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Robert Wieferich

Jerome Richard

SOME PROBLEMS ARISING FROM MUNICIPAL SUBWAY CONSTRUCTION

ROBERT WIEFERICH AND JEROME RICHARD*

THE recent commencement of construction on Chicago's long awaited subway has focused attention upon the legal problems arising from any such undertaking. There is no doubt that the city has power to construct the subway.[1] However, there are certain problems confronting the city in the exercise of this power. These problems may be classified into those arising because of injuries to the interests of encroaching landowners, and those arising from the possibility of injury to the interests of adjoining landowners.

The principal obstructions on the right of way are encroaching foundations, underground vaults and safes, and subsurface transportation facilities, such as elevators and tunnels.[2] Emphasis has been placed on cases involving subsurface obstructions, as obstructions upon or above the street are generally distinguishable, since the latter necessarily impede traffic, and are therefore nuisances.[3]

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

* Members of Illinois Bar.

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

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

3 In City of Chicago v. Norton Milling Co., 196 Ill. 580, 63 N. E. 1043 (1902), the court expressly distinguished the case of Hibbard & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256 (1898), involving an awning erected over the public easement, from Gregsten v. City of Chicago, 145 Ill. 451, 34 N. E. 426 (1893), concerning a subsurface vault, on the ground that the Hibbard case involved an obstruction to street travel and was a purprestur.

It is generally agreed that an abutting owner cannot, through adverse possession or by prescription, acquire the right to occupy permanently a portion of a city street, whether the encroachment be on the surface or merely a subsurface structure. A brief unequivocal statement of this position by the Illinois Supreme Court is found in *Russell* v. *City of Lincoln*,[4] where the court said, "A street and all its parts are held for a public use, and title to no part thereof can be obtained against the public by adverse possession."

The court has elaborated upon this position in several cases. In *Hibbard & Co.* v. *City of Chicago*,[5] the court stated that property held for street purposes by a city is held in trust for the public and to allow any title to be taken by a third party would be to divert trust property. The court went on to say that it is beyond the power of a municipality to grant permanently an exclusive use of a portion of a street for private purposes.[6] In *City of DeKalb* v. *Luney*,[7] it was held

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

5 173 Ill. 91 at 96, 50 N. E. 256 (1898).

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

7 193 Ill. 185 at 189, 61 N. E. 1036 (1901). "Adverse possession of a portion of the street by the appellee and those in the line of his title or possession, no matter how long continued, had no effect, by reason of the provisions of the

that the Statute of Limitations does not run to bar the right of the public as against an encroacher.

While it follows from the preceding position of the court that no prescriptive right can be acquired by a private party for the exclusive and permanent use of a portion of the street as against the right of the public to use such street for travel purposes, nevertheless a private party may obtain by contract the right to maintain an encroaching structure for a relatively extended period of time. However, in all of the cases involving contractual agreements, the Illinois courts have clearly indicated that such agreements must be made subject to revocation when the use of the street is required for public travel. Thus, in *Gregsten* v. *City of Chicago*,[8] a case most frequently cited for the proposition that a private party can have a contractual right to maintain a structure encroaching beneath the street, the agreement expressly reserved to the city a right of revocation in the event the public interest should require it. In *People* v. *Field & Company*,[9] the city of Chicago provided in the ordinance granting the defendant the right to construct a tunnel under a street that the city might revoke it at any time and in any event the permit should cease after twenty years. The court expressly distinguished all of the cases relied upon by the plaintiff, a tax payer, on the grounds that in those cases encroachment upon the street was of a permanent nature and for a fixed time and not, as here, under conditions where the encroachment could be removed at any time.[10] The city may not, however,

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

[8] 145 Ill. 451, 34 N. E. 426 (1893). This case involved a vault built beneath a public alley by the plaintiff, an abutting owner, pursuant to a revocable permit and the posting of a bond which required plaintiff to keep a portion of the alley in good repair. The plaintiff kept the alley in good repair, thus furnishing good consideration, and after a long period of time the city attempted to revoke the permit, not in the interest of public necessity for travel, but in order to allow a private party to construct a vault on the other side of the alley. Such revocation was not permitted. Obviously, the case may be reconciled with those involving revocation in the interest of public necessity.

[9] 266 Ill. 609, 107 N. E. 864 (1915).

