Taxability of Rights of Withdrawal under Federal Estate Tax

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The two most valued devices to inject flexibility into a testamentary or inter vivos plan of distribution are powers of appointment and rights of withdrawal or invasion. This resultant flexibility is a necessity because of the uncertainty of future events, and very few wills or trust agreements are drawn today which do not incorporate one or both of these devices.

Since any plan of distribution is necessarily based to some extent on the taxable incidents of its use, any question raised as to the taxable status of the plan creates doubt and limits its application. Powers of invasion or withdrawal have generally been considered as outside the purview of the Federal Estate Tax. Recently, however, some doubts have been expressed as to the soundness of this conclusion, and for this reason it has been deemed advisable to give some consideration to the question. All doubts expressed have been admittedly predicated on fear of general taxing policies and trends, and not on statutory provisions or court decision. There is a noteworthy lack of judicial authority.

The scope of this review is limited to that class of powers in which the beneficiary is given an unlimited and unfettered right to invade the corpus. A life estate is granted to A with the right, at any time and from time to time, to withdraw any or all of the principal, with remainder over to B. Upon the death of the life tenant, A, the question raised is whether

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or not the unexercised right of withdrawal should be included in his estate as a taxable interest for Federal Estate Tax purposes. Clearly, if A exercised the power and then died possessed of the property it would be subject to the tax. Estates *pur autre vie* are also excluded, as they are given special treatment by the Regulations.\(^1\)

Those instances in which the right is to be exercised by the beneficiary with the consent of the trustee or some other person, or is confined to support and maintenance, or to a certain percentage of the corpus in any year, present only limited difficulties and are treated only by way of summary.

At the outset it should be noted that the Supreme Court and the Courts of Appeal have not passed upon the question. This fact in itself indicates that there has been no serious attempt to subject such rights to taxation. There have been two recent cases, however, which have some bearing upon the proposition and which deserve study and comment. The first of these cases is *Lehman v. Commissioner*\(^2\) recently decided by the Board of Tax Appeals, in which the decedent, Harold M. Lehman, had created two irrevocable trusts on December 6, 1930, directing the entire net income therefrom to be paid to his brother, Allan S. Lehman, who was also granted the right to withdraw $75,000 from each trust at any time prior to December 31, 1935. The brother had simultaneously executed two similar trusts, in like amounts and terms, in favor of the decedent, granting him a life estate and the right to withdraw $75,000 of the principal of each trust.

The Commissioner had endeavored to include in the decedent’s gross estate the entire value of the two irrevocable trusts created by him for his brother. The Commissioner's contention was that since the decedent and his brother had executed reciprocal trusts, in like amounts and terms, those created by the decedent were in effect for his own benefit, and therefore taxable as transfers to take effect at or after death, under sections 302(c) or 302(d) of the Revenue Act of 1926. The trusts were irrevocable and the decedent had re-

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1 "There should also be included the value of an annuity payable to, or an interest or an estate vested in, the decedent for the life of another person who survives him." Regulations 80, Article 13 (1937 ed.), Bureau of Internal Revenue.
tained no rights which would otherwise subject the corpus to taxation in his estate.

The Commissioner also contended that in the event the entire corpus of the trusts created by the decedent were not taxable, there should be included in the decedent's gross estate the sum of $150,000, representing the amount which the decedent at the time of his death had a right to withdraw from the two trusts created by his brother. The Commissioner's theory was that the decedent had, in effect, retained the right to take down that amount from the trusts created by him. In other words, the taxability of the right to withdraw was predicated solely on the reciprocal trust theory.

However, this question was presented to the Board for decision apparently as an afterthought on the part of the Commissioner. Upon the hearing before the Board, counsel for the Commissioner had stated: "Personally, I think there is a technicality there, but I do not propose to urge that point, in view of the reciprocal nature of this disposition." No argument was made on the point in the petitioner's main brief, and the Commissioner included argument on this question for the first time in his reply brief. That it was a mere afterthought is clearly evidenced by the fact that the pages upon which the argument appears were inserted after the entire brief was completed, as pages 26 a and b, and the index does not contain any reference to the argument at all. The brief filed by the petitioner further shows that no evidence or testimony was offered at the hearing in connection with this issue, and that the stipulation was completely silent with regard to the question because no specific claim was made in the deficiency letter by reason of the existence of this right.

After considering at length the Commissioner's argument, that the entire amount should be included as a transfer to take effect at or after death, the Board of Tax Appeals held that the two trusts created by the decedent were not taxable on this theory. The decision on the question of reciprocal trusts is very interesting and sound, but need not be discussed further.

Acknowledgment is made of the cooperation of attorneys for the petitioner, Edgar J. Bernheimer and Sydney J. Schwartz, of New York City, who very willingly submitted a copy of their Reply Brief and an extract of the Commissioner's Reply Brief.
The Board then proceeded to approve the taxation of the $150,000 which the decedent had the right to withdraw, stating:

It cannot be questioned that the decedent gave his brother, Allan S. Lehman, the right to receive the income for life of the two trusts created by him and had a right to withdraw $150,000 from the principal of the trust estates during his life or until December 31, 1935, in exchange for similar rights of the decedent in the trust estates created by Allan. The right to make this withdrawal out of the reciprocal trusts created by Allan was the equivalent of a right in the decedent to withdraw that amount from the trust estates which he had created. This right had a value at the time of decedent's death of $150,000. It was an interest in property "which ceased by reason of the death." Edwards v. Slocum, supra. We are of the opinion that the respondent did not err in including the $150,000 in the gross estate of the decedent.

A reading of the majority opinion clearly discloses that the decision is limited to the facts of the particular case. The Board states that "the right to make this withdrawal out of the reciprocal trusts created by Allan was the equivalent of a right in the decedent to withdraw that amount from the trust estates which he had created." The reciprocal trust theory is therefore made the basis for the applicability of Section 302(d). The statement that "It was an interest in property 'which ceased by reason of the death,,'" citing Edwards v. Slocum is not to be taken literally the predicate for the decision. This particular quotation is discussed more fully in another connection. Had the decedent survived the date on which his power to withdraw expired by the terms of the instrument, i.e. December 31, 1935, no question would have arisen at all.

4 The majority opinion on this point has been quoted in full.
5 Black, joined by Arundell, Van Fossan, Leech, and Arnold, wrote a dissenting opinion stating:

"I do not agree to that part of the majority opinion. . . . Manifestly if the right to withdraw this $150,000 had survived decedent's death and was available as an asset to decedent's estate, then it is includable as a part of decedent's estate. This inclusion would be by reason of the provisions of section 302(a) of the Revenue Act of 1926, and not by reason of section 302(d) of the same act. . . . "Article 13 of Treasury Regulations 80 (1937 Ed.), Estate Tax, would seem to cover the situation which we have here, where it says: 'Nor should anything be included on account of an interest or an estate limited for the life of the decedent.'"

6 264 U. S. 61, 44 S. Ct. 293, 68 L. Ed. 564 (1924). This case, cited by the Board, involved the question of the computation of the tax where deductions for charitable residuary bequests were involved, and the opinion of the Circuit Court, reported in 287 F. 651 (C.C.A., 2d, 1923), is famous for its statement that "algebraic formulae are not lightly to be imputed to legislators."

7 See discussion at pages 9, 10.
Since the Board first held that the entire amount was not taxable in decedent's estate as a transfer to take effect at or after death, even though the trusts were reciprocal, and since, in arriving at that conclusion, it was determined that the transfers effected by each brother were independent, irrevocable, complete conveyances, the soundness of the reasoning leading to the taxability of the $150,000 might well be questioned. However, the decision seems clearly limited to its own peculiar facts and can hardly be made the basis for an extension of the doctrine to the type of case under consideration.

Although the Lehman case approved taxability of the right to withdraw under Section 302(d) on the theory of the reciprocal trusts involved, that section has no bearing whatsoever on the general type of case with which we are concerned. The only section of the act which can be applicable is Section 302(a) which includes all property (except real estate outside of the United States) "to the extent of the interest therein of the decedent at the time of his death." This section is a "catch all" and intended to cover and include those interests not specifically treated under the other sections of the Act which clearly have no application.

It would be safe to assume that had the Commissioner considered the right to withdraw in the Lehman case taxable under Section 302(a), he would have urged the point in the first instance. The failure of the Commissioner to assert taxability of such rights in other instances also indicates that they are not considered to be within the purview of the statute, but are treated as interests "limited for the life of the decedent."

There are two interesting provisions in the Regulations

8 Citing Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410 (1929), in which it was said: "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. . . . One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death." Also cited were May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826 (1930), which quoted the language above with approval; Shukert v. Allen, 273 U. S. 545, 47 S. Ct. 461, 71 L. Ed. 764 (1927); McGregor v. Commissioner of Internal Revenue, 82 F. (2d) 948 (1936); Kaufman v. Reinecke, 68 F. (2d) 642 (C.C.A., 7th, 1934).
relating to Section 302(a). It is stated that this section is intended to include all property the "beneficial ownership" of which was in the decedent at the time of his death. In setting forth exclusions, however, the Regulations provide "nor should anything be included on account of an interest or an estate limited for the life of the decedent." 9

In another recent case, however, the Commissioner did endeavor to claim that a right of sale was the equivalent of ownership and therefore taxable. In Davis v. United States,10 the decedent was entitled to receive a share of the trust income during his lifetime and also had a remainder interest contingent upon his surviving his brother. The court stated, "Plainly these interests, both of which became extinct at the decedent's death, are not touched by section 302(a)." The court then discussed the Commissioner's argument in connection with the right of sale possessed by the decedent during his lifetime:

Its argument is that the decedent had a power of sale over a portion of the real estate, the power expiring with his life, that this power was one to sell an absolute interest, and that in effect the portion of the property over which he had power of sale belonged to him. We may pass the point whether the power was one to sell an absolute interest or was merely one to sell the defeasible interests that the decedent himself had in the property, a point on which the trust instruments are by no means clear. For even if the power of sale were a power over an undivided share outright, such a power is not an "interest" within the meaning of section 302(a). That provision deals with property owned by a decedent and passing at death by will or intestacy.

There is little difference between a right of sale and a right of withdrawal for our purposes. In the former case the sale is a condition precedent to the right to use the proceeds, while in the latter case the formalities of withdrawal constitute the conditions precedent, there being no necessity to change the form or character of the asset before it may be subjected to the donee's use. In other respects, the rights of the life tenants and the remaindermen are identical. The remainders are vested subject to being divested by the life tenant, and the nonexercise of the right merely permits the remainder to vest in possession as well as interest. For these reasons, the Davis case is particularly important even though it deals with a right of sale and not a right of withdrawal.

9 Regulations 80, Article 13 (1937 ed.), Bureau of Internal Revenue.
10 Decided Feb. 6, 1939, U. S. Dist. Ct., So. Dist., N. Y.
The definition of Section 302(a) contained in the last sentence of the quoted portion of the opinion would preclude any possibility of a right of withdrawal or invasion being taxable under that section. The property subject to the unexercised right is not owned by the decedent at death, and does not pass by his will or under the laws of descent. This definition, therefore, is identical with that contained in the Regulations in that it excludes from taxation an interest limited for the life of the decedent. Likewise, it properly limits the words "beneficial ownership" to interests which are devisable or inheritable. This too would seem to be the intent of the Regulations. In article 2 it is provided: "In addition to property passing under a will or the intestate laws, the gross estate ... includes ...." the transfers and interests specifically covered by subsections (b) to (g) of Section 302. Thus we have vested remainders included and contingent remainders excluded, and we have reversionary interests taxed and mere possibilities of reverter eliminated. In fact, the only provision which gives any concern is the one referring to "beneficial ownership."

It will be admitted that a power to invade is a beneficial right. In fact, every right the exercise or non-exercise of which lies within the discretion of the donee is a beneficial one. Although the Regulations use the words "beneficial ownership," there must be such ownership as shall be the subject of transfer by will or laws of descent.

The Federal Estate Tax is not a succession tax. As the Board of Tax Appeals said in the Lehman case: "If anything is settled with respect to the Federal Estate Tax law, it is that it is not a 'succession excise' tax." This statement was made in reply to the Commissioner's argument that the tax was upon the transfer of the right to possession or enjoyment, and not upon the passing of the fact of possession or enjoyment. A predicate for this contention, said the Board, is that the "estate tax 'is a strict succession excise.' This is

12 Regulations 80, Article 2 (1937 ed.), Bureau of Internal Revenue.
a statement of what the Federal Estate Tax is not—not of what it is."

Perhaps the Commissioner failed to remember the following words of Justice Holmes: "Upon this point a page of history is worth a volume of logic." 15

In this connection the Regulations make a clear and unambiguous statement that "The . . . tax is imposed upon the transfer of the net estate." 16

The Federal Estate Tax, said Justice Holmes in Edwards v. Slocum, 17 is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in Knowlton v. Moore, 178 U.S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U.S. 49, "not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

The quotation from Hanson, if standing alone, would be confusing, and would appear to include any interest "which ceased by reason of the death." Taken literally, that language would include a pure life estate and all interests limited for the life of the decedent. This, of course, is not intended. Such interests are clearly excluded by the Regulations and the Board has held that a life estate is not the subject of tax. 18

The statement from Hanson refers to the English Finance Act of 1894, which, among other things, expressly covers property over which the decedent had no power of disposition. 19 Under that act life estates, leases, annuities, and all interests which "cease" by reason of death are subject to tax. But, as Hanson states, "the scheme of the Act is to tax not the interest which has ceased, but the property out of which the interest was enjoyed. Thus A has a life interest in £10,000; estate duty is payable on his death, not according to the value of the life interest he has enjoyed, but on £10,-

16 Regulations 80, Article 3 (1938 ed.), Bureau of Internal Revenue.
17 264 U. S. 61, 44 S. Ct. 293, 68 L. Ed. 564 (1924). This statement of Justice Holmes is frequently quoted by the courts.
19 Hanson, Death Duties (8th ed., London: Street & Maxwell, Ltd.), p. 5.
000."\(^{20}\) And again at page 6 he states: "So long as the interest ceased on the death, the quality of the interest does not matter, unless, indeed, it was an interest granted for money." The peculiarities of the English law are readily observed, and further distinctions in the scope and application of that Act and ours are to be found in Hanson’s book.

Section 302(a) does not attempt to tax an interest because it ceases, but because it is the subject of a transfer. It is, of course, essential to the transfer of an interest that all prior estates or interests cease and terminate. But the time or point at which the tax attaches in the process of transfer is important to distinguish it from a succession tax. Thus "it comes into existence before and is independent of the receipt of the property by the legatee." Beyond that point, it is submitted, the quotation from Hanson has no applicability to the interpretation of our act, and no attempt should be made to give literal effect to the language used. The Board’s abbreviated presentation of this quotation in the Lehman case should be guarded against and carefully noted in future decisions.

In *St. Louis Union Trust Company v. Becker*,\(^ {21}\) in which a mere possibility of reverter based on a condition subsequent was held not taxable, the court stated:

The only interest, then, which he retained was the right to have the trust property revert to him in case the beneficiaries should predecease him. That right to the reversion was not an interest which passed to the beneficiaries as a result of Mr. Guy's death. It was merely an interest which was obliterated by his death. It passed not to the living, but entirely out of existence. So far as we can discern, the rights of the beneficiaries to the trust property were complete at the time the declarations of trust were executed. . . However, in the case of estate taxes, the actual benefit for which the tax is paid must be a benefit which passes from the dead to the living, and where a complete transfer is made prior to death, the transferor certainly retains no "actual benefit" justifying the imposition of the tax.

The right of withdrawal, which is not self-conferred, is an interest which is obliterated by death to the same extent as a possibility of reverter predicated on a condition subsequent, and the transfer to the remaindermen is complete by the act of the donor and not by the donee. The interest

\(^{20}\) Ibid.

ceases and expires, and there is no transfer "from the dead to the living."

Since the tax is upon a transfer, the only basis on which the right of withdrawal could be held taxable would be that the right attaching to the life estate enlarges it or invests it with inheritable or devisable qualities. If any such change occurred it would, of course, be determined by and subject to state law.\(^2\)

In some cases it has been held that if the gift to the first taker is coupled with the absolute power of disposal or disposition, the gift over fails.\(^2\) In all of these cases, however, the courts have found that the subsequent language used was insufficient to cut down or limit the prior grant of the fee, and the limitations over were therefore repugnant.\(^2\)

Typical of these cases is *Sweet v. Arnold,\(^2\)* in which the testator devised his residuary estate to "my beloved wife, Hannah J. Stewart, and if at her decease there be any unexpended remainder" it should be distributed as directed by the will.

However, limitations after a life estate created by express terms, are held to be valid, even though contingent upon alienation by the life tenant\(^2\) and in such cases the executory limitations to take effect in default of the exercise of the rights vested in the life tenant, or to the extent to which such


\(^{23}\) Dalrymple v. Leach, 192 Ill. 51, 61 N. E. 443 (1901); Wilson v. Turner, 164 Ill. 398, 48 N. E. 820 (1896); Wolfer v. Hemmer, 144 Ill. 554, 33 N. E. 751 (1893).

\(^{24}\) Dalrymple v. Leach, 192 Ill. 51, 61 N. E. 443 (1901); Wilson v. Turner, 164 Ill. 398, 48 N. E. 820 (1896); Wolfer v. Hemmer, 144 Ill. 554, 33 N. E. 751 (1893); Potter v. Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. Ed. 721 (1891); Smith v. Phillips, 131 Ala. 629, 30 So. 872 (1901); Byrne v. Weller, 61 Ark. 366, 33 S. W. 421 (1895); Mansfield v. Shelton, 67 Conn. 390, 35 A. 271 (1896); Cameron v. Parish, 155 Ind. 329, 57 N. E. 547 (1900); Rowe v. Rowe, 120 Iowa 17, 94 N. W. 258 (1903); Ball v. Hancock's Adm'r, 82 Ky. 107 (1884); Stuart v. Walker, 72 Me. 145 (1881); Knight v. Knight, 162 Mass. 460, 38 N. E. 1131 (1894); Gadd v. Stoner, 113 Mich. 689, 71 N. W. 1111 (1897); Walton v. Drumtra, 152 Mo. 489, 54 S. W. 233 (1899); Banzer v. Banzer, 156 N. Y. 429, 51 N. E. 291 (1898); Bass v. Bass, 78 N. C. 374 (1878); Meacham v. Graham, 98 Tenn. 190, 39 S. W. 12 (1897); Judevine's Ex'rs v. Judevine, 61 Vit. 587, 18 A. 778 (1889); Wilmoth v. Wilmoth, 34 W. Va. 426, 12 S. E. 731 (1890); Bassett v. Nickerson, 184 Mass. 169, 68 N. E. 25 (1903).

\(^{25}\) 322 Ill. 597, 153 N. E. 746 (1926), in which the court stated at page 601: "Where, in a will, language is used which, standing alone, is sufficient to create an estate of inheritance in the first taker, any subsequent language, in order to cut down such estate, must be clear and unmistakable."
rights have not been exercised, are held good and will take effect.\(^{27}\) Thus, in \textit{People v. Freese},\(^{28}\) the will provided, "I hereby give and bequeath and devise all of the property, real, personal, and mixed, of which I shall die seized, to her, Minnie Phrehm, for and during her natural life. I direct that she, Minnie Phrehm, shall have full control of all my property and use the same as she shall desire, and that what remains after her death shall go to the nearest of my kin living at the time of my death." The court held that Minnie Phrehm took but a life estate.\(^{29}\)

It will be found useless to attempt to analyze all of the cases on this subject, since they turn on the interpretation of the language of the particular instrument under consideration in each instance. Also, most of the older cases involve legal life estates instead of equitable ones, although for our purposes, this distinction is not important. The generalities expressed are deemed sufficient.

In most modern instruments involving trusts the life interests are definitely expressed, although it must be admitted that too frequently difficulties of interpretation arise due to faulty drafting. In most cases we can safely assume that the life estate will be couched in sufficiently clear terms to prevent any difficulty, and when so expressed there are no devisable or inheritable characteristics superimposed. This being the case, there would seem to be no possibility of such an interest coming under Section 302(a) on that theory.

For inheritance tax purposes in New York, however, un-

\(^{27}\) Henderson v. Blackburn, 104 Ill. 227 (1882); Evans v. Folks, 135 Mo. 397, 37 S. W. 126 (1896); Cushman v. Goodwin, 95 Me. 353, 50 A. 50 (1901); Bryson v. Hicks, 78 Ind. App. 111, 134 N. E. 874 (1922); People v. Peoples Savings Bank, 314 Ill. 529, 145 N. E. 597 (1924); People v. Freese, 267 Ill. 164, 107 Ill. 857 (1915); Reed v. Reed, 194 Mass. 216, 80 N. E. 219 (1907); Mims v. Davis, 197 Ala. 88, 72 So. 344 (1916); Collins v. Wickwire, 162 Mass. 143, 38 N. E. 365 (1894); Girard Life Ins. & Trust Co. v. Chambers, 46 Pa. St. 485 (1884); Olson v. Weber, 194 Iowa 512, 127 N. W. 465 (1922); Trustees Presbyterian Church v. Mize, 181 Ky. 567, 205 S. W. 674 (1918); Scott v. Gillespie, 103 Kan. 745, 176 P. 132 (1918); In re Olsen's Will, 165 Wis. 409, 162 N. W. 429 (1917); Richards v. Morrison, 101 Me. 424, 64 A. 768 (1906); Brant v. Virginia Coal and Iron Co., 93 U. S. 326, 23 L. Ed. 927 (1876); Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61 (1894); Drier v. Gracey, 203 Mich. 399, 171 N. W. 749 (1919); Angel v. Wood, 153 Ky. 195, 154 S. W. 1103 (1913).

\(^{28}\) Welsch v. Belleville Savings Bank, 94 Ill. 191 (1879); Dickinson v. Griggsville Nat. Bank, 209 Ill. 350, 70 N. E. 593 (1904).

\(^{29}\) But see Davis v. Heppert, 96 Va. 775, 32 S. E. 467 (1899), in which it is held that even though a life estate is given by express terms, an absolute power of disposition will enlarge the estate into a fee.
nder statutes authorizing the tax on contingent interests at the highest possible rate, it has been held that exhaustion of the entire estate by the life tenant will be assumed if a greater tax can be collected at the death of the donor. For example, if the remainder interest were to a child, the entire estate would be taxed to the life tenant; whereas, if the remainderman were a stranger, they would assume that the remainder would vest in possession undiminished by the life tenant. This treatment has been expressly refused by Illinois, however, and it is held that the possibility of exhaustion should be ignored.

As an argument against taxability, the theory is sometimes advanced that until the right of withdrawal has been exercised there is no acceptance of the grant of the power evidenced by the life tenant. A similar argument has also been proposed to defeat taxation of property passing by reason of the nonexercise of a general power of appointment. It is submitted that the theory of nonacceptance is not the proper answer to the question, and that it cannot be relied upon with safety. Nevertheless, the theory deserves some discussion because of its prevalence.

A beneficiary is not compelled to accept a devise or gift without his consent. This principle is generally recognized and is not subject to dispute. However, in the absence of evidence to the contrary, a beneficial devise will be presumed to have been accepted. This presumption of acceptance is not conclusive and may be overcome by renunciation or disclaimer or by a showing that the donee has had no opportunity to elect. But it has been held that where there has been an opportunity to reject and the donee has failed to evidence his renunciation or disclaimer, there is a presumption of acceptance which may become conclusive.

The beneficiary must accept or disclaim the trust as a

30 C.f. In re Zborowski's Estate, 213 N. Y. 109, 107 N. E. 44 (1914); In re Rogers' Estate, 149 N. Y. S. 462 (1914); Kidder, State Inheritance Tax and Taxability of Trusts (1st ed.), 83 ff.
33 Peter v. Peter, 343 Ill. 493, 175 N. E. 846, 75 A. L. R. 890 (1931).
34 In re Howe's Estate, 112 N. J. Eq. 17, 163 A. 234 (1932).
35 Ibid.
whole within a reasonable time after notification of the existence of his interest.\textsuperscript{36} He will not be permitted to accept in part and reject the balance except where there are both beneficial and onerous provisions which are properly separable.\textsuperscript{37} Where the onerous and the beneficial provisions constitute an entire gift, the beneficiary must make his election to reject the whole.\textsuperscript{38}

The general doctrine has been well stated by the court in \textit{Strom v. Wood}:

The settled doctrine, however, is that a devisee is presumed to accept a devise favorable to him. This comports with human nature. A gift or devise by which one's estate is materially increased naturally carries a material benefit, and it is not human nature to refuse or reject such visitations of the fickle Goddess of Fortune, and the law does not require such an absurd result to be inferred or presumed. This being the sensible and practical presumption, it would naturally be expected that if the devisee should desire to renounce he would do so at least within a reasonable time.\textsuperscript{39}

The acceptance of income by the life tenant would seem to be an overt act sufficient to evidence acceptance of the entire gift, and it might well be held that, unless the right to invade were rejected prior to the acceptance of the first payment of income, the life tenant has accepted the entire gift.

