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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—OFFENSES AND PROSECUTIONS—WHETHER CITY OBTAINS JURISDICTION OVER MOTORIST BY SIMPLY ATTACHING A TICKET TO THE AUTOMOBILE AND CAN MAKE OUT A PRIMA FACIE CASE UPON PRESUMPTION THAT REGISTERED OWNER IS PERSON VIOLATING ORDINANCE—According to the facts in the recent case of *City of Chicago* v. *Crane*,[1] a police officer saw defendant's car parked five feet from a fire hydrant and as a consequence attached a ticket to the vehicle stating there had been a violation of a city ordinance prohibiting such parking.[2] Such ticket directed the owner to appear in court on a stated date. Defendant, owner of the vehicle, failed to appear and was sent a letter advising him that if he did not voluntarily appear within forty-eight hours a warrant would be sought for his arrest. Failing to respond thereto, a complaint was filed by the city, a quasi-criminal warrant was issued, and the owner of the automobile was arrested thereon. Defendant claimed that the court had not obtained jurisdiction over him, appearing specially for that purpose. Such plea was,

1 319 Ill. App. 623, 49 N.E. (2d) 802 (1943).
2 Municipal Code of Chicago (1939), §27-19(7).

however, overruled and the case proceeded to trial. The city then introduced evidence that a vehicle bearing defendant's license plates had been concerned in the violation of the parking ordinance, that a ticket had been attached thereto, and rested its case. The defendant elected not to put in any evidence, claiming that the city could not establish a prima facie case against him solely by authority of any presumption created by a city ordinance.[3] The trial court, dismissing the charge, held that the ordinance was without basis of law since no power for that purpose had been delegated by the legislature. On appeal therefrom by the municipality, the Illinois Appellate Court reversed the decision, holding the ordinance constitutional and the presumption created thereby sufficient to establish a prima facie case.

Where a complaint is filed, a warrant issued, and defendant is taken thereon and appears at the trial of the case, there is no question that the court has jurisdiction over the person of the defendant.[4] The city cannot, however, expect to obtain jurisdiction over the motorist merely by attaching a ticket to the automobile or even by sending a letter to the owner. An action must be started, a complaint of some sort must be filed, before a warrant may issue,[5] and arrest thereon is essential in order for the court to have power to try the case.[6] Jurisdiction might be obtained by attaching a ticket or sending a letter if the defendant voluntarily submits, but such things can serve only as a warning to the offender that actual steps will be taken if submission does not occur. A violation of due process would have occurred had the court relied for its jurisdiction over the motorist on these alone,[7] but as a complaint was filed and a warrant was issued and served, the court's power to try the offender was complete.

The main question presented was whether a prima facie case could be made out against the defendant by simply showing, in this case by a stipulation of facts, that the defendant owned the automobile that was illegally parked. In criminal cases the burden of proof is always upon the prosecution to establish the guilt of the accused beyond a reasonable doubt,[8] whether the case be one for felony or misdemeanor.[9] To do

3 The pertinent ordinance, adopted April 3, 1940, and amended Aug. 5, 1942, now Municipal Code of Chicago, § 27-34.1, reads: "Whenever any vehicle shall have been parked in violation of any of the provisions of this chapter . . . the person in whose name such vehicle is registered shall be prima facie responsible for such violation and subject to the penalty therefor."

4 Ker v. People, 110 Ill. 627 (1884), affirmed 119 U. S. 436, 7 S.Ct. 225, 30 L. Ed. 421 (1886); Ex parte MacDonald, 45 Cal. App. 480, 187 P. 991 (1920). See also 22 C.J.S., Criminal Law, § 143.

5 Ill. Rev. Stat. 1941, Ch. 38, §§ 663-4.

6 People v. Minto, 318 Ill. 293, 149 N.E. 241 (1925); People v. Guthman, 211 Ill. App. 373 (1918).

7 People v. Levins, 273 N.Y.S. 941, 152 Misc. 650 (1934).

8 People v. Buchholz, 363 Ill. 270, 2 N.E. (2d) 80 (1936); People v. Christocakos, 357 Ill. 599, 192 N.E. 677 (1934); People v. Etzel, 348 Ill. 223, 180 N.E. 789 (1932).

9 Meadows v. State, 26 Ala. App. 311, 159 So. 268 (1935).

this the prosecution must prove every essential element of the crime charged.[10] Such burden never shifts[11] even though the prosecution may have established a prima facie case,[12] hence it was necessary in the instant case to show not only that the automobile was illegally parked but also that the owner-defendant was responsible for such act. It was this latter point which the city expected to establish by its use of the presumption created by municipal ordinance.