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

arbitrarily or capriciously revoke this right.[11]

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

The principal question in connection with the construction of a subway is whether the easement is broad enough so that any use of the street which is inconsistent with the construction of a subway is an interference with the easement which must be removed at the abutting owner's expense. The language of a leading Illinois case, *People* v. *Field & Company*,[13] indicates that the city's easement in such a situation will be paramount.

11 Swaim v. City of Indianapolis, 202 Ind. 233, 171 N. E. 871 at 877 (1930). Reh. den., 202 Ind. 233, 173 N. E. 287 (1930). Cf. footnote 8 supra.

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

13 266 Ill. 609 at 623, 627, 107 N. E. 864 (1915). See also City of Dixon v. Sinow & Weinman, 350 Ill. 634, 183 N. E. 570 (1932); Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192, 93 N. E. 153 (1910); People ex rel. Jeffrey v. Murphy, 254 Ill. App. 109 at 113 (1929), in which the court stated: "The rule is well settled that when a public street is once established, all of the beneficial uses vest in and devolve upon the public. These uses include the uninterrupted, unimpeded and unobstructed use of every portion and part of such public highway, not only that they [the public] may use all the ground for foundation to travel upon, but that they may likewise enjoy the uses of the air above and the ground beneath the surface." The Massachusetts court has taken a similar position in Sears v. Crocker, 184 Mass. 586, 69 N. E. 327 (1904), and in Peabody v. City of Boston, 220 Mass. 376, 107 N. E. 952 (1915), both involving subway construction.

In any event, whether the fee title was in the city or the abutting property owner, the street under the surface of the ground could only be used in such a manner as would safeguard the paramount right of the public to the full and unobstructed use of the street for the purpose for which it was dedicated; that the city would not be estopped by any action of its own from requiring the space occupied beneath the street to be surrendered to the city whenever it became necessary for the uses of the public. . . . Under the authorities in this as well as other jurisdictions, if the subsurface of the street is needed by the public for travel or other public uses, the mere fact that such public use will deprive abutters of the use of vaults and other similar underground structures in the street theretofore maintained, cannot stand in the way of the construction of sewers or subways. "Abutters are bound to withdraw from the occupation of streets above or below the surface whenever the public needs the occupied space for travel."

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

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

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

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

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

16 121 Ill. 72 at 76, 12 N. E. 75 (1887). Quoting from J. K. Angell and T. Durfee, Highways (2d. ed), § 312.

than was necessary to the enjoyment of this right, as a trespass. But the modern decisions have very much extended the public right, and, particularly in the streets of populous cities, have reduced the interest of the owner of the soil to a mere naked fee of only a nominal value."

Where the city owns the fee in a street, the abutting owner's rights are limited to ingress and egress, an easement for light and air and the right to use the street in common with all other persons, and such owner has no right to appropriate exclusively any portion of a street, either above or below the surface.[17]

The remaining theory upon which an encroaching landowner may establish a right to maintain a structure beneath the street rests in the possibility of an equitable estoppel against the city. The Illinois cases conclude generally that where a municipality, by affirmative acts, has induced an abutting owner to build permanent structures encroaching upon a municipal easement or fee, the municipality will be estopped to require the encroacher to remove such structures, particularly when such removal involves great expense or hardship.[18]

While it is true that foundations, tunnels and vaults are regarded as permanent structures, and therefore meet one of the requisites for an estoppel,[19] nevertheless before a landowner can show the necessary inducement on the part of the city, he must show that it has taken certain positive steps which led him to build.[20] Generally this affirmative act consists of the city's building a street on the wrong property and

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

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

19 City of DeKalb v. Luney, 193 Ill. 185, 61 N. E. 1036 (1901); Russell v. City of Lincoln, 200 Ill. 511, 65 N. E. 1088 (1902); Kennedy v. Town of Normal, 359 Ill. 306, 194 N. E. 576 (1935). In the latter case the plaintiff had fenced in an alley which had been dedicated to the city but never used as an alley, and built a bird house and planted trees and bushes on the enclosed portion. The court held that these were not permanent improvements.

20 See People v. City of Rock Island, 215 Ill. 488, 74 N. E. 437 (1905). Cf. Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193 (1902). See also note 18, supra.