It would seem, therefore, unless there is a renunciation or disclaimer by some overt act of the life tenant, that acceptance of the entire grant would be presumed.\textsuperscript{40} Certainly the right to withdraw is a beneficial right granted to the life tenant. He may reduce to his possession and control the corpus of the trust within the limits of his power. It is conceivable that the complications arising from exercise of the


\textsuperscript{37} Brown v. Routzahn, 63 F. (2d) 914 (C.C.A., 6th, 1933).

\textsuperscript{38} Wisner v. Richardson, 132 Ark. 575, 202 S. W. 17 (1918); Lewis v. Carver, 140 Md. 121, 117 A. 108 (1922); Waggoner v. Waggoner, 111 Va. 325, 68 S. E. 990 (1910); W. H. Page, \textit{The Law of Wills} (2d ed.), II, 1205, § 1233.

\textsuperscript{39} 100 Kan, 556 at 560, 561, 164 P. 1100 (1917).

\textsuperscript{40} Strom v. Wood, 100 Kan, 556, 164 P. 1100 (1917); Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20 (1922); Lehr v. Switzer, 213 Iowa 658, 239 N. W. 564 (1931); DeFreese v. Lake, 109 Mich. 415, 67 N. W. 505 (1896); Perry v. Hale, 44 N. H. 362 (1882); Albany Hospital v. Hanson, 214 N. Y. 415, 108 N. E. 812 (1915); Bradford v. Leake, 124 Tenn. (16 Cates) 312, 137 S. W. 36 (1911); Crossman v. Crossman's Estate, 100 Vt. 407, 138 A. 730 (1927); \textit{In re Howe's Estate}, 112 N. J. Eq. 17, 163 A. 234 (1932).
right might become onerous and burdensome, but those would be consequences independent of the initial grant and acceptance of the power. The right to exercise should be distinguished at all times from the manner of exercise.

Not only does the theory of nonacceptance seem to fail upon the very proposition of law upon which it is predicated, but it would seem to constitute an admission difficult to overcome in many cases. Not infrequently the life tenant is granted the right to invade "at any time and from time to time." Suppose that the life tenant with such a power has at one time withdrawn a thousand dollars. The proponent of such a theory is compelled to undertake the difficult argument that each exercise is but a pro tanto acceptance. As a matter of fact it would seem in any case that by demurring to the question of taxability on the theory of nonacceptance it is impliedly admitted that a subsequent exercise should result in taxation. Such an admission would, of course, be wholly destructive.

The principles involved in the nonexercise of a general power of appointment are analogous to the principles involved in the nonexercise of a right of withdrawal, and for that reason should be considered. The analogy is particularly strong since in each instance we are dealing only with rights which are not self-conferred.

The taxation of property passing under a general power of appointment is specifically provided for by the Revenue Act, 41 and it is predicated on the theory that there is no distinction between a disposition of property subject to the general power and disposition of the fee. The donee of a general power may exercise the power in favor of any appointee without limitation, including his own estate or creditors. 42 "To take a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes." 43

It will be readily admitted that, in the event the donee of the power of withdrawal exercised the right, the property thus reduced to his absolute possession and control and own-

42 See Regulations 80, Bureau of Internal Revenue.
ed by him at time of death will be taxed in his estate in the same manner as property passing under a general power of appointment.

According to the common law, the appointee is deemed to take the property directly from the donor.\textsuperscript{44} The donee merely acts for the donor to the extent of the power conferred upon him,\textsuperscript{45} and until the interest over is finally disposed of by the exercise of the power the estates limited upon default of exercise are considered as vested, subject to being divested.\textsuperscript{46} In the event of the nonexercise of the power the property does not pass in the estate of the donee, but in the estate of the donor of the power.

It should be noted that the Revenue Act does not attempt to tax the nonexercise of a power of appointment. If Congress were to attempt taxation in such cases, grave doubts as to the constitutionality of such a provision would certainly be raised.\textsuperscript{47} Although the donee may exercise his discretion and permit the property to pass in default of the power, such transfer takes effect and is complete by force of the instrument creating the power and not by the act of the donee. The remainders vested in default of exercise merely become vested in possession. The donee has granted nothing and has taken away nothing and the shifting of economic benefits has occurred in the donor's estate and not the donee's. As the New York Court of Appeals, in the case of \textit{In re Lansing's Estate},\textsuperscript{48} said, "Where there is no transfer there is no tax. . . ." The same principles were approved

\textsuperscript{44} Kent, Commentaries on American Law (14th ed.), 337; United States v. Field, 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617 (1921).

\textsuperscript{45} In \textit{re Luques' Estate}, 114 Me. 235, 95 A. 1021 (1915); United States v. Field, 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617 (1921); Kidder, State Inheritance Tax and Taxability of Trusts (1st ed.), 41.

\textsuperscript{46} Sugden, Powers (8th ed.), 622.


\textsuperscript{48} 182 N. Y. 238 at 247, 74 N. E. 882 (1905), which held that the statute attempting to tax the nonexercise of the power was unconstitutional. But see Minot v. Stevens, 207 Mass. 588, 93 N. E. 973 (1911), where the constitutionality of a similar provision was upheld.
by the Supreme Court in *Helvering v. Grinnell*,\(^49\) in which it was held that no Federal tax attaches if the appointee renounces and elects to take under the default clause. The court thus recognized that the transfer was completed by the donor. The Board of Tax Appeals reached the same conclusion and held that property passing under the default clause\(^50\) or by the ineffective exercise of the power\(^51\) cannot be included in the donee's estate.

To admit that the failure of the life tenant to exercise the right of withdrawal was taxable would be to say that such nonexercise effected a transfer in his estate to the same extent as though he had exercised the right and died possessed of the property. It should be remembered, however, that the interests of the remainderman are fixed by the donor of the power, and not by any act of the life tenant, although they may be diminished or completely destroyed by the exercise of the right. The position of the remainderman may be well likened to that of the default takers under a power of appointment. They are vested, subject to being divested by the exercise of the power in either case. In fact, there seems to be no well defined difference whatsoever between an unexercised power of appointment and an unexercised right of withdrawal, and what has been said with reference to section 302(a) would seem to apply with equal force to both cases, since neither is accorded special statutory treatment.

In conclusion it is submitted that under the present provisions of the Revenue Act an unexercised right of invasion or withdrawal cannot be made the subject of tax in the estate of the donee.

It has been suggested, however, that, to avoid any possibility of the entire estate being subjected to tax, the right to withdraw be limited to a certain fixed percentage in any calendar year. The amount of the corpus subject to the power at the instant of death, therefore, would be definitely limited and would preclude the inclusion of more than that amount. In most cases such a limitation would be sound from the sociological and economical standpoint, as well,

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\(^{50}\) Estate of Hoffman, 3 B. T. A. 1381 (1926).
\(^{51}\) Lee v. Commissioner of Internal Revenue, 18 B. T. A. 251, affirmed 57 F. (2d) 399 (1932).
particularly where the amounts involved are substantial. The suggestion deserves careful consideration, therefore, in the planning of all estates.

In many cases the right to withdraw is limited for necessities of support and maintenance, or of education, or unusual hospital or medical expenses. Even if we assumed that such rights were taxable, they probably would be valued according to a reasonable estimate of the needs to which the power is limited, and the problem would then be one of valuation only.

Where the power is limited so as to require the consent of the trustee or some other person, it is obvious that the life tenant does not have a right he could exercise in his own discretion, and since the interest is not self-conferred, no reasonable basis for taxation can be established in any event.
LEGAL literature contains the fruits of a vast amount of careful research analysing and discussing the contractual, quasi-contractual, and tort liability of municipal corporations of all types under a wide variety of situations. One who scans the voluminous material on this general subject will doubtless find refreshment in the extent to which governmental agencies are compelled in a democratic society to assume the responsibilities which are imposed upon individuals and private business organizations in their manifold relationships. The lowly street vendor who recovers a judgment against a great metropolitan city for personal injuries sustained as a result of the negligent operation of a motor vehicle used by some municipally owned utility contributes to the folklore on this engrossing subject. Certainly such an event would seem to be strong evidence of the inherent justice embodied in democratic institutions. The lawyer will readily note that this street vendor was fortunate in getting hit by a waterworks or light plant truck instead of by a police wagon, since in the latter event the city would have been engaged in a "governmental" instead of a "proprietary" function and would have enjoyed complete immunity from all liability. We are not, however, presently concerned with the imbroglio suggested by this unpleasant possibility. The purpose of our discussion is to focus a little light upon the word "recover" so often used in references to the termination of a law suit adversely to a municipal corporation, and to analyze some of the means by which creditors of municipalities can compel payment of their claims. The limitations upon the various collection devices will also be treated in some detail.

Two fundamental concepts underlying the law of municipal corporations must be kept clearly in mind in the consideration of this general problem. The first is the well established principle that municipal corporations are crea-
tures of the state, have no inherent powers, and derive all their authority from the state. However, approximately one-third of the states have adopted constitutional amendments granting to municipalities the right to frame their own charters and to determine the extent of their powers in so far as purely local affairs are concerned and in such jurisdictions municipal corporations are unquestionably something more than administrative arms of the state. The second basic principle is the division of all municipal functions into two classes: those which are public or governmental and those which are private or proprietary in character. The limitations imposed by the application of these two principles will serve to explain, if not to justify, many of the peculiar problems underlying the legal relationships between municipalities and their creditors.

The remedies most appropriate for use in connection with attempts to enforce payment by municipal corporations of their obligations would seem to be execution and levy upon corporate property, attachment, garnishment, creditor’s bill, mechanics’ lien proceedings, and mandamus. Only the first and last of these possible procedures will be theoretically available in all cases. The other remedies will be available, if at all, in particular situations.

The idea that a creditor of a municipality may reduce his claim to judgment, secure execution thereon and levy upon the judgment debtor’s property will doubtless startle many practitioners. It must be admitted that this procedure is rarely employed, apparently because of the general impression that judgment liens cannot attach to municipal property on account of some supposedly fixed principle of absolute immunity extended by the law in order to protect the essential functions of municipal corporations from the disruptions which might be incident to this remedial process. But a municipality today may own a considerable amount of prop-

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1 For a complete discussion of the relationship between municipalities and the state see William B. Munro, Municipal Government and Administration (1925 ed.), chapters 1-5 and 8.

2 The following states have constitutional provisions for local self-government adopted in the years shown: Missouri (1875), California (1879), Washington (1889), Minnesota (1896), Colorado (1901), Oregon (1906), Oklahoma (1907), Michigan (1908), Texas (1909), Arizona (1910), Nebraska (1912), Ohio (1912), Maryland (1915), Pennsylvania (1922), New York (1923), Wisconsin (1924).
erty of a private or proprietary character which is not indispensable to the fulfillment of the public functions for which such municipality was created. Is there any reason why such property should not be subjected to the payment of creditor's claims? Many courts have evidently thought not. In a substantial number of jurisdictions the courts have been unwilling to exempt the private property of municipal corporations from seizure by judgment creditors in satisfaction of claims, recognizing that payment of just obligations is itself one of the highest duties owed by municipalities to their inhabitants. If this view is sound, then it is certainly fatuous reasoning to say that the common law remedy of execution and levy, if allowed, would hinder and embarrass a municipality in the performance of its corporate functions, since one of those corporate obligations is to be enforced by the process. Whatever validity there may be to the case against making the public property of municipalities subject to execution and levy, little if anything can be said for the extension of this protection to the property which is held in a private or proprietary capacity. However, some courts have apparently proceeded upon the theory that such private property should also be exempt where it is revenue producing, since the revenues received may be used and may be necessary to finance the essential obliga-

3 In the following cases municipal property held for purposes not connected with any public function was held to be subject to levy under execution: City of Sanford v. Dofnos Corporation, 115 Fla. 795, 156 So. 142 (1934), involving property acquired under tax foreclosure proceedings; City of Bradenton v. Fusillo, 184 So. 234 (Fla., 1938); Southern Railway Co. v. Hartshorne, 150 Ala. 217, 43 So. 583 (1907), involving vacant land which the municipality had attempted to donate to a railroad company; Murphree v. City of Mobile, 108 Ala. 663, 18 So. 740 (1895), involving proceeds from sale of land not held for governmental purposes; Murphree v. City of Mobile, 104 Ala. 532, 16 So. 544 (1894), where land was held for a burial ground and was not used; C. J. Kubach Company v. City of Long Beach, 8 Cal. App. (2d) 567, 48 P. (2d) 181 (1935), involving an oil lease on subsurface of property used for waterworks; Beadles v. Fry, 15 Okla. 428, 82 P. 1041 (1905); Gordon v. Thorp, 53 S. W. 357 (Tex., 1899); State ex rel. Courter v. Buckles, 8 Ind. App. 282, 35 N. E. 846 (1893); City of New Orleans v. Home Mutual Ins. Co., 23 La. Ann. 61 (1871), involving bonds issued by a private company and owned by city; Doyle v. City of Astoria, Or., 262 N.Y.S. 572 (1932), allowing attachment of funds in bank derived from operation of waterworks system; Harman v. City of Fort Lauderdale, 234 N.Y.S. 196 (1929), involving bonds and certificates of indebtedness of port authority owned by city; Shamrock Towing Co. v. City of New York, 20 F. (2d) 444 (1927); Hart v. City of New Orleans, 12 F. 292 (1882).

4 Dillon, Municipal Corporations (5th ed., 1911), § 992. Execution against public property which is essential for the rendition of vital public services, cannot, of course, be defended.
tions of the municipality. Hence, indirectly, according to this argument, a sale upon execution of municipal property held in a proprietary capacity would be just as detrimental as a judicial sale of property held for strictly public purposes. A further and logical extension of this same argument, however, would lead to the absurd conclusion that the payment of accrued claims against a municipality should never be enforced when all revenues received by the municipality could be used to furnish public services more necessary and beneficial than those which gave rise to the accrued claim. The compulsory payment of any accrued debt even by judicially sanctioned and legislatively approved mandamus proceedings will, of course, result in the "loss" of funds which would otherwise be available to finance new services for the benefit of the public. However, the most ardent advocates of complete immunity would probably not be willing to maintain that a municipality should be able to spend all of its income in the performance of current functions to the exclusion of its accrued debts. Some functions, such as the efficient maintenance of adequate fire-fighting resources, law enforcement facilities, water supply, and sewage systems, are doubtless entitled to priority over the payment of accrued obligations, but there is no virtue in a policy which would recognize the right of a municipality to expand its services and embark upon improvements not indispensable, while creditors of the corporation with claims overdue are compelled to trust in a more favorable financial position on the part of the municipality in the uncertain future.

The case against the allowance of the writ of fieri facias against municipal corporations was vigorously and fully presented by the Illinois Supreme Court in an early case raising this issue as a matter of first impression.\(^5\) In reaching the conclusion that the ordinary writ of fieri facias could not legally be issued against a municipal corporation the court observed as follows:

There can be no doubt that the property of a private corporation may be seized and sold under a *fi. fa.* for the payment of its debts, as in the case of an individual, such corporation being bound to provide for its just debts,

\(^5\) City of Chicago v. Hasley, 25 Ill. 595 (1861).
whether payment is made by a forced sale of its property for that purpose, or with money from its safe.

The nature, objects and liabilities of political, municipal or public corporations, we think stand on different grounds. These corporations signify a community, and are clothed with very extensive civil authority and political power. All municipal corporations are both public and political bodies. They are the embodiment of so much political power, as may be adjudged necessary, by the legislature granting the charter, for the proper government of the people within the limits of the city or town incorporated, and for the due and efficient administration of their local affairs. For these purposes, the authorities can raise revenue by taxation, make public improvements, and defray the expenses thereof by taxation, exercise certain judicial powers, and generally act within their limited spheres, as any other political body, restrained only by the charters creating them—beyond them, they cannot go. This power of taxation is plenary, and furnishes, ordinarily, the only means such corporations possess, by which to pay their debts. They cannot be said to possess property liable to execution, in the sense an individual owns property so subject, for they have the control of the corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only. Levying on and selling such property, and removing it, would work the most serious injury in any city. Many of our cities, Chicago especially, have costly water works, indispensable to the lives and health of the citizens. These works are as much the property of the city as any other it may control, and, in appellee's view, liable to be seized and sold on execution, to the great discomfort and probable ruin of the inhabitants. Fire engines are also indispensable; they too can be seized and sold, and a great city exposed to the ravages of fire, and all this to enable one or more creditors of the city to obtain the fruits of judgments against the city, which, by another process, not producing any of these destructive inconveniences, they could fully obtain. The money raised by taxation could also be levied upon, and the whole business of the city be broken up and deranged. Its offices and office furniture, its jails, hospitals and other public buildings, taken from the corporate authorities, and sold to strangers, who would have a right to the exclusive possession of them, if not redeemed. In the absence of an express statute authorizing a proceeding, fraught with such consequences, we must hold, that a fi. fa. cannot issue against the city of Chicago.6

6 The majority opinion elaborates further: "Before we can assent to the proposition that political corporations, clothed with so many important powers of government, and so essential to be sustained in the exercise of all their rights and privileges, and be secured in their property and means by which their functions can be properly exercised for the benefit of the citizen, we must see some positive act of the legislature authorizing the issuing of such writ. The property of such corporations, and the taxes collected by them for public purposes, are a constituent part, and a necessary ingredient of their public power, and are no more liable to seizure and sale than the whole power itself would be. If not so, a party obtaining a judgment against the city would be able to do indirectly what no power short of the legislature can do—destroy the corporate powers and franchises by taking away the aliment which sustains them. Under our constitution it cannot be admitted that any power or any individual possesses, directly or indirectly, such an overwhelming influence over other powers as would enable either of them to put an end to their functions, and thus disorganize the government. It cannot be so. The power, if conceded, to seize the property
One of the justices, however, was unpersuaded by the reasoning of the majority and in a vigorous dissenting opinion denied that there was any adequate basis either in precedent, in statutory provisions, or in the inherent nature of municipal corporations which called for a judicial determination to the effect that municipal property is exempt from execution and levy. In his dissenting opinion the justice stated:

As municipal corporations are created alone for public and not for private benefit, it may constitute a cogent reason why the legislature should exempt their property from sale on execution, or that such process should not issue against them, but does not, as I conceive, create the exemption.

If such an exemption exists, I feel confident that it is not by the common law. After a careful search of all the elementary books and reports of adjudged cases which have come within my reach, I am unable to find that such a rule has ever been announced. I find at the common law they were liable to be sued, and judgment rendered against them precisely as if they were corporations created for private purposes. When it is remembered that the execution is the fruit of the judgment, if such an important exception existed, it would certainly have been announced either in Great Britain or some of the States of the Union. To my mind the fact that the question has never arisen, is conclusive that such an exception does not exist at the common law.

It will be conceded that this city is a body politic or corporate, as its charter has in terms declared that it shall be a "corporation by the name of the city of Chicago," and by that name may sue and be sued, complain and defend in any court. Nor does the charter exempt the city from having its property sold on execution. It would also seem that when the general assembly provided that the corporation might be sued, that as they failed to relieve it from the effects and consequences of a recovery in ordinary cases, that it must have been the design of the law-making power to leave them in precisely the same situation as individuals, or private corporations.

It will be noted that the Illinois court did not expressly distinguish between the property of a municipal corporation held for public purposes and property held in a private or proprietary capacity for revenue producing purposes. While it unquestionably is true that no satisfactory distinction can
be made between the two classes of corporate property in many instances, still cases frequently arise where the differentiation can be made with complete unanimity in the result, as where property acquired for corporate uses has ceased to be needed for the purposes intended and is vacant or leased to private individuals or concerns. As to such property, the writ of fieri facias can hardly be said to be more disruptive of municipal administration than the approved remedy of mandamus which may and often does divert revenues from useful public projects.

Nevertheless, the decision in *City of Chicago v. Hasley* has been scrupulously followed by the Illinois courts without question or qualification. It would seem that, if the courts so desired, they could interpret that case as denying the

7 For a representative and scholarly discussion of the difficulties inherent in a division of municipal functions into two general classes, governmental and proprietary, for the purpose of determining liability in tort, see Professor E. M. Borchard's exhaustive series of articles in 34 Yale L. J. 1, 129, 229; 36 Yale L. J. 1, 737, 1039; 28 Col. L. Rev. 577, 734.

As suggested elsewhere in this article, the classification of municipal activities on the basis of their governmental or proprietary character, for the purpose of deciding tort liability, is not followed in determining what corporate property may be seized to satisfy the claims of creditors. The private property of public bodies which may be seized upon execution is much more limited in scope than might be suggested by the usual classification where the pertinent question to be considered is one of tort liability. For example the following cases held that property which would normally be regarded as related to the private or proprietary functions of a municipality if a question of tort liability were involved, was not subject to execution: Mayor of City of Monroe v. Johnston, 106 La. 350, 30 So. 840 (1901), involving a gravel pit furnishing gravel for streets; Brockenborough v. Board of Water Commissioners, 134 N. C. 1, 46 S. E. 28 (1903), waterworks; Marin Water and Power Co. v. Town of Sausalito, 49 Cal. App. 78, 193 P. 294 (1920), waterworks; United Taxpayers' Co. v. City and County of San Francisco, 202 Cal. 264, 259 P. 1101 (1927), involving a jail building leased to private concern; C. J. Kubach Co. v. City of Long Beach, 8 Cal. App. (2d) 567, 48 P. (2d) 181 (1935); Eastern Union Co. of Delaware v. Moffet Tunnel Improvement District, 6 Harr. (Del.) 488, 178 A. 864 (1935), rental revenues; Board of Councilmen of City of Frankfort v. White, 224 Ky. 570, 6 S. W. (2d) 699 (1928), revenues from lease of opera house; Martin v. City of Asbury Park, 114 N. J. L. 288, 176 A. 172 (1935), land leased to private persons for a public bathing beach; City of Coral Gables v. Hepkins, 107 Fla. 778, 144 So. 365 (1932), golf course leased to private concern; Equitable Loan & Security Company v. Town of Edwardsville, 143 Ala. 182, 38 So. 1016 (1905), stock of liquors in municipal liquor dispensary.

8 See the following cases; Elrod v. Town of Bernadotte, 53 Ill. 368 (1870); Board of Trustees v. Schroeder et ux., 58 Ill. 353 (1871); City of Kinmundy v. Mahan, 72 Ill. 462 (1874); City of Bloomington v. Brokaw & Co., 77 Ill. 194 (1875); City of Elgin v. Eaton, 83 Ill. 555 (1876); Village of Kansas v. Junten, 84 Ill. 360 (1877); City of Paris v. Cracraft, 85 Ill. 294 (1877); City of Morrison v. Hinkson, 87 Ill. 587 (1877); City of Flora v. Nancy, 136 Ill. 45, 26 N. E. 645 (1891); Village of Dolton v. Dolton, 196 Ill. 154, 63 N. E. 642 (1902); Farrow v. Eldred Drainage District, 359 Ill. 347, 194 N. E. 515 (1935).
right of execution only against municipal property held in trust for essential public purposes. Such a limitation, however, would likely afford only a very limited extension of the opportunities available for the collection of creditors' claims, since the division of corporate functions into governmental and private for the purpose of determining tort liability would probably not be followed in classifying municipal property with reference to its exemption or non-exemption from execution. Municipalities are not authorized, ordinarily, to engage in operations of a strictly private nature and consequently the property which will normally be held for purely commercial purposes will never be very extensive. If municipal creditors are to be adequately protected, therefore, any extension in the use of the writ of execution will leave us far from a complete solution.

From an examination of the limitations upon the use of the writ of fieri facias we turn to a consideration of the writs of attachment and garnishment as instruments for the collection of municipal debts. Logically we should expect the same judicial attitudes with reference to these remedies as those which have been expressed in connection with the use of the common law writ of execution, and the cases reflect this parallelism. The funds of a municipality as well as its real and personal property may be essential to maintain necessary governmental functions, and public policy should prevent the subordination of public interests to the demands of creditors. The test here, as in other creditor's actions should be the extent to which the assets pursued are vital to the efficient rendition of basic public services. The source of the revenues involved in an attachment action should be immaterial, since the municipality may well have computed the income to be derived from proprietary operations and property as well as the income from public or governmental sources in drawing the annual appropriation ordinance providing for essential municipal functions. Some courts have not recognized this test, but it is submitted that no other approach to the problem is feasible under the present status of the law on this subject.