While a statute or municipal ordinance which shifted the burden of proof or compelled the defendant to prove his innocence would be unconstitutional,[13] it is likewise clear that a statute declaring that certain acts shall be prima facie evidence of fraudulent intent would not involve an interference with the powers of the judiciary,[14] and it has been held constitutionally proper for the legislature to declare what facts shall be regarded as prima facie evidence of other facts so long as the inference to be drawn is a reasonable one.[15] Such presumption does not involve a violation of the accused person's right to be deemed innocent until proven guilty[16] but merely necessitates the defendant's going forward with the case. It has, therefore, been regarded as sufficient if the prosecution has proved those facts regarded as the basis of a prima facie case when aided by the presumption, particularly where the same would almost conclusively establish guilt except for facts the knowledge of which is peculiar to the accused.[17]

The principal limitation put on the legislative power to declare what shall be sufficient prima facie evidence of a fact is that the same must be reasonably related to, and be of aid in proving, the crime in question. Tested by such standards, the presumption involved in the instant case appears valid as there can be little doubt as to the reasonable relationship between the prescribed fact of ownership of the automobile and the probability of its having been used by such owner in a violation of law.[18] Such presumption is also undoubtedly helpful in proving the offense for no one is in a better position to produce evidence, which the prosecution in most cases could obtain only with difficulty, than the owner of the automobile.

A decision such as that in the instant case is a matter of practical

10 People v. Kingsbury, 353 Ill. 11, 186 N.E. 470 (1933); People v. Cramer, 298 Ill. 509, 131 N.E. 657 (1921).

11 People v. Sanders, 357 Ill. 610, 192 N.E. 697 (1934).

12 State v. Davis, 214 N.C. 787, 1 S.E. (2d) 104 (1939).

13 In re Wong Hane, 108 Cal. 680, 41 P. 693, 49 Am.S.R. 138 (1895).

14 State v. Thomas, 144 Ala. 77, 40 So. 271 (1906).

15 See annotations on this point in 6 Ann. Cas. 746, 51 A.L.R. 1139, and 86 A.L.R. 179.

16 State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905).

17 Commonwealth v. Minor, 88 Ky. 422, 11 S.W. 472 (1889).

18 Similar presumptions have been held valid in Commonwealth v. Kroger, 276 Ky. 20, 122 S.W. (2d) 1006 (1938); Commonwealth v. Ober, 286 Mass. 25, 189 N.E. 601 (1934); People v. Kayne, 286 Mich. 571, 282 N.W. 248 (1938); and People v. Marchetti, 276 N.Y.S. 708, 154 Misc. 147 (1934).

importance, for it is almost impossible owing to the increased use of automobiles to expect a policeman to waste time waiting by an illegally parked car in order to make positive just who is the person offending. The practical viewpoint was expressed by Mr. Justice McReynolds when he said that the states "are now struggling with new and enormously difficult problems incident to the growth of automobile traffic, and we should carefully refrain from interference unless and until there is some real, direct, and material infraction of the rights guaranteed by the Federal Constitution."[19] The absence of any material infraction of such rights in the instant case warrants the decision pronounced therein.

L. H. ASCHERMAN

CORPORATIONS—CAPITAL, STOCK AND DIVIDENDS—WHETHER OR NOT REFUSAL OF TRANSFEREE TO COMPLY WITH COURT ORDER TO SURRENDER STOCK CERTIFICATES OBTAINED BY FRAUD ENTITLES ORIGINAL OWNER TO COMPEL CORPORATION TO ISSUE NEW CERTIFICATES—According to the facts in the recent case of *Knight* v. *Schutz*,[1] one George Knight owned certain stock certificates, the assignment and delivery of which Mrs. Schutz obtained fraudulently. He died and his executor sued to compel the surrender of such certificates and to enjoin against their transfer. A decree was entered according to such prayer, but Mrs. Shutz refused to comply therewith. She was, accordingly, held in contempt of court and jailed but subsequently secured her release therefrom without obeying the decree or divulging the location of the certificates. Thereafter she transferred one of the stock certificates to a bona-fide purchaser. The executor thereupon amended his suit and asked the court to compel the several corporations to re-issue new certificates to him and to require them to pay all dividends to his order. Though enjoining the corporations from making further transfers, the lower court refused to require them to re-issue certificates inasmuch as no proof had been offered that the originals had been lost or destroyed. Upon appeal by the executor, the Supreme Court of Ohio affirmed the decision on the ground that the rights of the parties were exclusively determined by the provisions of the Uniform Stock Transfer Act which was silent on the question posed by the instant case.

Though stock ownership may exist without the use of stock certificates,[2] it is more frequently the case that a corporation will issue certificates as evidence of ownership of shares therein. Such certificates, when issued, are merely evidence of title and possess no attributes of negotiability, hence, in the absence of statute or by-law, need not be surrendered at the time transfer is made on the corporate books.[3] Their

[19] Frost v. Railroad Commission, 271 U. S. 583 at 603, 46 S.Ct. 605, 70 L. Ed. 1101 at 1108, 47 A.L.R. 457 at 466 (1926).

[1] 141 Ohio St. 267, 47 N.E. (2d) 886 (1943).

[2] Chandler v. Northern Cross R. R. Co., 18 Ill. 190 (1856); Wemple v. St. L., J. & S. R. R. Co., 120 Ill. 196, 11 N.E. 906 (1887).

