (Mar. 1, 1898). To use the court's language: "How-

ever firmly convinced the judge who decided the case was that the new testimony had been manufactured to avoid the nonsuit, the evidence should have been submitted to the jury." The facts were that the plaintiff, in the day time, in plain sight of a bridge, turned his back to it and was thrown from the top of the box car on which he was standing and was injured. He recovered, below, as for injuries inflicted by defendant's negligence. On appeal it was held that he should have been non-suited. The Court of Appeals reversed this decision for the reasons stated. Unless fraud or intentional misstatement be shown, the question as to the credibility of evidence is for the jury: *People* v. *Chapleau*, 121 N. Y. 266 (1890); *The Santissima Trinidad*, 7 Wheat. 339 (1822); *Conrad* v. *Williams*, 6 Hill, 444 (1844); *Wilkins* v. *Earle*, 44 N. Y. 172 (1871); *Pease* v. *Smith*, 61 Id. 477 (1875); *Place* v. *Minster*, 65 Id. 89 (1875); *People* v. *Kentucky*, 99 Id. 415 (1885). And the court will not charge the jury that if they should find that certain witnesses had in their previous testimony, in respect to the same matters, committed wilful perjury, the jury should wholly disregard their testimony given on the trial. *People* v. *O'Neil*, 109 N. Y. 251 (1888); *Hunter* v. *R. R.*, 116 N. Y. 615 (1889), 130 N. Y. 669 (1892), is in line with the principal case, and contains an interesting discussion by the court on the subject of giants in general, with particular reference to the height of man that would have been required to be struck by the bridge in question in a sitting posture. "It can be asserted, I think, without contradiction," says the court, "that a man whose forehead would be four feet seven inches above a seat upon which he was sitting would have a frame at least nine feet high. History affords no authenticated instance of men attaining such height." After citing Buffon and other eminent authorities, the learned judge reaches the inevitable conclusion that this plaintiff must have been standing up.

LIBEL; WORDS LIBELLOUS *per se*. The recent case of *Gates* v. *New York Recorder Co.*, 49 N. E. 769 (Mar. 1, 1898), decided by the Court of Appeals of New York, presents an interesting question of libel. The defendant had published of the plaintiff, three days after her marriage, that she was a "dashing blonde, twenty years old, and is said to have been a concert hall singer and dancer at Coney Island." There was no special damage proved, but evidence was given tending to show that a "concert hall at Coney Island" is a place of evil report and frequented by disreputable characters. There were also places of respectable entertainment on the island. The Court of Appeals, by a vote of 4 to 2, held that the words were libellous *per se*, and the plaintiff was entitled to recover without proof of special damage.

As O'Brien, J., said in his dissenting opinion: "The whole trial was an attempt to make words not actionable in themselves libellous by extraneous proof." The majority considered the

charge libellous as imputing unchastity, but it is hard to see that the words themselves contain any such imputation. To give that effect to them by allowing proof of other facts, would be to enlarge the divisions of words libellous *per se* to a dangerous and unwarranted extent.

It is well settled that libel consists of words which (1) import a charge of some punishable crime; (2) impute some offensive disease which would tend to deprive a person of society; or (3) which tend to injure a party in his trade and occupation or business; or (4) which have produced some special damage: *Onslow* v. *Horne*, 3 Wils. 177 (1771); *Moore* v. *Frances*, 121 N. Y. 199 (1890); S. C., 23 N. E. 1127. At the common law words imputing unchastity to a female were not actionable *per se: Bassell* v. *Elmore*, 48 N. Y. 561 (1872); *Pollard* v. *Lyon*, 91 U. S. 225 (1875). This rule has been abrogated in New York by statute: Laws of 1871, c. 219; Code, § 1906. But the fact remains that the words used must impute unchastity; and it is submitted that the words used in the principal case can in no way be said to impute unchastity,

Words which are equivocal must be strengthened by a colloquium to make them actionable: *Carter* v. *Andrews*, 16 Pick. (Mass.) 1 (1834). But words may be actionable if there be a local meaning to them, or they be circulated among people who understand them in a particular way: *Lipprant* v. *Lipprant*, 52 Ind. 273 (1875). On that ground the principal case may be right; but in such cases the question as to the meaning of the words is for the jury: *Oles* v. *Pittsburg Times*, 2 Pa. Super. Ct. 130 (1896).