Incidentally, it should be noted that in general the courts have also held municipal corporations exempt from garnishment process in suits where third persons are the principal debtors. While the problems presented in such cases are essentially different from those involved in actions where the municipalities are themselves the principal debtors, the same solicitude for safeguarding the interests of the public is manifested. It is questionable, however, whether the disruption of municipal administration envisioned by the courts, if such actions were tolerated, is a necessary consequence. There is some reason to believe that the self-interests of municipal creditors would have a strong tendency to forestall wholesale garnishment suits, and that the expense of defending such suits as were filed would not be especially burdensome particularly where liability was not contested. Moreover, private organizations are not visibly burdened by the liability to garnishment process. Nevertheless, where this judicial hostility to the subjection of municipal corporations to garnishment suits exists, there is little that can be expected in the way of relaxation of the exemption protecting municipal property against judgment executions.

Occasionally statutory provisions have definitely set to rest any questions which might otherwise have arisen with reference to the possibility of issuing executions against the property of public corporations. For example, an Illinois statute expressly prohibits the issuance of executions against the lands or other property of a county. Such public quasi-corporations, however, have quite uniformly been regarded as distinct from municipal bodies possessing extensive and more or less complete powers of local self-


12 Ill. Rev. Stat. 1937, Ch. 24, § 34.
government. Counties, townships, school districts, park districts, and the like, generally possess only very limited powers and are organized for specialized purposes as arms of the state government. The functions which they perform are functions of the state and governmental in character. Cities and villages, on the other hand, are organized to exercise a wide range of powers many of which are indistinguishable from the activities of private concerns, and such municipal corporations serve local needs primarily. It is improper, therefore, to analogize as to the legislative policy with reference to the issuance of executions against city or village property from the statutory provisions on this subject enacted with reference to political subdivisions of a quite distinct type. Moreover, we have already indicated that the property of a municipality which is held solely for governmental purposes should be exempt from seizure by its creditors. This exemption would necessarily extend to all of the property of such public quasi-corporations as those mentioned, since they are presumed to be exclusively engaged in governmental as distinguished from proprietary functions. Finally it is idle to speculate as to the significance which should be attached to a legislative expression on this question in the case of one type of municipality when no specific provision has been made in other instances. It would be no more logical to assume a general legislative policy opposed to the awarding of executions against all the property of all municipal corporations than it would to presume a policy permitting such process in all instances where no express prohibition was declared. Such speculations may afford a basis for argument but they can scarcely lead to any intelligent conclusion.

In some of the New England states a peculiar doctrine with reference to municipal indebtedness prevails either by statute or by immemorial usage. According to this doctrine the property of the inhabitants of a municipality may be seized and applied against corporate obligations in the event that the corporation is unable to pay its debts. This unique

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13 See note 4 supra.

14 Rev. Stat. Maine 1930, Ch. 98, § 30, and Ch. 56, § 116; Public Laws of N. H. 1926, II, Ch. 346, § 8; Public Laws of Vt. 1933, § 2253. This latter section reads as follows: "When judgment is rendered against a county, town, village, school, or fire district, execution shall issue against the goods or chattels of the inhabi-
and drastic remedy does not seem to have been adopted elsewhere in the United States and has in fact been expressly repudiated upon occasion.\textsuperscript{15} In the states where this remedy is available, however, a high level of municipal credit prevails and few defaults on municipal obligations have occurred, and these conditions may be attributable, at least in part, to the restraining effect of such a weapon in the hands of creditors.\textsuperscript{16}

Where attempts have been made to avoid the judicial or legislative restrictions upon the use of the writ of fieri facias against the property of municipal corporations by resort to the equitable creditor's bill, the courts have extended the doctrine of immunity to cover this action as well. In the case of \textit{Addyston Pipe Company v. City of Chicago},\textsuperscript{17} the Illinois court held that essentially a creditor's bill seeking to reach moneys in the hands of a municipality held for payment to a third person and to subject the same to the payment of the creditor's judgment against such third person was very similar to a garnishment proceeding and that the same arguments applicable to the use of the latter process were applicable to the use of a creditor's bill. Obviously there can be little dispute as to the soundness of this position. Whatever the merits in the reasoning may be, the same

tants of such county, town, village, school or fire district, and may be levied or collected of the same."  


\textsuperscript{15} In jurisdictions outside New England there are numerous constitutional and statutory provisions directed specifically against the subjection of private property to the payment of judgments against municipal corporations: Iowa Code (1935), § 11771; Montana Constitution, Art. XII, § 8; Comp. Laws of N. D. (1913), I, § 3251; Comp. Laws of S. D. (1929), § 5792. This procedure has been repudiated elsewhere by judicial decision. Horner \textit{v. Coffey}, 25 Miss. 434 (1853); Lyon \textit{v. City of Elizabeth}, 43 N. J. L. 158 (1881).

\textsuperscript{16} Securities and Exchange Commission—Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part IV, Committees for the Holders of Municipal and Quasi-Municipal Obligations, Section III.

\textsuperscript{17} 170 Ill. 580, 48 N. E. 967 (1897). See also Lamb \textit{v. Lamb}, 256 Ill. App. 226 (1930).
case can be made against both procedures. A different situation is presented where the municipality is the principal debtor, but the objections to a creditor's bill or to garnishment to reach assets of a municipal corporation in the hands of third persons would be even stronger.\textsuperscript{18}

Creditors of municipal corporations whose claims arise out of labor performed or materials furnished in connection with the construction of public works and buildings, may have a lien upon such property under mechanics' lien statutes unless excluded by express limitations therein or judicial pronouncements of public policy. The Illinois Mechanics' Lien Act, like that of many other states, gives a lien to "any person" furnishing labor or materials to the owner of a tract of land in various types of construction work and such lien attaches, when appropriate steps have been taken, to the land improved by such labor or materials.\textsuperscript{19} Subcontractors, in the case of public improvements, are given a lien on the money due the principal contractor, provided that a written notice of claim is presented to the disbursing officers of the public body and proceedings are brought for an accounting within sixty days after the filing of the claim.\textsuperscript{20}

There is no express exemption of municipal property from the operation of this statutory lien and no particular reason to assume that the lien given subcontractors on public funds is exclusive of all other remedies. However, the Illinois court had occasion to consider the interpretation of similar language under an earlier statute and reached the conclusion that "the Mechanics' Lien Law is framed with reference to such property as is subject to be sold under execution" and that property essential to the performance of governmental functions, such as a schoolhouse or a courthouse, could not be made the subject of a lien.\textsuperscript{21} Under this construction of the statute the word "owner" as used by the legislature does not include public bodies or political subdi-

\textsuperscript{18} 28 C. J. 168.  
\textsuperscript{19} Ill. Rev. Stat. 1937, Ch. 82, § 1.  
\textsuperscript{20} Ill. Rev. Stat. 1937, Ch. 82, § 23.  
\textsuperscript{21} Bouton v. McDonough County, 84 Ill. 384 (1877). The leading Illinois case on this point is Board of Education v. Neidenberger, 78 Ill. 58 (1875). The court there held that the mechanic's lien "proceeding is restrictive of the common law power to issue a fieri facias to collect the judgment" and that an action of mandamus to compel the payment of the claim or the levying of sufficient taxes for its payment was a "sure and complete remedy." Accord: McMillan v. Joseph P. Casey Co., 311 Ill. 584, 143 N. E. 468 (1924).
visions. The only remedy available to the contractor who is not paid presumably is by mandamus, and the subcontractor must look to the principal contractor for payment or seek to enforce a lien on any funds which may be due to him or sue on the contractor's statutory bond.

The decisions on this subject are quite uniformly opposed to the allowance of mechanics' liens on public property and the reason generally stated is that such liens would be contrary to public policy, since the ordinary method of enforcing a lien is by a sale of the lien property and this would result, in the case of public agencies, in the impairment or destruction of necessary governmental functions. The public policy involved in this situation is the same as that discussed previously in connection with executions against municipal property.

The generally approved device for the collection of claims against municipal debtors that neglect or refuse to honor their obligations is mandamus, a legal action with equitable implications. In many jurisdictions this is said to be the only remedy available either because of specific statutory provisions or because of a judicially determined public policy. It is therefore important to observe the possibilities and limitations involved in the use of this proceeding.

While it has been said that the writ of mandamus is a prerogative writ granted upon equitable considerations in the discretion of the court, it is not generally true today that this remedy can be arbitrarily withheld where a petitioner presents facts clearly indicating a legal claim against the party sought to be coerced which cannot be adequately satisfied by any other legal process. Statutes have been generally adopted establishing the action of mandamus as an appropriate remedy in certain cases, and the courts have

24 The following cases are representative: Wilkinson v. Hoffman, 61 Wis. 637, 21 N. W. 816 (1884); Boise-Payette L. Co. v. Challis Independent School District No. 1, 46 Ida. 403, 268 P. 26 (1928). See also cases cited in note 20, Supra.
not hesitated to allow the action when it appeared that other remedies were inadequate or less effective and that mandamus would afford a convenient, practical, and effective method for the protection of the petitioner's rights.\textsuperscript{27} The discretionary character of the writ is similar to the discretionary character of any equitable relief. In situations where it appears that a petitioner has not conclusively established that his claim is founded upon unimpeachable principles of justice or that ordinary legal processes will not sufficiently protect his interests, doubtless a court may grant or withhold equitable relief as its discretion may dictate in the light of all the facts presented to it. However, a petitioner who has clearly brought himself within bounds of well-recognized rules controlling the granting of such relief, cannot arbitrarily be deprived of the aid of equitable remedies. It is not strange to find the courts in considerable confusion in the phrasing of such an elusive rule. The prevalence of the notion that no one can have an absolute right to equitable and extraordinary remedies has probably led to the denial of relief in many cases where the court has, largely upon subjective analysis, determined that the applications for equitable aid did not indicate extreme situations involving a shocking need for an effective legal remedy. That such a test is entirely too strict, and not in accord with modern conceptions of the judicial process seems undeniable. The honest claims of litigants should not be exposed to the hazards and uncertainties of this sort of erratic treatment. Recent judicial utterances indicate, however, that the court's discretion in granting the writ of mandamus cannot be exercised arbitrarily where an applicant for the writ shows a clear legal right to its issuance. The importance of this principle will be readily apparent from a study of the rules and cases to be discussed in the following pages.\textsuperscript{28}

Since the writ of mandamus will not lie to compel the performance of discretionary duties,\textsuperscript{29} a municipal creditor.

\textsuperscript{27} Ill. Rev. Stat. 1937, Ch. 87. Since the adoption of the Illinois Mandamus Act in 1874 the adequacy of other legal remedies has not been a bar to mandamus. People ex rel. Waber v. Wells, 255 Ill. 450, 99 N. E. 606 (1912); People ex rel. City of Chicago v. Kent, 300 Ill. 324, 133 N. E. 276 (1921); People ex rel. Baird & Warner, Inc. v. Lindheimer, 370 Ill. 424, 19 N. E. (2d) 336 (1939).

\textsuperscript{28} Dillon, Municipal Corporations (5th Ed., 1911), §§ 1483 and 1489.

\textsuperscript{29} City of East St. Louis v. United States ex rel. Zebley, 110 U. S. 321, 4 S. Ct. 21, 28 L. Ed. 162 (1884); People ex rel. German Insurance Co. v. Getzendaner,
cannot establish a legal right to the writ until his claim has been liquidated by a proper audit and certification for payment or by a reduction to judgment. The duty to pay remains discretionary until statutory prerequisites in the form of an administrative review of the validity of a claim have been observed, or until it has been judicially determined to be a legal obligation of the municipality. These preliminary procedural reviews to place a claim in order for payment can of course be compelled by mandamus if the proper municipal officers fail or refuse to act upon it.\(^\text{30}\) Payment, however, cannot be enforced, until the claim has been audited and approved by the officers designated for this function, since the disbursing officer’s duty to pay is not clear and nondiscretionary until such steps have been taken. As long as the municipality has an opportunity to assert defenses to the validity of the claim, the duty to pay the same is discretionary and not ministerial.

It follows from what has been said above that it is incumbent upon a petitioner for the writ of mandamus to place the municipality in default by making demand upon its officers for recognition and payment of his claim.\(^\text{31}\) It has been stated, however, that a formal demand is not necessary when it sufficiently appears that the agents of the municipality have already conclusively indicated a determination not to honor the claim.\(^\text{32}\) Likewise, a demand is held not to be essential when a writ is sought to compel the performance of official duties.


\(^\text{30}\) United States ex rel. Portsmouth Sav. Bank v. Board of Auditors of the Town of Ottawa, 28 F. 497 (1886); Town of Lyons v. Coolidge, 89 Ill. 529 (1878), mandamus to compel audit of claim; People ex rel. Mosby v. Stevenson, 272 Ill. 215, 111 N. E. 595 (1916), issuance, signing, and countersigning of warrant; People ex rel. Northup v. Cook County, 274 Ill. 158, 113 N. E. 58 (1916).

\(^\text{31}\) People ex rel. Rinard v. Town of Mt. Morris, 137 Ill. 578, 27 N. E. 757 (1891); State Board of Equalization v. People ex rel. Goggin, 191 Ill. 528, 61 N. E. 339 (1901); City of Cairo v. Everett, 107 Ill. 75 (1883); City of Olney v. Harvey, 50 Ill. 453 (1869); People ex rel. Thatcher v. Village of Hyde Park, 117 Ill. 462, 6 N. E. 33 (1886).

\(^\text{32}\) The court held in United States ex rel. The Aetna Ins. Co. v. Auditors of the Town of Brooklyn, 8 F. 473 (1881), that a demand upon officers to pay a judgment was unnecessary where the officers knew of the judgment and failed to pay. The court recognized that a formal demand would, in such a case, be entirely futile.
of duties owed to the public generally as distinguished from private obligations.\textsuperscript{33}

The municipal creditor who has reduced his claim to judgment and who has made demand for payment, may find it necessary in some jurisdictions to have execution issued upon his judgment and the same returned nulla bona, in order to establish the inadequacy of remedies other than mandamus.\textsuperscript{34} In jurisdictions allowing execution against municipal property held for proprietary use, there may be some justification for this requirement, but it would be an empty and senseless gesture to establish such a requirement in a jurisdiction not allowing execution against any public property.

Assuming that a creditor has met the usual requirements for bringing an action of mandamus, what defenses are commonly available to defeat the relief sought? If the record shows that there is an unqualified duty to pay and that sufficient funds are available from which payment can legally and properly be made, a peremptory writ should issue. However, suppose the municipality alleges that there are no funds on hand with which the claim can legally be paid or that all the revenues of the corporation are necessary for the support of essential functions of the government. Certainly it would seem that the courts should not attempt to compel public officers to do that which is impossible or to violate the law by diverting money from funds created by specific appropriation.\textsuperscript{35} Unless a specific appropriation has

\textsuperscript{33} City of East St. Louis v. United States ex rel. Zebley, 110 U. S. 321, 4 S. Ct. 21, 28 L. Ed. 162 (1884); People ex rel. German Insurance Co. v. Getzendaner, 137 Ill. 234, 34 N. E. 297 (1891); People ex rel. Bartlett v. Dunne, 219 Ill. 346, 76 N. E. 570 (1906); People ex rel. McCormick v. Western Cold Storage Co., 287 Ill. 612, 123 N. E. 43 (1919); People ex rel. Blome v. Nudelman, 371 Ill. 30, 19 N. E. (2d) 933 (1939).

\textsuperscript{34} This seems to be an unnecessarily burdensome procedure in view of the general acceptance of mandamus as the most appropriate remedy for the enforcement of private claims against municipalities. The requirement is criticized by Dillon, Municipal Corporations (5th ed.), § 1510. It is recognized by a New York Court in Shamrock Towing Co. v. City of New York, 20 F. (2d) 444 (1927).

\textsuperscript{35} Actual want of funds has always been a good defense to an application for a writ of mandamus to compel immediate payment, but this argument has become so standard that many courts require a detailed account of fiscal administration before denying relief. If there are no available funds out of which payment of the claim can legally be made, there is still room, of course, for a writ to compel the appropriation and levy of sufficient taxes to discharge it. De Wolf v. Bowley, 355 Ill. 530, 189 N. E. 893 (1934); People ex rel.
been made for the payment of the claim in question there is not much likelihood that any "free" funds will be available out of which the claim can be paid. This problem is acute in all claims not founded upon direct contractual relations and may exist even in the latter situations when the governing body of a municipality has been delinquent in the performance of its duties and has neglected to include in the annual appropriation ordinance provisions covering all express and contingent liabilities. If an appropriation has been made and taxes levied and collected for purposes which include the creditor's particular claim, the exhaustion of available funds even by diversion into improper uses may constitute a defense to an application for a writ of mandamus or render the writ futile if granted.

It may thus be incumbent upon the individual creditor, availing himself of the use of mandamus as a remedy, to bring successive actions to achieve a desired result. If there are no funds presently available for the payment of his claim, and if the governing body of the municipality refuses to take the necessary action to provide a fund for the payment of the claim, then the creditor must petition for a writ of mandamus to compel the appropriation and levy of a sum sufficient to discharge his claim. But the officers of the municipality may and probably will neglect or refuse to pay over the taxes collected on account of the obligation unless


People ex rel. Bunge v. Downers Grove Sanitary District, 281 Ill. App. 426 (1935). The court, in Board of Supervisors v. People ex rel. Ashbrook, 226 Ill. 576, 80 N. E. 1066 (1907), held that by adjournment without having included the payment of any outstanding judgments after demand had been made among the purposes of its tax levy, a county board could not escape its duties and that mandamus would lie to compel the board to reconvene and provide for the payment of such claims.

Galena v. United States ex rel. Amy, 72 U. S. 705, 18 L. Ed. 560 (1867); German Insurance Co. v. Getzendaner, 137 Ill. 234, 34 N. E. 297 (1891); The People ex rel. Fox Howard & Co. v. City of Cairo, 50 Ill. 154 (1869). The latter case illustrates an intelligent attitude toward the interests of all parties concerned. The court ordered the municipality to levy the maximum tax allowed by statute and to pay over to the judgment creditor a sufficient sum to discharge his claim after providing for the most economical expenses of the city. The city was not required to issue bonds because of the poor market for its securities and because of the discretion involved in such a procedure.
compelled to act by another writ. This condition necessitates a constant and careful study of municipal financial operations in order to forestall any attempted diversion of tax moneys which should be segregated for the satisfaction of the claim. Presumably a court to which application has been made for a writ of mandamus to compel the payment of a claim might issue a writ directing the performance of all the successive acts necessary to effect an actual liquidation of the account and retain jurisdiction for the purpose of supervising the performance directed, although this procedure does not appear to be commonly employed. Formerly, an additional hazard had to be met. Municipal officers, whose acts were necessary to effect a payment of municipal indebtedness, could forestall relief to creditors indefinitely by resigning in the face of mandamus process. According to one writer this practice became so common that it was necessary for candidates who aspired to appropriating and disbursing offices to promise to resign if mandamus proceedings to compel the payment of certain obligations were instituted. Modern statutes have made this easy form of repudiation impossible by permitting the writ to be directed against the municipality generally or against the offices concerned with payment. The writ, under such procedure, does not abate upon the death or resignation of particular officers but continues against their successors.

The above comments, tacitly assume that the municipality's refusal to pay legal claims asserted against it is due to a wilful repudiation and not to physical impossibility of performance. However, the latter may well be the case. Mounting costs and falling revenues may have combined to make it impossible to discharge all obligations in full as they accrue. Constitutional and statutory debt and tax limitations fix definite bounds to the revenue producing power of most municipalities, and tax delinquencies may reduce actual collections far below the theoretical maximum. While ordinarily courts should and do direct the levying of taxes up to the limits set by law, where a municipal creditor shows that existing revenues are insufficient to discharge his claim

38 Dillon Municipal Corporations (5th ed., 1911), § 1520 et seq.
and that a reserve of taxing power is available, still it does not follow that this procedure will be productive of satisfactory results either from the standpoint of the petitioning creditor, the tax-bearing public, or other creditors. During periods of economic depression, low property values and reduced incomes may establish a point of diminishing tax returns short of constitutional or statutory tax limitations. If taxes become too burdensome, many taxpayers may conclude that efforts to keep their property free from tax liens are futile and financially unjustifiable. Moreover, other creditors spurred on by the prospect of having all the municipal debtor's resources exhausted in the process of meeting one creditor's obligations in full, may be prompted to make more diligent efforts to collect their claims without loss of priority. If the sum total of all unsatisfied outstanding obligations is beyond the practical power of the municipality to pay, the net result will necessarily be a large amount of litigation costly both to the creditors and to the municipality whose energies and finances will be diverted from more useful purposes into a defense against this mass assault upon its revenues. This sort of a "trial by battle" may be a happy condition for a few lawyers in a position to exact fat fees as a result of the turmoil, but it cannot be productive of any equitable results to the municipality, its creditors, or its taxpayers.40

Furthermore, practical difficulties confront the creditor and the court in the use of mandamus to compel a municipality to use its taxing powers. The writ commonly takes the form of an order directing the municipal debtor through its proper officers to levy the maximum rate permitted by law and to pay over to the judgment creditor the amount of his claim out of any surplus that may remain after provision has been made for the most economical administration of the affairs of the municipality.41 This sort of an order has a pleasing sound but the creditor beneficiary is still a long way

40 For a good description of an actual litigation record involving creditors' fruitless suits against an insolvent municipality see the article by Edward J. Dimock, "Legal Problems of Financially Embarrassed Municipalities," 22 Va. L. Rev. 39 at 41-42.

41 The People ex rel. Fox Howard & Co. v. City of Cairo, 50 Ill. 154 (1869); People ex rel. Anderson v. Village of Bradley, 367 Ill. 301, 11 N. E. (2d) 415 (1937).
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from the cash payment of his claim. Even granting that the court may be willing to retain jurisdiction for the purpose of compelling the production of detailed and itemized accounts of municipal expenditures in order to determine whether there has been a bona fide attempt at compliance with the writ, it is still primarily a legislative and not a judicial function to determine the ordinary and minimum public functions which should not be sacrificed in order to provide funds for individual creditors. The courts have repeatedly held that a receiver cannot be appointed to take over in whole or in part the management of municipal affairs in order to make certain that revenues will be set aside for the payment of the claims of judgment creditors. Even if such a procedure did not involve an infringement of the fundamental principle of separation of powers, the practical difficulties would still be almost insurmountable. Under the present volume of municipal indebtedness in default, the administrative and supervisory burden would undoubtedly so tax the facilities and time of the courts as to make effective and efficient results virtually impossible, to say nothing of the neglect which must perforce befall the business of other litigants.

We need not therefore be surprised at the fact that, while the city of Chicago has outstanding and unpaid judgments standing against it to an amount in excess of six million dollars, with the total mounting yearly, it nevertheless finds itself able to carry out a costly system of public improvements involving the beautification of lake front property, the construction of subways and numerous other projects. We do not wish to be understood as taking a stand upon the morality of this procedure but only as suggesting that the creditor’s ability to secure an effective use of his municipal debtor’s taxing power for his benefit is narrowly circumscribed.

42 City of East St. Louis v. United States ex rel. Zebley, 110 U. S. 321, 4 S. Ct. 21, 28 L. Ed. 162 (1884). But where a municipality alleged that its revenues were insufficient to meet current expenses, it was held that the burden was upon such public body to establish this fact by the submission of figures upon receipts and operating costs. People ex rel. Bunge v. Downers Grove Sanitary District, 281 Ill. App. 426 (1935).

43 Rees v. Watertown, 88 U. S. 107, 22 L. Ed. 72 (1874); Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197 (1880), which held that a court cannot levy and collect taxes through its own marshal.

The city of Chicago has found another convenient and effective device to block mandamus-seeking creditors who hope to secure payment of their claims out of funds derived or to be derived from a special judgment tax authorized by statute. According to the statute and an ordinance of the city passed pursuant thereto, judgments must be paid out of the fund "in the order in which same were obtained." Under this provision a petitioner for a writ of mandamus to compel the payment of a judgment out of the judgment tax fund must allege and prove, according to one decision, that his judgment is first in order of unpaid judgments against the city. Over six million dollars in unpaid judgments are outstanding and apparently the want of diligence on the part of the holder of an early judgment would block holders of subsequent judgments from any right to participate in the proceeds of the tax fund if this ruling stands. It would appear that a few early judgments placed in sympathetic hands might constitute a perfect protection against creditors' attacks through this inviting but deceptive hole in the municipality's defense armor.