[3] Ohman v. Lee, 149 Minn. 451, 184 N.W. 41 (1921).

loss, destruction, or even retention by others would not, therefore, prevent transfer of the shares by the registered owner or his legal representative, and the transferee without notice of the rights of third persons would acquire title to the shares.[4] Under such rules, the inability of the executor to recover the certificates from the fraudulent possessor thereof, as in the instant case, would not defeat his right to the shares, to the dividends thereon, or to make transfer thereof.

To avoid some of the consequences indicated by such rules, most corporations have adopted by-laws requiring surrender of the outstanding certificate before permitting a transfer of the shares on the corporate records, and they usually incorporate a reservation to that effect in the certificate itself. Provisions of this nature, then, become an element in the contract between the corporation and the shareholder, and, as such, are binding on the parties.[5] To add further characteristics to the stock certificate, certain of the states, including the one in question, have adopted the Uniform Stock Transfer Act,[6] by the terms of which a stock certificate has become something more than mere evidence of title. By Section 8 thereof,[7] a stock certificate indorsed in blank is sufficiently negotiable to pass title to the shares represented thereby to a good faith purchaser even though delivered by one having no right of possession and lacking authority to make a transfer.[8] The provisions of such statute, where enacted into law, are, of course, but further implied terms in the contract between the corporation and the shareholder.

Though the act recognizes the right of the latter to replace lost or destroyed certificates,[9] it makes no provision for a situation like that presented in the instant case. Its language speaks in terms of actual control over the certificate, rather than determining the effect of a mere order to surrender the same.[10] To require a corporation to issue a new certificate under such circumstances, would be to compel it to undertake an act it has not agreed to perform. It would seem, therefore, that the court was correct in denying to the executor the re-issue of stock certificates. Though the identical problem has not been passed upon before, decisions exist which tend to support that result, as courts have held that a corporation must resist a transfer of shares unless the old certificate is surrendered,[11] and have penalized the corporation which

4 Union Bank of Georgetown v. Laird, 15 U. S. (2 Wheat.) 390, 4 L. Ed. 269 (1817); New York & N. H. R. R. Co. v. Schuyler, 34 N.Y. 30 (1865).

5 La Belle Iron Works v. Quarter Savings Bank, 74 W.Va. 569, 82 S.E. 614 (1914).

6 6 U.L.A. vii; Ill. Rev. Stat. 1941, Ch. 32, § 416 et seq.

7 6 U.L.A., p. 14; Ill. Rev. Stat. 1941, Ch. 32, § 423.

8 Iowa Securities Corp. v. Ridgewood Nat. Bank, 175 N.Y.S. 776 (1919); Stoltz v. Carroll, 99 Ohio St. 289, 124 N.E. 226 (1919).

9 6 U.L.A. § 17; Ill. Rev. Stat. 1941, Ch. 32, § 432.

10 6 U.L.A. § 7 provides: "Any court of appropriate jurisdiction may . . . enjoin the further transfer of the certificate or impound it." See also Ill. Rev. Stat. 1941, Ch. 32, § 422.

11 Allmon v. Salem Building Ass'n, 275 Ill. 336, 114 N.E. 170 (1916); Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N.W. 337 (1890); First Nat. Bank v. Strib-

did not do so,[12] on the theory of a violation of a duty imposed by contract.

The decision, however, suggests the necessity of a possible amendment to the Uniform Stock Transfer Act, since the apparent remedy of the executor, i. e. to compel the return of the original certificates, has been demonstrated as practically worthless as long as the fraudulent possessor remains recalcitrant and is willing to suffer for the contempt of court.

R. FOSTER

EASEMENTS—EXTENT OF RIGHT, USE AND OBSTRUCTION—WHETHER OR NOT A STRANGER MAY CROSS RIGHT OF WAY ABOVE OR BELOW AREA ACTUALLY REQUIRED FOR MAINTENANCE OR OPERATION OF RAILROAD—Public utilities engaged in furnishing electrical power or means of communication are frequently required to cross railroad rights of way with their lines or other structures. Of interest to them should be the recent decisions in *Farmers Grain & Supply Company of Warsaw* v. *Toledo, Peoria & Western Railroad*[1] and *Cleveland, Cincinnati, Chicago & St. Louis Railway Company* v. *Central Illinois Public Service Company*.[2]

In the first of these cases, a suit was brought to enjoin the defendant railroad from interfering with the construction of an overhead conveyor extending from a mill elevator belonging to the plaintiff, adjacent to defendant's tracks, above and across the one hundred foot right of way of defendant's railroad to the bank of a navigable stream. None of the fixtures designed to support the conveyor were to be located on the right of way, which defendant held only upon an easement for railroad purposes. Defendant, however, claimed that its easement extended upward beyond the height of the proposed conveyor which, if erected, would then interfere with the use and enjoyment of its right of way for railroad purposes. The court therein affirmed an injunction in favor of plaintiff, following the rule previously established in Kentucky[3] and Tennessee.[4] In the course of its opinion, the court said: "Aside from the generally recognized rule that the owner of the fee may construct improvements above the right of way that will not interfere with the enjoyment of the easement, a railroad company cannot complain or interfere with the con-

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ling, 16 Okla. 41, 86 P. 512 (1906); National Bank of New London v. Lake Shore & M. S. R. Co., 21 Ohio St. 221 (1871). See also 61 A.L.R. 433.