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

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

In *People* v. *Field & Company*,[23] the court stated:

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

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

In *Tacoma Safety Deposit Company* v. *City of Chicago*,[24] the court said:

21 Village of Itasca v. Schroeder, 182 Ill. 192, 55 N. E. 50 (1899).

22 Jordan v. City of Chenoa, 166 Ill. 530, 47 N. E. 191 (1897).

23 266 Ill. 609, 107 N. E. 864 (1915). Cf. Sears v. Crocker, 184 Mass. 586, 69 N. E. 327 (1904); Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192, 93 N. E. 153 (1910); Fifty Associates v. City of Boston, 201 Mass. 585, 88 N. E. 427 (1909).

24 247 Ill. 192, 93 N. E. 153 (1910). This case involved an attempt by the city to require an abutting owner to pay rent for the use of the subsurface beneath the street for vault space. Accord, Leo N. Levy Corporation v. Dick, 190 N. Y. S. 238 at 243 (1921). There is language in two Illinois cases in which the court

It is also urged that the city, having granted to the complainant a permit to construct its building upon its premises according to plans and specifications which provided for the construction of subways beneath the sidewalks adjoining its premises, is now estopped to deny the right of the complainant to maintain said subways upon the property of the city free of charge. It is too clear for argument, we think, that the city had the right to regulate the construction of complainant's building at the time it was erected; and the fact that it may, through its building department, have approved certain building plans which were submitted to it by the complainant and granted to it a permit to construct its building, we think obviously did not estop the city afterwards to require the complainant to pay for the use of the city's property, which its building in part occupied, or to remove its building, or the part thereof which rested upon the city's property. The complainant, at most, we think, obtained a license to construct a subway beneath the sidewalk of the city adjoining its building, which license could be revoked by the city in case the complainant refused to comply with the ordinance which required it to pay to the city compensation for the use of the space beneath the sidewalk in the street which belonged to the city.

Even if an inducement could be shown, the lapse of time since the construction of most of the obstructions, though frequently emphasized in the cases,[25] should not in this instance be significant in creating an estoppel. No lapse of time can give rise to a prescriptive right.[26] The original investment of anyone who builds permanent structures such as the foundations of buildings, vaults, etc., usually overshadows any subsequent expenditures on his part. Therefore, whatever reliance took place, occurred at the time of the initial investment, and the subsequent unmolested use of the city's property cannot be set up retroactively as a justification for the original expenditure.

II

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

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

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

26 Russell v. City of Lincoln, 200 Ill. 511, 65 N. E. 1088 (1902). Cf. Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193 (1902).

could be imposed upon the city. It might be imposed because of the constitutional provision prohibiting the damaging of private property for the public use without just compensation.[27] The city might also be held liable for the damage done by independent contractors because the work of such contractors involved intrinsically dangerous activity, liability for which the principal cannot escape. Thirdly, if the contractor were negligent and the city retained a sufficient degree of control, it might be considered as a master-servant, rather than as a principal-contractor relationship, and liability imposed accordingly on principles of respondeat superior. Again the discussion of these problems will be confined, as closely as possible, to cases involving excavating and tunnelling.

As between two private citizens, each owning an adjoining piece of land, it has been held that if the excavation on one lot causes an adjoining unimproved lot to settle or otherwise injures it, there is liability on the excavating landowner even in the absence of negligence.[28] If, however, the injury is to an improved lot or to the improvements thereon, the excavator is liable only if he is negligent. Otherwise, a landowner, by erecting a building, would be imposing an additional responsibility on his neighbors, since they would owe him the same duty of care, despite the fact that by erecting a structure upon his own land, he increases the hazards confronting them.[29]

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

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

[28] Chicago City Ry. Co. v. Rothschild & Co., 213 Ill. App. 178 (1919).

[29] Best Manf. Co. v. Creamery Co., 307 Ill. 238, 138 N. E. 684 (1923); City of Quincy v. Jones, 76 Ill. 231 (1875); Mamer v. Lussem, 65 Ill. 484 (1872); Korogodsky v. Shimberoff, 256 Ill. App. 255 (1930); Noceto v. Weill, 166 Ill. App. 162 (1911). See also, 50 A.L.R. 486; E. Leesman, "Significance of the Doctrine of Lateral Support as a Real Property Right," 16 Ill. L. Rev. 108 at 115. The fact that independent contractors were employed has not caused courts to shift all liability to the contractors. They hold that since the work is done by the order of the principal he is liable. Chicago City Ry. Co. v. Rothschild & Co., 213 Ill. App. 178 (1919); Starr v. Standard-Tilton Milling Co., 183 Ill. App. 454 (1913).

