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Recent Case Trends in Local Taxation

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RECENT CASE TRENDS

LOCAL TAXATION

(a) Relation of municipal corporations to the state with reference to the taxing power

The complete dependence of the taxing power of a municipality (as indeed of all other powers) upon the state was emphasized by the Supreme Court of Florida in *Durham v. Pentucket Groves, Inc.*, 189 So. 482 (1939). Here a statute provided that when any municipality of 150 electors or less had within it lands which were excluded from the benefits of the municipality, such lands might on the petition of the owner be excluded from the municipality and thereby be released from all its obligations. In this case certain lands were thus excluded; but this exclusion was protested by holders of municipal bonds payable from land taxes. The court, however, sustained the exclusion of the lands from the municipality, and their consequent exemption from municipal taxes, on the ground that the bondholders must have taken the bonds with knowledge of the possibility of their exclusion of the land from the taxable property of the municipality under the terms of the state statute. The statute was held not to contravene the provision of the state constitution providing that the legislature might abolish municipalities, but only on condition that their creditors should be protected.

In spite of this complete power of the state, the courts try to protect the municipalities so far as possible. Thus it was *held* by the Supreme Court of Minnesota in *Board of Education v. Anderson*, 285 N. W. 80 (1939), that an amendment to the state income tax law providing for the change of the distribution of the state income tax among the school districts of the state was not retroactive in operation and did not affect income tax already collected when it came into effect. Though of course the legislature might have made this change retroactive, the court held that it had not. It was also *held* in *Little Red River Levee District v. Moore*, 126 S. W. (2d) 605 (Ark., 1939) that land held by an improvement district for its public purposes is not subject to state taxes, in the absence of an express statute thus subjecting it. Here the district had sold timber on land which it had bought in for non-payment of taxes, under an agreement that the purchaser should pay the state taxes due from the district in consideration of an extension of time for payment of the timber. The court held that since the district had no obligation to pay the state taxes the extension was unenforceable as without consideration; but this did not effect the binding force of the original sale.

The Supreme Court of Tennessee *held* in *Storie v. Norman*, 130 S. W. (2d) 101 (1939), that a county had no power to levy additional taxes beyond the limited general authorization except where the state statutes clearly give such additional authorization. Under this general principle it was held that no taxes could be imposed for the costs of courts, for officers' salaries, or for taking care of paupers. In all these cases, there were statutory provisions fixing the amount due; but the court considered that the legislature contemplated that this should be covered under the general tax levy. On the other hand, imposition of special taxes for jail purposes and for a sinking fund for “time warrants” were upheld. In both these cases the court held that the special authorization for these purposes clearly indicated that a special tax could be levied to pay for them. In the case of the time warrants the special tax could cover both interest and principal. The court held that the county was authorized only to issue bonds but considered that the time warrants were really bonds under a different name.

Finally, in *Spokane v. State*, 89 Pac. (2d) 826 (1939), the Supreme Court of Washington *held* without discussion that a city is subject to a state excise tax upon the use of personal property brought into the state. The only question discussed was as to the interpretation of the use tax law.

(b) Property taxes—exemptions and abatements

The Supreme Court of Georgia in *Elder v. Home B. & L. Association*, 3 S. E. (2d) 75 (1939), asserted the well settled proposition that where a state constitution designates permissible exemptions from property taxation, other statutory exemptions are unconstitutional. Here the legislature attempted to exempt from taxation debts owed by the stockholders of a building and loan association to the association. This the court held was not permitted by the state constitution. The court apparently conceded that such an exemption might be sustained even under the strict terms of the state constitution, provided it merely did away
with double taxation; but it asserted that this exemption could not thus be justified, especially as it was not shown that all the exempted debts were secured by mortgage on taxable real estate.

The exemption of state property from municipal taxes was emphatically supported by the Supreme Court of Pennsylvania in Commonwealth v. Dauphin County, 6 Atl. (2d) 870 (1939). Here the state had invested part of its employees retirement system fund in a mortgage. The mortgage was foreclosed and the property bought in by the state. It was held that this property could not be subjected to local taxation. The court said that while there is a general presumption against tax exemptions, this presumption does not apply in the case of property owned by the state, which can only be subjected to local taxation by express and affirmative statutory language. The court also found that there was an express exemption for this property in the statute creating the employees retirement fund.

The Supreme Court of Florida in State v. Gulfport, 189 So. 703 (1939), held, without discussion, that homesteads were entirely exempt from property tax under a provision of the state constitution, even though the constitutional provision had been adopted after the original obligations payable from the tax money had been issued. These obligations were now being refunded, but it was held that the homestead property was entirely exempt.

The case of Y.W.C.A. v. Baumann, 130 S. W. (2d) 439 (1939), shows a somewhat more liberal point of view of the Supreme Court of Missouri as to tax exemptions than has sometimes been the case with that court. Here the property of the Y.W.C.A. in St. Louis was held exempt, notwithstanding the fact that the association taught swimming and tennis in the building, for which instruction a fee was exacted, and also that a cafeteria open to the public was operated in the building. The court said that the fees for the swimming and tennis classes were no more than frequently charged by educational institutions clearly exempt; and that the cafeteria was hardly a real commercial enterprise, and, in any event, was merely incidental to the principle use of the building. The entire property was therefore held exempt from taxation.

Even more liberal to taxpayers is the point of view of the Supreme Court of Tennessee in Memphis v. Alpha Beta Welfare Association, 126 S. W. (2d) 323 (1939). Here the question was as to the taxability of the property of a fraternity composed entirely of medical students of a university. The court held the property exempt, though conceding that college fraternity property is not normally exempt from tax, at least in the absence of an express statute. The exemption was predicated upon the theory that this fraternity was actually an educational institution. It was shown that the upper-class members gave counsel and advice to the younger students and that there were numerous informal lectures by city doctors. It was further alleged that the association of the members of this chapter with medical students of other chapters enabled the students to learn the "art" besides the science of medicine. It is difficult to see how this property was actually used any differently from any other fraternity property, and the exemption seems hardly justified.

On the other hand the decision of the Supreme Court of Rhode Island in Society for the Preservation of New England Antiquities v. Tax Assessors of Newport, 5 Atl. (2d) 293 (1939), 5 L. N. 60 (July, 1939), seems to go rather far the other way. Here property of an association organized in Massachusetts for the preservation of old houses in New England was held subject to local taxation on its property in Newport, Rhode Island. The decision was based on the ground that the association was not shown to be educational or charitable. The court seemed to emphasize particularly a provision of the charter limiting the admission to such houses which could be charged to the public. It was contended that this did not expressly say that the public was to be admitted at all—an argument which reminds one a little bit of the famous (or infamous) legal decision by Portia. It is submitted that this decision is unduly illiberal, and that the exemption should have been accorded.

In Bridgeport v. First National Bank, 7 Atl. (2d) 829 (1939), the Supreme Court of Errors of Connecticut decided that a proceeding for the abatement of taxes under a statute permitting such an abatement where the taxpayer was poor was not put to an end by the death of the person assessed. This decision seems rather obviously correct.

(c) Property taxes—assessment and levy

Exporters Etc. Co. v. Martin, 130 S. W. (2d) 860 (1939), a decision by the Texas Court of Appeals, lays down the well-settled principle that the assessing authorities are accorded wide latitude in their methods of determining valuation. Here
the Board of Equalization took into consideration many facts and circumstances in valuating the property in question. The court declined to change the valuation even though a jury had found it too high.

Similarly, Commonwealth v. Louisville Gas and Electric Co., 128 S. W. (2d) 778 (1939), a decision by the Appellate Court of Kentucky, sustains the determination by the State Tax Commission of the franchise value of a utility even though the valuation was made solely on the basis of net income, and although there was considerable dispute as to certain items of deduction in computing such net income. The securities of the utility were apparently not dealt in on the market, and the court therefore held that the basis of net income was the best or at least was a permissible basis for valuation. It was conceded that the assessment could have been set aside for fraud, but no fraud appeared merely because of considerable differences of opinion between the assessing board and the state.

The similarly wide discretion given to the administrative authorities in assessing taxes is shown in Payne County Excise Board v. Atchison Etc. Ry. Co., 90 Pac. (2d) 422 (1939), where the Supreme Court of Oklahoma held that a provision of the state laws that unclaimed tax refunds should be added to the surplus for the fund for which the taxes were collected did not necessarily require a corresponding reduction in the tax levy for that fund in the subsequent year.

It is well settled that due process of law requires reasonable notice to taxpayers of the assessment of their property. However, the Kentucky Court of Appeals in Board of Supervisors v. Smith, 128 S. W. (2d) 540 (1939), held that personal notice of an increase of assessment is unnecessary. Here the notice was taken to the house of the taxpayer, and on failure of any one to answer the door-bell, was posted on the door. This was held adequate notice. It may be noted, however, that this particular taxpayer could hardly claim inadequacy of notice since he was compelled to admit that he actually saw the notice the same day. A similar rule was applied as to the service of notice of delinquency by the Louisiana Court of Appeals in Reed v. Stinson, 188 So. 509 (1939).

(d) Property taxes—collection

That there is no vested right in the rules covering the collection of taxes, which are subject to change at any time, is entirely clear; but the courts tend to construe statutes making such procedural changes rather strictly. This is shown by the decision of the Superior Court of Pennsylvania in Harrisburg Trust Co. v. Romberger, 5 Atl. (2d) 597 (1939). Here the legislature changed the law covering the method of collecting taxes. It was held that this change did not repeal a previous statute governing tax sales, and providing that where the property brought sufficient to cover the delinquent taxes, the lien of such taxes was removed even though they were not actually paid.