While courts will not issue peremptory writs of mandamus to compel the levy and collection of taxes in excess of statutory or constitutional limitations, it is nevertheless frequently possible to stay within these limitations if the levy is directed to be spread over successive years so as to produce only a portion of the amount of the judgment in any one given year. This procedure, moreover, in cases when the ratio of the judgment to the total appropriation for the taxing district is large, avoids the dangers of a tax strike inherent in any excessive levy. With this flexible arrangement avail-

46 See People ex rel. Krajci v. Kelly, 279 Ill. App. 22 (1935). The Illinois Supreme Court, however, has indicated that the constitutional provision that compensation must be made for private property taken for public use cannot be impaired by statute or ordinance and that a judgment for such taking or damage must be paid, if funds are available and if there is no showing that creditors with prior rights are actually claiming such funds. People ex rel. John V. Farwell Co. v. Kelly, 361 Ill. 54, 196 N. E. 795 (1935); People ex rel. John V. Farwell v. Kelly, 367 Ill. 616, 12 N. E. (2d) 612 (1937).
47 United States v. County Court of Macon County, 99 U. S. 582, 25 L. Ed. 331 (1879); Clay County v. United States ex rel. McAleer, 115 U. S. 616, 29 L. Ed. 482 (1885); City of East St. Louis v. People ex rel. Seim, 6 Ill. App. 76 (1880); City of East St. Louis v. Board of Trustees, 6 Ill. App. 130 (1880).
48 This procedure was employed in People ex rel. Euziere v. Rice, 290 Ill. App. 514, 8 N. E. (2d) 683 (1937).
able there is seldom any occasion warranting the use of a mandamus writ to compel the issuance and sale of bonds for the purpose of raising money with which to pay a petitioner's claim. This probably accounts for the fact that there are very few cases in which mandamus has been used for such a purpose. There are to be considered in this connection also statutory limitations upon the purposes for which bonds may be issued. Obviously, however, a municipality seeking to defeat the granting of a mandamus writ on the ground of lack of funds and the necessity of using all its taxing power to raise revenues for necessary current operations, should be required to establish its good faith by submitting detailed figures and estimates showing with considerable exactitude its financial needs. It will then be incumbent upon the court to determine whether the awarding of the writ will be likely to produce funds for the payment of the creditor's judgment without undue embarrassment to the fiscal administration of the municipality. If it appears that the awarding of the writ may create confusion and disorder in the management of municipal affairs to the serious detriment of the inhabitants, the remedy should, of course, be withheld. Although there may be strong objections to a judicial determination upon political or legislative matters, this condition is apparently inescapable in meeting the problem presented with a proper regard for the various interests at stake. Moreover, no realistic person will any longer main-

49 The court held in People ex rel. Euziere v. Rice, 290 Ill. App. 514, 8 N. E. (2d) 683 (1937), and in People ex rel. Bunge v. Downers Grove Sanitary District, 281 Ill. App. 426 (1935), that a municipality must do more than merely allege the inadequacy of existing revenues to meet the expenses of maintaining essential governmental functions. Presumably the courts will make some sort of independent determination of the need for the application of the full revenue raising power to meet the economical administrative requirements of the municipality. People ex rel. Fox Howard & Co. v. City of Cairo, 50 Ill. 154 (1869).

The court, in Cunningham v. City of Cleveland, 98 F. 657 (1899), held that after a writ of mandamus has issued directing a municipality to levy the maximum tax rate permitted by law, the city could not expend a portion of the taxes so levied for the purpose of erecting school buildings. This was not an ordinary current expense to which the revenues of the city could be applied while it owed money on a judgment for a debt incurred as a current expense, the court held. The municipality could and should have paid for the buildings out of the proceeds of a bond issue authorized by its charter.

In Maryland Casualty Co. v. Leland, 214 N. C. 235, 199 S. E. 7 (1938), the court said, "We have no definite classification as to the kind of service a municipality may perform its citizens to the postponement or defeat of its obligations to creditors." It was indicated, however, that the court would not be governed by an arbitrary classification.
tain that a clear cut separation of legislative and judicial functions is observed under the political and constitutional systems as they are now operating. Lip service is still paid to the time worn apothegm that the courts are not and cannot be concerned with the wisdom of legislative practices and policies, but judicial decisions are nevertheless constantly being based upon the reasonableness or unreasonableness of legislative action. This process of necessity involves some degree of substitution of judicial predilection for legislative determinations. Hence, judicial scrutiny of municipal expenses for the purpose of determining the feasibility of issuing a writ of mandamus is not only a conventional process but an appropriate and even necessary operation if the judicial discretion involved in the awarding of the writ is to be wisely exercised.

The above discussion leads inevitably to the conclusion that the usual legal remedies available to enforce the payment of creditors' claims against municipal corporations and quasi-corporations are oftentimes inadequate and unscientific when viewed in the light of the wider interests involved. A realistic appraisal of the situation can be made only in the light of the magnitude of the problem involved and the alternative solutions which may be evolved within the framework of our present legal structure. A recent study made by the Securities and Exchange Commission^50 states that there are approximately 175,000 taxing units in the United States and that between two and three thousand of these taxing districts were in default in 1933 upon an estimated $1,200,000,000 out of a gross municipal bonded indebtedness of $18,500,000,000. Many more municipalities not actually in default were reported as being unable to meet their current expenses except by resort to dubious schemes of financial jugglery. While these figures apply to funded indebtedness they nevertheless indicate the almost hopeless situation confronting the ordinary judgment creditor in many areas. Approved legal remedies will not produce funds for the satisfaction of a creditor's claim when the municipal debtor has no property or income subject to execution and its taxing and debt incurring power has been exhausted. The available data with reference to local governmental indebted-

^50 See note 15, supra.
edness strongly indicates that a considerable volume of municipal obligations will not be honored in full under present conditions. What, then, can be suggested as a sane and practical approach to the problem?

Fundamentally, of course, some thorough-going revision in archaic tax levies may be necessary as well as state administrative control over expenditures of local taxing units. Scientific application of new mechanical techniques will not produce milk from a dry cow. However, if the cow is not dry, but can't be milked because too many opposing and insistent milkers are vying with one another for a chance to do the job, then it may be necessary to give the beast a little air and compromise these claims upon her resources. The evidence available shows that many taxing units have tapped all their resources without producing sufficient revenues to meet their obligations and that a breathing spell will not solve the problem. In such cases it is difficult to see any solution other than a compromising of creditors' claims through some sort of voluntary agreement or through resort to municipal bankruptcy proceedings.

We have already seen that municipal creditors cannot accomplish much toward the satisfaction of their claims through such legal remedies as judgment levies and executions, garnishment and attachment, creditors' bills, and mechanics' lien proceedings, and that the effectiveness of mandamus depends upon the existence of funds or taxing power which may be used to effect a payment of such claims. In some cases statutory or constitutional increases in the taxing and debt incurring power might afford partial relief. Special judgment taxes or bonds might be authorized with the provisions that they should not be considered in computing the maximum tax or debt limits fixed by law. This procedure has found some support and undoubtedly has considerable merit when considered upon moral grounds. If coupled with some sort of state administrative control over

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51 The Ohio Gen. Code 1930, §§2293-3, 2293-13, authorizes municipalities to issue bonds to pay judgments for personal injuries and other non-contractual obligations and provides that such bonds shall not be included in the net indebtedness of the issuing bodies.

The Illinois statutes (Ill. Rev. Stat. 1937, Ch. 24, § 65.5) give cities and villages the power to issue bonds for the purpose of paying or funding judgment debts, but such bonds would be included in the constitutional and statutory limitations upon indebtedness.
municipal expenditures it might go far toward achieving an equitable result in the case of municipalities whose operating expenses are not grossly disproportionate to the reasonable value of their assessed property. Some restraint upon outlays for ordinary current expenses seems inevitable if creditors’ claims are not to be generally postponed or defeated by the exhaustion of municipal revenues and revenue producing powers upon such operating costs. Presumably this restraint would require the creation of a state board with general and extensive control over the budgets of all taxing districts. The adoption of such a plan admittedly would necessitate the overcoming of strong prejudices in favor of the sanctity of local self-government and the supposedly inherent right of local inhabitants to control local affairs. However, the history of the past few years should have sufficiently demonstrated that responsible and intelligent management of the functions and fiscal policies of local taxing districts cannot always be expected. The reasons, which are to be found primarily in the inexperience of underpaid officials, are not of primary importance in the search for an immediate and practical method by which improvements may be effected.

Where municipalities are actually insolvent, the immediate problem obviously must involve some scaling down of the total indebtedness either by voluntary agreements or by proceedings under the municipal debt readjustment act. Voluntary compositions by creditors are difficult to work out and afford many opportunities for the pursuit of policies which do not accord equitable treatment of the rights of all the parties concerned. Unless all creditors cooperate in the composition preferences will result either from voluntary treatment or from individual coercive measures such as mandamus actions. In most cases it will be difficult, if not impossible, to work out a debt adjustment plan which will command a one hundred per cent indorsement. Proceedings under the Federal bankruptcy statutes will, therefore, be

52 For an excellent study of the subject of state administrative control over municipal indebtedness see Stason, “State Administrative Supervision of Municipal Indebtedness,” 30 Mich. L. Rev. 833.

53 11 U. S. C. A. §§ 401 et seq. The first municipal debt readjustment act was held unconstitutional as an impairment of the sovereignty of the states. Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U. S. 513, 56 S. Ct. 892,
the preferable, if not the only solution, in cases involving insolvent municipal corporations.

It is to be hoped that the various state legislatures will recognize in the near future the seriousness of the municipal debt problem and will undertake careful studies of the matter in all its aspects to the end that some permanent improvement in conditions may be forthcoming. As indicated in these pages, any real solution must go farther than merely to perfect and enlarge present legal remedies available to creditors but must recognize the necessity for a re-establishment of municipal credit and solvency by the adoption of measures designed to facilitate the liquidation of hopelessly excessive debt burdens, to improve the tax structure both as to the subject matter of taxation and the methods of collection, and to extend state administrative supervision over municipal budgetary operations. Authorization of additional taxes and bond issues for debt service should be considered as a part of a complete program of credit reconstruction but with an intelligent understanding of the limited scope of the relief involved in this process alone. A thorough analysis of municipal indebtedness might even disclose that our system of local taxing units enjoying large measures of autonomy is obsolescent and unsuited to present-day social, economic, and political needs. Only harm can come from an ostrich-like habit of refusing to face the dangers involved in the continued growth of local indebtedness with mounting defaults.

80 L. Ed. 1309 (1936). Justice Cardozo in a dissenting opinion remarked, "If voluntary bankruptcies are anathema for governmental units, municipalities and creditors have been caught in a vise from which it is impossible to let them out. Experience makes it certain that generally there will be at least a small minority of creditors who will resist a composition, however fair and reasonable, if the law does not subject them to pressure to obey the general will."

A revised edition of the same statute was upheld in United States v. Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137 (1938).

State legislation is advisable, if not necessary, to supplement the Federal statute in order to establish the consent to municipal bankruptcy procedure required by the statute. For an example of such legislation see Mason's Minn. Stats. 1938 Supp., Ch. 10, §§ 1938-23, 24.
SOME PROBLEMS ARISING FROM MUNICIPAL SUBWAY CONSTRUCTION

ROBERT WIEFERICH AND JEROME RICHARD*  

THE recent commencement of construction on Chicago's long awaited subway has focused attention upon the legal problems arising from any such undertaking. There is no doubt that the city has power to construct the subway. However, there are certain problems confronting the city in the exercise of this power. These problems may be classified into those arising because of injuries to the interests of encroaching landowners, and those arising from the possibility of injury to the interests of adjoining landowners.

The principal obstructions on the right of way are encroaching foundations, underground vaults and safes, and subsurface transportation facilities, such as elevators and tunnels. Emphasis has been placed on cases involving subsurface obstructions, as obstructions upon or above the street are generally distinguishable, since the latter necessarily impede traffic, and are therefore nuisances.

There are four principal theories upon which an abutting owner may allege a right to maintain an encroaching structure beneath a street. These are: (1) a right of prescription, or title by adverse possession; (2) a right created by contract; (3) the right remaining in the abutting owner when the city took less than a fee in establishing the street; (4) an estoppel arising which prevents the city from asserting its paramount title to the land occupied by an encroaching structure.

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1 Ill. Rev. Stat. 1937, Ch. 24, § 569; People v. City of Chicago, 349 Ill. 304, 182 N. E. 419 (1932); Barsaloux v. City of Chicago, 245 Ill. 596, 92 N. E. 524 (1910).

2 While existing utility facilities will probably prove to be greater physical obstacles than those above mentioned, in practically all cases, the utilities have agreed, as a condition of their original construction permit, to remove at their own expense, such facilities in the event the city requires this space. Thus any litigation arising in connection with the relocation of such utilities will revolve upon the interpretation given to such agreements. See Chicago Tribune, March 1, 1939, page 27, column 2.

3 In City of Chicago v. Norton Milling Co., 196 Ill. 580, 63 N. E. 1043 (1902), the court expressly distinguished the case of Hibbard & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256 (1898), involving an awning erected over the public easement, from Gregsten v. City of Chicago, 145 Ill. 451, 34 N. E. 426 (1893), concerning a subsurface vault, on the ground that the Hibbard case involved an obstruction to street travel and was a purpresture.
It is generally agreed that an abutting owner cannot, through adverse possession or by prescription, acquire the right to occupy permanently a portion of a city street, whether the encroachment be on the surface or merely a subsurface structure. A brief unequivocal statement of this position by the Illinois Supreme Court is found in *Russell v. City of Lincoln*, where the court said, "A street and all its parts are held for a public use, and title to no part thereof can be obtained against the public by adverse possession."

The court has elaborated upon this position in several cases. In *Hibbard & Co. v. City of Chicago*, the court stated that property held for street purposes by a city is held in trust for the public and to allow any title to be taken by a third party would be to divert trust property. The court went on to say that it is beyond the power of a municipality to grant permanently an exclusive use of a portion of a street for private purposes. In *City of DeKalb v. Luney*, it was held

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4 200 Ill. 511 at 522, 65 N. E. 1088 (1902), and see E. McQuillan, Municipal Corporations (2d ed.), IV, 76, § 1423: "A municipality cannot authorize any use of its streets by a private person inconsistent with the future legitimate uses of the street by the municipality . . . and no right to use the street for private purposes can be acquired by prescription as against the municipality." Cf. Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193 (1902), where the court said: "It being established, then, that the city of Chicago was the owner of the fee of Michigan avenue, including the strip in question, no rights in the strip as a part of the street could accrue to the appellant, or any of his grantors, by reason of any possession of the strip, no matter how long continued."

5 173 Ill. 91 at 96, 50 N. E. 256 (1898). "The municipal corporation can grant no easement or right therein [in public streets] not of a public nature, and the entire street must be maintained for public use, hence no individual or corporation can acquire any portion of the street for exclusive private use to the exclusion of the public. The city council has no power to grant such use. . . . There is no power in the municipality to sell or grant for private use a public street and exclude the public therefrom. . . . A permanent encroachment upon a public street for a private use is a purpresture, and is, in law, a nuisance." Cf. Dallenbach v. Burnham, 248 Ill. 468, 94 N. E. 41 (1911), where the city acquired a prescriptive easement over an abutting owner's land although the abutting land owner had actually built upon part of the property himself. The adjoining owner held in fee a 20" strip, which strip was used by the city as part of a street for twenty-five years. A part of the adjoining owner's home had been built on the strip, including foundation stones extending out beneath the surface and an encroaching cornice above the surface. The owner now sought to add to the front of his home on the remainder of this strip, but the city secured an injunction on the ground that by using the strip for travel over a twenty-five year period, it had acquired an easement therein. The rationale of the case was that since the owner's use was not inconsistent with the acquisition of the easement by the city it did not prevent the easement from arising.

6 193 Ill. 185 at 189, 61 N. E. 1036 (1901). "Adverse possession of a portion of the street by the appellee and those in the line of his title or possession, no matter how long continued, had no effect, by reason of the provisions of the
that the Statute of Limitations does not run to bar the right of the public as against an encroacher.

While it follows from the preceding position of the court that no prescriptive right can be acquired by a private party for the exclusive and permanent use of a portion of the street as against the right of the public to use such street for travel purposes, nevertheless a private party may obtain by contract the right to maintain an encroaching structure for a relatively extended period of time. However, in all of the cases involving contractual agreements, the Illinois courts have clearly indicated that such agreements must be made subject to revocation when the use of the street is required for public travel. Thus, in *Gregsten v. City of Chicago*, a case most frequently cited for the proposition that a private party can have a contractual right to maintain a structure encroaching beneath the street, the agreement expressly reserved to the city a right of revocation in the event the public interest should require it. In *People v. Field & Company*, the city of Chicago provided in the ordinance granting the defendant the right to construct a tunnel under a street that the city might revoke it at any time and in any event the permit should cease after twenty years. The court expressly distinguished all of the cases relied upon by the plaintiff, a taxpayer, on the grounds that in those cases encroachment upon the street was of a permanent nature and for a fixed time and not, as here, under conditions where the encroachment could be removed at any time. The city may not, however, retroactively apply the statutory provisions to bar the right of the public to be restored to possession of the street to the full width thereof. The title to the street is vested in the city in its governmental capacity and the Statute of Limitations does not run in favor of appellee to bar the right of the public.

*Statute of Limitations, to bar the right of the city to be restored to possession of the street to the full width thereof. The title to the street is vested in the city in its governmental capacity... and the Statute of Limitations does not run in favor of appellee to bar the right of the public.*

*Gregsten v. City of Chicago*, 145 Ill. 451, 34 N. E. 426 (1893). This case involved a vault built beneath a public alley by the plaintiff, an abutting owner, pursuant to a revocable permit and the posting of a bond which required plaintiff to keep a portion of the alley in good repair. The plaintiff kept the alley in good repair, thus furnishing good consideration, and after a long period of time the city attempted to revoke the permit, not in the interest of public necessity for travel, but in order to allow a private party to construct a vault on the other side of the alley. Such revocation was not permitted. Obviously, the case may be reconciled with those involving revocation in the interest of public necessity.

*People v. Field & Company*, 266 Ill. 609, 107 N. E. 864 (1915).

Ibid., p. 627. In *City of Chicago v. Norton Milling Co.*, 196 Ill. 580, 63 N. E. 1043 (1902), it was held that a lease by the city of a vault space would be a legal and binding agreement, the city receiving consideration in the permission of the Norton Milling Company allowing it to swing the end of the Madison Street bridge over its property. It is significant that the court specifically noted that if the use of the public so required, the city might reclaim the space leased.
arbitrarily or capriciously revoke this right.\textsuperscript{11}

Distinguished from cases involving the acquisition by an adjoining land owner of a new right to encroach are those involving the exercise of the rights left in the landowners when the city acquired only an easement for street purposes. In discussing the difference between ownership of streets in fee and in easement by the city, the courts have never specifically identified the rights remaining to an abutting owner after the city acquires an easement for street purposes. The general conclusion in such a situation has been that the abutting owner may make any use of the street not inconsistent with the city’s easement.\textsuperscript{12}

The principal question in connection with the construction of a subway is whether the easement is broad enough so that any use of the street which is inconsistent with the construction of a subway is an interference with the easement which must be removed at the abutting owner’s expense. The language of a leading Illinois case, \textit{People v. Field & Company},\textsuperscript{18} indicates that the city’s easement in such a situation will be paramount.


\textsuperscript{12} The People \textit{v. Field & Company}, 266 Ill. 609, 107 N. E. 864 (1915): “This court has quite recently had before it for consideration the respective rights of abutting property owners, the city authorities and the public with reference to the use of the space under the surface of the streets, both when the fee was owned by the city and when it was owned by the abutting property owners. In those cases it was decided that . . . when the abutting owner was the owner of the fee he had the right to make any reasonable use of the street which did not interfere with the free enjoyment of the public . . . that the city would not be estopped by any action of its own from requiring the space occupied beneath the street to be surrendered to the city whenever it became necessary for the uses of the public.” See also \textit{City of Dixon v. Sinow & Weinman}, 350 Ill. 634 at 636, 183 N. E. 570 (1932). “The easement for a street includes such use of the land at or beneath the surface as will make the easement effective . . . The owner of the land under a street, however, may make any reasonable use of his land that is not inconsistent with the proper enjoyment of the easement by the public.” See \textit{Town of Palatine v. Krueger}, 121 Ill. 72, 12 N. E. 75 (1887).

\textsuperscript{13} 266 Ill. 609 at 623, 627, 107 N. E. 864 (1915). See also \textit{City of Dixon v. Sinow & Weinman}, 350 Ill. 634, 183 N. E. 570 (1932); \textit{Tacoma Safety Deposit Co. v. City of Chicago}, 247 Ill. 192, 93 N. E. 153 (1910); \textit{People ex rel. Jeffrey v. Murphy}, 254 Ill. App. 109 at 113 (1929), in which the court stated: “The rule is well settled that when a public street is once established, all of the beneficial uses vest in and devolve upon the public. These uses include the uninterrupted, unimpeded and unobstructed use of every portion and part of such public highway, not only that they [the public] may use all the ground for foundation to travel upon, but that they may likewise enjoy the uses of the air above and the ground beneath the surface.” The Massachusetts court has taken a similar position in \textit{Sears v. Crocker}, 184 Mass. 586, 69 N. E. 327 (1904), and in \textit{Peabody v. City of Boston}, 220 Mass. 376, 107 N. E. 952 (1915), both involving subway construction.
In any event, whether the fee title was in the city or the abutting property owner, the street under the surface of the ground could only be used in such a manner as would safeguard the paramount right of the public to the full and unobstructed use of the street for the purpose for which it was dedicated; that the city would not be estopped by any action of its own from requiring the space occupied beneath the street to be surrend ered to the city whenever it became necessary for the uses of the public. . . . Under the authorities in this as well as other jurisdictions, if the subsurface of the street is needed by the public for travel or other public uses, the mere fact that such public use will deprive abutters of the use of vaults and other similar underground structures in the street there tofore maintained, cannot stand in the way of the construction of sewers or subways. "Abutters are bound to withdraw from the occupation of streets above or below the surface whenever the public needs the occupied space for travel."

Any conclusion to the effect that the city's easement in its streets is not broad enough to cover subway purposes would have to be based principally on the theory that street purposes were to be limited to those in effect at the time the easement was acquired or to those specific purposes for which the easement was then acquired. 14 This argument is supportable on the ground that had the abutting owner contemplated giving up his right to encroach beneath the street he would have asked a larger consideration. 15 As the language of the cases now stands, when a city takes an easement for street purposes, the rights which remain in the abutting owner are of nominal value only, becoming valuable principally upon the vacation of a street.

In Town of Palatine v. Kreuger 16 the court quoted:

"The more ancient decisions limited the rights of the public to that of passage and repassage, and treated any interference of the soil, other

14 In Sears v. City of Chicago, 247 Ill. 204 at 217, 93 N. E. 158 (1910), the court said: "One buying a lot abutting upon a street in which the city has only an easement must be presumed to purchase with knowledge of the fact that a conveyance of the abutting lot carries the title to the center of the street, subject only to the easement of the public therein. The abutting lot owner thus being the owner of the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement which is held for the use of the public." The last sentence of the above quotation would seem to indicate, however, in the light of the cases cited in note 13 supra, that the city's easement is broad enough to include subsurface travel.

15 Ibid. However, Sears v. Crocker, 184 Mass. 586, 69 N. E. 327 (1904), which has been frequently cited by the Illinois courts, indicates that when an easement for travel is taken and paid for by the city the entire payment has been made, regardless of whether the modes of travel change so as to include subterranean travel.

16 121 Ill. 72 at 76, 12 N. E. 75 (1887). Quoting from J. K. Angell and T. Durfee, Highways (2d ed), § 312.
than was necessary to the enjoyment of this right, as a trespass. But the modern decisions have very much extended the public right, and, particularly in the streets of populous cities, have reduced the interest of the owner of the soil to a mere naked fee of only a nominal value."