of 1870, reading as follows: "Private property shall not be taken or damaged for public use without just compensation."[30] This obviously imposes a greater liability upon the city. The old Illinois Constitution of 1848 required payment for property taken, but had no provision regarding the necessity for payment for property damaged for the public use.[31]

However, the courts did attempt to provide compensation to injured landowners. On one occasion, the Illinois Supreme Court held that injury to property resulting from a city's negligence in constructing a street constituted in effect a "taking" of that property under the eminent domain provision.[32]

When the present Constitution was adopted, the necessity for such judicial legislation was eliminated. Courts continued to impose liability for damage to property under the "eminent domain" provision,[33] and did so in cases where the injury was caused by negligence, and by inherently dangerous activity, as well as on purely "eminent domain" grounds, *i.e.*, where the injury was caused without the fault of the public body involved.

Three cases involving liability without fault have been found. They apparently turn on the fact that the city in each case either used or permitted the use of space beneath the surface of a street in such a manner as to result in injury to private property. In two of these cases, the city allowed a street railway company to construct tunnels under the Chicago River at La Salle Street. In both cases, the property of adjoining landowners was damaged. In neither case was there any allegation of negligence. In *Barnard* v. *City of Chicago*,[34] the court said,

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

30 Ill. Const. 1870, Art. II, § 13. 31 Ill. Const. 1848, Art. XIII, § 11.

32 Nevins v. City of Peoria, 41 Ill. 502 (1866).

33 Article II, § 13 of the Ill. Const. will be referred to throughout this discussion as the "eminent domain" provision, including both the taking and damaging of private property for the public use, although usually the term is reserved for cases involving the judicial taking of property.

34 270 Ill. 27, 110 N. E. 412 (1915).

The court concluded that where the city permits such a public use of a street, or any space beneath the surface of the street as results in damage to private property, it will be liable for such damage, notwithstanding it may be caused by the withdrawal of lateral support of the weight of a building or other structures on the private property involved. The other two cases, *Peck* v. *Chicago Railways Company*[35] and *Schroeder* v. *City of Joliet*,[36] reached similar results.[37]

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

In *Bruno* v. *City of Chicago*,[38] the city contracted for the construction of a water tunnel. Dynamite blasts were set off. The plaintiff charged that the contractor's negligence in allowing the adjoining land to settle and in producing vibrations by means of blasting had damaged the plaintiff's building. The court said, "While the plaintiff's pleadings do make charges of negligence, they also contain such allegations as make out a right of action for damages suffered by the plaintiff's property for a public use."

In *Nixon* v. *City of Chicago*,[39] the plaintiff's building was damaged by the construction under Dearborn Street of a tunnel which was being built by the Illinois Tunnel Company pursuant to a permit issued by the city which reserved the power of supervision over the city. The court said, "Where a tunnel is constructed under a public street and for a public use, pursuant to authority granted by the municipality and under its supervision and inspection, and there is an injury caused to owners of adjoining property by such construction, the city will be liable for the damages sustained." The court went on to say, "Since the adoption of the Constitution of 1870, where such an operation in a public street as is involved in the case at bar causes damage to adjoining private property, the city has been held to be liable in damages, the basis of the liability being the interference with the rights of the owner to

35 270 Ill. 34, 110 N. E. 414 (1915). 36 189 Ill. 48, 59 N. E. 550 (1901).

37 The latter case is discussed elsewhere in this article.

38 214 Ill. App. 498 (1919).

39 212 Ill. App. 365 (1918), cert. denied; Tacoma Safety Deposit Co. v. City of Chicago, 257 Ill. 192, 93 N. E. 153 (1910); Leo N. Levy Corp. v. Dick, 190 N. Y. S. 238 (1921); Gridley v. City of Bloomington, 68 Ill. 47 (1873).

the full use and enjoyment of his property, including the building." In this case, also, the plaintiff had alleged negligence on the part of the contractor, and again there was a combination of liability on both theories.[40]

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

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

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

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

[40] See also Eldred Drainage & Levee Dist. v. Wilcoxson, 365 Ill. 249, 6 N. E. (2d) 149 (1936), in which "eminent domain" liability was again imposed for damage done in the construction of a public works project, and in which the contractor was negligent.

[41] 212 Ill. 9, 72 N. E. 46 (1904).