The rather absurd lengths to which some courts go in construing tax statutes as not imposing personal liability is evidenced in the recent decision of Commonwealth ex rel. Martin v. Stone, 130 S. W. (2d) 750 (Ky., 1939). Here it was attempted to impose a personal liability for taxes upon the owner of property; but the court denied such personal liability even though the statute apparently provided expressly for it. The court said that this provision of the statute was intended to apportion the liability between the holders of different interests in the property, but not to impose a personal liability upon any one of them. It must be conceded that this rather forced construction of the statute is perhaps partly justified by a later statute (not applicable in this case) which had clearly imposed personal liability.

The Supreme Court of Pennsylvania held in In re Curtis, 6 Atl. (2d) 283 (1939), that a city has no power by ordinance to impose a penalty for non-payment of taxes collected by the city as agent for the state. The court conceded that the grant of power to a municipality to impose taxes carries with it a power to impose penalties for non-payment; but since these were state taxes, merely collected by the city as a matter of convenience, the state law as to penalties governed, and the city had no power to add to it. Somewhat similarly, the Supreme Court of Arizona held in Maricopa Co. District v. Oglesby, 91 Pac. (2d) 257 (1939), that a provision of a state law giving to a county all interest and penalties on taxes of a conservation district within the county, but collected by the county, was valid. The court contended that this award of interests and penalties to the county was intended as compensation due it for its work in collecting the taxes.

The Supreme Court of Wisconsin in Munkwitz Co. v. Deidrich Schaefer Co., 286 N. W. 30 (1939), held that penalties and interest on delinquent taxes,
as well as the taxes themselves, are a preferred claim in the case of bankruptcy of the owner of the property. The court conceded that there were many authorities to the contrary on this point. The preference did not however extend to a 5% penalty to be paid to a police officer for collecting the taxes. The court held that in fact this penalty could not be claimed at all, since the taxes were not collected.

The Supreme Court of Rhode Island held in Conaty v. Guaranty Loan Co., 6 Atl. (2d) 698 (1939), that there is no preference even for taxes themselves in a receivership proceeding, unless claim therefore is duly made in the proceedings by the municipality to which the taxes are owed. Accordingly, a legal or equitable assignee of the rights of the municipality could not claim preference unless the municipality itself had made the claim. The court further held that a mortgagee which had paid the taxes on the property, was not entitled to subrogation to the municipal tax lien—an illiberal but unfortunately not uncommon judicial point of view. The mortgagee had previously brought an action at law to recover the amount paid, and the court contended this evidenced an election not to claim subrogation.

The case of Myrick v. O'Neill, 92 Pac. 651 (1939), a decision of the California Court of Appeals, is a holding that a revocation of the franchise of a corporation for failure to pay its franchise tax does not invalidate a subsequent mortgage of its property made by the corporation. The court relied upon a change in the statutes of the state which made contracts of corporations thus suspended from activity merely voidable and not void, as provided in the previous statute. In any event, it would seem this result should be reached, even under the old statute, in the interest of security of title of real estate.

The courts necessarily construe statutes imposing tax and similar liens rather strictly. This principle may have been carried rather too far by the Supreme Court of Alabama in King v. American Surety Co., 187 So. 458 (1939). Here the statute provided that in the case a petition was made to a court for the establishment of a drainage district and the court found the petition was insufficient, a lien for court costs should be placed upon the property of the petitioner. In this case, the petition was found sufficient but was voluntarily withdrawn by the petitioner. It was held that no lien should be imposed upon the property since the statute provided for such only when the petition was found insufficient.

In Edge v. Lexington, 127 S. W. (2d) 393 (1939), the Court of Appeals of Kentucky held that a taxpayer who resists an action by a city to enforce tax liens, on the ground that the liens are invalid, cannot claim the right to redeem given by the same statute which provided for the tax liens. The position of the court was that if a taxpayer insists that the statute is invalid he cannot claim any affirmative rights given by the same statute.

The rules as to tax sales continue to be rather strict, at least so far as involves compliance with statutes. This is shown by the decision of the New York Court of Appeals in Olds v. Jamestown, 20 N. E. (2d) 756 (1939). Here the state statute provided that notice of municipal tax sales should be published once a week for six successive weeks. The city council of Jamestown attempted to amend the charter by changing the requirement of publication to only three weeks. The court seems disposed to sustain the validity of this change, though expressly reserving the point. However, it held that where the last publication came only sixteen days after the first publication, the notice was insufficient, as the three publications were required to be a week apart. The tax sale in question was held therefore wholly void.

In Baker v. Duson, 189 So. 510 (1939), a decision of the Court of Appeals of Louisiana, a municipal tax sale was sustained even though the purchaser never entered into possession of the property, and even though neither the original owner nor the purchaser at the tax sale paid subsequent state and parish taxes. The property was adjudicated to the state for the delinquent state and parish taxes, but was redeemed by the original owner. It was held nevertheless that the original sale for delinquent taxes was valid and binding. The redemption from the sale for delinquent state and parish taxes was expressly made without prejudice to any privilege of the municipal corporation; but the court indicated that the same result would have been reached anyway.

In District Landowners Trust v. Adams Co., 89 Pac. (2d) 251 (1939), the Supreme Court of Colorado sustained a statute authorizing any irrigation district to sell tax sale certificates in its possession at such times and under such terms as the governing board of the district should determine. A sale by the particular district of a number of tax certificates in bulk was sustained, even
though the taxes were delinquent before the statute was passed, and even though a prospective purchaser, who was interested in part of the property and therefore desired to bid, was not notified of the sale. The decision is an encouraging example of a tendency (which should be strengthened) to permit the simplification and the increase of effectiveness of tax sales.

On the other hand Culmer v. Office Realty Co., 189 So. 52 (1939), a decision of the Supreme Court of Florida, seems somewhat reactionary. The question was as to the validity of extending the statutory time for redemption from tax sales. The court quite reasonably held that this could not be done where the tax sale certificates were in the hands of private purchasers at the time of the extension. But it further held that the same rule applies even though the certificates were in the hands of the state. To thus extend the time for redemption would, the court held, interfere with the settled system of collection of taxes in the state, and therefore violate the provision of the constitution requiring property taxes to be uniform and to be annually levied and collected. The Florida Court has several times before taken a very narrow attitude as to the legality of the compromise of taxes; and the present decision seems an extension of the same unfortunate point of view.

(e) Property taxes—rights of taxpayers

In Davenport v. Snyder, 90 Pac. (2d) 652 (1939), the Supreme Court of Oklahoma dealt with an attempt of a single taxpayer to enjoin a tax sale not only of his own land but as to all lands on which this tax was delinquent. The contention of the plaintiff was that while the tax was valid the method of collection used by the county was invalid. The decision of the court was that such a suit could not be maintained; that no taxpayer could enforce the rights of any other taxpayer to prevent the enforcement of a tax. Nor did the plaintiff show that his interests as a general taxpayer would be substantially affected even if the sale was a useless expense to the municipality.

That a taxpayer cannot ordinarily prevent the collection of delinquent taxes by mandamus is shown by the decision of the Supreme Court of Ohio in State v. Pontius, 21 N. E. (2d) 868 (1939). The taxpayer claimed that part of the tax which it was not tendering and the acceptance of which tender was attempted to be enforced by mandamus, was illegal. The court said that this was essentially an attempt to enjoin the collection of this tax, which could not be allowed, where there apparently would be an adequate remedy at law.

A similar point of view was taken by the Court of Chancery of New Jersey in Luckenbach Terminals, Inc. v. North Bergen, 6 Atl. (2d) 548 (1939). Here the taxpayer attempted to secure an injunction against the enforcement of a tax, on the alleged grounds that the apportionment and assessments were fraudulent and void. The court declined to permit the action to be maintained, holding that a more specific case must be shown for equitable relief, especially as the plaintiff appeared to have been guilty of considerable laches. The court pointed out that the normal method of review of an assessment by a court was by a writ of certiorari.

In Huber v. Delong, 91 Pac. (2d) 53 (1939), the Supreme Court of Wyoming had to deal with an injunction suit which though relating to taxes is clearly maintainable under proper circumstances. Here the suit was not an attempt to enjoin the collection of taxes but was directed against a purchaser at a tax sale. The suit was brought by the former owner of the property and alleged that the sale was void. The invalidity of the sale seems to have been conceded. The court held, however, that the plaintiff must do equity by repaying the amount paid at the tax sale by the defendant; and in the absence of an offer on the plaintiff’s part to do this, the suit was dismissed.

In certain cases an aggrieved taxpayer will be debarred from any relief because of his own delinquency. An example of this is Bridgeport Screw Co. v. Bridgeport, 7 Atl. (2d) 649 (1939), a decision of the Supreme Court of Errors of Connecticut. Here the assessment for the years 1927 to 1934 was made on the basis of tax maps, which erroneously included as part of the plaintiff’s property some adjoining property. The plaintiff paid the taxes assessed for these years without discovering the mistake and now sues to recover the additional taxes thus paid. The court held that the plaintiff was barred by his own negligence. Somewhat similar is the decision of the Supreme Court of Colorado in Stephens & Co. v. Board of Equalization, 92 Pac. (2d) 732 (1939). Here the mistake was in the valuation; but it was due to a clerical error of the plaintiff’s bookkeeper in making the return of its property. Here too the court denied recovery of additional taxes paid, on the ground that it was
the fault of the plaintiff itself rather than of the taxing authorities.

(1) Other municipal taxes

The principles which have already been stated apply in many respects in municipal taxes other than property. However, there have been an increasing number of cases involving particular features of these other sorts of taxes.

The Supreme Court of Appeals of Virginia held in Campbell v. Goode, 2 S. E. (2d) 456 (1939), that a provision of the state constitution prohibiting the collection of poll taxes by legal process until they have been delinquent for three years invalidates a statute making the payment of poll taxes a prerequisite to a license to practice law. The court said that this was certainly collection by legal process, as the practice of law by an unlicensed person is a serious crime.