Where the city owns the fee in a street, the abutting owner's rights are limited to ingress and egress, an easement for light and air and the right to use the street in common with all other persons, and such owner has no right to appropriate exclusively any portion of a street, either above or below the surface.\(^7\)

The remaining theory upon which an encroaching landowner may establish a right to maintain a structure beneath the street rests in the possibility of an equitable estoppel against the city. The Illinois cases conclude generally that where a municipality, by affirmative acts, has induced an abutting owner to build permanent structures encroaching upon a municipal easement or fee, the municipality will be estopped to require the encroacher to remove such structures, particularly when such removal involves great expense or hardship.\(^8\)

While it is true that foundations, tunnels and vaults are regarded as permanent structures, and therefore meet one of the requisites for an estoppel,\(^9\) nevertheless before a landowner can show the necessary inducement on the part of the city, he must show that it has taken certain positive steps which led him to build.\(^{20}\) Generally this affirmative act consists of the city's building a street on the wrong property and

\(^{17}\) Sears v. City of Chicago, 247 Ill. 204, 93 N. E. 158 (1910).

\(^{18}\) See People v. City of Rock Island, 215 Ill. 488, 74 N. E. 437 (1905). In this case a railroad had occupied part of the surface of a street for over fifty years and spent $400,000 in improvements. The street remained wide enough to permit ordinary travel, and in this suit by a private citizen seeking a mandamus to compel removal of the tracks, the court held that an estoppel had arisen, saying: "Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied." One distinguishing feature of this case, however, is that the city had actually obtained consideration for the use of the street by the railroad. Cf. Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193 (1902).

\(^{19}\) City of DeKalb v. Luney, 193 Ill. 185, 61 N. E. 1036 (1901); Russell v. City of Lincoln, 200 Ill. 511, 65 N. E. 1088 (1902); Kennedy v. Town of Normal, 359 Ill. 308, 194 N. E. 576 (1935). In the latter case the plaintiff had fenced in an alley which had been dedicated to the city but never used as an alley, and built a bird house and planted trees and bushes on the enclosed portion. The court held that these were not permanent improvements.

later attempting to re-route the street,\(^\text{21}\) or having indicated that not only was the surface or a portion of the street not to be used but rather that no street at all was to be used.\(^\text{22}\) In the construction of the subway there are at least two points in favor of the city upon this inducement issue:

1. The courts have apparently recognized that the use of the subsurface of the street for travel is not an unexpected development of the street and therefore a private owner cannot be said to have built without some contemplation that the street would be used for such subsurface travel.

   In *People v. Field & Company*,\(^\text{23}\) the court stated:

   The courts, in applying the rules of law to questions of this nature, should not permit the streets to be used in such a manner as to prejudice the rights of abutting owners while at the same time fully safeguarding all the rights of the public therein. These public rights do not depend upon the methods of travel recognized at the time the streets were opened or such public uses as have been sanctioned by long continued custom and acquiescence. The use of the streets must be extended to meet the new needs of locomotion, both above and below the surface of the ground. The public uses to which a city street may be applied cannot be limited by arbitrary rules, but must be extended to meet public wants and necessities occasioned by the enlarged uses to which the abutting property is devoted. . . . The right of the public in the city streets necessarily includes every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper. The original owners of lands in the great cities of our country did not foresee the growth of population and business which has caused property owners in such cities to erect buildings twenty stories or more in height and to excavate under them basements, cellars, and sub-cellars; nor was it anticipated that the surface of the streets would be insufficient for the use of the people. . . .

2. The approval of the City Building Commission of plans allowing an abutting owner to encroach with foundations or other structures beneath the surface of the street is not sufficient as an affirmative act by the city to create an estoppel.

   In *Tacoma Safety Deposit Company v. City of Chicago*,\(^\text{24}\) the court said:

\(^{21}\) Village of Itasca v. Schroeder, 182 Ill. 192, 55 N. E. 50 (1899).
\(^{22}\) Jordan v. City of Chenoa, 186 Ill. 530, 47 N. E. 191 (1897).
\(^{24}\) 247 Ill. 192, 93 N. E. 153 (1910). This case involved an attempt by the city to require an abutting owner to pay rent for the use of the subsurface beneath the street for vault space. Accord, Leo N. Levy Corporation v. Dick, 190 N. Y. S. 238 at 243 (1921). There is language in two Illinois cases in which the court
It is also urged that the city, having granted to the complainant a permit to construct its building upon its premises according to plans and specifications which provided for the construction of subways beneath the sidewalks adjoining its premises, is now estopped to deny the right of the complainant to maintain said subways upon the property of the city free of charge. It is too clear for argument, we think, that the city had the right to regulate the construction of complainant's building at the time it was erected; and the fact that it may, through its building department, have approved certain building plans which were submitted to it by the complainant and granted to it a permit to construct its building, we think obviously did not estop the city afterwards to require the complainant to pay for the use of the city's property, which its building in part occupied, or to remove its building, or the part thereof which rested upon the city's property. The complainant, at most, we think, obtained a license to construct a subway beneath the sidewalk of the city adjoining its building, which license could be revoked by the city in case the complainant refused to comply with the ordinance which required it to pay to the city compensation for the use of the space beneath the sidewalk in the street which belonged to the city.

Even if an inducement could be shown, the lapse of time since the construction of most of the obstructions, though frequently emphasized in the cases, should not in this instance be significant in creating an estoppel. No lapse of time can give rise to a prescriptive right. The original investment of anyone who builds permanent structures such as the foundations of buildings, vaults, etc., usually overshadows any subsequent expenditures on his part. Therefore, whatever reliance took place, occurred at the time of the initial investment, and the subsequent unmolested use of the city's property cannot be set up retroactively as a justification for the original expenditure.

II

The remaining problems are concerned with the rights of the owners of land adjoining the subway. There are three bases upon which liability for damages to adjoining property

pointed out that once a city permitted an encroaching structure to be built, it could not be absolved from its duty of care toward the property simply because the building encroached upon the public right of way. Nixon v. City of Chicago, 212 Ill. App. 365 (1918), cert. denied; Gridley v. City of Bloomington, 68 Ill. 47 (1873). However, these cases obviously do not control in the present instance, as they decided merely that a city may be estopped with respect to a negligence action but not that it can be estopped to require the removal of an encroaching structure.

25 Gridley v. City of Bloomington, 68 Ill. 47 (1873); Nixon v. City of Chicago, 212 Ill. App. 365 (1918).

could be imposed upon the city. It might be imposed because of the constitutional provision prohibiting the damaging of private property for the public use without just compensation. The city might also be held liable for the damage done by independent contractors because the work of such contractors involved intrinsically dangerous activity, liability for which the principal cannot escape. Thirdly, if the contractor were negligent and the city retained a sufficient degree of control, it might be considered as a master-servant, rather than as a principal-contractor relationship, and liability imposed accordingly on principles of respondeat superior. Again the discussion of these problems will be confined, as closely as possible, to cases involving excavating and tunnelling.

As between two private citizens, each owning an adjoining piece of land, it has been held that if the excavation on one lot causes an adjoining unimproved lot to settle or otherwise injures it, there is liability on the excavating landowner even in the absence of negligence. If, however, the injury is to an improved lot or to the improvements thereon, the excavator is liable only if he is negligent. Otherwise, a landowner, by erecting a building, would be imposing an additional responsibility on his neighbors, since they would owe him the same duty of care, despite the fact that by erecting a structure upon his own land, he increases the hazards confronting them.

Although the construction of tunnels by municipalities might seem to involve problems analogous to those arising when a private party excavates near the land of another, a distinguishing factor is found in the clause of the Constitution

27 "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken." Ill. Const. 1870, Art. II, § 13.


29 Best Manf. Co. v. Creamery Co., 307 Ill. 238, 138 N. E. 684 (1923); City of Quincy v. Jones, 76 Ill. 231 (1875); Marner v. Lussem, 65 Ill. 484 (1872); Korogodsky v. Shimberoff, 256 Ill. App. 255 (1930); Noceo v. Weill, 166 Ill. App. 162 (1911). See also, 50 A.L.R. 486; E. Leesman, "Significance of the Doctrine of Lateral Support as a Real Property Right," 16 Ill. L. Rev. 108 at 115. The fact that independent contractors were employed has not caused courts to shift all liability to the contractors. They hold that since the work is done by the order of the principal he is liable. Chicago City Ry. Co. v. Rothschild & Co., 213 Ill. App. 178 (1919); Starr v. Standard-Tilton Milling Co., 183 Ill. App. 454 (1913).
of 1870, reading as follows: "Private property shall not be taken or damaged for public use without just compensation." This obviously imposes a greater liability upon the city. The old Illinois Constitution of 1848 required payment for property taken, but had no provision regarding the necessity for payment for property damaged for the public use.

However, the courts did attempt to provide compensation to injured landowners. On one occasion, the Illinois Supreme Court held that injury to property resulting from a city’s negligence in constructing a street constituted in effect a "taking" of that property under the eminent domain provision.

When the present Constitution was adopted, the necessity for such judicial legislation was eliminated. Courts continued to impose liability for damage to property under the "eminent domain" provision, and did so in cases where the injury was caused by negligence, and by inherently dangerous activity, as well as on purely "eminent domain" grounds, i.e., where the injury was caused without the fault of the public body involved.

Three cases involving liability without fault have been found. They apparently turn on the fact that the city in each case either used or permitted the use of space beneath the surface of a street in such a manner as to result in injury to private property. In two of these cases, the city allowed a street railway company to construct tunnels under the Chicago River at La Salle Street. In both cases, the property of adjoining landowners was damaged. In neither case was there any allegation of negligence. In Barnard v. City of Chicago, the court said,

Before the Constitution of 1870 . . . acts authorized to be done by a valid act of the legislature, performed with due care and skill, in conformity with the provisions of the act, could not be made the ground of an action, however great the damage done. Since the Constitution of 1870, however, the power of the legislature has been restricted and the statute constitutes no defense where property has been damaged for the public use.

32 Nevins v. City of Peoria, 41 Ill. 502 (1866).
33 Article II, § 13 of the Ill. Const. will be referred to throughout this discussion as the "eminent domain" provision, including both the taking and damaging of private property for the public use, although usually the term is reserved for cases involving the judicial taking of property.
34 270 Ill. 27, 110 N. E. 412 (1915).
The court concluded that where the city permits such a public use of a street, or any space beneath the surface of the street as results in damage to private property, it will be liable for such damage, notwithstanding it may be caused by the withdrawal of lateral support of the weight of a building or other structures on the private property involved. The other two cases, *Peck v. Chicago Railways Company*36 and *Schroeder v. City of Joliet*,88 reached similar results.87

The courts have also held that the same series of events gave an injured landowner a right of action against the public body for its contractor’s negligence, as well as a right of action under the eminent domain provision.

In *Bruno v. City of Chicago*,89 the city contracted for the construction of a water tunnel. Dynamite blasts were set off. The plaintiff charged that the contractor’s negligence in allowing the adjoining land to settle and in producing vibrations by means of blasting had damaged the plaintiff’s building. The court said, “While the plaintiff’s pleadings do make charges of negligence, they also contain such allegations as make out a right of action for damages suffered by the plaintiff’s property for a public use.”

In *Nixon v. City of Chicago*,90 the plaintiff’s building was damaged by the construction under Dearborn Street of a tunnel which was being built by the Illinois Tunnel Company pursuant to a permit issued by the city which reserved the power of supervision over the city. The court said, “Where a tunnel is constructed under a public street and for a public use, pursuant to authority granted by the municipality and under its supervision and inspection, and there is an injury caused to owners of adjoining property by such construction, the city will be liable for the damages sustained.” The court went on to say, “Since the adoption of the Constitution of 1870, where such an operation in a public street as is involved in the case at bar causes damage to adjoining private property, the city has been held to be liable in damages, the basis of the liability being the interference with the rights of the owner to

35 270 Ill. 34, 110 N. E. 414 (1915). 36 189 Ill. 48, 59 N. E. 550 (1901).
37 The latter case is discussed elsewhere in this article.
38 214 Ill. App. 498 (1919).
39 212 Ill. App. 365 (1918), cert. denied; Tacoma Safety Deposit Co. v. City of Chicago, 257 Ill. 192, 99 N. E. 153 (1910); Leo N. Levy Corp. v. Dick, 190 N. Y. S. 238 (1921); Gridley v. City of Bloomington, 68 Ill. 47 (1873).
the full use and enjoyment of his property, including the building.” In this case, also, the plaintiff had alleged negligence on the part of the contractor, and again there was a combination of liability on both theories.40

A further group of cases couples liability for damage done because of inherently dangerous activity with liability under the eminent domain provision. In City of Chicago v. Murdoch,41 the city let a contract for the construction of a water tunnel. Dynamiting was necessary and the explosions caused the plaintiff’s adjacent building to settle and cracked its walls. The court stated that usually a principal is not responsible for the negligence of an independent contractor, but added that the rule “does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed.”42 The court approved two instructions, one imposing liability because of fault and the other imposing liability under “eminent domain” principles.

Although it seems clear that the city would be liable for damages to adjoining buildings under the eminent domain provision, either solely on the constitutional basis, or that, together with some other basis of liability, it seems worthwhile to investigate briefly the other two possible theories upon which injured landowners might rely.

It has been held that the principal is liable for damage caused by an independent contractor when the nature of the work done by that contractor may be described as “intrinsically dangerous.” A succinct statement of the rule may be found in the very recent case of Macer v. O’Brien:43

As a general rule, a municipality cannot be held liable ex delicto unless the tort was committed by its agents or servants under circumstances such as would bring the doctrine of respondeat superior into operation. An exception to this rule is where the contract requires the doing of work which is intrinsically dangerous in and of itself, no matter how carefully it may be performed. In cases of that kind, such as the boring of tunnels, the deep removal of large areas of lateral support, the use of high ex-

40 See also Eldred Drainage & Levee Dist. v. Wilcoxson, 365 Ill. 249, 6 N. E. (2d) 149 (1938), in which "eminent domain" liability was again imposed for damage done in the construction of a public works project, and in which the contractor was negligent.
41 212 Ill. 9, 72 N. E. 46 (1904).
43 356 Ill. 486, 190 N. E. 904 (1934).
plosives, etc., the principal remains liable, regardless of the intervention of an independent contractor.

It is difficult to think of a project which fits more neatly into the definition of the class of intrinsically dangerous work than does the construction of the subway. All three elements—the boring of tunnels, the deep removal of large areas of lateral support, and the use of high explosives—will be present.

In this case the city had passed an ordinance granting permission to the Sanitary District of Chicago to build a sewer under certain streets. The Sanitary District agreed to indemnify the city against all claims for damages. The contracts for the work were let by the Sanitary District to various contractors, who in turn employed various subcontractors, one of which was a codefendant in this case. The negligence of this subcontractor in breaking up a street caused injury to the plaintiff’s adjoining property. The city had notice of the manner in which the work was being done, and was held liable for permitting its licensee to work on the streets in such a manner as to injure others.

This case, of course, did not involve the relationship of principal and contractor in the same manner that it would have if the city had been a principal to the contracts, and therefore it might be argued that the above quotation is merely dictum. However, since the city's relationship to the contractor was not as close as it would have been had the city been a principal, it seems that the statement would apply with even more force in the subway case, where the city will be a principal.

Moreover, this case is supported by other Illinois cases which appear to be directly in point. In the City of Joliet v. Harwood,44 the city let a contract for the construction of a sewer. The agreed statement of facts read substantially as follows: “The contractors ‘used all due care, skill, and caution in the discharge of, and the covering of, all blasts discharged in the prosecution of the work; that from, and by means of, a blast in said sewer a stone was thrown against [and damaged plaintiff’s building]. . . .’ ” The court held that since the city had caused intrinsically dangerous work to be done, it was liable for the damage resulting therefrom

44 86 Ill. 110 (1877).
even in the absence of negligence, as the natural, although not the necessary, consequence of the work was injury to the plaintiff's property. The court did not discuss the eminent domain problem.

There is also the possibility that the agreement between the city and each contractor will reserve a high degree of control to the city over the work, as a result of which the courts may consider the relationship as being one of master and servant, rather than one of principal and independent contractor. If that were the case, the city would be liable to third persons for injuries caused by the contractor, on the theory of respondeat superior. However, under the doctrine of the Macer case, the construction of the subway would seem to involve inherently dangerous activity with consequent liability on the city, regardless of the degree of control it retained.

It thus appears probable that the city can be held liable for damage done to adjoining property on one theory or another. The question next arises as to what standard should be used to measure the damages. At one time, Illinois courts held that the measure of damages for injuries to property resulting from the construction of a public improvement was the actual cost of the necessary repairs. However, the court now takes the view that the measure of damages is the difference in the market value of the property before and after the construction of the improvement, plus the cost of such repairs as are made to preserve the property during the period of construction.

A good expression of this rule may be found in the Peck case. In the course of construction of a tunnel under the Chicago River at LaSalle Street certain steps were taken by

45 See also Robbins v. City of Chicago, 71 U. S. 657, 18 L. Ed. 427 (1867).
46 City of Chicago v. Murdoch, 212 Ill. 9, 72 N. E. 46 (1904), citing City of Chicago v. Joney, 60 Ill. 383 (1871), and City of Chicago v. Dermody, 61 Ill. 431 (1871).
48 FitzSimons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249 (1902); City of Chicago v. Rust, 117 Ill. App. 427 (1904); City of Chicago v. Murdoch, 212 Ill. 9, 72 N. E. 46 (1904).
50 Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915).
the plaintiff to protect his adjoining building, after he was notified by the contractor and by the City Building Commissioner that he should brace and protect the building, as work was about to be commenced upon the tunnel. However, despite the precautions taken the building settled, causing great damage to the plaintiff. The court said that an instruction declaring the difference in market value to be the measure of damages was improper because it omitted any reference to the expenses incurred in the effort to diminish the damages, stating:

It is true that in this case there is no breach of contract or tort. The declaration makes no charge of negligence or complaint as to the manner in which the improvement was made or the skillfulness with which the labor upon it was performed. The damages must therefore be estimated under the same rules as upon a petition to condemn the property. We see no reason why a different rule should prevail in such a case, and if from the evidence it appears that expenses were incurred by the appellees [plaintiffs] in good faith and in the exercise of a reasonable and prudent judgment in an effort to reduce the damages, those expenses should be regarded as a part of the damages to their property.

In Schroeder v. City of Joliet, as a result of an excavation for a street improvement, plaintiff's property was damaged because of the removal of the lateral support. The only question raised concerned the measure of damages. The court held, "... the measure of damages is the diminution in value of the property by reason of the act of the city. ... But if, upon a consideration of the effects of the improvement upon the property, there is no damage, neither the constitution nor the law authorizes a recovery."

In Biedler v. The Sanitary District of Chicago, the court quoted:

"Where an action is brought to recover damages, where no part of the plaintiff's property has been taken, but merely damaged by a public improvement, the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained, and no recovery can be had."

In Bruno v. City of Chicago, the court said, "Of course, if

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51 189 Ill. 48, 59 N. E. 550 (1901).  
52 211 Ill. 628, 71 N. E. 1118 (1904).  
53 Citing Springer v. City of Chicago, 135 Ill. 552, 26 N. E. 514 (1891). See also Osgood v. City of Chicago, 154 Ill. 194, 41 N. E. 40 (1895). The court's latest expression of this view may be found in Department of Public Works and Buildings v. Barton, 371 Ill. 11, 19 N. E. (2d) 935 (1939).  
54 214 Ill. App. 498 (1919).
MUNICIPAL SUBWAY CONSTRUCTION

there has been no depreciation in the value of the property there can be no recovery, regardless of the question of the cost of repairs.” Consequently if the construction of the subway results in an increase in the value of adjoining property, such increase could be set off against the damages caused by the injury to the property, and only an amount equal to the difference would be payable to the injured landowner.

It should also be noted that there can be no recovery except for an actual physical injury to the property. Thus in the Peck case the court said, “Inconvenience, expense or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement in a street give no cause of action against a municipality....”

In an attempt to mitigate damages, the city may itself shore up adjoining buildings, but it is more probable that it would request each landowner to shore up his own buildings by giving him notice to do so. The legal effect of such notice should not be emphasized although its practical effect may be great.

In cases where private adjoining landowners are involved, the court has apparently not considered the question of notice as significant in determining the extent of liability. The court has indicated that it would impose liability under the same principles in circumstances similar in every sense, except that in one case notice was given and in the other no notice was forthcoming. Even if such shoring is done, under the

55 Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915).
56 Citing Osgood v. City of Chicago, 154 Ill. 194, 41 N. E. 40 (1895); Lefkovitz v. City of Chicago, 238 Ill. 23, 87 N. E. 58 (1909); Chicago Flour Co. v. City of Chicago, 243 Ill. 266, 90 N. E. 674 (1910).
57 There is some doubt as to whether the city could compel any land owner to shore up his building, although it is probable that failure to do so after notice was given would result in a diminution in the amount of recovery for the damages. In Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915), the court said, “A person injured by another's breach of contract or tort is bound to use reasonable care to render the injury as light as possible. ...” However, in Korogodsky v. Shimberoff, 256 Ill. App. 255 (1930), the Appellate Court refused to allow the excavator to recover the cost of the shoring of the adjoining building, saying, “A party cannot of his own volition create an obligation in his own favor by doing some act for his own interests. ...” It may be that the cases are reconcilable, since a public body was involved in the Peck case, whereas in the other case two private parties were involved.
doctrine of the Peck case, the city would be responsible for expenditures made by any such landowner in a reasonable attempt to minimize the damage to his property, whether or not that attempt proved successful.

The only remaining question to be discussed deals with the possibility of the city's shifting its liability. There are various ways in which this may be done. It could conceivably secure some form of insurance, although the cost might prove prohibitive as a practical matter. In New York, subway contracts have contained provisions designed to shift all liability to the contractors. Such contracts have been upheld together with contracts imposing ultimate liability on subway builders for all damages caused by their negligence alone.

59 Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915).
60 Dooley v. M'Mullen, Snare & Triest, 172 N. Y. S. 135 (1918); Freedman v. Hart & Early Co., 293 N. Y. S. 525 (1935); Schnaier v. Bradley Contracting Co., 169 N. Y. S. 88 (1918). The provisions read as follows:

"Article 38—The contractor expressly admits and covenants to and with the city that the plans and specifications and other provisions of this contract, if the work be done without fault or negligence on the part of the contractor, do not involve any damage to the foundations, walls or other parts of adjacent buildings or structures or to navigation; and the contractor will at his own expense make good any damage that shall, in the course of construction, be done to any such foundations, walls or other parts of adjacent buildings or structures or to navigation. The liability of the contractor under this covenant is absolute and is not dependent upon any question of negligence on his part, or on the part of his agents, servants or employees, and the neglect of the engineer to direct the contractor to take any particular precautions or to refrain from doing any particular thing, shall not excuse the contractor in case of any such damage. Where the work is required to be done by tunnelling the same admission and covenant is also applied to the foundations, walls and other parts of buildings and to any other structures or surface over the tunnel. But this admission and covenant shall not apply to the foundations, walls or other parts of buildings or any part thereof acquired by the city and which the engineers may determine should be raised.

"Article 40—The contractor shall be solely responsible for all physical injuries to persons or property occurring on account of and during the performance of the work hereunder, and shall indemnify and save harmless the city from liability upon any and all claims for damages on account of such injuries to persons or property, and from all costs and expenses in suits which may be brought against the city for such injuries to persons or property. It being distinctly understood, stipulated and agreed that the contractor shall be solely responsible and liable for and shall fully protect and indemnify the city against all claims for damages to persons or property occasioned by or resulting from blasting or other methods or processes in the work of construction, whether such damages be attributable to negligence of the contractor or his employees or otherwise."

61 Rigney v. New York Cent. & H. R. R. Co., 217 N. Y. 31, 111 N. E. 227 (1916); 148 Smith Street Realty Corp. v. City of New York, 288 N. Y. S. 1012 (1935). In some cases, the court permitted the injured landowners to bring actions against the contractors directly on the theory that the plaintiffs were third-party beneficiaries of the contract. Dooley v. M'Mullen, Snare & Triest, 172 N. Y. S. 135 (1918); Schnaier v. Bradley Contracting Co., 169 N. Y. S. 88 (1918); the Rigney
It is problematical as to which is the least expensive method of shifting the city's liability. Presumably the cost of insurance would be prohibitive and the inclusion of contractor-liability clauses in the contracts merely results in higher bid prices. The city has adopted the latter expedient by inserting into the subway contracts provisions imposing ultimate liability for negligence upon each contractor. The weakness in any such clause is that it cannot permit the city to evade the absolute liability imposed upon it by the Constitution, and therefore is only a partial solution of the problem.

In 148 Smith Street Realty Corp. v. City of New York, supra, the court directed that the city should have a judgment against the contractor to enable it to reimburse itself in the event that it would be forced to pay the judgment of the injured property owner.
NOTES AND COMMENTS

NEGOTIABILITY OF ILLINOIS MORTGAGES

Does the assignee of a negotiable note, and the mortgage securing it, take the mortgage subject to all the equities, infirmities, and defenses which the mortgagor could have asserted in an action brought to enforce the mortgage by the original mortgagee?