[42] Citing City of Joliet v. Harwood, 86 Ill. 110 (1877); Village of Jefferson v. Chapman, 137 Ill. 438, 20 N. E. 33 (1889). Cf. City of Chicago v. Rusk, 117 Ill. App. 427 (1904).

[43] 356 Ill. 486, 190 N. E. 904 (1934).

plosives, etc., the principal remains liable, regardless of the intervention of an independent contractor.

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

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

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

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

[44] 86 Ill. 110 (1877).

even in the absence of negligence, as the natural, although not the necessary, consequence of the work was injury to the plaintiff's property.[45] The court did not discuss the eminent domain problem.

There is also the possibility that the agreement between the city and each contractor will reserve a high degree of control to the city over the work, as a result of which the courts may consider the relationship as being one of master and servant, rather than one of principal and independent contractor. If that were the case, the city would be liable to third persons for injuries caused by the contractor, on the theory of respondeat superior.[46] However, under the doctrine of the Macer case,[47] the construction of the subway would seem to involve inherently dangerous activity with consequent liability on the city, regardless of the degree of control it retained.

It thus appears probable that the city can be held liable for damage done to adjoining property on one theory or another. The question next arises as to what standard should be used to measure the damages. At one time, Illinois courts held that the measure of damages for injuries to property resulting from the construction of a public improvement was the actual cost of the necessary repairs.[48] However, the court now takes the view that the measure of damages is the difference in the market value of the property before and after the construction of the improvement, plus the cost of such repairs as are made to preserve the property during the period of construction.[49]

A good expression of this rule may be found in the Peck case.[50] In the course of construction of a tunnel under the Chicago River at LaSalle Street certain steps were taken by

45 See also Robbins v. City of Chicago, 71 U. S. 657, 18 L. Ed. 427 (1867).

46 City of Chicago v. Murdoch, 212 Ill. 9, 72 N. E. 46 (1904), citing City of Chicago v. Joney, 60 Ill. 383 (1871), and City of Chicago v. Dermody, 61 Ill. 431 (1871).

47 Macer v. O'Brien, 356 Ill. 486, 190 N. E. 904 (1934).

48 FitzSimons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249 (1902); City of Chicago v. Rust, 117 Ill. App. 427 (1904); City of Chicago v. Murdoch, 212 Ill. 9, 72 N. E. 46 (1904).

49 Bruno v. City of Chicago, 214 Ill. App. 498 (1919); Schroeder v. City of Joliet, 189 Ill. 48, 59 N. E. 550 (1901); Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915); Beidler v. Sanitary District of Chicago, 211 Ill. 628, 71 N. E. 1118 (1904); Osgood v. City of Chicago, 154 Ill. 194, 41 N. E. 40 (1894).

50 Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915).

the plaintiff to protect his adjoining building, after he was notified by the contractor and by the City Building Commissioner that he should brace and protect the building, as work was about to be commenced upon the tunnel. However, despite the precautions taken the building settled, causing great damage to the plaintiff. The court said that an instruction declaring the difference in market value to be the measure of damages was improper because it omitted any reference to the expenses incurred in the effort to diminish the damages, stating:

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

In *Schroeder* v. *City of Joliet*,[51] as a result of an excavation for a street improvement, plaintiff's property was damaged because of the removal of the lateral support. The only question raised concerned the measure of damages. The court held, ". . . the measure of damages is the diminution in value of the property by reason of the act of the city. . . . But if, upon a consideration of the effects of the improvement upon the property, there is no damage, neither the constitution nor the law authorizes a recovery."

In *Biedler* v. *The Sanitary District of Chicago*,[52] the court quoted:

"Where an action is brought to recover damages, where no part of the plaintiff's property has been taken, but merely damaged by a public improvement, the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained, and no recovery can be had."[53]

In *Bruno* v. *City of Chicago*,[54] the court said, "Of course, if

[51] 189 Ill. 48, 59 N. E. 550 (1901). [52] 211 Ill. 628, 71 N. E. 1118 (1904).

[53] Citing Springer v. City of Chicago, 135 Ill. 552, 26 N. E. 514 (1891). See also Osgood v. City of Chicago, 154 Ill. 194, 41 N. E. 40 (1895). The court's latest expression of this view may be found in Department of Public Works and Buildings v. Barton, 371 Ill. 11, 19 N. E. (2d) 935 (1939).