The District Court of Appeals of California held in McAdams Oil Co. v. Los Angeles, 89 Pac. (2d) 729 (1939), that a city ordinance exacting a license tax of ½ cent per barrel of oil produced within the city limits was valid. The court conceded that this was a tax and could not be sustained as an inspection fee. Nevertheless, it was a valid tax, and not subject to attack because it ignored the specific gravity, and therefore the value, of the oil produced, the court holding that a distinction of this basis is not practical or required.

Less liberal, and it is submitted less sensible, is the decision by the Supreme Court of Alabama in Rochell v. Florence, 188 So. 249 (1939), invalidating a city tax on the distribution of soft drinks from a warehouse not located in the city. The court said that this was a tax upon a method of doing business, which is unconstitutional—an indication that this court has never heard of the chain store tax cases! But the decision of the Supreme Court of Georgia in Elder v. Smith, 2 S. E. (2d) 670 (1939), invalidating a business license tax based on gross income of the previous year, on the ground that it is unfair to determine this year’s tax on the basis of last year’s business, seems almost as bad. Perhaps this latter case might be sustained on the theory that the tax was at an increasing rate, which seems in disfavor as to gross sales taxes; but the grounds given would invalidate practically every gross and also every net income tax.

In Decatur v. Poole, 189 So. 483 (1939), the Supreme Court of Alabama had before it the question whether a city sales tax could be avoided by purporting to deliver the goods sold to the buyer outside the city. The scheme was that the goods should be delivered in the city but the buyer should take them outside of the city (being paid for transporting them) and deliver them to himself there. It is hardly necessary to add that the court made short shrift of this plainly fraudulent scheme, and held that the sales were made in the city and taxable by it.

The Supreme Court of Pennsylvania has recently decided two cases involving the nature of a net income tax. The first of these, Sley System v. Philadelphia, 5 Atl. (2d) 583 (1939), involved the state net income tax in its effect on a municipal tax on the gross receipts from parking lots. A state statute prohibited cities from taxing property or transactions taxed by the state. The court held that this provision invalidated the city tax, since the owner of the business had to pay a net income tax to the state. This net income tax must be regarded as a tax upon the property and business, which is therefore immune from tax by the city. Taking the decision literally, it is hard to see much left for the city to tax.

In Butcher v. Philadelphia, 6 Atl. (2d) 298 (1939), the same court held without discussion that a city net income tax is valid but is to be regarded as a property tax. It is therefore subject to the uniformity clause, and no exemptions can be permitted. Neither can a provision giving a credit for ordinary property taxes paid by the same taxpayer be allowed. The law was sustained but with provisions of this sort eliminated. It is submitted the Supreme Court of Pennsylvania is unduly limiting municipal and even state taxing power by its unfortunate misunderstanding of the nature of a net income tax, which should be regarded as a property tax.

Robert C. Brown

DELEGATION AND CONSTRUCTION OF MUNICIPAL POWERS

A. Nature and Construction

Reaching fairly consistent results as to actual disposition of the problems considered, several recent cases present interesting variations in the language used to describe the nature and construction of municipal powers. All cases found within the last few months recognize the well-settled prin-
ciple as announced in Judge Dillon’s classic statement:

“A municipality is a creature of the legislature and it can exercise (1) the powers granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation—not simply convenient, but only those which are indispensable, to the accomplishment of the declared objects of the corporation.”

As the Honorable Murray Seasongood frequently points out, however, this statement itself contains an ambiguity as to the implied powers. There is an essential inconsistency between the restriction of implied powers to those necessarily implied, while at the same time permitting inclusion of those fairly implied. This classic statement may itself be the cause of some of the variation in the approach of courts to the interpretation of municipal powers or it may be merely a classic example of the confusion resulting from the complicated and numerous sources from which municipal powers are derived and applied to an ever-changing and widening scope of facts surrounding municipal activities. As a result it may be said at the risk of a perversion of language that, while all cases adhere to the strict rule of interpretation that doubtful powers are to be resolved against the municipality, some courts apply the strict rule with great liberality. There is a natural tendency to assume that home rule cities have broad general powers coextensive with those of the legislature itself. While this is probably the practical result of the wide sphere of activity reposed in a municipality with respect to local affairs under home rule, nevertheless, it has been appropriately pointed out that, except for the differences in the source of power and the necessarily resulting differences from the broad scope of powers conferred, the construction of powers in a home rule city should follow the same principles as those of non home rule cities. See Bird, J., dissenting in Bowler v. Nagel, 228 Mich. 434, 200 N. W. 259 at 262 (1924), and City of Kalamazoo v. Titus, 208 Mich. 252, 175 N. W. 480 (1919).

Unusually broad is the language used by the Supreme Court of Michigan in construing the powers of the City of Detroit in the case of Detroit v. Safety Inv. Corp., 288 Mich. 511, 285 N. W. 42 (1939). The actual decision of this case is ortho-
dox. The question presented was whether the city had authority to adopt a charter amendment providing for a specific method of foreclosure for tax liens. The court held that the power to levy taxes for the existence and financial support of the community must be construed as implying power to provide for prompt methods of enforcement. In discussing the interpretation of the powers of the City of Detroit under the Home Rule Act, however, the court quotes with approval language originally appearing in the case of Thomas v. Board of Supervisors, 214 Mich. 72 at 85, 182 N. W. 417 at 421 (1921).

“When action is taken by a state or one of its municipal subdivisions, manifestly in the interests of its people as a whole, and the rights of individuals are not abridged thereby, and such action is not within the inhibition of some constitutional or statutory provision, it should be upheld as a valid exercise of authority, though lacking in any positive grant of power to support it.”

This language is significant as indicating an approach quite different from that of the classic statement above. It seems to substitute for the carefully enumerated steps of strict construction a broad approach safeguarded by the limitations of the manifest interest of the people as a whole, the rights of private individuals and specific constitutional or statutory limitations.

In the case of Kennerly v. Town of Dallas, 215 N. C. 532, 2 S. E. (2d) 538 (1939), 5 Legal Notes 49 (July, 1939), the court quotes with approval the traditional language of Judge Dillon but was presented with the very simple problem of determining the obvious meaning of an express legislative grant of power. The action was brought against the municipality for death alleged to be the result of negligence of municipal employees in the operation of an extra-territorial electric light system. Among other defenses the city contended that its operation of an electric light plant for distribution of electric service outside the corporate limits was ultra vires the corporation and therefore no liability of the municipality could result from the ultra vires act. Specific legislation, however, was cited by the court together with amendments thereto which conferred on the municipality the power to furnish light to any person, firm, or corporation outside the corporate limits and to fix the rates therefor.
A New York court in considering the validity of a local law purporting to authorize store keepers and peddlers in New York City to display Christmas trees, holiday decorations and toys on sidewalks during December, found the act to be outside the power of the municipality. The court first read the measure in the light of the existing charter and found that it conflicted with a provision requiring that revocable licenses be required for any permitted use or obstruction of the streets or sidewalks for erection of booths, stands, displays, etc. The court then considered the possibility of interpretation of the measure as a charter amendment and found it invalid on this count because the procedure for enactment of a charter amendment had not been complied with. *People v. Berner*, 10 N. Y. S. (2d) 339 (N. Y. Co., 1939). The court said:

"Governmental agencies, be they legislative, executive or judicial, may not trespass beyond their defined or fairly implied authority, nor infringe upon the limitations specifically expressed in the basic organism creating them and under whose authority they are enabled to exist and to function."

An undoubted application of a very strict and perhaps short sighted interpretation of municipal power is found in a Rhode Island case entitled *In re Opinion to the House of Representatives*, 5 Atl. (2d) 455 (R. I., 1939). The Supreme Court had been asked its opinion as to the power of the Providence Bureau of Police and Fire to adopt parking meters as a means of traffic control. The court held that there was no express charter or statutory provision authorizing a charge for parking on the city streets. They indicated that it was significant that at no time in the past had any such charge been made and concluded that the power to impose a parking fee did not exist. It should be noted that in this case the court failed to consider or did not treat as of any importance the distinction recognized in most of the parking meter cases in other jurisdictions between a tax for revenue purposes and a license fee imposed to defray the reasonable cost of police regulation. Most of the cases find power to impose a fee designed to return to the city the reasonable cost of police regulation as an incident of the police power.

Correspondingly rigid is the interpretation of the Supreme Court of Oklahoma of the power of the City of Broken Bow to levy a license tax on an oil company pursuant to the grant of power to levy a license tax on occupations and on "merchants of all kinds". In this case the court held that the word "merchant" necessarily meant one who not only sold at retail but who also purchased commodities for resale. The oil company in question was a manufacturer-producer and did not purchase commodities for resale but sold its own products principally at wholesale, and to a small extent, retail. It is noteworthy that the statement of the method of interpreting powers set forth in this case omits any reference to powers "fairly" implied. It concludes that any doubt as to the existence of a power is to be resolved against the municipality. *Magnolia Pet. Co. v. City of Broken Bow*, 184 Okl. 362, 87 Pac. (2d) 319 (1939). A comparison might be suggested between this court's interpretation of the meaning given by the municipality to the word "merchant" and the court's interpretation in a case discussed below of the meaning of the word "newspaper of general circulation" as adopted by a municipality. *See King County v. The Superior Court in and for King County*, infra.

The Court of Appeals of Kentucky in *Gregory v. City of Raceland*, 130 S. W. (2d) 825 (Ky. 1939) found that a sewage disposal plant is not part of a sewage system and therefore the municipality was not empowered to construct such a disposal plant and assess the cost thereof against property abutting on the sewer line. While the court announces the view of strict interpretation in the strictest terms the decision reached would be impelled by any approach adopted in view of the interpretation of legislative intent by simple statutory construction. Statutes of the state specifically provide that cities of the third and fourth classes may construct sewer systems and include in them sewage disposal plants. The court decides that the omission of reference to sewage disposal plants in the corresponding powers prescribed for cities of the fifth class must be taken as intentional.