Marks v. Pope, the latest Illinois case on this subject, has taken another important step toward removing Illinois from the small minority of states which have answered the above query in the affirmative. This case arose when a trustee sought to foreclose a trust deed on Chicago real estate for the benefit of the holders of bonds secured by the trust deed and the maker of the bonds asserted a defense of usury. The facts of the case were somewhat involved and the findings of the trial court were not as complete as they might have been, but the court passes over the non-essential facts to state the question as follows, "The question for decision, therefore, is whether the individual maker of a series of bonds which are payable to bearer, so as to be negotiable without endorsement, may interpose the defense of usury as against a holder in due course, when the trustee brings an action to foreclose the trust deed for the benefit of all bondholders."

In an able and well reasoned opinion by Chief Justice Shaw, the court answered this question in the negative, limiting its decision, however, to the particular facts of this case. The court seemed to be impressed with the importance of the question here involved as it affects present day real estate loan transactions and hence consented to reexamine the

1 370 Ill. 597, 19 N. E. (2d) 616 (1939).
2 Only three states seem to have followed the minority rule consistently. See Olds v. Cummings, 31 Ill. 188 (1863); Hirsh v. Arnold, 318 Ill. 28, 148 N. E. 882 (1925); Johnson v. Carpenter, 7 Minn. 176 (1862); Smith v. Parsons, 55 Minn. 520, 57 N. W. 311 (1893); Union Trust Co. v. New York, C. & St. L. R. R. Co., 9 Ohio Dec. 773 (1887); Baily v. Smith, 14 Ohio St. 396 (1863).
3 The essential facts in the Marks case: Nicholas Pope and his wife, on October 8, 1925, executed a trust deed conveying real estate to Arnold K. Marks, as trustee, to secure the payment of their fifty-eight bonds, aggregating $40,000 in principal amount, dated October 10, 1925, due serially to October 10, 1932, payable to bearer, with interest at 7 per cent per annum. All of the bonds were delivered by the makers to Marks & Company, the house of issue, but, by a collateral agreement, Marks & Company withheld a commission of $4,000, or 10 per cent. Bonds totalling $18,000 in principal amount were paid as they matured, and all interest coupons due to and including October 10, 1932, were paid as due. There was a default in payment of the remaining $22,000 of principal on October 10, 1932, and the trustee filed a bill to foreclose for the benefit of the bondholders. The defendant asserted a defense of usury, and the trial court found that the defense had been proved, but held that it could not be asserted against holders in due course. The appellate court reversed the decree of the chancellor. Marks v. Pope, 289 Ill. App. 558, 7 N. E. (2d) 481 (1937).
4 The appellate court had some difficulty with the question of whether the intervenor (a bondholder) had proved herself to be a holder in due course, but the Supreme Court dismissed the question, stating that Section 59 of the Uniform Negotiable Instruments Act (Ill. Rev. Stat. 1937, Ch. 98, § 79) provides that "every holder is deemed prima facie to be a holder in due course. . . ."

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entire doctrine as laid down by previous Illinois cases.

The problem is probably as old as the practice of making mortgages of real estate to secure loans of money, but it seems to be peculiarly an American problem, since the practice of giving negotiable notes, instead of individual non-negotiable bonds, to evidence the indebtedness arose in this country. The history of the problem, the two contrary doctrines, and the reasons underlying them have been ably set out by Professor Britton in his article on assignment of mortgages and need not be reexamined here.

The earliest case in Illinois squarely to present the problem was Olds v. Cummings, decided in 1863, wherein the court committed Illinois to the rule later designated as the minority rule. Although the opinion indicates that the court had found no cases contrary to the rule adopted

5 Wm. E. Britton, "Assignment of Mortgages Securing Negotiable Notes," 10 Ill. L. Rev. 337 (1915). Professor Britton states that the first case presented to an American court was Reeves v. Scully, Walkers Ch. (Mich.) 248 (1843), wherein the Michigan court adopted the majority rule without argument and without citing authority. The entire decision is as follows, "The decree must be entered for the amount of the note and mortgage. Reeves, as a bona fide endorsee of the note, was not affected by the equities existing between Hawkins and Scully. It would have been otherwise, if a bond, instead of a note, had been given with the mortgage." According to Professor Britton, the next cases arose as follows: Fisher v. Otis, 3 Pinney (Wis.) 78 (1850) stated the majority rule by way of dictum; Martineau v. McColloch & Pinney (Wis.) 455 (1852) adopted the majority rule without mentioning the previous Wisconsin or Michigan cases; Dutton v. Ives, 5 Mich. 515 (1858); and Craft v. Bunster, 9 Wis. 503 (1859), follow the previous holdings of these states. In Johnson v. Carpenter, 7 Minn. 176 (1862), the court examined the Michigan and Wisconsin cases but refused to follow them, adopting the minority rule. In 1863 came Olds v. Cummings, 31 Ill. 188, and Baily v. Smith, 14 Ohio St. 396, in which both courts adopted the minority rule on independent reasoning. In 1870 the Colorado Territorial Court, in Longan v. Carpenter, relied on Olds v. Cummings, 31 Ill. 188 (1863), and adopted the minority rule. This decision was reversed by the United States Supreme Court in Carpenter v. Longan, 83 U.S. (16 Wall.) 271, 21 L. Ed. 313 (1873) in a strong opinion. This soon became the leading case in the United States and was the basis for the rapid adoption of the majority rule in various states. For further discussion of the general topic, statements of the two rules and the reasoning on which they are based, and further citation of authorities see 41 C. J. 693, 694.

6 Perhaps the clearest statement of the minority rule is contained in Union Trust Company v. New York, C. & St. L. R. R. Co., 9 Ohio Dec. 773 (1883), "Whatever may be the law of any other state . . . in this state, it has been the settled and undisputed law . . . that a mortgage given to secure negotiable notes or bonds is itself a non-negotiable chose in action, and open to all defenses existing between the mortgagor and the mortgagee, even when the notes and bonds secured thereby, in the hands of innocent holders for value are not themselves open to any such defenses." A complete statement of the majority rule is contained in State National Bank v. Flathers, 45 La. Ann. 75, 12 So. 243 (1892): "A bona fide holder of a negotiable note acquired before maturity, secured by a mortgage duly recorded, which has been executed by one having lawful authority to make it, and bearing on its face nothing to impeach its validity, cannot be defeated in his mortgage rights by secret equities between the original parties existing before or arising after its execution, of which neither the act nor the public records afforded any notice, and of which he had no actual notice, at least when such equities are opposed by the original mortgagor or in his right."
in that case, there were already decisions in other states holding to both the minority rule and the majority rule.

As with most legal problems afecting a large proportion of the people and involving substantial amounts of money, there were logical arguments to support both views. It was only natural that the early courts were loath to allow mortgages to take on the character of negotiable paper when mortgagor and mortgagee were known to each other, with the mortgagee usually being also the payee of the note and with neither party intending that the instruments circulate in commerce in the manner of bills and notes. This view was adequate to the transactions of our pioneer days and, no doubt, worked substantial justice in most cases. It was no hardship in those days for a purchaser of a mortgage to get in his buggy and drive over to the mortgagor's house or farm and inquire whether the mortgage was valid and would be paid. The Illinois court seemed satisfied with the rule of the Olds case and, during the next twenty years, applied it without question to cases of individual mortgages where the assignee attempted to defeat the defenses raised by the mortgagor.

With the coming of the railroads and the growth of large cities, new methods of finance were necessary to raise the capital to develop our resources. The very size of industrial enterprises and construction projects made it necessary that the lenders of money be numerous and widely scattered. The device of the conveyance to a disinterested trustee to secure the payment of large issues of notes and bonds then came into general use. That this presented new problems to the courts is readily apparent. What inquiry could a bondholder in Illinois make of a railroad corporation in Delaware regarding the building of the road in Nebraska or the existence of fraud or usury in the contract with

8 The court states, "We have not met with a single case, where remedy has been sought in a court of chancery, upon a mortgage, by an assignee, in which every defense has not been allowed which the mortgagor or his representatives could have made against the mortgagee himself. . . ."

9 Johnson v. Carpenter, 7 Minn. 120 (1862).

10 Reeves v. Scully, Walkers Ch. (Mich.) 248 (1843); Dutton v. Ives, 5 Mich. 515 (1856); Fisher v. Otis, 3 Pinney (Wis.) 78 (1859); Martineau v. McCollum, 3 Pinney (Wis.) 455 (1852); Croft v. Bunster, 9 Wis. 583 (1859).

11 This view is admirably expressed in the Olds case: "Here is expressed the very essence of the reason of the law. Mortgages are not commercial paper. It is not convenient to pass them, from hand to hand, performing the real office of money in commercial transactions, as notes, bills and the like . . . it [commercial paper] relies upon personal security, and is based upon personal credit. It is a part of the credit system, which is said to be the life of commerce, which requires commercial instruments to pass rapidly from hand to hand. Mortgage securities are too cumbersome to answer these ends."

12 In the Olds case, it was said: "When one takes an obligation secured by a mortgage, relying upon the mortgage as the security, he must do it deliberately, and take time to inquire if any reason exists why it should not be enforced. . . ."

13 Hamilton v. Lubukee, 51 Ill. 415 (1869); Kleeman v. Frisbie, 63 Ill. 482 (1872); White v. Sutherland, 64 Ill. 181 (1873); Haskell v. Brown, 65 Ill. 29 (1872); Thompson v. Shoemaker, 68 Ill. 256 (1873); Bryant v. Vix, 83 Ill. 11 (1876); Melendy v. Keen, 89 Ill. 395 (1878); U. S. Mortgage Co. v. Gross, 93 Ill. 463 (1879); Ellis v. Sisson, 96 Ill. 105 (1890).
the corporate trustee or underwriting house in New York? Should the holders of such bonds, who were unquestionably bona fide purchasers for value without notice, be deprived of their rights because of some latent infirmity in the mortgage transaction as between the maker of the bonds and the underwriter, or between the maker and the construction company which accepted the bonds in payment for services and sold them on the market? There could be but one answer to the latter question and the Illinois court had no difficulty in answering in the negative in *Peoria and Springfield Railroad Co. v. Thompson*, decided in 1882. That case expressed dissatisfaction with the rule of the Olds case, stating, "The rule . . . rests, at least in part, on technical grounds, which have lost much of their force in more recent times . . . ."

Since that time the court has held that the rule of the Olds case does not apply to large bond issues, but has continued to apply the rule to individual mortgages, and also to chattel mortgages. The court, however, has refused to apply the rule where the mortgagor made the payee his agent to sell the notes in the market, where the notes were accommodation paper, and where the defenses arose out of a collateral transaction between the mortgagor and mortgagee.

Thus the court has whittled away at the broad rule of the Olds case and it is apparent that the rule now applies only within the narrower confines of individual mortgage transactions; but the basic, underlying principle that mortgages are assignable only in equity and that they pass to the assignee subject to all equities and defenses remains in the law of Illinois.

No reason is apparent why the present day individual real estate loan, secured by a mortgage or trust deed, should not also be held to be free from all equities and defenses in the hands of a bona fide purchaser for value without notice. The reasons for the former rule have almost completely disappeared and it seems that the rule should go with them. It is now almost the universal practice, at least as regards urban loans, to execute bearer notes negotiable in form and to convey

14 103 Ill. 187 (1882).
15 Towner v. McClelland, 110 Ill. 542 (1884); Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642 (1886); Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671 (1898); Schultz v. Sroelowitz, 191 Ill. 249, 61 N. E. 92 (1901); Bouton v. Cameron, 205 Ill. 50, 63 N. E. 800 (1903); Bartholf v. Bensley, 234 Ill. 336, 84 N. E. 928 (1908); Peacock v. Phillips, 247 Ill. 467, 93 N. E. 415 (1910); Pittsburgh Plate Glass Co. v. Kransz, 291 Ill. 84, 125 N. E. 730 (1920); Hirsh v. Arnold, 318 Ill. 28, 148 N. E. 882 (1925).
16 Bryant v. Vix, 83 Ill. 11 (1878); Hodgson v. Eugene Glass Co., 156 Ill. 397, 40 N. E. 971 (1895).
17 McIntire v. Yates, 104 Ill. 491 (1882).
18 Naef v. Potter, 226 Ill. 628, 80 N. E. 1084 (1907); Foreman Trust & Savings Bank v. Cohn, 342 Ill. 280, 174 N. E. 419 (1931); Miller v. Larned, 103 Ill. 562 (1882).
19 Colehour v. State Savings Institution, 90 Ill. 152 (1878).
20 In Marks v. Pope, 370 Ill. 597, 19 N. E. (2d) 616 (1939), after summarizing the history of the doctrine in Illinois, the court states, "Inasmuch as the reasons for the decision in the Olds v. Cummings case do not exist in cases of a bond issue secured by a trust deed and intended to be sold on the open market, the rule does not apply." This seems to leave the rule of the Olds case in force in Illinois, with the few exceptions mentioned above.
the property to a corporate trustee who has no interest in the transaction (save to identify the note and trust deed). The mortgagor usually has all his dealings with a mortgage house or loan correspondent who handles all the details of closing and paying out the loan, but who has no intention of retaining the paper for investment. A large proportion of the loans are sold to insurance companies, investment trusts, university endowment funds, trust funds, and city banks, the purchasers of the loans relying on what is disclosed on the face of the instruments and on the public records.\textsuperscript{21} Does it seem equitable to hold that such holders of notes and mortgages should be subject to all equities, defenses, and infirmities that may arise between a mortgagor and his broker or mortgage banker in an active and competitive loan market?\textsuperscript{22}

The trend of thought among the members of the bar seems to be toward the view that notes and mortgages should be allowed to circulate as freely as possible, as is shown by some of the provisions of the proposed mortgage act prepared by a committee of the Chicago Bar Association.\textsuperscript{23}

It is well that we now have definite assurance that urban bond issues, intended to be sold to the public, are free from latent equities and defenses; but the decision comes at a time when most of the defaulted bond issues of the 1920's have been foreclosed.\textsuperscript{24} What will be the trend

\textsuperscript{21} Of course, the large investors usually require the mortgagor to execute a so-called “waiver of defense,” in order to give themselves some protection from latent equities or defenses. This document merely recites that a certain mortgage and note, executed on a certain date and recorded on a certain date, is good and valid and free from all equities and defenses. The usual practice is to date these waivers subsequent to the note and mortgage, but they are generally executed in blank along with the mortgage and filled in later by the mortgagee or broker. Just what value this document would have in a real controversy, if the true facts of its execution were known, is problematical.

\textsuperscript{22} While most loans are now being made at low rates of interest and small commissions, it must be remembered that we are not so far away from the days when 6 per cent to 7 per cent interest was not unusual and commissions often exceeded 4 per cent and 5 per cent. Thus the usurious loan contract is not wholly theoretical.

\textsuperscript{23} See “Draft of a Bill for an Act to Revise the Law in Relation to Mortgages of Real Estate and the Foreclosure Thereof,” Chicago Bar Association, 1939. Section 12 reads as follows: “A mortgage shall be considered as incident to the indebtedness thereby secured and shall be subject only to such matters of defense as appear of record at the time the mortgage is recorded or appear in the mortgage itself or would be available in an action at law upon the instrument evidencing the indebtedness secured by the mortgage.”

\textsuperscript{24} Foreclosures filed in Cook County, as reported in “Statistics on Mortgages and Foreclosures” published by Chicago Mortgage Bankers Association quarterly, January, 1939, edition:

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For a thorough discussion of the foreclosure of urban bond issues see Homer
of the methods of financing in the next real estate boom is a matter of conjecture, but it now seems that a larger portion of the financing will be done by the corporate investors and trust funds mentioned above. It is to be hoped that the statutes can be revised to place Illinois in the list of states which allow mortgage paper to circulate freely, thus making real estate loan investments more attractive. But, until the statutes are revised, it is to be hoped that the Illinois Court will take the next logical step beyond the Marks case and overrule Olds v. Cummings expressly and completely, thus freeing all mortgages from latent equities and defenses.

W. S. McClanahan

Release—Right to Contest Validity—Restoration of Consideration as Prerequisite to Avoidance of Release Procured by Fraud in the Inducement.—In the last issue of the Chicago-Kent Law Review we had occasion to consider the question as to whether the Illinois courts would hold restoration of consideration to be a prerequisite to the avoidance of a release procured by fraud in the inducement, in a subsequent tort action based upon the same subject matter. The New York case upon which the comment was predicated has since been affirmed. As the review of the earlier cases tended to indicate, it is now certain in New York that, where the cause of action is founded upon a completed rescission, payment or tender must be made before commencement of the action, but if the action is designed to secure rescission it will be sufficient to offer to return the amount received in the complaint and make the tender on the trial.

Eight days after the aforementioned decision, the Illinois Appellate Court handed down a decision which throws some official light on the question so far as this state is concerned. The action was brought under the Injuries Act to recover for the death of the plaintiff's intestate arising from an automobile collision. The defendant filed a motion to dismiss, attaching thereto a copy of a release procured from the deceased in his lifetime. Upon denial of the motion, the defendant asserted the same matter in an answer. The plaintiff filed a reply in which it was averred that the deceased at the date of the release was of unsound mind and was unable to comprehend the nature of the release. Defendant denied the allegations of the reply, and the case was at issue. At the close of the evidence the defendant entered a motion for a directed verdict on the ground that the plaintiff's failure to return the fifty dollars which had been paid for the release was fatal to the cause of action. The Circuit Court overruled this motion and gave judgment for the plaintiff on the verdict. On appeal by the defendant, this was reversed, on the ground

25 31 Ill. 188 (1883).
1 17 Chicago-Kent Law Review 93.
4 Roggenkamp v. Marks, 19 N. E. (2d) 828 (Ill. App., 1939).
5 Ill. Rev. Stat. 1937, Ch. 70. 6 Ill. Rev. Stat. 1937, Ch. 110, §172 (g).
that the court should have sustained the defendant's motion for a directed verdict.

The court points out that a person seeking to avoid a contract for misrepresentation or lack of capacity is bound to restore all that he has received under it, and, while he might not be compelled to rescind before the suit is brought, as where he does not know of the existence or nature of the contract, still the rescission and offer to restore must be at the earliest practicable moment. The plaintiff's failure to so offer before defendant's motion for a directed verdict resulted in too long a delay and hence barred a recovery. Seemingly the only element which obviates the necessity of returning the money is "actual intended fraud." 7

L. BRUNETTE

CIVIL PRACTICE ACT CASES

ACTION—ABOLITION OF DISTINCTION AS TO FORM—AVAILABILITY OF MOTION IN NATURE OF CORAM NOBIS IN CHANCERY PROCEEDINGS.—Section 721 of the Illinois Civil Practice Act, abolishing the writ of error coram nobis and providing a similar remedy by motion to correct "all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ," was held applicable to chancery proceedings in the recent case of Frank v. Newburger. 3 It has generally been held, in the absence of statutory provision otherwise, "that a writ of error coram nobis has no place in chancery proceedings, and is strictly a common-law writ," 4 although some equity courts have treated the petition for the writ as a bill to avoid a decree or a motion for a new trial. 6 While the Frank case seems to reach a just result, 7

7 Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621 (1900).
1 "The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. . . ." Ill. Rev. Stat. 1937, Ch. 110, § 196.
2 The writ of error coram nobis, or coram vobis, was a common law writ for the purpose of correcting a judgment in the same court in which it was rendered. The writ was predicated on an alleged error in fact not appearing on the record, which error it was presumed would not have been committed had the fact in the first instance been brought to the notice of the court. See Fugate v. State, 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268 (1904), and 2 R. C. L. 305, § 259.
4 Bradford v. White, 130 Ark. 532, 197 S.W. 1175, L.R.A. 1918A 1177 (1917). See also Reid's Adm'r v. Strider's Adm'r, 7 Gratt (Va.) 76, 54 Am. Dec. 120 (1850).
5 "The pleading . . . though denominated a petition for writs of error coram nobis, is a bill to avoid a decree as well." Leftwick v. Hamilton, 9 Heisk. (Tenn.) 310 (1872).
6 Estes v. Nell, 163 Mo. 387, 63 S.W. 724 (1901).
7 The original proceeding was one to foreclose a mortgage. The defendants defaulted. Thereafter, the complainants, by leave of court, amended their complaint without notifying the defendants. The new decree found a larger amount to be due than that which had been allowed by the original decree and also stated that the plaintiff was entitled to recover from the defendants "the value of all
there is much to be said for the view of the dissent that the clause in Section 72, "which, by the common law, could have been corrected . . .," seems to modify "all errors in fact" and thus was probably inserted by the legislature for the purpose of limiting the use of the motion to cases in which coram nobis was available before the act.

W. L. SCHLEGEL

APPEAL AND ERROR—JURISDICTION—WHEN APPELLATE COURT HAS JURISDICTION OVER APPEAL PERFECTED AFTER DISMISSAL.—The First Division of the Illinois Appellate Court, in the recent case of Melsha v. Johns-Manville Sales Corporation,1 has held that, where an appeal was dismissed for failure to file the transcript of the record within the sixty day period from the date of the filing of the notice of appeal,2 which failure was not due to culpable negligence on the part of the appellant,3 the appeal could still be perfected under Section 764 of the Civil Practice Act, it being shown that there was merit in the appeal. The contention that this practice would permit two appeals was rejected on the ground that the first attempt had resulted in a nullity.

Under the former practice the right to appeal was statutory, and it was held that the statute must be strictly followed. The reason for this strictness lay in the fact that relief by writ of error could still be secured as a matter of right in civil cases even though the original appeal failed.4 Since the writ of error is now abolished, the court concludes that the reason for the rule of strict construction no longer exists.5

The decision appears to be just. Any other construction of the section would mean that the right to have a judgment reviewed might be denied to one having a meritorious case through a mere technicality.

M. H. TUTTLE

assets received by them from the two estates of their parents for any deficiency. . . ." The defendants filed their motion under Section 72 to vacate the new decree and all other orders subsequent to that decree, in order that they might defend the amended bill of foreclosure, which petition was granted.