12 Bank v. Lanier, 78 U. S. (11 Wall.) 369, 20 L. Ed. 172 (1871); New York & N. H. R. R. Co. v. Schuyler, 34 N.Y. 30 (1865). See also Fletcher, Cyclopedia of the Law of Private Corporations, Perm. Ed., Vol. 12, § 5540.

1 316 Ill. App. 116, 44 N.E. (2d) 77 (1942).

2 380 Ill. 130, 43 N.E. (2d) 993 (1942).

3 Citizens' Telephone Co. v. Cincinnati, N. O. & T. P. R. Co., 192 Ky. 399, 233 S.W. 901, 18 A.L.R. 615 (1921).

4 Illinois Cent. R. Co. v. Centerville Telephone Co., 135 Tenn. 198, 186 S.W. 90 (1916). A similar rule has been established in Missouri, see St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Tel. Co., 134 Mo. App. 406, 114 S.W. 586 (1908), and in Pennsylvania, see Cumberland Valley & W. R. Co. v. Chambersburg & G. Electric R. Co., 15 Pa. Dist. R. 965 (1903).

struction of an improvement by a stranger, since the same is above and beyond the use and purpose of the easement granted, and the railroad company therefore holds no legal right or interest therein."[5] In fixing the upward limits of the easement, the court applied the rules of the Illinois Commerce Commission regulating minimum clearance above railroad tracks which, at the present time, is 21½ feet. The fact that the railroad might, at times, move pile drivers or cranes over its tracks with booms extending to a height in the air greater than the minimum clearance was held to be immaterial, since the court found that the railroad was required to lower such booms when passing beneath overhead bridges.

In the second case, a public service company constructed four electrical transmission wires across the right of way of plaintiff railroad suspended from towers standing on either side thereof, without first having secured plaintiff's consent. Again, the overhead structure was higher than the minimum clearance and the railroad did not own the fee in its right of way. Suit for a mandatory injunction to compel removal of these wires was dismissed and the Supreme Court affirmed the decree, holding that plaintiff's consent was not necessary so long as the wires did not interfere with the operation of the railroad. The court, interpreting the instrument of conveyance to the railroad, followed the rule previously laid down in *Tallman* v. *Eastern Illinois and Peoria Railroad Company*[6] to the effect that a fee simple title is deemed to have been conveyed, when the estate is not otherwise ascertained, from the use of the words "convey and warrant," but that the entire deed must be examined to ascertain what estate the parties intend to convey and, if it appears that a right of way only was intended to be conveyed, the railroad company grantee takes only an easement for railroad purposes.

Both cases point out that the Illinois Constitution provides that: "The fee of land taken for railroad tracks, without the consent of the owners thereof, shall remain in such owners subject to the use for which it is taken,"[7] hence the railroad could secure only an easement of sufficient scope to permit the operation of the railroad, thereby making its rights subject to all other privileges and uses retained by the owner of the fee.[8]

That a stranger, without the consent of the railroad, can place fixtures underneath and across the right of way where only an easement for right of way purposes exists, has already been decided by a Pennsylvania court.[9] It stated that the property rights of a railroad company, not owning the fee, in its right of way "do not extend upwards beyond a

5 316 Ill. App. 116 at 126, 44 N.E. (2d) 77 at 81.
6 379 Ill. 441, 41 N.E. (2d) 537 (1924), noted in 21 CHICAGO-KENT LAW REVIEW 51.
7 Ill. Const. 1870, Art. II, § 13.
8 See Becker, Subdividing the Air, CHICAGO-KENT REVIEW (Extra Vol. 1931), p. 40.
9 Cumberland Valley & W. R. Co. v. Chambersburg & G. Electric R. Co., 15 Pa. Dist. R. 965 (1903).

line necessary to transport its passengers and employees with safety and dispatch, or downward below a line of support for their tracks and superstructures. The line of demarcation has not been, and probably cannot be, defined in feet."[10] That such a rule would be followed in this state has already been indicated by an earlier Illinois case.[11]

It would, therefore, appear that so long as a public utility complies with the minimum clearance requirements of the Illinois Commerce Commission, it may construct its lines and fixtures under, over and across railroad rights of way without consent of the railroad concerned in all cases except where the railroad has purchased fee simple title to the strip of land used. If done with the consent of the owner of the fee, its occupation of the superincumbent air or of the subjacent surface must pass unquestioned by any one.