**B. Discretion**

The Supreme Court of Washington in the case of *King County v. Superior Court*, 92 Pac. (2d) 694 (Wash. 1939) held that the power of the county commissioners to contract with a newspaper for insertion of legal notices was a discretionary power invested in the board of commissioners as an administrative body. The exercise of such power is held, therefore, to be beyond the scope of judicial review so long as it does not transcend the limits placed on such power by the charter and the state...
laws and so long as the power is not shown to be exercised in an arbitrary or capricious manner. This case is particularly interesting for its discussion of the nature of a newspaper as distinguished from a "propaganda" or "house organ". It is to be noted that in the trial of the case below a large number of newspaper men testified unanimously that the newspaper with which the commissioners had contracted for insertion of legal notices was not a newspaper in the proper sense of the word but was a propaganda sheet of limited circulation or a "member house organ". The contention was made that the authority of the Commissioners extended to contracting for insertion of legal notices in a newspaper of general circulation only and that the newspaper with which the commissioners had contracted for insertion of legal notices was not a newspaper in the proper sense of the word but was a propaganda sheet of limited circulation or a "member house organ". The contention was made that the authority of the Commissioners extended to contracting for insertion of legal notices in a newspaper of general circulation only and that notices published in the paper chosen would be invalid. The decision reviews a large number of cases and decides that for the purpose of legal notices the dictionary or journalistic definition of a newspaper need not be followed. The court says:

"An official newspaper, designated as such by a municipal corporation, whether city, county, or state, is available to anyone who desires to keep in touch with the official notices therein published, and anyone desiring to read the official bulletins may subscribe to the newspaper or read it at some library."


C. Delegation

Affirming the general proposition that a township committee cannot delegate its powers to an individual and that such a committee must act by way of ordinance or resolution, the common pleas court of Monmouth County, New Jersey, held that a police officer was improperly discharged for violation of regulations which had been promulgated orally by the chief of police. Harvey v. Poole, 7 Atl. (2d) 630 (N. J. 1939). In this case the township committee had power to adopt rules and regulations for the management of the police department but it delegated its authority to do so to the chief of police who promulgated oral regulations without any action thereon by the township committee.

D. Contracts

Perhaps the most carefully considered case of those decided in the past few months on the subject of municipal power to contract is Federal Paving Corp. v. City of Wauwatosa, 286 N. W. 546 (Wis., 1939). The court in its opinion not only takes occasion to analyze the whole matter of municipal liability for unjust enrichment in cases involving void contracts, but also cites law review articles, treatises, and section 62 of the Restatement on Restitution. In spite of its exhaustive analysis of the subject the court holds that, however harsh the result may appear to be, the weight of authority upholds the proposition that failure to comply with mandatory procedure in contracting with a municipality leaves the contracting party without remedy on principles of quasi-contract or restitution as well as on the contract. In this situation a paving contract with the city was invalid because of the failure of the city to comply with the statute requiring publication of advertisements for bids as the basis for letting the contract. The court sets out and follows as a principle the proposition that a "municipality does not become liable for money, goods or services upon principles of unjust enrichment where it is prohibited from contracting in any other than a specified way as, for instance, with the lowest bidder."

As evidence of the growing trend toward a more liberal liability of municipalities for restitution and for unjust enrichment on principles of quasi-contract at least where the municipality has power to contract for the specific subject matter but the contract executed is invalid because of failure to comply with statutory provisions in the manner of contracting see American La-France, Inc. v. City of Philadelphia, 184 So. 620 (Miss. 1938); 4 Legal Notes 305 (March, 1939), noted (1939) 16 N. Y. U. L. Q. Rev. 494. Where the subject of the contract is legal and the invalidity of the specific contract results from failure to comply with mandatory procedure, cases usually permit recovery against the municipality for benefits conferred. In general, the courts will not permit recovery in quasi where the invalidity of the express contract results from failure to comply with a mandatory procedural provision. The American La-France, Inc. case is very unusual in view of the fact that the court held that since the contract was invalid because of failure to comply with a mandatory provision the contractor was
denied recovery for the reasonable value of equipment furnished. In order to relieve the hardship of the situation, however, the court referred to the power of the municipality to lease rather than purchase the equipment that had been contracted for under a purchase and sale agreement and held the city liable as a lessee for reasonable compensation for use of the equipment.

The great volume of municipal activity and the expansion of municipal enterprises is indeed persuasive justification for expanding the rule of liability of a municipal corporation for restitution or unjust enrichment while at the same time recognizing, of course, the public policy requiring limitation of municipal activities by strict construction in order to protect the taxpayer.

Following the general rule is the case of *Hamer v. City of Huntington*, 21 N. E. (2d) 407 (Ind. 1939). In this case the mandatory provision that funds be appropriated for purchase of equipment before the contract of purchase may be legally executed was not complied with and the court held that a taxpayer could enjoin payment for equipment delivered to the city under the contract which was void. The court also held that although the city had power to purchase the fire engine and equipment involved, the contract was void and could not be subsequently ratified.

Two cases hold that no claim for compensation may be made on a basis of implied contract or *quantum meruit* where an express contract governs the relations of the parties and the services rendered were governed by its terms. *Ralph B. Slippy Engineering Corporation v. City of Grinnell*, 286 N. W. 508 (Iowa 1939); *Bronx Asphalt Corporation v. City of New York*, 13 N. Y. S. (2d) 197 (City Ct. of N. Y., Bx. Co., 1939). The New York case, however, also expresses the proposition that where the city has received the benefit of services rendered by the plaintiff under the terms of the contract, it may not enrich itself through misrepresentations, authorized or unauthorized. The city was bound by representations made to the contractor by the chief of the bureau of audit and the disbursing clerk in the comptroller's office concerning the effect of a reservation contained in the release executed at the time of the receipt of a warrant for less than the amount claimed.

Extra compensation claimed on the basis of an implied contract was also denied in the case of *Willis Bancroft, Inc. v. Millcreek Tp.*, 6 Atl. (2d) 916 (Pa. 1939). The contractor had a properly executed contract with the township but performed the work according to extensive and material changes ordered by the engineer which increased the cost of the work and extended the time necessary for completion. The theory of his claim, which was first presented to a board of arbitration, was that the formal contract had been abandoned and one substituted as an implied contract in parol. The township by statute is denied power to make any expenditure on a contract not in writing over $500. The amount involved here was many times that sum. In view of the lack of power of the municipality to make a parol contract for a sum in excess of the set limit, the court held the plaintiff without a remedy in spite of the fact that the city had received the benefit of the work.

**E. Indebtedness**

Neither the contract in the bonds nor the doctrine of estoppel afforded a bondholder a remedy to seek payment from other funds of the city where the bonds had been issued payable only from local improvement funds. *State ex rel. Booth v. Tatro*, 96 Pac. (2d) 206 (Wash., 1939). The City had power to issue local improvement district bonds payable only from the proceeds of special assessments for the local improvements. The bonds carried the recital of the limitation of the fund from which they were to be payable. The city, without authority, set up a revolving fund for the payment of these bonds. A bondholder brought action to compel payment of his bonds by the city from the revolving fund. The court held that payment by the city from the revolving fund was unauthorized and that since the bondholder had notice of the limitations on recovery in his bond itself as well as the statutes, no doctrine of estoppel could be considered.

**F. Moral Obligation**

The above cases are good examples of situations in which a strong appeal could be made to morals and fairness in spite of the absolute legal invalidity of the claims advanced. A satisfactory disposition of such problems requiring, however, appropriate legislation is suggested in *State v. Thiessen*, 286 N. W. 561 (Wis. 1939). In this case the city of Oshkosh had had originally power to construct water main extensions and to assess the costs against the abutting owners or to assume the costs as a public expense. For the first few years the costs were assessed against abutting owners but later the
policy was changed and the costs assumed as a public expense. Further legislation was obtained which permitted refunding to the abutting owners the amounts which they had paid as water main extension costs. The statute itself stated that the refund was authorized because of the obvious unfairness in having assessed the costs against some owners as improvements while giving others the benefit of similar improvements without cost. Mandamus was sought to compel refund of assessments according to a council resolution pursuant to the statute. It was held that the legislature had validly authorized the refund as a recognition of a moral though legally unenforceable obligation. This is held to be a public purpose and the state act, although adopted as a result of the specific situation in Oshkosh, applies equally to all cities in the state and is therefore general legislation of uniform operation.

G. Public Welfare

Appropriation of funds for relief of needy inhabitants is generally recognized as an appropriate power for delegation by the legislatures to municipalities in spite of the general limitation that public funds cannot be expended for the benefit of private persons. Relief of paupers, while immediately benefiting the individual recipient, is a discharge of the public duty of the community to provide for the general welfare. There is even some slight authority for the proposition that such power is “inherent” in a municipality without legislative grant. See McLean Co. v. Humphreys, 104 Ill. 378 (1882).

The recent decision of Board of Sup'rs., Attala County v. Ill. Central R. Co., 190 So. 241 (Miss., 1939), recognizes the power of the legislature to limit to a reasonable extent the amount of taxation for support of the poor but denies that the legislature could remove the power to tax for this purpose altogether. The state constitution confers on the local authority the power to provide homes, etc. for the poor, aged, and unfortunate. This power is construed as carrying with it the necessary power to accomplish the purposes authorized. In this suit involving a petition for refund of taxes levied for support of paupers which were alleged to be in excess of the limit prescribed by the legislature, the court held that the legislative limit was confined to taxes for general purposes and that the levy for poor relief was for a special purpose not subject to the general limitation.