2 Ill. Rev. Stat. 1937, Ch. 110, § 259.36, as amended by Ill. Rev. Stat. 1938 Supp., Ch. 110, § 259.36, provides among other things that "The record on appeal shall be transmitted to the reviewing court not more than 60 days after notice of appeal has been filed."
3 The failure arose from the illness of appellant's counsel.
4 "No appeal shall be taken to the Supreme or Appellate Court after the expiration of ninety days from the entry of the order, decree, judgment or other determination complained of; but, notice of appeal may be filed after the expiration of said ninety days, and within the period of one year, by order of the reviewing court, upon motion and notice to adverse parties, and upon a showing by affidavit that there is merit in appellant's claim for an appeal and that the delay was not due to appellant's culpable negligence." Ill. Rev. Stat. 1937, Ch. 110, § 200.
5 Drummer Creek Drain. Dist. v. Roth, 244 Ill. 68, 91 N. E. 63 (1910).
6 The court distinguishes the case of People ex rel. Bender v. Davis, 365 Ill. 389, 6 N. E. (2d) 643 (1937), which was followed by the Appellate Court for the third division in Schroeder v. Campbell, 289 Ill. App. 337, 7 N. E. (2d) 329 (1937), and Moss v. Federal Life Ins. Co., 289 Ill. App. 379, 7 N. E. (2d) 468 (1937), on the ground that in the Bender case the appeal had been heard on its merits and that the matter came up in the Supreme Court on a petition for mandamus in which the order dismissing the appeal could not be considered.
EXECUTION—EXECUTION AGAINST THE PERSON—SPECIAL FINDING THAT DEFENDANT WAS MALICIOUS AS CONDITION PRECEDENT TO ISSUANCE OF THE WRIT UNDER ILLINOIS STATUTE.—The recent Illinois Appellate Court case of Miles v. Glad\textsuperscript{1} involves an interesting change in the Illinois statute\textsuperscript{2} relating to executions against the person.\textsuperscript{3} Formerly, the successful plaintiff in a tort action could take out execution against the person of the defendant without any showing of malice.\textsuperscript{4} The defendant was then compelled to apply to the County Court for a determination that the tort action was not founded on malice in order to obtain his release.\textsuperscript{5} The Miles case decided that, under the present modified act, it is a condition precedent to the issuance of such an execution that the jury, or the court, if the case is tried without a jury, make a special finding that malice is present. The court also held that, if the defendant feels that execution has been improperly issued, his remedy is to apply to the court where the judgment was rendered to have the execution quashed.\textsuperscript{6}

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\textsuperscript{1} 19 N. E. (2d) 844 (III. App., 1939).
\textsuperscript{2} Prior to amendment, the provision read as follows: "No execution shall issue against the body of the defendant, except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of capias ad satisfaciendum (respondendum) as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors." Cahill's Ill. Rev. Stat. 1933, Ch. 77, § 5. The defendant obtained his release under Cahill's Ill. Rev. Stat. 1933, Ch. 72, § 5, which reads as follows: "When any person is arrested or imprisoned upon any process issued for the purpose of holding such person to bail upon any indebtedness, or in any civil action when malice is not the gist of the action . . . such person may be released from such arrest or imprisonment upon complying with provisions of this Act." This latter provision has not been amended, but the former section now reads: "No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, and it shall appear from a special finding of the jury, or from a special finding by the court, if the case is tried without a jury, that malice is the gist of the action . . . ." Ill. Rev. Stat. 1937, Ch. 77, § 5.
\textsuperscript{3} Execution against the person was a well known common-law remedy. It was affected by the writ of capias ad satisfaciendum. It is well settled that such an execution is not a violation of a constitutional prohibition against imprisonment for debt. The judgment, while a debt for some purposes, is considered in the nature of a punishment where it has been obtained for tort. People ex rel. Brennan v. Cotton, 14 Ill. 414 (1853); Lipman v. Goebel, 357 Ill. 315, 192 N. E. 203 (1934), cert. den. 294 U. S. 712, 55 S. Ct. 508, 79 L. Ed. 1246 (1935).
\textsuperscript{4} See Fetz v. People, 239 Ill. App. 250 (1926).
\textsuperscript{5} See Reinwald v. McGregor, 239 Ill. App. 240 (1926).
\textsuperscript{6} Miles v. Glad, 19 N. E. (2d) 844 at 845 (III. App., 1939). It was also held that a special finding by the jury that the defendants were "guilty of wilful and wanton conduct which was the proximate cause of the plaintiff's injury" was tantamount to a finding of malice. The court went on to say that "it is manifest that malice is the gist of an action for assault and battery." In many cases of assault and battery malice will be present, but sound reasoning would indicate that it is not an essential element to either of the two torts. See Singer Sewing Mach. Co. v. Philps, 49 Ind. App. 116, 94 N. E. 793 (1911); Booher v. Trainer, 172 Mo. App. 376, 157 S.W. 848 (1913); Pizitz v. Bloomburgh, 206 Ala. 136, 89 So. 287 (1921); Luttermann v. Romey, 143 Iowa 233, 121 N.W. 1040 (1909).
DISCUSSION OF RECENT DECISIONS

CONTRACTS—PERFORMANCE OR BREACH—DISCHARGE BY IMPOSSIBILITY WHERE A CORPORATION BECOMES INSOLVENT.—The defendant, in the case of O'Hern v. De Long,¹ had given a note secured by a mortgage. These were assigned to the Peoria Life Insurance Company. A partnership, of which the defendant was a member, was given an agency by the insurance company. The contract by which the agency was created provided that the partnership should solicit insurance for the company and would receive as compensation 60 per cent of the first year’s premium and 7½ per cent commission from renewal premiums for the second to the tenth year inclusive on each policy written. It was expressly provided that commissions would only accrue when the premiums had been paid in cash. The partnership, over a period of several years, wrote a large amount of insurance, of which about five hundred policies were still in force when the company, because of insolvency, was ordered dissolved at the instance of the Director of Insurance. The plaintiff, receiver, brought this action to foreclose the mortgage on the defendant’s property. The defendant as assignee of all claims by the partnership against the corporation set up a counterclaim insisting that the corporation was guilty of an anticipatory breach of contract whereby the defendant had been deprived of the renewal commissions that he would have received had the corpora-

¹ 19 N.E. (2d) 214 (Ill. App., 1939).
tion remained solvent and in existence. The Illinois Appellate Court refused to allow the counterclaim.

The court seems to reach its result by making an analogy between the death of a party whose existence is necessary for the performance of the contract—as where a person has contracted to render personal services—and this case where the corporate "person" has "died" because of dissolution. In support of this contention the court cited the case of People v. Globe Mutual Life Insurance Company,\(^2\) where the New York court upon very similar facts said, "The subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were [sic] not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract in its own nature was dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed."

The analogy is probably unfortunate. It attempts to bring a new situation within the purview of a rule laid down to control situations having materially distinguishing facts. In the case of an individual, death is a certainty, and the parties can logically be presumed to have intended the contract to terminate should death prevent further performance.\(^3\) A corporation, on the other hand, is an artificial person capable of "living" on forever, and therefore its "death" cannot normally be said to be a factor which was in the minds of the parties at the time of contracting. This is especially true of corporations whose existence is not specifically limited by law or their charters. A second objection to the analogy is that the death of a natural person is usually without his fault, while the dissolution of a corporation is almost without exception a result of the corporation's doing acts or getting into circumstances which are considered legally the fault of the corporation. Saying that the dissolution of a corporation is analogous to the death of a contracting party only tends to cause one to lose sight of this very important fact. Still another objection, apparently overlooked by the courts, is that the dissolution of the corporation has not made its performance impossible. Its obligation is to pay


money, and its assets still remain for the purpose of satisfying such obligations. We are not confronted with the question of whether the corporation is able to reap the benefits of its bargain. Nor is it logical to liken the case to the death of a personal employer. The claim of the defendant in the case under discussion was not based on the refusal of the employer to continue the employee in its employ, being instead a claim for compensation accruing for services already rendered.

A view opposed to the New York decisions arose in New Jersey, recognizing the difficulties of the logic in the New York cases.4 The courts there refused to concede that the dissolution of the corporation can reasonably be said to have been within the contemplation of the parties; hence they refused to concede that its continued existence must be considered an implied condition to their agreement. The Louisiana court, in Chas. E. & W. F. Peck v. Southwestern Lumber & Exportation Company,5 said: "The argument that the intention of the court, or, in other words, of the 'sovereign power,' operates as a vis major, loses sight of the fact that such intervention is the necessary consequence of the acts of the corporation itself in provoking the appointment of a receiver by the mismanagement of its affairs."

Assuming that the company's insolvency is solely the result of misfortune, this fact, in the case of contracts between individuals, is held to be only a subjective impossibility, as the party impliedly promises to keep himself in such financial condition as not to interfere with the performance of the contract.6 Why there should be a different result in the case of a corporation is not apparent.

With this very unsatisfactory difference of opinion existing, the United States Supreme Court was called upon to make a choice between these two opposing views in the leading case of Central Trust Company of Illinois v. Chicago Auditorium Association.7 In that case a transfer company made a contract with the Chicago Auditorium Association, providing that a certain amount of money should be paid by the transfer company in consideration of being given the exclusive right to transport passengers and luggage to and from the hotel. The transfer company went into involuntary bankruptcy, and the association submitted a claim for breach of contract. The court expressly denounced the New York doctrine, saying: "The same principle that entitles the promisee to continued willingness [to perform on the promisor's part] entitles him to continued ability

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5 131 La. 177, 59 So. 113 (1912). See also Roehm v. Horst, 178 U.S. 1, 20 S. Ct. 780, 44 L. Ed. 953 (1900). In Delaware the courts have made a distinction between contracts for the sale of goods and contracts for personal services, holding that dissolution because of bankruptcy does not amount to a breach of the latter but it does of the former. Compare these cases: Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 81 A. 1089 (1912); In Re Ross & Son, Inc., 10 Del. Ch. 434, 95 A. 311 (1915).
on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement."

This case overruled the majority of the decisions in the lower federal courts on this point and definitely initiated a trend in the state courts to a position opposing the New York doctrine. The Illinois court, finding it necessary to avoid the logic of the United States Supreme Court, differentiates the two cases on the ground that the corporation's promise and obligations in the Chicago Auditorium case were unconditional. In the Illinois case, the defendant's promise is conditioned upon the payment of premiums, which condition cannot happen, and therefore the company's obligation, according to the court, has not, and never will, come into existence.

It is true, that as a general rule, a condition is not excused merely because it becomes impossible for the condition to occur. One very well recognized exception to this rule, however, is that the condition precedent is excused when the person whose promise is thus conditioned prevents, by his own acts, the happening of the condition. This is, of course, assuming that the parties did not contemplate that the promisor might interfere with the happening of the condition, which brings us right back to the controversy decided in the Auditorium case, namely, whether the cor-

8 Malcomson v. Wappoo Mills, 88 F. 680 (1898); Moore v. Security Trust & Life Ins. Co., 168 F. 496 (1909); In re Imperial Brewing Co., 143 F. 579 (1906); In re Inman & Co. 171 F. 185 (1909).


10 A question might be raised as to the uncertainty of damages, in view of the fact that they are contingent upon the payment of premiums by the insured. Although no definite criterion can be found, the best considered cases seem to indicate that this case is well within those whose damages are provable with an adequate degree of certainty. Where the promisee is certain to receive damage, as we must admit he is in this case with five hundred policies in force at the time of bringing the action, a minimum of proof of the amount of damage is required. See Leach v. New York, N.H. & H.R. Co., 35 N.Y. S. 305 (1895); Lanahan v. Heaver, 79 Md. 413, 29 A. 1036 (1894). Especially can tolerance be exercised in the proof of damages when the breach is the direct cause of the damages being uncertain. "Where a right to a promised performance is conditional upon the happening of some fortuitous event, the promisee can recover damages measured by the value of the conditional right at the time of breach, (a) if it is impossible to determine with reasonable certainty whether or not the event would have occurred if there had been no breach. . . ." Restatement of Contracts, § 332. See Taylor Mfg. Co. v. Hatcher & Co., 39 F. 440, 3 L.R.A. 587 (1889); Myers v. Sea Beach R. Co., 60 N.Y.S. 284 (1889); Shoemaker v. Acker, 116 Cal. 239, 48 P. 62 (1897); Cutting v. Miner, 52 N.Y.S. 288 (1898); Salinger v. Salinger, 69 N.H. 589, 45 A. 558 (1899).
poration is legally at fault when it becomes insolvent and is thereby dissolved. The Auditorium case answered this in the affirmative, and it may reasonably be doubted whether one can avoid saying that the corporation has legally prevented the happening of the condition precedent to its promise if the logic in that case is followed. W. L. THOMPSON

CRIMINAL LAW—DIRECTION OF VERDICT—POWER OF COURT TO RESERVE RULING ON MOTION FOR DIRECTED VERDICT.—United States v. Standard Oil Co. (Indiana)\(^1\) was a prosecution for violation of the anti-trust laws conducted in the United States District Court for the Western District of Wisconsin. At the close of the evidence, motions for directed verdicts were made on behalf of certain defendants. The rulings on these motions necessitated the examination of a voluminous record, and, in order not unduly to detain the jury,\(^2\) the court reserved its rulings thereon and allowed the case to go to the jury. Subsequent to the jury's verdict of guilty as to these defendants, the court, pursuant to the reservation, granted motions for judgments in form non obstante veredicto resulting in the dismissal of said defendants.

Following this action a petition was filed by the United States in the Circuit Court of Appeals of the Seventh Circuit, entitled Ex parte United States,\(^3\) for an order directing the District Judge to show cause why mandamus should not issue compelling him to expunge the orders of dismissal.\(^4\) The grounds relied upon by the government were (1) that such action was an invasion of the constitutional right to trial by jury\(^5\) and (2) that there was no authority for the court to adopt such procedure in a criminal prosecution.\(^6\) The Court denied the United States' petition for writ of mandamus, holding that there was no valid constitutional objection to the procedure followed by respondent and that in the absence of prohibitive legislation courts have inherent power to provide themselves with appropriate procedures required for the performance of their tasks.\(^7\)

It is well established that the court's action in sustaining a motion for a directed verdict does not invade the constitutional guarantee of the right to trial by jury as it existed at common law, nor does it invade the

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1 24 F. Supp. 575 (1938).
2 The jury had been sequestered from October, 1937, to January, 1938.
3 101 F. (2d) 870 (1939).
4 This type of action was necessary to raise the point, since no appeal by the prosecution was possible after dismissal of the defendants.
5 The government's contention was based upon the fact that at common law the court could only grant a new trial after verdict had been taken and could not order a dismissal under these circumstances.
6 The government further contended that the respondent had not in fact reserved his rulings on the motions for directed verdicts but had taken the jury's verdicts of guilty unconditionally. The Circuit Court of Appeals found that respondent had in fact so reserved his rulings.
7 The decision in the instant case was forecast by the action taken in Collenger v. United States, 50 F. (2d) 345 (1931), decided by the same Circuit Court of Appeals, wherein the court felt itself powerless to act, except to grant a new trial, as the trial court had not reserved the right to pass on the motion for directed verdict after taking the verdict.
province of the jury. Decisions upon questions of law are within the exclusion province of the court. How, then, could the conditional taking of a jury’s verdict, subject to the court’s reserved ruling on such legal question, abridge this guarantee? The question of law as to the legal sufficiency of the evidence remains a question of law until it is disposed of one way or the other. To take the jury’s verdict conditionally, pending the decision of this legal question by the court, as a convenience to the jury, court, and litigants, where as a matter of law there is no fact to be tried by the jury and to so decide subsequently by granting a judgment notwithstanding the jury’s verdict is tantamount to withdrawing the case from the jury in the first place, as is done by granting a motion for directed verdict. Such at least is the holding in civil cases at present.

Do the federal courts possess inherent power to adopt such procedure in criminal cases where there is no constitutional objection and where the field is unoccupied by federal legislation? Where Congress has not directed the courts to follow state laws on a particular subject, the federal courts have frequently in procedural matters, by right of the court’s own power, changed and applied common law principles in the light of reason, experience, and changing public policy.


9 Sparf v. United States, 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1894); United States v. Fullerton, Fed. Cas. No. 15,176 (1870); Nosowitz v. United States, 282 F. 575 (1922); Cady v. United States, 293 F. 829 (1923). Nor is the principle that one shall not be put twice in jeopardy of life or limb for the same offense violated by a directed verdict of innocence. Patton v. United States, 281 U. S. 276 at 288-9, 50 S. Ct. 253, 74 L. Ed. 854 (1930).

10 In Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913), the United States Supreme Court held, five to four, that a judgment of dismissal notwithstanding the jury’s verdict was an abridgment of the Seventh Amendment where there had been no reservation of ruling on the motion for directed verdict, despite the fact that the upper court found that there was no fact to be tried by the jury. However, in the subsequent case of Baltimore & Carolina Line v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636 (1935), the Supreme Court held that it was error on the part of the trial court to deny defendant’s motion for a dismissal of the complaint and for a directed verdict on the ground of insufficiency of the evidence after the trial court had, without objection, reserved decision on the motion and submitted the case to the jury subject to its opinion on the questions reserved. The court thus limited the decision in the Slocum case and held the procedure now under consideration constitutional and proper in a civil action.

11 The United States contended, in the case under discussion, that Rules 1 and 2 of the rules of practice and procedure authorized by 28 U.S.C.A. § 723 (a) affirmatively prohibit the procedure employed. These rules apply to post-trial motions, whereas in the instant case the motion is a pre-verdict motion.

12 Thus in Matter of Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920), the court appointed an auditor to simplify the facts to be submitted to the jury in a complicated accounting case; in Patten v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930), the court sanctioned the waiver of the constitutional right to a twelve-man jury, permitting an eleven-man jury to decide the facts; and in
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done so in the past with the sanction of the Supreme Court cannot be doubted, and, if the decision in *Ex parte United States* is to stand, it would seem that the courts will be free in the future to revise criminal procedure in cases before it, except as such procedure is already regulated by statute or constitutional requirement.\(^\text{13}\)

In the adoption of such modifying procedures, the persuasive authority of common law doctrines, state statutes and decisions, and prior federal court decisions will no doubt play an important role. The American system of case decision is in large measure based upon the persuasive authority found in similar cases and applied to questions specifically new. In this realm may be found an abundance of such persuasive authority to support the decision in *Ex parte United States*. The identical procedure has been sanctioned by the Supreme Court of the United States in civil cases,\(^\text{14}\) and the use of similar procedures in civil cases may be considered in criminal cases, as is illustrated by *Sparf v. United States*,\(^\text{15}\) where the court said, "The cases thus cited were, it is true, of a civil nature; but the rules they announce are, with few exceptions, applicable to criminal causes, and indicate the true test for determining the respective functions of court and jury."

Some of the states have statutes permitting this same procedure in civil cases\(^\text{16}\) and in many others it has been made the rule without the aid of statute.\(^\text{17}\) Some even authorize such action in criminal cases, as is true in Wisconsin where the original proceeding was tried.\(^\text{18}\)

The English common law procedure, adopted by the judges traveling on circuit, of taking the verdict of the jury in criminal cases subject to the opinion of the twelve judges on questions of law, is of some persuasive value.\(^\text{19}\)

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Funk v. United States, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933), the court extended the rules of evidence in criminal cases to allow a wife to testify for her husband.

\(^{14}\) See note 10.\(^{15}\) 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1894).
\(^{18}\) State v. Meen, 171 Wis. 36, 176 N. W. 70 (1920). Though criminal procedure in the federal courts is governed not by state practice, but by federal statutes and decisions of the federal courts, United States v. Murdock, 284 U. S. 141, 52 S. Ct. 63, 76 L. Ed. 210 (1931), the federal courts in deciding matters of criminal procedure feel that they clearly have the right under the Conformity Act to apply the provisions and laws of the state in which the court is held. Avila v. United States, 76 F. (2d) 39 (1935); United States v. Kelly, 51 F. (2d) 263 (1931); United States v. Eagan, 30 F. 608 (1887).
\(^{19}\) After the twelve judges at assize time decided questions of law so reserved, the defendant was discharged. The King v. Isaac Cockwayne, 1 Leach 498, 168 Eng. Rep. 351 (1788); The King v. Parkes and Brown, 2 Leach 776, 168 Eng. Rep.
Numerous federal court decisions exist where appellate courts, possessing the opportunity for mature deliberation not always found in the heat of the trial, have reversed convictions and discharged defendants for the insufficiency of evidence where a motion for directed verdict should have been granted. The action taken in the instant case will now allow such opportunity to the trial judge, and the decision should be attended with beneficial consequences to courts, litigants, and public alike.

D. C. PHILLIPS

INTERNATIONAL LAW—CHANGE OF SOVEREIGNTY—RELATIVE RIGHTS OF DE JURE AND DE FACTO SOVEREIGNS.—At a time when Britain recognized Italy as the de facto government of Ethiopia, but still recognized Haile Selassie as the de jure sovereign, the Negus Negasti brought suit in England for the payment to him of funds due by the defendant wireless company to Ethiopia for the use of a State radio station. The company raised as a defense the right of Italy to the fund. The court held that, regardless of what might be the effect of the de facto status in the territory actually under control, Haile Selassie, as de jure sovereign, had the right to the fund. While appeal was pending, Britain recognized the King of Italy as the de jure sovereign of Ethiopia; and this was held on appeal to have divested the King of Kings of his right to sue.

Although a foreign sovereign is exempt from the jurisdiction of the courts, he has a right to bring suit in them, if he is recognized as a government by the sovereign of the courts in which he seeks to sue.

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488 (1796); The King v. Joseph Bazeley, 2 Leach 335, 168 Eng. Rep. 517 (1799). However, the usual procedure in criminal cases at common law for obviating errors of law made during the trial after verdict was by way of royal pardon. It is of interest to note that Professor Holdsworth, in reply to a letter addressed to him by Thurman Arnold, Assistant Attorney General, during the course of the litigation in Ex parte United States, 101 F. (2d) 870 (1939), suggests that the government's contention that there is no basis at common law for the procedure is probably right and that the only means of dismissing after a verdict of guilty was by way of royal pardon.

Thus, to mention a few, the Supreme Court held, in France v. United States, 164 U. S. 676, 17 S. Ct. 219, 41 L. Ed. 595 (1897), that the federal statute upon which the indictment was founded did not cover the instant transaction and that therefore the conviction could not be sustained. In Famous Smith v. United States, 151 U. S. 50, 14 S. Ct. 234, 38 L. Ed. 67 (1894), the evidence did not show that the court had jurisdiction. In Romano v. United States, 9 F. (2d) 522 (1925), the evidence failed to show that any criminal act had occurred. In Schaefer v. United States, 251 U. S. 466, 40 S. Ct. 259, 64 L. Ed. 360 (1920), the court did not believe that there was substantial evidence to sustain defendant's conviction. See also Nosowitz v. United States, 282 F. 575 (1922); Cherry v. United States, 78 F. (2d) 334 (1935); Reiner v. United States, 92 F. (2d) 823 (1937).

1 Haile Selassie v. Cable and Wireless, Limited, [1939] 1 Ch. 182.
In a monarchy, the right has been said to be vested in the sovereign, "subject to a moral obligation on his part to apply it for the benefit of his subjects," whereas in a republic the right is in the state and it may sue in its corporate name. This distinction, apparently a remnant from the days when rulers were absolute, would necessitate treating such a fund as this as a private property right of the Emperor, but it has not been so treated in the cases which follow. More probably, the so-called "moral obligation" of the sovereign really turns him into a quasi-trustee for the people, and a later conquest operates to transfer the trusteeship as an assignment by operation of force. The holding on the original facts in the Haile Selassie case can be justified upon the ground that, if the conqueror is not yet a de jure sovereign, he has not yet demonstrated that his regime is permanent enough to entitle him to become trustee for the people.

The power to recognize a government as de facto or de jure is a purely political power, within the purview of the executive and legislative departments, and their decisions are binding on the courts. If a government which is in fact sovereign within its territory is not yet recognized as de facto sovereign by the government of the forum, its acts and decrees will be treated as void by the courts of the forum. However, though the acts of such an unrecognized government are treated as illegal and void, the courts will not shut their eyes to the facts; and, if such an illegal act has affected private rights, the courts will take notice of it—this being a judicial function and not one for the State Department. International policy may affect the question as to whether the courts will take notice of confiscatory acts or decrees, though this seems to be a usurpation of the State Department's function.

Recognition of the new sovereign, either as de facto or as de jure, relates back to the time when such sovereign was actually in control "and validates all the actions and conduct of the government so recognized from the commencement of its existence." The courts will take

5 United States of America v. Wagner, L. R. 2 Ch. 582 (1867).
10 Hennenlotter v. Norwich Union Fire Ins. Soc., 207 N. Y. S. 588 (1924); The Nueva Anna, 6 Wheat. 193, 5 L. Ed. 239 (1821).
judicial notice of the fact of recognition. The acts of either de jure or de facto sovereigns confiscating property within their territorial jurisdiction are given absolute validity by the courts of other nations without question. In the words of one English case shortly after the United States became independent, "It may be a question for private speculation whether such a law made in Georgia was wise or an improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an independent country, and the laws of every country must be equally regarded in courts of justice here, whether in private speculation they are wise or foolish." Conflicting with these decisions are two cases holding that a law of a recognized power may be disregarded where it is contrary to public policy or to the usage of nations.

The penal law of even a de facto sovereign will not be enforced in other jurisdictions. Thus an order confiscating all the private property of a ruler will not be enforced; but in the instant case, Haile Selassie was suing for state funds.

In the United States it is held that the validity of the acts of a de facto government depends upon its eventual success or failure. A government which is a successor to one which has failed can only take the rights of its predecessor in foreign courts subject to its duties. Previous decisions which are two cases holding that a law of a recognized power may be dismissed include:

Molina v. Comision Reguladora, 92 N. J. L. 38, 104 A. 450 (1918); Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918); Terrazas v. Holmes, 115 Tex. 32, 275 S. W. 392 (1925); Terrazas v. Donohue, 115 Tex. 46, 275 S. W. 396 (1925); Ricaud v. American Metal Co., 246 U. S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918). But see Kennet v. Chambers, 14 How. 38, 14 L. Ed. 316 (1852), deciding that a contract with a de facto power made illegal by a treaty with the de jure sovereign could not be validated by later recognition of the de facto government.


Ogden v. Folliot, 3 T. R. 726, 100 Eng. Rep. 825 (1790); Macleod v. Attorney-General for New South Wales, [1891] A.C. 455; LeCouturier v. Rey, [1910] A.C. 262; Huntington v. Attrill, [1893] A.C. 150, in which case, however, it was held that the action was remedial of a private right.

Banco de Vizcaya v. Don Alfonso de Borbon y Austria, [1935] 1 K.B. 140.