G. KLOEK

EMINENT DOMAIN—COMPENSATION—WHETHER MORTGAGEE IS ENTITLED TO THE PROCEEDS OF A CONDEMNATION AWARD PAID AFTER FORECLOSURE OF THE REMAINING ESTATE OR IS LIMITED TO SATISFACTION OF DEFICIENCY JUDGMENT THEREFROM—In the recent case of *City of Chicago* v. *Salinger*,[1] the court had before it the problem of the relative rights of mortgagor and mortgagee to the proceeds of a condemnation award allowed for that part of the mortgaged premises which had been taken for public use. It appeared that after mortgage had been given on the entire premises, a portion thereof was condemned but payment of the award was delayed. Before payment, the mortgagee foreclosed upon the balance of the premises, purchased at the foreclosure sale for less than the amount due, received a deficiency judgment, and, after redemption period had expired, took title to the balance of the property. After all this had been accomplished, the municipality deposited the amount of the award with the county treasurer who contemplated paying the same to the mortgagor less the amount of the deficiency judgment. The mortgagee intervened, claiming the entire award on the theory that the same had been substituted for the mortgaged premises under the doctrine of equitable conversion and that he, as the present owner of the balance of the premises, had become entitled thereto. The trial court limited his recovery to the amount of the deficiency judgment and, on appeal, that decision was affirmed.

The principle is well established that the lien of a mortgage covers the entire property, and, when a portion thereof is taken for public use, the lien attaches to the award from which the mortgagee may satisfy the entire amount of his claim,[2] for the award is considered an equitable

10 15 Pa. Dist. R. 965 at 968.

11 Eldorado, M. & S. W. R. Co. v. Sims, 228 Ill. 9, 81 N.E. 782 (1907).

1 317 Ill. App. 542, 47 N.E. (2d) 725 (1943).

2 City of Chicago v. Gage, 268 Ill. 232, 109 N.E. 28 (1915); Colehour v. State Savings Inst'n, 90 Ill. 152 (1878); Stopp v. Wilt, 76 Ill. App. 531 (1898); Pomona College v. Dunn, 7 Cal. App. (2d) 227, 46 P. (2d) 270 (1935).

substitute for the property to which the lien attaches.[3] It naturally follows that the mortgagee is entitled to be paid therefrom before the owner of the condemned premises. Only the residue, if any, may be paid to the title holder.[4] If, pending payment of the award, the mortgagee has foreclosed upon the balance of the property and has exhausted his legal lien thereon without getting full satisfaction, it is certainly equitable to give him a lien upon the fund arising from the destruction of part of the security, at least to the extent of any deficiency, so as to make him whole.[5]

In that regard, however, some courts will require exhaustion of the mortgagee's legal remedy so far as the balance of the security is concerned before permitting an equitable lien on the award upon the theory that the mortgagee's right therein is contingent upon whether or not a deficiency arises.[6] The majority of courts do not require such exhaustion of remedy, since they act on the assumption that a partial condemnation necessarily results in an impairment of the mortgagee's security.[7] In neither event, however, is the mortgagee entitled to more than the amount of his debt, being entitled to the entire award only if it is insufficient to pay the full amount thereof,[8] while any excess remains the property of the owner of the condemned premises.[9] The decision in the instant case, permitting collection of the deficiency judgment from the condemnation proceeds, was, then, obviously correct.

It is the other contention of the mortgagee, that as owner of the balance of the premises by reason of foreclosure he became entitled to the entire award, which presents a novel question not heretofore decided in Illinois. The nearest comparable case is that of *In the Matter of the Petition of Dillman,*[10] in which a Michigan court decided that the mortgagee, who had foreclosed after condemnation proceedings had been instituted but before determination of the award, was limited to the amount of the deficiency only, even though, prior to payment of the award, he had purchased the balance of the premises subject to the mortgagor's right of redemption. In so deciding, the court announced the rule that the right to compensation for property taken vests in the owner thereof at the time of taking and is not divested by a subsequent foreclosure.

While a voluntary sale of the premises upon which condemnation

3 Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57, 13 N.E. 222 (1887). See also cases noted in Jones, Mortgages (8th Ed.), Vol. 2, § 875, particularly note 9.

4 South Park Commissioners v. Todd, 112 Ill. 379 (1884); Martin v. Rockford Trust Co., 281 Ill. App. 441 (1935).

5 In re Dillman, 276 Mich. 252, 267 N.W. 623 (1936); Stemper v. County of Houston, 187 Minn. 135, 244 N.W. 690 (1932).

6 In re Bowery Sav. Bank, 284 N.Y.S. 232 (1936); Walker v. Brownsville-South Realty Co., 275 N.Y.S. 589 (1934).

7 In re Dillman, 276 Mich. 252, 267 N.W. 623 (1936). See also cases cited in 58 A.L.R. 1534, 110 A.L.R. 542, and 29 C.J.S. Eminent Domain, § 201.