Two other welfare cases discuss the problem of proof of the settlement of a pauper in one town and the facts which will show the loss of such a settlement upon his removal to another. Each case involved action by one town or the state industrial commission against another town to recover the amount of relief furnished persons alleged to have a settlement in the defendant town and not to have lost it. In the case of Inhab. of Moscow v. Inhab. of Solon, 7 Atl. (2d) 729 (Me. 1939), the pauper had established a settlement in town A by residing there for five years without receiving relief as a pauper. He left town A for a period of from three to six weeks with the intention of returning and did return. It was held that his absence did not cause him to lose his settlement in town A. In the case of Town of Cleveland v. Industrial Commission, 286 N. W. 558 (Wis., 1939), the Industrial Commission reimbursed the town which had given relief to a pauper because the pauper was not settled in that town and the Commission then sued the town of the pauper's alleged settlement to be reimbursed. The pauper was held not to have lost his original settlement by his absence from the town of his admitted first settlement, since he was not absent during any period as a “party not a pauper and not needing or receiving support”.

JOHN A. McINTIRE

MUNICIPAL UTILITIES

A city may provide for the acquisition or extension of a municipal utility by pledging the revenues from the improvement thereby obtained, without being subject to the limitations upon incurring indebtedness. But if it obligates itself expressly or by implication to draw upon the proceeds of taxation to make stipulated payments, it must comply with all requirements for becoming indebted. A new illustration of this well recognized rule is furnished in Neff v. City of Jacksonville, (1939) 190 So. 468. The town of Green Cove Springs entered into a contract for a period of ten years with the city of Jacksonville in Florida, to purchase a supply of electrical current delivered at its generating station for distribution by the town. The town agreed to pay for such energy unit prices not less than $500 per month.

The constitution of Florida prohibits a muni-
ceptibility from issuing bonds without a vote of the freeholders. The contract in question was not submitted to the freeholders. It obviously was contemplated that the rates collected by the town for supplying the purchased current to the inhabitants would provide a fund for the payment of the purchase price to Jacksonville. But the proceeds of the rates were not pledged. The Supreme Court of Florida, Division B, said that the contract might contingently place a liability for the minimum monthly payments of $500, $60,000 for the ten years, upon the town, which in turn might require the exercise of the taxing power to satisfy. Consequently the court held that the contract was a bond within the meaning of the constitutional provision, and being made without an approving vote of the freeholders, was illegal.

In Davies v. Village of Madelia, (1939) 287 N. W. 1, a contract between the village of Madelia, Minnesota, and Fairbanks, Morse & Co. for the construction of a light, heat and power plant to be owned and operated by the village as a municipal utility, was under attack in a tax-payers' suit. A utility company had been supplying the village and its inhabitants with electricity under a contract which was expiring. The controversy was one which frequently arises between advocates of municipal ownership and operation of public utilities, and those who favor keeping such functions as private enterprises under public regulation.

The Supreme Court of Minnesota overruled all objections to the contract and upheld it. The objection discussed at greatest length, was that representatives of Fairbanks, Morse & Company attended village meetings during the discussion of the project and made suggestions concerning the plans and specifications. But the court pointed out that other interests were represented including the utility company whose franchise was expiring. The court held that there was no collusion but only open discussion of the matters involved, and that the council acted "freely and independently."

Attack was made upon a provision of the specifications that any excess in earnings should be used only for extensions and additions to the plant, and that the earnings from that source should be used only toward payment for the original plant. The court held in effect that this was a matter fairly within the discretion of the council; that all the earnings would be made possible by the establishment of the original plant, and consequently it was not unreasonable to provide that they should be used to retire the investment in it.

Can a local government operating a water system, enforce the payment of delinquent water bills against a transferee acquiring the property to which the water was furnished, after the incurring of the charges? The Supreme Court of Utah answered no in Home Owners Loan Corporation v. Logan City, (1939) 92 Pac. (2d) 346, and the Supreme Court of Colorado answered yes in Home Owners Loan Corporation v. Public Water Works District, (1939) 92 Pac. (2d) 745. The difference in the decisions is explained by a difference in the statutes.

In the Utah case the ordinance of Logan City provided that water should not be turned on to any premises until all charges for water supplied to the same or a previous owner or occupant had been paid. The state statute provided that if the owner or occupant of any premises failed to pay for water furnished to such owner or occupant, the city should not be required to turn the water on again until all arrears had been paid. The court held that under this provision of the statute a subsequent purchaser of premises could not be compelled as a condition of securing water, to pay the arrears of a prior owner or occupant, unless he had agreed to be liable for them. The court further said that under the Utah statute no lien was impressed on property for delinquent water bills nor was a city empowered by ordinance to create such a lien. To the extent that the Logan City ordinance purported to do so it was invalid.

In the Colorado case, the statute provided that charges for water supplied by water districts should be a continuing lien upon the property upon which they are levied, prior to all other liens except general taxes. The court held that under this statute there was a lien for the price of water supplied, of which all persons dealing with the property were required to take notice. It further held, that the lien was not lost by the water district's failing to shut off delivery of the water when it became entitled to do so on account of the delinquency. Apparently the Home Owners' Loan Corporation had not known of the charge until after it had perfected title to the property by foreclosure of its mortgage. Nevertheless it was held liable for the lien.

In Nelson v. Wayne County, (1939) 286 N. W. 617, it appeared that the Board of Auditors of Wayne County, Michigan, had entered into contract
with the Board of Water Commissioners of the City of Detroit to supply water to the Wayne County Training School, about five miles from the Detroit city limits, the mains to connect with the existing water system of Detroit and necessary reservoir and machinery to be supplied by the county. The agreement provided that the city should have the right to supply water to owners of other properties through the new mains but only with the written approval of the county. The county expended about $200,000 in building the mains, reservoir, and apparatus specified in the contract.

From time to time about twelve permits were issued for supplying water from the new extension to private homes in the vicinity. Another application for supply to a residence was made, and investigation showed that the applicant was intending to put on the market a residential subdivision. The particular addition to the demand upon the extension would not be substantial, but the extension of it to a subdivision would impair the supply to the county institution for which the investment of the county had been made. Consequently the application for approval was rejected by the county. The Supreme Court of Michigan held that the rejection was not arbitrary or unreasonable and upheld the dismissal of a mandamus proceeding brought by the applicant against the county.

City of Coral Gables v. City of Miami, 190 So. 427, presents a situation arising out of the Florida hurricane in 1935. The city of Coral Gables was operating at that time a street railway on streets in the city of Miami under a franchise granted by Miami in 1925 to a street railway company and assigned by the company to Coral Gables in 1927. The storm disrupted the street railway system to such an extent that some time would be required to restore it to service, and Coral Gables asked and was granted by Miami permission to use buses temporarily during the emergency. The operation of street cars never was resumed; Coral Gables continued to operate buses instead. In November 1936 Miami passed an ordinance imposing a tax of 5% upon the gross receipts derived from the transportation of passengers, for the privilege of using the streets of the city.

Coral Gables sued to enjoin the collection of the tax on its receipts from the transportation of passengers in buses, on the ground that this would be a violation of the franchise ordinance. The Supreme Court of Florida, Division A, upheld the tax. It said that the franchise ordinance had been abandoned by the permanent substitution of buses for street-cars for which the ordinance provided. The temporary resort to street-cars immediately after the hurricane had been without prejudice to the franchise. But more than eighteen months had intervened between the hurricane and the filing of the bill to enjoin the tax, during which no steps had been taken to restore the street railway system. There was no evidence of any such intention. Under these circumstances the operation of the buses was not attributable to the franchise ordinance, and Coral Gables was subject to the tax imposed by Miami on all vehicles used for the carriage of persons for hire.

Henry P. Chandler

MUNICIPAL ORDINANCES AND LOCAL LEGISLATION

In recent months, a number of decisions with respect to the construction, application and validity of municipal ordinances and other local legislation have been rendered. It is the purpose of this review to digest and discuss several of the more interesting of these cases, all of which have been rather arbitrarily classified according to the subject-matter of the particular ordinance involved. The lack of a more pertinent classification is understandable if the broad field encompassed by the general title of the review be considered.

(a) Freedom of speech and assemblage.

Unquestionably one of the most significant of the cases to be treated is Hague et al. v. Committee for Industrial Organization et al., 59 Sup. Ct. 954 (1939). Although this case has been reviewed previously by Grenville Clark in 5 Legal Notes 5-8 (July, 1939), it is important for purposes of this review, aside from its civil liberties implications, for its discussion of the question of original jurisdiction of the Federal Courts in a matter involving the validity of a municipal ordinance. The suit was filed by the C.I.O. and others against the mayor and other officials of Jersey City to restrain interference with freedom of speech and assemblage, the bill alleging that pursuant to an ordinance of Jersey City plaintiffs were denied the right to hold public meetings and to distribute pamphlets and other literature.

The ordinance concerning meetings provided in essence that there should be "no public parades
or public assemblies in or upon the public streets, highways, public parks or public buildings of Jersey City" without a permit obtained from the Director of Public Safety. The Director of Public Safety was authorized to grant said permit upon application made three days prior to the proposed parade or assembly, or to refuse same "for the purpose of preventing riots, disturbances or disorderly assembly." The ordinance concerning the distribution of literature forbade any person to "distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet."

In brief, the District Court found that the defendants had adopted a deliberate policy of forbidding plaintiffs and their associates from holding public meetings or assemblies and from distributing pamphlets or other literature for the purpose of communicating their views concerning the National Labor Relations Act to the citizens of Jersey City. The court further found that the purposes of the plaintiffs were lawful, and that their actions had been peaceful and orderly. The District Court then concluded that it had jurisdiction of the suit under Section 24 (1) (12) and (14) of the Judicial Code, and that defendants' acts were in violation of the Fourteenth Amendment.