[54] 214 Ill. App. 498 (1919).

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

It should also be noted that there can be no recovery except for an actual physical injury to the property. Thus in the Peck case[55] the court said, "Inconvenience, expense or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement in a street give no cause of action against a municipality. . . ."[56]

In an attempt to mitigate damages, the city may itself shore up adjoining buildings, but it is more probable that it would request each landowner to shore up his own buildings by giving him notice to do so. The legal effect of such notice should not be emphasized although its practical effect may be great.[57]

In cases where private adjoining landowners are involved, the court has apparently not considered the question of notice as significant in determining the extent of liability. The court has indicated that it would impose liability under the same principles in circumstances similar in every sense, except that in one case notice was given and in the other no notice was forthcoming.[58] Even if such shoring is done, under the

[55] Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915).

[56] Citing Osgood v. City of Chicago, 154 Ill. 194, 41 N. E. 40 (1895); Lefkovitz v. City of Chicago, 238 Ill. 23, 87 N. E. 58 (1909); Chicago Flour Co. v. City of Chicago, 243 Ill. 268, 90 N. E. 674 (1910).

[57] There is some doubt as to whether the city could compel any land owner to shore up his building, although it is probable that failure to do so after notice was given would result in a diminution in the amount of recovery for the damages. In Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915), the court said, "A person injured by another's breach of contract or tort is bound to use reasonable care to render the injury as light as possible. . . ." However, in Korogodsky v. Shimberoff, 256 Ill. App. 255 (1930), the Appellate Court refused to allow the excavator to recover the cost of the shoring of the adjoining building, saying, "A party cannot of his own volition create an obligation in his own favor by doing some act for his own interests. . . ." It may be that the cases are reconcilable, since a public body was involved in the Peck case, whereas in the other case two private parties were involved.

[58] Starr v. Standard-Tilton Milling Co., 183 Ill. App. 454 (1913); Korogodsky v. Shimberoff, 256 Ill. App. 255 (1930).

doctrine of the Peck case,[59] the city would be responsible for expenditures made by any such landowner in a reasonable attempt to minimize the damage to his property, whether or not that attempt proved successful.

The only remaining question to be discussed deals with the possibility of the city's shifting its liability. There are various ways in which this may be done. It could conceivably secure some form of insurance, although the cost might prove prohibitive as a practical matter. In New York, subway contracts have contained provisions designed to shift all liability to the contractors. Such contracts have been upheld[60] together with contracts imposing ultimate liability on subway builders for all damages caused by their negligence alone.[61]

[59] Peck v. Chicago Railways Co., 270 Ill. 34, 110 N. E. 414 (1915).

[60] Dooley v. M'Mullen, Snare & Triest, 172 N. Y. S. 135 (1918); Freedman v. Hart & Early Co., 293 N. Y. S. 525 (1935); Schnaier v. Bradley Contracting Co., 169 N. Y. S. 88 (1918). The provisions read as follows:

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

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

[61] Rigney v. New York Cent. & H. R. R. Co., 217 N. Y. 31, 111 N. E. 227 (1916); 148 Smith Street Realty Corp. v. City of New York, 288 N. Y. S. 1012 (1935). In some cases, the court permitted the injured landowners to bring actions against the contractors directly on the theory that the plaintiffs were third-party beneficiaries of the contract. Dooley v. M'Mullen, Snare & Triest, 172 N. Y. S. 135 (1918); Schnaier v. Bradley Contracting Co., 169 N. Y. S. 88 (1918); the Rigney

It is problematical as to which is the least expensive method of shifting the city's liability. Presumably the cost of insurance would be prohibitive and the inclusion of contractor-liability clauses in the contracts merely results in higher bid prices. The city has adopted the latter expedient by inserting into the subway contracts provisions imposing ultimate liability for negligence upon each contractor. The weakness in any such clause is that it cannot permit the city to evade the absolute liability imposed upon it by the Constitution, and therefore is only a partial solution of the problem.

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case, supra. However, there is nothing to prevent the landowner from bringing an action against both the city and the contractor, as codefendants. In such a case, the primary liability would still rest upon the contractor in accordance with his agreement. In 148 Smith Street Realty Corp. v. City of New York, supra, the court directed that the city should have a judgment against the contractor to enable it to reimburse itself in the event that it would be forced to pay the judgment of the injured property owner.