8 In re Houghton and Olmstead Avenues, 266 N.Y. 26, 193 N.E. 539 (1934).

9 In re East 29th St., in City of New York, 288 N.Y.S. 806 (1936).

10 276 Mich. 252, 267 N.W. 623 (1936).

proceedings are pending may carry with it the right to any award unless expressly reserved,[11] the same rule should not apply to an involuntary sale. Had foreclosure preceded condemnation, the mortgagee's position in the instant case might be regarded as sound since, as purchaser, he would have acquired all rights of the mortgagor in the entire property. Such, at least, was the holding in *Wadelski* v. *16th Ward Building and Loan Association*,[12] in which the mortgagor was denied the right to recover the amount of an award paid to the mortgagee whose foreclosure had proceeded to the stage of certificate of sale before any portion of the property had been taken, even though the redemption period had not then expired. If, however, condemnation comes first, the mortgage, as to the part taken, has become *functus officio*. The rights of the parties therein have entirely ceased except as they may have been preserved by transfer to the fund representing the property. A subsequent foreclosure of the balance of the property could give the purchaser no interest therein, for the mortgagee, by that proceeding, is asserting no right thereto, nor does the court by its decree purport to exercise any control thereof. Such purchaser, whether mortgagee or stranger, does not succeed to any greater rights than those created by the mortgage and the decree,[13] which, by that time, is merely a lien on the remainder of the property. He would, and could, acquire no more than the equity of redemption in that balance.

Though an equitable lien, as has been seen, may attach to the fund in favor of the mortgagee, it proceeds on an entirely different foundation and is granted merely to afford him a chance to get full payment of his debt. It is an enforcible right, but not by foreclosure, hence having once obtained satisfaction thereof through sale of the balance of the premises and discharge of the deficiency judgment, he should be denied the right to anything more. L. ASCHERMAN

MUNICIPAL CORPORATIONS—TORTS—WHETHER OR NOT A CITY IS LIABLE WHERE FIREMEN, FLOODING VACANT PROPERTY FOR ICE SKATING PURPOSES, NEGLIGENTLY CAUSE ICE TO ACCUMULATE ON PRIVATE WALK THEREBY CAUSING PERSONAL INJURY—In the recent case of *McKeown* v. *City of Chicago*[1] it appeared that an icy condition on a private walk was caused by water leaking from a defective hose used by city firemen when flooding a vacant lot for ice skating purposes. The work was done under a permit to use water from the city fire hydrants granted pursuant to ordinance.[2] Plain-

11 Chandler v. Morey, 195 Ill. 596, 63 N.E. 512 (1902).

12 276 Ill. App. 74 (1934).

13 Powell v. Voight, 348 Ill. 605, 181 N.E. 403 (1932).

1 319 Ill. App. 563, 49 N.E. (2d) 729 (1943).

2 Municipal Code of Chicago (1939), Ch. 185, § 15 states: "The Mayor is duly authorized and empowered, from time to time, as he in his discretion may see fit, to permit the use of water from the city hydrants, free of charge, for the purpose of flooding vacant property, subject to the consent of the owner or owners of such property, where it may be desired to use such property when so flooded for the purpose of skating; provided, that no charge shall be made to any person for the privilege of skating on property so flooded."

tiff, injured by falling on the icy walk, sued to recover damages and contended that, in flooding such lot, the city acted in a purely ministerial or proprietary manner. The municipality claimed that it acted in its governmental capacity, hence was not liable for the negligent acts of its agents. Judgment for the plaintiff in the trial court was affirmed, the upper court holding that, as the elements of creation and operation of a recreational facility by the municipality were lacking, the project could not be considered a governmental function. Since the city did no more than merely furnish the water, it was treated as acting in a ministerial way.

It is well settled that when a municipal corporation acts in a governmental capacity it is exempt from liability for the tortious conduct of its agents,[3] but when acting in its proprietary capacity it is liable.[4] The difficulty in any given case lies in ascertaining when the municipality is acting in its corporate capacity in contrast to its governmental one. The division or classification of these functions is far from well defined, in fact is vague and indefinite, and the cases on the subject are in hopeless confusion. As a consequence, the courts have frequently said that the only thing that can be done is to determine each case on its own particular facts.[5] If any test can be laid down, it seems to be that if the municipality is performing the particular activity for the general public good it is exercising a governmental function in behalf of the state, but if it is performed chiefly for the private advantage of the community it is then engaged in a proprietary one.[6]

Using this test, it would seem that the suggested basis for differentiating liability laid down in the instant case is not a sound one. Certainly, the operation and maintenance of an ice skating pond such as was there involved was for the specific benefit and advantage of the urban community embraced within the corporate boundaries. Providing the residents with easy access to a healthful sport, the benefits of which were not intended to be enjoyed by the general public from beyond the corporate limits, clearly falls in the latter category. The mere fact that the public at large might benefit indirectly therefrom is not sufficient to make the function a governmental one,[7] for almost all affairs of purely local concern produce some indirect results on the general safety, health, and welfare. If, then, the function is one largely local or corporate

3 Gebhardt v. Village of LaGrange Park, 354 Ill. 234, 188 N.E. 372 (1933); Bedtke v. City of Chicago, 240 Ill. App. 493 (1926), cert. den. 241 Ill. App. xv.

4 Roumbos v. City of Chicago, 332 Ill. 70, 163 N.E. 361 (1928).

5 Johnston v. City of Chicago, 258 Ill. 494, 101 N.E. 960 (1913); Schmidt v. City of Chicago, 284 Ill. App. 570, 1 N.E. (2d) 234 (1936); Costello v. City of Aurora, 295 Ill. App. 510, 15 N.E. (2d) 38 (1938); Millar v. Town of Wilson, 222 N.C. 340, 23 S.E. (2d) 42 (1942); City of Miami v. Oates, —Fla.—, 10 So. (2d) 721 (1942).