The Circuit Court of Appeals concurred in the findings of fact by the District Court and held that it had jurisdiction under Section 24 (1) and (14) of the Judicial Code. The decree was affirmed with a modification of one of its provisions. The defendants appealed to the Supreme Court, challenging the jurisdiction of the District Court and the finding that the street-meeting ordinance was unconstitutional. Defendants also contended in addition that the decree exceeded the power of the District Court and was impracticable of enforcement or of compliance.

An opinion in support of the majority holding was delivered by Mr. Justice Roberts with Mr. Justice Black concurring.

The first point made in the opinion was that the District Court did lack jurisdiction of the suit under Section 24 (1) of the Judicial Code. Section 24 (1) confers original jurisdiction on the District Courts in civil suits where the amount in controversy exceeds, exclusive of interest and costs, $3,000, and arises under the constitution or laws of the United States. In commenting, the court said: "The record here is bare of any showing of the value of the asserted rights to the respondents individually and the suggestion that, in total, they have the requisite value is unavailing, since the plaintiffs may not aggregate their interests in order to attain the amount necessary to give jurisdiction."

However, the opinion found that the District Court did have jurisdiction under Section 24 (14) which grants jurisdiction of suits "at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom, or usage of any state of any right, privilege, or immunity secured by the constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." This holding followed from the determination that "the right peaceably to assemble and to discuss these topics [national legislation and matters pertaining there to] and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizens of the United States which the Amendment protects." The use of the streets and public places for purposes of peaceful assembly and speech has "from ancient times, been a part of the privileges, rights and liberties of citizens"; this privilege may be regulated for the general comfort and convenience, but it must not "be abridged or denied."

Since the street-meeting ordinance did not make the general comfort or convenience the standard of official action, the District Court was correct in holding it void on its face.

Concerning the objections to the decree, two modifications were made. First, the decree should only declare the ordinance prohibiting the distribution of circulars, etc., to be void, and enjoin the defendants from enforcing it. Second, inasmuch as the street-meeting ordinance is void, the plaintiffs are free to hold meetings without a permit; the decree should not specify the conditions under which a permit must be granted plaintiffs, as this in effect permits the court to rewrite an invalid ordinance.

In a separate opinion in support of the majority holding Mr. Justice Stone concurred in the affirmation of the decree as modified, but vigorously dissented with the theory by which this result was obtained. He argued that freedom of speech and assembly are rights secured by the due process clause of the Fourteenth Amendment, and that
neither of these rights has ever been held to be a privilege or immunity peculiar to citizens of the United States to which alone the privileges and immunities clause refers (citing the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394). The right to bring a suit to restrain state officers acting under a state law from infringing these rights is given by Act of Congress (8 U. S. C. A. Section 43) to every person within the United States whether a citizen or not, and such suit may be maintained without allegation of proof of the jurisdiccional amount required under Section 24 (1) of the Judicial Code. Mr. Justice Stone was of the opinion, therefore, that the holding of the majority of the court involved "constitutional experimentation as gratuitous as it is unwarranted."

However, in spite of the division of the court in theory, the effect of this case ought to be a substantial strengthening of the rights of citizens everywhere to freedom of speech.

(b) Picketing.

As repercussions of the Supreme Court's decision in the Hague case, we may point to the unanimous decision of the Supreme Court of Michigan handed down September 6, 1939, in which an ordinance seeking to forbid the distribution of handbills without a license if the handbills contained immoral, libelous or treasonable statement or statements, the truth of which could not be established to the satisfaction of the city clerk, was held invalid on its face under the ruling of Lovell v. City of Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1938). The standard set up in the ordinance makes the city clerk the sole judge of whether or not the handbill may be distributed and is thus tantamount to an arbitrary power to refuse permission for such distribution. City of Dearborn v. Ansell, 287 N. W. 551 (Mich., Sept. 6, 1939). See also C. W. Tookte, Individual Jeopardy under Unconstitutional Ordinances, 3 Legal Notes 351 (May, 1938), 12 So. Cal. L. Rev. 466-468, 14 Ind. L. Journ. 454-456.

Another case of considerable interest is People v. Tüken et al., 90 Pac. (2d) 148 (Cal. App., 1939) involving four sections of a Los Angeles ordinance concerning picketing. Section 3 of this ordinance provided in substance that it "shall be unlawful for any person to picket" in a manner calculated or intended to influence another person to refrain from entering any place of business, from laboring or seeking employment, from patronizing such place of business, or from performing various other specified acts. Section 4 provided that "the provisions of Section 3 hereof shall not apply . . . if all of the conditions hereinafter specified in this Section exist and if such picketing be conducted . . . in the manner and subject to the limitations, provisions and regulations hereinafter in this section set forth, to-wit: (a) If a bona fide strike shall be in progress at a place of business . . . such place of business may be picketed by such bona fide employees so designated (as set forth in this sub-section) . . . " Four other subsections of Section 4 were prohibitions and restrictions upon the number of pickets, manner and place of picketing.

Section 5, with phraseology analogous to that of Section 3, prohibited the carrying and displaying of banners or other placards. Section 6 provided that "notwithstanding the provisions of Section 5, a bona fide employee while carrying on lawful picketing within the provisions of Section 4 hereof may wear or carry an arm band or other banner not exceeding twenty (20) by thirty (30) inches in size," and setting forth certain permitted representations and statements as specified in the section.

Defendants were convicted on a complaint charging violation of Sections 3 and 5. On appeal, this conviction was reversed, the upper court holding that the complaints failed to charge any public offense "for they failed to charge that any of the defendants committed an act in violation of any of the provisions of either Section 4 or 6."

It was the contention of respondents that Sections 4 and 6 were exceptions to Sections 3 and 5 respectively, and that according to the familiar rule that an indictment, information or complaint need not allege that an accused does not come within exceptions mentioned in a statute under which he was convicted, the conviction was valid. The court, however, refused to agree with this contention, basing its conclusion that Sections 4 and 6 constitute an integral part of the offense set up in the ordinance, on the ground that to rule otherwise would render the ordinance unconstitutional as placing an onerous and weighty burden on the defendants.

In answer to the argument that the form of the ordinance was against such a construction, the court said: "The form of the ordinance, however, is not conclusive; that which appears to be an exception, set up in a separate section, may prove to be actually a part of the definition of the offense
sought to be created. . . While the manner in which the ordinance is drafted constitutes the strongest argument against our conclusion, we find in further details of its drafting support for our interpretation. That is to say, while the introductory paragraph of Section 4 might well be said to be cast in the form of an exception, much of the content of the section is plainly in the language used in creating crimes."

It is submitted that this construction of the ordinance by the court is somewhat awkward and strained, and can only be explained, perhaps, on the ground that the court was reluctant to declare the ordinance invalid.

(c) Licenses.

In Hillman v. Sea Isle City, et al., 122 N. J. L. 327, 5 Atl. (2d) 477 (1939), the defendant, a milk driver, was convicted for the violation of an ordinance requiring a license fee from peddlers. He was principally engaged in making deliveries of milk in Sea Isle City to regular customers at their stores or homes, but also incidentally sold milk at retail on the streets of the city to casual purchasers. The chief question was whether defendant's activities constituted peddling within the purview of the licensing ordinance. In affirming the conviction, the Supreme Court of New Jersey held that part of the activities of the defendant, which consisted in selling milk and other dairy products from the truck to regular customers at their homes or places of business was not peddling. In support of this conclusion, the court cited and discussed Huband v. Evans, 114 N. J. L. 586, 177 Atl. 871 (1935), and Hewson v. Englewood, 55 N. J. L. 522, 27 Atl. 904 (1893), in both of which cases the court had held that the activities of the defendant before it did not constitute peddling. In the instant case, however, the court determined that part of the defendant's occupation which consisted in selling milk and other dairy products from the truck to customers in the streets of Sea Isle City was peddling: "... one who sells in the streets to all comers and without ringing the door-bells of houses is none the less a peddler."

In La Crosse Rendering Work, Inc. v. City of La Crosse, et al., 285 N. W. 393 (Wis., 1939) a bill for an injunction was filed by plaintiff, assignee of a right or license to operate a rendering plant in La Crosse, which right or license to operate for 50 years had been granted to plaintiff's assignor by the ordinance passed by the council of the City of La Crosse. This ordinance was subsequently repealed, and plaintiff contended that he had acquired vested property rights through investment in the business in reliance upon said right or license which could not, therefore, now be interfered with, and that a general ordinance for licensing of rendering plants is void because the supervision of the same is under the State Board of Health. A demurrer to the bill was sustained by the lower court and on appeal the judgment was affirmed. The Supreme Court of Wisconsin, quoting from 12 American Jurisprudence, page 57, said: "The power to legislate in the interest of the morals, health and safety of the people is not restricted by the contract clause of the constitution. The exercise of the police power cannot be limited by contract, and it is immaterial on what consideration the contracts rest, since in all cases it is beyond the authority of a state or its municipalities to subrogate this power so necessary to the people's safety."

In the instant case, therefore, the defendant city could not, and did not, by the enactment of the first ordinance, divest itself of its right thereafter in the exercise of its police power, to repeal said ordinance and enact the general licensing ordinance. The original ordinance operated merely as a license and could be revoked for cause, or repealed by the city through the exercise of its police power. In saying that there was no conflict between the statutes of the State and the provisions of the general licensing ordinances so as to render the latter invalid, the court quoted from Fox v. Racine, 225 Wis. 542, 545 (1937): "The mere fact that the state in the exercise of the police power has made certain regulations does not . . . prohibit a municipality from enacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not in themselves pernicious, as being unreasonable or discriminatory, both will stand . . ."