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ously a distinction has been recognized between acts within the jurisdiction and rights without the nation, a de facto government having no rights except as to property which has been within its power and has had that power exerted on it. Two recent cases have held that a de facto power over banks within the jurisdiction operates to give the de facto sovereign power over the foreign balances of those banks. Though the one was consistent with the above limitation of de facto powers, holding that the "acts of the government which His Majesty's Government recognizes as the de facto government . . . cannot be impugned as the acts of a usurping government, and conversely the court must be bound to treat the acts of a rival . . . de jure government . . . as a mere nullity," the other case was placed upon the broader ground that a de facto state must "for all purposes" be treated as "a duly recognized foreign state," while all that a de jure recognition does is give the sovereign some color of right to reconquer his country. This ground, which makes de facto recognition equivalent to de jure recognition, is obviously contrary to the holding on the original facts in the Haile Selassie case, which distinguished the above case on its facts. Although it may involve illogical distinctions between acts within the country and extraterritorial rights, it is submitted that, not only is the final holding in the Haile Selassie case sound because the new de jure sovereign is now entitled to be trustee for the people, but the holding on the original facts is also sound, (1) because, as before mentioned, the withholding of de jure status from Italy showed a belief by the State Department that its regime was not yet permanent enough to entitle it to become quasi-trustee for the people, and (2) because the probable intent of the political departments in withholding de jure recognition is to deny the rights to international comity, while not denying the existence of acts that do in fact exist. However, attention should be called to a serious difficulty which will arise in cases where a debtor has property within the power of the de facto sovereign; a decision of that ruler's courts awarding the debt to the de facto sovereign, plus a decision of another ruler's courts awarding the debt to the de jure sovereign, will result in compelling the debtor to pay his debt twice over. Hence probably the de facto government should triumph even in an extraterritorial suit in a case where property of the debtor is within the de facto ruler's power, this being considered an extension of the proposition that the courts will not shut their eyes to the fact that a de facto government does exist and has powers.

R. W. BERGSTROM

LANDLORD AND TENANT—DAMAGES—NECESSITY OF RELETTING PREMISES FOR FULL TERM TO RECOVER FULL DAMAGES ON LONG TERM LEASE WHEN LESSEE HAS ABANDONED PROPERTY.—Of interest to landlords with properties rented

23 Banco de Bilbao v. Rey, [1938] 2 K.B. 176.
under long term leases is the recent case of People ex rel. Nelson v. West Town State Bank, in which the court held that future damages accruing under a lease with twenty-eight years to run were, in the absence of a new lease for the remainder of the term, so uncertain and speculative that the landlord must await their accrual. The court also held that the distribution of receivership assets need not wait, which would seem to bar the future damages absolutely.

The lessee in this case was a bank which had ceased operations. The receiver of the bank vacated the premises while the lease still had about thirty-three years to run. The lessor took possession, rented the premises for five years, and, having sustained a loss of $1054 per year for the said five year period after the abandonment of the premises, filed a claim in the receivership proceedings for $28,458, the basis of which was that a similar loss would be sustained for the balance of the term. The court held that, because of the uncertainty as to the amount of damages to be sustained, the lessor could not recover damages for the future but would have to await the accrual thereof.

It is well settled that the measure of damages for the wrongful breach of a lease is the difference between the rent reserved and the rent received from another letting, provided due diligence was used by the landlord. It is quite probable that if the plaintiff here had relet the premises for the balance of the term at a lower rental than the amount reserved in the bank's lease, the claim would have been allowed. As a matter of fact, the court distinguishes the case of Smith v. Goodman, in which case the premises were so relet, on that ground.

It would seem to be clear in the instant case that the experience of the first five years after the breach of the lease was not sufficiently certain to warrant its use to estimate damages for twenty-eight years in the future, no lease having been entered into for the balance of the term.

M. H. Tuttle

MASTER AND SERVANT—NATIONAL LABOR RELATIONS ACT—TERMINATION OF RELATION OF MASTER AND SERVANT.—The highest court in the land has handed down another opinion in which the following most interesting question is raised: When an employer, admittedly guilty of unfair labor

3 149 Ill. 75, 36 N. E. 621 (1893). A three-year lease was abandoned by the assignee of the lessee at the end of the first year. It was held that, since the premises had been relet for the balance of the term and since the lease provided that the measure of damages should be the difference between the amount received from a reletting and the rent reserved, the claim for damages could be proven against the insolvent estate.

practices within the meaning of the National Labor Relations Act, discharges employees who are engaged in a "sit-down" strike, under what circumstances does the National Labor Relations Board have authority to order their reinstatement? Language in the act to the effect that the board may reinstate only "employees" and do only those things necessary "to effectuate the policies" of the act provides only the skeleton of an answer, leaving the meat to be filled in by the courts.

In order to approach the problem effectively, it is necessary to consider the facts in the Fansteel case in some detail. The employer had engaged in such unfair labor practices as encouraging the formation of a company union, isolating the president of the employee's organization, and refusing to bargain with the majority unit. The strikers took over two key buildings of the plant, thereby suspending operations. The plant superintendent formally requested a surrender of the buildings, and announced, after a refusal of the men so to do, that all men holding the buildings were discharged. An injunction proved unavailing, and the strikers repulsed the sheriff's attempt to enforce a writ of attachment. A week later the sheriff was successful, the plant resumed operations, and some of the men were sentenced for contempt. About one-third of the strikers were taken back, and new men were hired in the places of the others. None of those found guilty of contempt were recalled. The basis for reinstatement is not clear, but the board found that none of the persons named in the complaint were discharged or denied reinstatement by reason of union membership or activity.

The purposes of the act have been variously stated, the declared policy being to remove obstructions to interstate commerce caused by absence of collective bargaining in industry. In view of the fact that its validity is hung upon the interstate commerce peg, these statements of the courts upon that question are perhaps most appropriate: "to safeguard the flow of interstate commerce by protecting the right of employees 'to organize and bargain collectively'" and "to obviate appeals to brute force which are too often the accompaniment of labor disputes."

2 The sit-down strike as a labor device appears to have arisen within the confines of the aircraft industry, the United Aircraft incident being the forerunner of a veritable epidemic during the years 1936 and 1937, the main event being the Douglas Aircraft affair.

3 Section 8 (3) of the act, 29 U.S.C.A. § 158 (3), forbids an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." Section 2 (3), 29 U.S.C.A. § 152 (3), defines an "employee" as an "individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . ."


7 Black Diamond Steamship Corp. v. National Labor Relations Board, 94 F. (2d) 875 (1938).

the provisions and purposes of the act thus in view, it becomes less difficult to decide whether or not these "sit-strikers" remained employees, eligible for reinstatement and, if not, whether their reinstatement would accomplish the object which Congress had in mind.

Just what effect does the act have on an employer's right to determine whom his employees shall be? Section 9 (a) of the act\(^9\) "does not prevent the employer 'from . . . hiring individuals on whatever terms' the employer 'may be unilateral action determine,'"\(^10\) although Section 8 (3)\(^11\) rather obviously prohibits the making of "yellow-dog" contracts or hiring in the first instance on the basis of unionism. Be that as it may, however, the act does not purport to "preclude the discharge of any employee for any reason that seems proper to the employer other than union activities or agitation for collective bargaining with employees."\(^12\) Such a conclusion is inevitable under the rule that as between two possible constructions of a statute the one which would render the statute unconstitutional or even raise a serious constitutional question must be discarded.\(^13\) Certainly a statute which takes away the right of an employer to discharge for cause would unwarrantably interfere with the freedom of contract.\(^14\) It is true that the ordinary right to select em-

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\(^9\) 29 U.S.C.A. § 159 (a). In National Labor Relations Board v. Bell Oil & Gas Co., 91 F. (2d) 509 (1937), the court stated that the act does not " 'interfere with the normal exercise of the right of the employer to select its employees or to discharge them.' " The language was approved in Appalachian Elec. Power Co. v. National Labor Relations Board, 93 F. (2d) 985 (1938). However, there are no available cases which determine what that normal right to hire and fire might be.

Section 9 (a), 29 U.S.C.A. § 159 (a), provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

\(^10\) National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

\(^11\) 29 U.S.C.A. § 158 (3). The conclusion seems inevitable, despite Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 38 S. Ct. 65, 62 L. Ed. 260 (1917), in which an injunction restraining violation of such a contract was granted; Coppage v. Kansas, 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915), in which a state statute declaring such contracts illegal was held unconstitutional; and Adair v. United States, 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908), holding a similar federal statute invalid.


\(^14\) In Standard Lime & Stone Co. v. National Labor Relations Board, 97 F. (2d) 531 (1938), the court said, "The right of an employer to discharge or to refuse to reinstate a man who has committed a crime which endangers the safety of his fellow workmen or the integrity of the plant cannot be successfully challenged. The statute does not purport to destroy this right, or contemplate that an employer must continue to employ or to treat as employees men who have engaged in unlawful conduct of this character."
employees becomes vulnerable on the commission of an unfair labor practice, but it does not die.

It is difficult to conceive how a general reinstatement in the instant case would effectuate the policies of the act. It is equally difficult to see how such reinstatement does not "condone" violent or illegal employee acts. To say that the board has no regulatory power over employees and does not inquire into the degree of culpability of employees' acts is no answer. Looking at the matter from a practical standpoint, the average employee does not know the technicalities of the Wagner Act, and when reinstated he is of the opinion that his past conduct has been given a stamp of approval. If that conduct has been violent or illegal he believes he is justified in engaging in it or similar conduct again. At least one court has supported the familiar argument that reinstatement under such circumstances only serves "to promote discord between employer and employee."

The cases are apparently irreconcilable as to the character of the atrocities perpetrated by employees which will preclude the board from ordering reinstatement after discharge. Attempting to distinguish between misdemeanors and felonies, or between degrees of violence, can only result in the creation of empty distinctions. Certainly it cannot be said that the right of an employer to employ and discharge is to be controlled by criminal codes. There is also an intimation that the line must be drawn by the board itself, but the warrant of authority for such proposition is difficult to find. The board's discretion is limited to finding the facts and determining what action is necessary under the facts as so found to effectuate the clearly stated policies of the act. Comparable attempts to distinguish between degrees of damage, as in the Douglas Aircraft case, or to determine whether or not the acts constituted "sabotage," as in the Fansteel case, can lead to no better result.

Let us examine the board's argument that the order is justified under its power to reinstate "employees." If an employee has been discharged for cause, the board has no power to reinstate, even though union activ-

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15 Black Diamond Steamship Corp. v. National Labor Relations Board, 94 F. (2d) 875 at 879 (1938).
17 Note, 33 Ill. L. Rev. 208.
19 Available cases range from dynamiting the plant in the Republic Steel case to a one and one-half hour sitdown in the Douglas Aircraft case.
20 As was done in the Republic Steel Case, N.L.R.B. Case No. C-184 (Apr. 8, 1938), where the Board in determining whether or not reinstatement was proper took into consideration evidence of convictions of strikers and pleas of guilty to acts of violence.
21 In Thompson Cabinet Co. v. C.I.O., 11 N.L.R.B. 99 (Mar. 14, 1939), the Board refused reinstatement of an employee who had been found to have been discriminatorily refused reinstatement and who had offered to act as a labor spy, on the grounds that reinstatement would not effectuate the policies of the Act.
22 Note, 33 Ill. L. Rev. 208 at 210.
23 In National Labor Relations Board v. Oregon Worsted Co., 96 F. (2d) 193 (1938), the court looked to the evidence to ascertain whether the man was discharged for cause in order to determine whether the court had power to reinstate.
ity is one of the contributing reasons for the employer's so doing. The term "employee" was given a peculiarly wide definition in the act for the single purpose of preserving the employment relation despite a labor dispute or unfair dismissal. Further expansion beyond this definition seems unjustified. Congress went far enough in carefully failing to reach all the evils within its grasp. The courts also went far enough in holding that an employee who goes on strike retains his status although there is no reasonable justification for his so doing. Certainly it is not unreasonable to construe vandalism as "a renunciation of the employment relation."

The dissenting opinion in the Fansteel case took the position that labor strife commonly gives vent to improper conduct, that Congress thought it desirable to continue the eligibility of the striker regardless of such conduct, and that the striker remains amenable to punishment by the state. Clearly the preservation of the "right to strike" in Section 13 of the act contemplates negative, not affirmative, conduct. If the product of a heart "regardless of social duty and plainly bent on mischief" does not look to a termination of the employment relationship, presumably, if it were for cause the Board had no power to reinstate, even though others discharged for the same cause were reinstated.

In the matter of United Fruit Co., 2 N.L.R.B. 896 (1937). The situation bears some analogy to the tort rule whereby a man owes no duty to assist another man, his enemy, out of danger, provided he was not responsible for the circumstances of the latter.

See Note 3.

In National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 46, 57 S. Ct. 615, 81 L. Ed. 893 at 916, 917 (1937), the court said the validity of the Act is not affected by the fact "that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible. . . . The legislative authority, exerted within its proper field, need not embrace all the evils within its reach."

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938). Query whether such holding conflicts with the statement in the Black Diamond S. S. case that "each party to a labor controversy is left to use its own economic strength in all lawful ways to promote its advantage."

In National Labor Relations Board v. Sands Mfg. Co., 59 S. Ct. 508 at 514, 83 L. Ed. (Adv.) 488 (1939), the court said, "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer." The court thus seems to take the position that the right of the Fansteel Company is beyond dispute, and that once the relation was severed the employer could deal with the individuals as it pleased.

Justices Reed and Black wrote the opinion.


The "sit strike" as a labor device was not known at the time the act was drafted, the ordinary strike being nothing more than a refusal to work.

In Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, 91 F. (2d) 134 (1937), the court said, "The relationship existing between employer and employee is not necessarily terminated by strike, and, in the absence of any action looking to the termination of that relationship, employees are entitled to rank as employees."
it is difficult to conceive how that result may be brought about.\textsuperscript{34}

In view of the fact that the employment relationship was effectively terminated in the Fansteel case and of the additional fact that reinstatement of the strikers would not effectuate the policies of the National Labor Relations Act, the board's order holding the discharge unlawful was "an injustice not only to the employer, but to the unions and their friends who wish them well."\textsuperscript{35}

L. BRUNETTE

WORKMEN'S COMPENSATION—PERSONS AND EMPLOYMENTS NOT WITHIN THE ACT—WHEN AN ASSISTANT HIRED BY AN EMPLOYEE IS WITHIN THE ACT.—An interesting question arose when the helper of a driver on a Times newspaper truck sued the Times Publishing Corporation for personal injuries sustained as a result of a collision in which the truck driver was found to be guilty of negligence.\textsuperscript{1} The driver was employed by the defendant corporation to drive one of its trucks in the delivery and distribution of Times newspapers. The driver hired as his helper the minor plaintiff, whose duties were to assist the driver on his route by loading and unloading the truck and by counting and binding papers. The helper was paid three dollars per week and was given one meal a day by the driver, who was not reimbursed by the corporate defendant.

The plaintiff's action was based on the common-law theory that he was an invitee to whom the defendant owed a duty to exercise reasonable care. The complaint alleged that he was riding in the newspaper truck "at the invitation and request of [the driver] with the knowledge, actual or constructive, of the corporate defendant upon the business of the defendant. . ."\textsuperscript{2} So far as it is pertinent to the appeal the answer admitted the allegations and concluded that the plaintiff was an employee of the corporate defendant and therefore was bound by the provisions of the Workmen's Compensation Act. The jury found for the plaintiff, assessing damages at $27,000,\textsuperscript{3} and from a judgment thereon the defendant appealed. The Appellate Court, denying that the trial court erred in rejecting the defendant's motion for a directed verdict, affirmed the judgment.

It is fundamental that where the evidence as to the existence of a certain legal relation is undisputed and reasonably susceptible of but a single inference the finding of the relationship is a matter of law and

\textsuperscript{34} Cases in which the employer engages in a subtle plan or scheme, the primary purpose of which is to undermine the efforts of his employees to organize for bargaining purposes, such as In the Matter of Algonquin Printing Co., 1 N.L.R.B. 264 (1936), have not been considered in this comment. Naturally an employer is not to be allowed to discriminate indirectly, while Sec. 8 (3), 29 U.S.C.A. § 158 (3), forbids him to do so directly.

\textsuperscript{35} Fansteel Metallurgical Corp. v. National Labor Relations Board, 98 F. (2d) 375 at 381 (1938).


\textsuperscript{2} At p. 238.

\textsuperscript{3} The plaintiff's recovery under the compensation act would be limited to $470.00 for the loss of a leg, plus medical and hospital expenses, plus fifty per cent of this amount as a penalty, since the plaintiff was illegally employed. Ill. Rev. Stat. 1937, Ch. 48, § 145.
should not be left to the jury. It follows, therefore, that the determination as to whether the court erred in rejecting the defendant's motion for a directed verdict depends on whether the undisputed facts establish an employer-employee status as a matter of law.

The Compensation Act defines an employee as “every person in the service of another under any contract of hire, express or implied, oral or written...” The act is designed to replace the ineffectual and uncertain common-law remedy of a servant against his master and to abrogate the latter's common-law defenses by establishing a fair guaranty of compensation for injuries arising out of and in the course of the employment. It is apparent, therefore, that the act has reference to those cases arising out of the common-law master and servant relationship. So, too, courts dealing with statutes similar to our own in other jurisdictions have said that by the employer-employee relation is meant a master and servant relation. In fact, it has been generally held that the master and servant relation is “that which arises out of a contract of employment, express or implied, between a master or employer and a servant or employee.”

The question in the instant case then is whether the plaintiff, who is an assistant to a servant of the defendant, is himself a servant of the defendant. In the few cases in Illinois where the injured party was an assistant to a servant helping him in the course of the master's business it was only necessary for the court to determine that the assistant was an invitee as distinguished from a mere licensee or trespasser. Since a servant is also a type of invitee those cases do not negative the possibility that an assistant to a servant working in the course of the master's business is himself a servant of the master.

A frequently cited case on the question is Paducah Box and Basket Co. v. Ruby Parker. There the plaintiff was hired by two of the employees of the Paducah Company. The employees operated a machine that made wire baskets. The plaintiff, with the permission of the employer, was hired by the employees to assist in stitching bottoms on baskets. The plaintiff sued the Paducah Company for injuries sustained when her apron was caught in a revolving shaft which was negligently allowed to remain unguarded. The Paducah Company defended on the

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4 See Cinofsky v. Industrial Com., 290 Ill. 521, 125 N. E. 286 (1919).
5 Ill. Rev. Stat. 1937, Ch. 48, § 142. The fact that the plaintiff was illegally employed does not affect his right to recover under the Workmen's Compensation Act, but gives him the additional right to file a notice of rejection of his rights under the compensation act and to sue under his common-law right, provided the notice is filed within six months after the injury. See Landry v. Shinner, 344 Ill. 579, 176 N. E. 895 (1931).
8 39 C. J. 33, § 1; Cooley, Torts (4th ed.), III, 42.
10 143 Ky. 607, 136 S. W. 1012, 43 L. R. A. (N. S.) 179 (1911).
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grounds that the plaintiff was not its employee. The court denied the merits of this contention, saying: "It is not necessary, to create the relation of master and servant, that the master shall directly employ the servant, or that the servant shall be directly responsible to the master, or that the master shall have authority to control his employment, fix his wages, or discharge him. When a person who undeniably occupies the relation of servant employs, with the consent and approval of the master, another to assist him in the performance of the duties he is discharging for the master, the relationship of master and servant is thereupon created between the master and the person so employed, although the person so employed may be compensated by and be under the immediate control of the person employing him."11

In an Oregon case,12 a minor was employed by his father as an assistant in a mine. The father received their joint earnings, but the car tickets were made out in the names of both the father and son. The court there said that the fact that the minor, with the express or implied consent of the owner of the mine, assisted his father was sufficient to create the relation of master and servant between the minor and the owner. Many other cases,13 some of which were relied on in the Oregon case, affirm the aforementioned rule.

Following the rule of the above cases it would seem that the plaintiff in the instant case is an employee of the defendant corporation. The Illinois Appellate Court did not question this rule but merely said: "If knowledge as well as acquiescence was necessary in the employment of the boy, then the record as to fixing his employment is silent."14

Of course the court in the Paducah case and in the Oregon case found that not only did the employer have knowledge of the employment but also that he acquiesced in it. Yet, is the instant case so different? Contrary to the court's statement quoted above, it would seem that the employer did have knowledge of the employment. The plaintiff alleged in his complaint that the defendant had knowledge of the employment, and the defendant expressly admitted it in his answer. As to the question of acquiescence, the answer is less obvious. In this connection it is noted that the court in the Paducah case and in the Oregon case did not deem it essential to determine whether the acquiescence was created

11 At 136 S. W. 1013.
13 Tennessee Coal Iron & R.R. Co. v. Hayes, 97 Ala. 201, 12 So. 98 (1892). See Chicago W. & V. Co. v. Moran, 210 Ill. 9, 71 N. E. 38 (1904), where under substantially the same facts the court, while actually finding merely that the plaintiff was not a mere licensee, used language which would imply the existence of an employer-employee relation; Call Pub. Co. v. Ind. Accident Com. of Calif., 89 Cal. 194, 264 P. 300 (1928), where the facts are almost identical with those of the Kijowski case but the court found that the employer permitted the employee to hire the assistant; Schmidt v. Wm. Pfeifer Berlin Weiss Beer Brewing Co., Ill. Ind. Comm. Bulletin No. 1, p. 118, where the driver of a beer delivery truck had an assistant who helped the driver solicit orders and deliver beer, which helper was held to be an employee of the brewing company so that he could recover under the compensation act for his injuries.
by implication or by expressed consent. If acquiescence may be implied, and logic compels such a conclusion, certainly no other case could present facts and circumstances from which it would be more reasonable to imply acquiescence than the instant case. As previously stated, the defendant admitted knowledge of the fact that the driver hired the plaintiff. In addition the evidence shows that the plaintiff's duties required him to be on the defendant's premises at certain times during the day to load and unload the papers. Moreover, it would be impossible for the driver to finish his daily work if he had to park his truck at every news stand, count and bind the papers himself, and carry them to the stands. These circumstances, in addition to the fact that there is no evidence that the defendant ever objected to the employment, might very well have been grounds for a finding of acquiescence on the part of the defendant. But the Appellate Court said: "Now the jury in the instant case did find by its verdict that the plaintiff's minor was not an employee of the defendant company. . . ." If, of course, it was a proper question for the jury to answer under the circumstances, we must trust that their decision rested upon a careful consideration of all the evidence.16

Aside from a possible difference arising from the question of acquiescence there is another difference between the instant case and those previously mentioned. In the Paducah case and in the Oregon case, the plaintiff was trying to establish that he was an employee of the defendant company. In each case, the cause of action was based upon a breach of a duty owed by a master to his servants. In the instant case, the plaintiff's right to recover depended on a determination that he was not an employee of the defendant company. As a matter of logic it is not material how the question arises or which party is attempting to establish or deny the existence of the relationship. But the aforementioned difference in the cases does serve a purpose in that it brings to light another question. Can it be said that, in all cases where the employer has knowledge of, and acquiesces in, his employee's conduct in hiring an assistant to do work in the furtherance of the employer's business, the assistant becomes an employee of the employer? The knowledge and acquiescence in the employment merely operate as a ratification. It would seem to follow, therefore, that if the employee did not intend to hire the assistant on behalf of the employer the latter could not by ratification make the assistant his employee. Under such circumstances, the so-called employee would be, as to his assistant, an independent contractor, and the employer would not be responsible for torts to the assistant. In turn it would seem to follow that where an assistant enters a contract with an employee who hires as an agent and not

16 Suppose, however, that the injury was accidental and that consequently the defendant would not be liable at common-law, it would not have been surprising had the jury, traditionally philanthropic as it is, found that the plaintiff was an employee of the defendant company so that he could recover under the compensation act.
as a principal, the contract binds the employer, if the employee had authority to hire the assistant or if the employer ratified the contract. Did the plaintiff contract with the driver as a principal in the instant case? It would seem inconsistent for the plaintiff to claim that he contracted with the driver as principal and not as an agent of the defendant company, and, at the same time, to claim that the defendant company is responsible for the driver's torts committed against him and arising out of the employment. In other words, the plaintiff in bringing his action against the corporate defendant for the tort of the driver has admitted that he has dealt with the driver in his representative capacity and not as a principal.

In conclusion it may be said that there is a common-law principle to the effect that when an assistant enters into a contract of employment with a servant in his representative capacity and in furtherance of the master's business, with the knowledge and acquiescence of the master, the assistant becomes a servant of the master; that this principle is applicable to the employer-employee relationship under the Workmen's Compensation Act; and that the instant case presents facts and circumstances from which the court might have held that the plaintiff was an employee.

W. H. MAYNOR
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