6 Merrill v. City of Wheaton, 379 Ill. 504, 41 N.E. (2d) 508 (1942), and cases cited in note 5, ante.

7 Johnston v. City of Chicago, 258 Ill. 494, 101 N.E. 960 (1913); Merrill v. City of Wheaton, 379 Ill. 504, 41 N.E. (2d) 508 (1942); Schmidt v. City of Chicago, 284 Ill. App. 570, 1 N.E. (2d) 234 (1936).

in nature the city cannot, and should not, escape liability merely because the act might, in some general way, also relate to a function of the government.[8]

A further test suggests that sometimes, when the admittedly governmental service comes to an end, a ministerial form of duty is imposed on the city to prevent or abate dangerous conditions which may have been caused by the exercise of the governmental function. A failure to observe such duty will then impose liability. Thus a city of one state has been held liable for injuries caused to a person slipping on ice, where the icy condition was produced by flooding a street in the process of cleaning it.[9] The same theory was followed in another state to impose liability where a waste box cover was negligently permitted to protrude over a sidewalk.[10] Still a third state has required a city to answer when ice formed on a street from water used by the fire department in extinguishing a fire.[11] Although Illinois does not appear to have announced its adherence to such a rule, it would seem from the facts in *Graham* v. *City of Chicago*[12] that it is willing to follow the same, for liability was there imposed for permitting ice to form from water allowed to run onto a sidewalk when a school undertook to flood its playground for the purpose of providing an ice skating rink.

An even more modern trend appears to be developing against the rule of non-liability which was provided by the cloak of governmental immunity. The establishment and maintenance of town parks, playgrounds, recreational centers,[13] and bathing beaches,[14] whether cast upon the municipality by mandatory provision of law or created pursuant to permissive provisions,[15] have all been treated as being types of ministerial service, for which the careless municipality has been held liable. Statutory abolition of well-recognized former immunities[16] has encouraged the courts to extend the tendency against immunity[17] and to quote with approval from writers who assert that the distinction between the two classifications should be abandoned.[18] Functions long considered to

8 Roumbos v. City of Chicago, 332 Ill. 70, 163 N.E. 361 (1928).

9 Renstrom v. City of Nampa, 48 Ida. 130, 279 P. 614 (1929).

10 Mayor, etc., of City of Savannah v. Jones, 149 Ga. 139, 99 S.E. 294 (1919).

11 Crandall v. City of Amsterdam, 4 N.Y.S. (2d) 372 (1938).

12 346 Ill. 638, 178 N.E. 911 (1931).

13 Lane v. City of Buffalo, 250 N.Y.S. 579 (1931).

14 Augustine v. Town of Brant, 249 N.Y. 198, 163 N.E. 732 (1928), re-argument denied 250 N.Y. 537, 166 N.E. 315 (1929).

15 Van Dyke v. City of Utica, 196 N.Y.S. 277 (1922).

16 Laws 1931, p. 618; Ill. Rev. Stat. 1941, Ch. 24, § 1-13, for example, removes the immunity formerly accorded in case of negligence by firemen engaged in the performance of their duties.

17 See Wasilevitsky v. City of Chicago, 280 Ill. App. 531 (1935), in which liability was imposed for the negligent operation of a garbage truck and trailer.

18 See Borchard, Government Liability in Tort, 34 Yale L.J. 229 (1925), particularly pp. 242-5, quoted in 280 Ill. App. 531 at 536, and note in 34 Harv. L. Rev. 66, quoted with approval in the instant case.

belong to the class which provided immunity[19] are shifted into the other category for purpose of fixing liability,[20] until it begins to appear that municipal freedom from liability for the torts of its agents is approaching an end. The holding in the instant case adds but another instance.

W. S. GROTEFELD

SALES—TRUST RECEIPTS—EFFECT OF FILING OF STATEMENT OF INTENTION TO ENGAGE IN TRUST RECEIPT TRANSACTIONS UPON SUBSEQUENT ADVANCEMENTS MADE BY THIRD PERSON ON SAME SECURITY—In *Donn* v. *Auto Dealers Investment Company*,[1] an action for the conversion of certain automobiles, it appeared that the plaintiff filed a declaration of intention to engage in trust receipt financing with the owner thereof. Subsequently plaintiff did in fact make advances on such cars, but in the meantime the defendant, not aware of plaintiff's existence, also filed a similar declaration and made advances on the same automobiles. Upon the owner's default, defendant took possession of the property, sold the same at public sale and applied the proceeds on the debt thus created in defendant's favor without making any payment on the sums due plaintiff. The trial court held that, inasmuch as defendant had no knowledge of plaintiff's existence and had, in fact, made the earlier advances, plaintiff could not maintain an action for conversion. On appeal, the judgment was reversed and remanded with directions to enter judgment in plaintiff's favor.