The court further overruled objections raised by complainant to the lack of sufficient standards set up in the ordinance, and decided that the ordinance contained sufficiently definite standards with respect to the granting or refusing of licenses by the council.

In Pearson v. City of Seattle, et al., 90 Pac. (2d) 1020 (Wash., 1939), plaintiff sued to recover license fees alleged to have been illegally exacted under an ordinance imposing a $25.00 license tax on each solid fuel dealer, plus $15.00 for each fuel truck used in excess of one. In affirming a judgment for the plaintiff, the court held that where
an ordinance is solely a regulatory measure, "the classification may not be such as to unjustly discriminate against persons or against a particular business by omitting from the regulations persons or lines of business operating in the same class;" however, "a business may be classified by ordinance under the police power of a state if the object of the legislation is revenue, and all necessary and proper penalties may be provided to insure its due enforcement." The court proceeded to point out "a vital distinction... between the power to tax occupations under the form of a license which by reason of the character of the occupation is subject to police regulation, and the power to tax what are termed useful trades and employments under the guise of a license. It is well settled that the license required of employments of the latter character can carry with it only such fee as is necessary to make compensation for the regulation services, and cannot be perverted into a tax." (This quotation reiterated by the court was from Seattle v. Dencker, 58 Wash. 501, 108 Pac. 1086 (1910).)

The court then concluded that the ordinance in question (expressly declaring on its face that it should be termed and construed as a police measure and not a revenue measure) was discriminatory in singling out a particular business and seeking to impose upon it special regulations. "The city may not... impose a revenue tax under the guise of a police regulation."

In Commonwealth v. Saitz, 6 Atl. (2d) 819 (Pa., 1939), there was presented to the court the question of liability for mercantile license tax of the defendant, proprietor of a cigar store, where a leased "pinball" machine had been installed. The statute provided that a tax be imposed on a person keeping for profit "any alley or place in which any game is played with the use of balls and pins or other objects." The court held that the machine in question which deflected the balls by photo-electric "eyes" instead of by pins or pegs was included within the wording of the statute, and that the defendant was liable for the license tax. The case concerned strictly a point of construction, and the court apparently adopted a very liberal and broad interpretation. This may be partially explained on the basis of a previous decision, Commonwealth v. Klucher, 326 Pa. 587, 193 Atl. 28 (1937), in which the court had decided that the proprietor of a store maintaining a "pinball game" was required to obtain a license and pay the fee prescribed by the statute. The instant case, therefore, merely necessitated an extension of the classification of "pinball" machines.

BARNET HODES
Assisted by HERBERT M. ABRAMS

SPECIAL ASSESSMENTS
(a) The distinction between local and general improvements

A number of significant decisions regarding special assessments have been rendered in recent months. What may well prove to be a leading case on the difference between local and general improvements is City of St. Louis v. Pope, 126 S. W. (2d) 1202 (Mo., 1939). In this case the Supreme Court of Missouri held that a special assessment could not be levied by the city of St. Louis to defray any part of the cost of acquiring land for a public plaza near the City Hall, to be known as Memorial Plaza, on which it was contemplated there should be erected a memorial building or monument in appreciation of the services of the citizen soldiers of Missouri in the World War, "and for the purpose of preserving the records and perpetuating the memory of their heroic achievements and sacrifices."

The charter of St. Louis contains a provision that special assessments may be levied upon property specially benefited to provide funds for the payment of damages for lands condemned for various specified purposes including "public squares and parks" and another provision that damages for lands condemned for other public purposes shall be paid by the city. In considering whether the proposed Memorial Plaza was a "public square" or a "park" within the meaning of the quoted charter provision, the court made an exhaustive study of the meaning of the word "plaza," and particularly the sense given to it in Spanish because it is of Spanish origin. The court concluded that it meant more than an open space for air or grass, trees, and recreation, signifying rather "a pretentious open space of considerable importance, activity and grandeur faced by the most important public and commercial edifices,—the center of civic activities." The Memorial Plaza in St. Louis was of this character, being adjacent to the City Hall and designed as a civic center. This the court held was unique, different from an ordinary public square or park for which a special assessment under the charter might be levied. Correspond-
ingly the improvement was general and not local. The court said, "A memorial is never erected for the purpose of conferring special benefits on adjacent property."

Incidental to the main issue was a question of evidence. The trial court admitted in evidence a pamphlet signed by numerous organizations and a citizens' committee appointed by the mayor, and widely circulated among the voters during the campaign for bond issues to defray the city's share of the cost of a system of improvements, of which the Memorial Plaza was one. This pamphlet contained arguments for the improvements and showed general public interest in them. The trial court overruled an objection that the pamphlet was not issued by the city and could not bind it. The Supreme Court approved the ruling saying that the history of the improvement shown by the pamphlet was a proper matter for the court to consider.

On a somewhat similar question, the Supreme Court of Illinois more than twenty years ago in City of Chicago v. Lord, 277 Ill. 397 (1917) took a somewhat different position. In a proceeding for a special assessment to defray the cost of widening Twelfth Street (now Roosevelt Road) in that city, it was shown that the improvement was part of the Chicago Plan evolved by a citizens' commission appointed by the city to develop a general plan of public improvements. The court in that case said, "The commission was not a corporate authority of the city." The Illinois court held that the greatest advantage of the street widening would accrue to the locality of the street, and did not attach much weight to the inclusion of the improvement in the Chicago Plan. The widening of a street, even an important street, has plainly much more of the elements of a local improvement than a civic center so that the Illinois case was different. The result there is not questioned. Notwithstanding that, the greater consideration given to the motive for the improvement and the nature of the support for it, in the recent Missouri decision evinces a somewhat more open-minded attitude on the part of the court.

In City of Newark v. Essex County Circuit Court, 6 Atl. (2d) 671 (N. J. Sup., 1939), the Supreme Court of New Jersey held that the establishment of a plaza in Newark in accordance with an agreement with a railroad company, was a railroad improvement, and hence not local and would not support a special assessment. This case and more particularly the Missouri case, indicate a salutary disposition of the courts to protect property owners against special assessments for improvements which are really general and ought to be paid for by the entire people. In addition the Missouri decision is an excellent example of the study of sources in arriving at the interpretation of a word. It has unusual interest and literary merit.

(b) The limitation of special assessments to a proportion of value

It has been urged in many quarters that a safeguard against the abuse of special assessments would be to limit assessments to some specified proportion of the value of the property. In City of Morehead v. Nickell, 128 S. W. (2d) 723 (Ky., 1939), the Supreme Court of Kentucky enforced a limit of 50%. The city brought suit to compel the payment of two assessments, on specified property. On a plea that the assessments exceeded 50% of the value of the property, the matter was submitted to a jury which found that the value was less than double the amount of the larger assessment. In consequence the trial court reduced that assessment to one-half of the value determined by the jury, and let the other stand. The Supreme Court affirmed the judgment. It held that the property owners were not estopped to raise the objection that the assessment exceeded one-half the value of the property by paying the first two of the ten annual installments, and that those installments should be credited upon the assessment as reduced to conform with the value.

As above stated there will probably be general approval for the policy of limiting special assessments to a fixed proportion of the value of the property assessed. In order to be effective such a limit will have to apply to the total of all assessments instead of any single assessment as apparently was the rule in the Kentucky case. On the other hand it would seem that the statute establishing the limit should require any objection that the limit is exceeded, to be raised within a reasonable period after the levy of the assessment, instead of permitting it to be brought up two years later after payments on account of the assessment have been made as was done in the Kentucky case. The decision in that case was based on the failure of the statute to place any limit upon the time of raising the objection.
(c) Abutting property for the purpose of an assessment

City of Winston Salem v. Smith, 3 S. E. (2d) 328 (N. C., 1939), decided by the Supreme Court of North Carolina, was a proceeding to enforce special assessments for paving and sidewalk. The resolution of the city provided that part of the cost should be defrayed by special assessment on the abutting property. The pavement and sidewalk laid were narrower than the land which the city had acquired for a street adjacent to the property assessed, so that there was an unimproved strip between the sidewalk and the private property, although the title to it was in the city. The court held that in consequence the land assessed did not abut the improvement and was not subject to assessment. The purported assessment was void and the objection could be raised in defence against the action to enforce notwithstanding failure to object at the time of the levy of the assessment.

The result of the decision under the terms of the resolution for the improvement, may have been necessary. It illustrates, however, that the right to levy a special assessment for a local improvement should be made to turn by the applicable legislative act, upon the question whether the property assessed is specially benefited, rather than as in this case the more or less arbitrary test, whether it abuts the improvement.

(d) The relation between special assessment liens and tax liens

For some time it has been a mooted question in Illinois whether the lien of special assessments is on a parity with the lien of general taxes or whether the latter is paramount. The question has been laid at rest by the decision of the Illinois Supreme Court in People v. Taylorville Sanitary District, 371 Ill. 280, 20 N. E. (2d) 576 (1939). The court upon examination of the provisions of the Local Improvement Act governing special assessments and the Revenue Act governing the levy assessment and collection of taxes, deduced a legislative intent that the liens of general taxes and special assessments should be "on a parity and equal, with no preference or priority of any one over the other". Recently also in Paulk v. City of Ocilla, 2 S. E. (2d) 642 (1939), the Supreme Court of Georgia gave effect to the statute of that state making the lien of special assessments "coequal with the liens of other taxes, and prior to and superior to all other liens" against the lands assessed. The relation between tax liens and liens of special assessments depends of course upon the provisions of the statutes of the particular state. But the rule which accords parity to special assessment liens instead of subordinating them to the lien of general taxes, is equitable, and may be expected to be recognized increasingly in the public policy of the various states.

(e) Liability to new assessment for completed improvement where first assessment held illegal.