The problem thus presented involved the effect of Section 13 of the Uniform Trust Receipts Act[2] which provides that any entruster undertaking to engage in such transactions is entitled to file a statement of intention with the Secretary of State and purports to give him priority on all security transactions engaged in between the parties during the space of the ensuing year. The defendant contended that the mere filing of the statement of intention was not enough to give priority since no actual lien was created thereby but that the lien did not arise until an actual advance was made, so that if another without actual notice made an earlier advance of money he should be accorded the priority of lien which he would have been granted in the absence of any statutory regulation.[3]

It had been earlier determined in *Middleton* v. *Commercial Investment Corporation*[4] that the fact of filing such statement with the Secretary of State was enough to give notice to the world of the potential rights of the entruster in much the same way that recording does in

19 The maintenance of public parks was long regarded as a governmental function in Illinois: Stein v. West Chicago Park Com'rs, 247 Ill. App. 479 (1928); Gebhardt v. Village of LaGrange Park, 354 Ill. 234, 188 N.E. 372 (1933).

20 Costello v. City of Aurora, 295 Ill. App. 510, 15 N.E. (2d) 38 (1938).

1 318 Ill. App. 95, 47 N.E. (2d) 568 (1943).

2 Ill. Rev. Stat. 1943, Ch. 121½, § 178.

3 Chessen v. Morick, 260 Ill. App. 1 (1930).

4 301 Ill. App. 242, 22 N.E. (2d) 723 (1939).

the case of real estate transactions,[5] hence defendant's claim that it lacked actual notice of the plaintiff's existence was properly held unavailable. While the statement does not furnish the particularity of information that is given by a recorded mortgage, it does sufficiently warn the person about to loan money on such security that further inquiry would be advisable and provides him with a source for such inquiry.[6]

A more difficult problem presented in the case concerns the priority to be accorded where one person files the earlier notice of intention but the other makes the earlier advance. The court concluded that the first person acquired an inchoate security interest merely by filing notice of intention which would ripen into an actual lien as soon as money or credit was advanced and, when advanced, the same operated retroactively. In arriving at that result, the court was unaided by any precedent from other jurisdictions which have adopted the Uniform Trust Receipts Act since no case involving that point appears to have arisen.[7] It did, however, depend upon an analogy provided by the case of a mechanic's lien which, under the statute, although notice of lien is not filed until sometime after completion of the work, in fact relates back to the date of the contract, thereby subordinating all rights which might arise thereafter.[8]

One difficulty is presented by such analogy. In the case of the mechanic's lien, the contractor is, by reason of the contract, bound to complete the work or suffer damages for its non-completion. Since he is under an obligation to expend money and labor, it is not unfair to make his lien operate retroactively to the date when he so became obligated. Such is not necessarily the case with the entruster in the trust receipt transaction for he is permitted to file his notice of intention whether he has already advanced or undertaken to advance credit or merely "expects to be engaged in financing under trust receipt transactions."[9] If a firm commitment exists between the lender and borrower, then the analogy would be sound, but if the lender merely "expects" to

5 See, for example, Ill. Rev. Stat. 1943, Ch. 30, § 29.

6 The Commissioners of Uniform Laws indicated that the purpose of the Uniform Trust Receipts Act was to relieve the commercial world of much of the notoriety and red-tape that would be involved in a full recording system: see 9 U.L.A. 667. Bacon, A Trust Receipt Transaction, 5 Ford. L. Rev. (1936), p. 265, noted that the filing requirements were "unusual" but considered them adequate. A somewhat similar device is used in the Torrens System where provision is made for the filing of a caveat of intention to create a charge on registered property. See Ill. Rev. Stat. 1943, Ch. 30, § 103.

7 The act has been adopted in only 13 states in the period between 1934 and 1943, and the specific problem does not appear to have arisen elsewhere than in the instant case. In Middleton v. Commercial Investment Corporation, 301 Ill. App. 242, 22 N.E. (2d) 723 (1939), the issue arose between an entruster under a trust receipt and the holder of a bill of sale by way of security. The opinion does not elaborate on the theory of priority.

8 Boyer v. Keller, 258 Ill. 106, 101 N.E. 237, Ann. Cas. 1916B 628 (1913).

9 Ill. Rev. Stat. 1943, Ch. 121½, § 178.

loan money without being obligated so to do he should be accorded no greater security than is furnished the lender on real estate. The latter is afforded a lien only from the time of actual advancement even though his mortgage be recorded earlier[10] unless, by statute,[11] the fact of recording operates as a *caveat*.

The court, in the instant case, refused to pass on the question as to what result would follow if the entruster had merely filed a statement of intention without being bound to advance funds. The defendant's claim that such was the stipulated fact was rejected because no such statement appeared in the stipulation.[12] It might very well, when that question is presented, deny priority of lien to one who has given no commitment. On the problem actually presented, however, the court seems to have carried out the legislative purpose without doing violence to equitable principles concerning priority of lien.

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10 Frye v. Bank of Illinois, 11 Ill. 367 (1849); Schultze v. Houfes, 96 Ill. 335 (1880).

11 Ill. Rev. Stat. 1943, Ch. 30, § 37a.

12 318 Ill. App. 95 at 106, 47 N.E. (2d) 568 at 573.