It not infrequently happens that an improvement is held illegal on objection to an assessment, but that by the time the matter of the assessment is finally determined, particularly in case of appeal, the improvement has been constructed. It is a sound rule of public policy requiring however an express statute, that if the objecting owner is specially benefited by the improvement and there is nothing in it contra bonos mores, he should be compelled to pay his fair share of the cost under a second assessment notwithstanding that the first assessment was held illegal. Statutes providing for this will ordinarily be given a liberal construction in favor of the right of assessment in order to prevent the manifest injustice of a property owner's receiving for nothing the benefit of a local improvement for which his neighbors similarly situated are compelled to pay.

Such a case is Winnetka Park District v. Hopkins, 371 Ill. 46, 20 N. E. (2d) 58 (1939). Land had been condemned for a local park, and the owner of adjacent land had been assessed for a part of the cost. The assessment had been set aside by a court on account of defects in the proceeding. In the reported case the Supreme Court of Illinois upheld a new assessment based upon the benefit from the completed improvement, notwithstanding that there was an unexplained delay of nearly fifteen years between the filing of the second assessment in court and the confirmation of it by the court. The property-owner objected that the provisions of the statute for a new assessment, referred to improvements consisting of construction work and did not refer to improvements consisting of the acquisition of land. The court interpreted the statute broadly, however, and this is in accordance both with the terms of the act quoted in the decision, and the equitable principle
against discrimination among property-owners which would otherwise result.

(f) Immunity of property assessed from an additional assessment to compensate for assessments on other property held illegal.

It is a converse of the rule that property specially benefited by a local improvement may be reassessed for the benefit received from the completed improvement, even though the assessment levied in anticipation of the improvement was held illegal, that property which has had its full share of an assessment cannot be subjected to an additional assessment to make up for assessments on other property held illegal. Such a case is Barrett v. Board of Commissioners of Tulsa County, 90 Pac. (2d) 442, decided by the Supreme Court of Oklahoma. Part of an assessment levied by a drainage district could not be collected because it was levied on the lands of Indians not subject to assessment. In a suit brought by bondholders in the federal court in Oklahoma on account of the resulting default in payment of some of the bonds, the federal court had awarded judgment against Tulsa County for the amount in arrears, specifying that it should not be a general judgment but that it should be paid by reassessment against the lands of the drainage district. A statute of Oklahoma provided that when any lands in an improvement district were not assessable, the total assessment might be prorated among the lands subject to assessment.

Even so the Supreme Court of Oklahoma held in the cited case, at the instance of owners of property reassessed, that the reassessment was illegal and could not be enforced. The primary ground was the injustice of imposing on property-owners who had already paid their assessment, a deficit due to the illegality of other assessments. The court said that the statute referred to, permitted the cost of an improvement to be assessed in the first instance upon lands subject to assessment disregarding lands exempt, but that it did not authorize the levy of a second assessment after the first had been completed and might fairly be regarded as closed.

Another statute of Oklahoma provided that when a judgment was rendered in a federal court based on bonds of a drainage district, an assessment should be made sufficient to pay it. The Supreme Court of Oklahoma held that this statute was unconstitutional as special legislation because it discriminated between the holders of judgments of federal courts and the holders of judgments of state courts. The court overruled the argument that the judgment of the federal court was an adjudication which compelled the levy of the reassessment, saying that the judgment was a determination of the amount due to the bondholders on their bonds, but that it did not bind the property-owners reassessed because they were not parties to the suit in the federal court. "In so far as it (the judgment) attempted to increase the burden on their property by authorizing an additional assessment under an unconstitutional law and thus prejudice their rights, it is a nullity."

The case presents an interesting conflict of interest between the holders of bonds against an assessment part of which is held illegal, and the property-owners rightfully assessed who have paid their assessments. It would seem good public policy to secure the payment of the bonds which were purchased in good faith, in reliance on the availability of assessments to pay them. On the other hand there is much equity on the side of the property-owners against a new imposition in no way attributable to their fault. The fairest solution of such a problem where the law permits it, is probably to place the burden upon the tax-payers generally. Of course the entire difficulty can be avoided by determining accurately in the first instance what property is legally subject to assessment, and apportioning the assessment only on such property.

(g) The effect of the Statute of Limitations upon the enforcement of special assessment securities

A city issuing special assessment securities, has many of the characteristics of a trustee in reference to the enforcement of the securities for the benefit of the holders, even though it is not liable for them out of its general funds. It must use due diligence to collect the assessment, and it must hold and apply the proceeds only for payment of the obligations issued against them. It would be quite logical that as a trustee it should be held not entitled to the defense of the Statute of Limitations.

The rule is generally, however, that the Statute of Limitations applies, and actions by contractors or holders of special assessment obligations are barred unless brought within the period fixed by law for actions of a similar nature. In City of El Paso v. West, 102 Fed. (2d) 927, the Federal
Circuit Court of Appeals for the Fifth Circuit, applied a two year statute of limitations to suits by holders of special assessment certificates to hold the city of El Paso liable for the loss resulting from negligence in failing to collect special assessments. The court in its opinion stated that the suits were in the nature of actions in tort for money damages and so treated by the parties.

There are two rather obvious points to be drawn from this case.

First, the holders of special assessment securities and their counsel should pay attention to the Statute of Limitations in order to avoid any danger of being barred by it.

Second, if the defence of the statute is raised, and the statute seems to have run, the only prospect of avoiding it lies in emphasizing the fiduciary duties of a city in reference to its special assessment securities. In the reported decision the court said that neither case "appeals to equity to treat the City as the trustee of a fund and to hold it to an account of what it has or ought to have in hand." Perhaps such an appeal if made would not have succeeded in those particular cases. But the trust theory is sound and much the most promising defence against the Statute of Limitations where the period of the statute has run.

(h) Propriety of the appointment of a receiver to represent the holders of special assessment securities

Harvey v. City of St. Petersburg, 189 So. 861, was a proceeding brought to foreclose certificates of indebtedness issued against property assessed for the construction of sidewalks. The statute of Florida provided that the lien of such certificates might be enforced by the city, or in the name of the city by the holders. In the cited case the proceeding was brought by a receiver who had previously been appointed by a court to take charge of all the certificates of the particular issue and secure their collection. The principal issues in the case were whether the appointment of a receiver for such securities was proper and whether he could maintain the foreclosure. The Supreme Court of Florida upheld the authority of the receiver, observing that "the interest of the different holders became so confused that it was not feasible or practicable to bring separate suits to enforce their rights." The property-owner in her answer alleged that the sidewalks had been laid without notice to her, but the court found that she had actual knowledge of the making of the improvement, and held that after the eleven years which had elapsed, it was too late for her to complain of defects in the procedure.

Henry P. Chandler

THE REGULATION OF STREETS AND HIGHWAYS

When the control of local streets is taken by the state or a state agency for a through highway or boulevard, questions frequently arise concerning the right of regulation for various purposes. Such a question was decided by the Supreme Judicial Court of Massachusetts in City of Medford v. Metropolitan District Commission, (1939) 22 N. E. (2d) 110. This concerned the Fellsway part of the Metropolitan Park System radiating from Boston under the control of the Metropolitan District Commission. The Commission was cutting down shade trees along the boulevard within the cities of Medford and Malden. The cities contended that the care of the trees was their function. There was no statute that expressly provided for the care of trees on boulevards, but under the general provision committing to the Metropolitan District Commission the preservation and care of boulevards, the court held that the control of the trees on the boulevard was in the Commission and not in the cities.

Adley Express Company v. Town of Darien, (1939) 7 Atl. (2d) 446, involved a complaint by an express company against the exclusion of its trucks from Noroton Avenue in the Town of Darien, Connecticut, which formed part of the route of the Boston Post Road, a heavily travelled automobile highway. The Supreme Court of Errors of Connecticut held that if the town had authority to pass the ordinance excluding trucks from the street in question, the court would uphold the ordinance even though it put trucks to the inconvenience of a considerable detour because the evidence showed that the presence of trucks in Noroton Avenue was an element of danger. The court held however that a regulation of the nature of the regulation involved was within the province of the state and not of the town under the statutes. It therefore enjoined the enforcement of the ordinance.

A method of regulating parking that has been rather widely discussed and given a much more
limited application is the designation of parking areas in which there shall be a small charge for parking collected through the medium of parking meters. The case of *County Court of Webster County v. Roman*, (1939) 3 S. E. (2d) 631, deals with such a method in the Town of Addison, West Virginia. The Supreme Court of Appeals of West Virginia upheld the legality of a town ordinance prohibiting the parking of automobiles in designated areas in the streets except upon the payment of a five cent charge to be deposited in parking meters. One judge dissented and another who concurred in the result, expressed the view that the opinion of the majority was too broad, and that the installation of parking meters would be reasonable only in areas of heavy traffic. The majority of the court held that the power vested in the town to regulate the parking of vehicles in streets, authorized it to establish a reasonable charge for parking to be collected by parking meters if in its discretion it saw fit. Some of the objectors were owners of adjoining property, and they contended that an incident of their ownership was the right to park their vehicles in the adjacent street without charge. The Supreme Court of Alabama so held in 1937 in *City of Birmingham v. Hood-McPherson Realty Company*, 172 So. 114, 108 A. L. R. 1140. The Supreme Court of West Virginia rejected this conclusion however, saying that although an abutter had a right of ingress and egress over the street to and from his property, he had no right within the area of the street superior to that of the general public. Inasmuch as the court adjudged a system of parking meters to be a reasonable method within the discretion of the public authorities, of regulating parking in the streets, it was legal in relation to abutting owners as well as the public generally.

HENRY P. CHANDLER

TO THE MEMBERS OF THE SECTION ON MUNICIPAL LAW:

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