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AN INQUIRY INTO THE PRINCIPLES OF MUNICIPAL RESPONSIBILITY IN GENERAL ASSUMPSIT AND TORT

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I. *Introduction*

This paper is written in the conviction that the world is governed by natural law. It is our ambition to describe an analytical method by which the true responsibility of a municipality in respect to any given claim in general assumpsit or tort may be ascertained. It is not pretended that the method which we shall offer will yield a result in harmony with every reported judicial decision and statute, nor even that it may not differ rather widely from the system of legal rules prevailing currently in many states. It is our hope to present an exposition of basic principles in harmony with the historic traditions of the Anglo-American system and which will command the reader's assent.

In order to forestall misunderstanding, it will be desirable to define the sense in which the term "general assumpsit" is used. As used in this paper, it is intended to exclude not only all demands based on an express agreement, but also all demands based on any actual agreement or promise which is inferred from the conduct of the parties or from the course of events. Its use will be confined to that class of cases in which a defendant is alleged to be indebted for value received, not in consequence of any agreement, but by operation of law. In short, it is the intent of this paper to deal with the subject of municipal liability to pay money arising otherwise than from a contract made by a municipal officer in strict accordance with the authority conferred upon him.

No person or organization can pay out money unless it has acquired money in some way. There are, in general, three methods of acquiring money in this world. One is to ask for it; one is to earn it; and one is to take it away from someone else.

The first method, that of asking for it, is one which municipalities ordinarily do not pursue.

The second method, that of earning it, is not characteristic of municipalities, although it is pursued rather frequently — as when municipalities supply services or commodities such as water, light, power, or sewerage service to such customers as choose to purchase at specified prices; or when they operate toll bridges or toll roads. This is the

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method of economic enterprise, the means by which the majority of any population must necessarily acquire whatever money they have.

The third method, that of taking money from others, is that normally pursued by all states and municipalities, and is called taxation when pursued by them. It is distinguished from larceny solely on the ground that the state or municipality employs the money thus collected to sustain services and maintain conditions which are deemed indispensable to the continued life of the people, and therefore to the life of the individuals of whom the people is composed. Because the exaction of taxes can only be justified by reference to the real or alleged necessities of the people, the authority which exacts the taxes — be it king or assembly — invariably claims for itself the sole and final decision as to what those necessities are. In other words, it declines to submit to any outside authority the question when, how, and for what purposes the tax money thus exacted shall be disbursed. This is called the doctrine of sovereign immunity, and — since that doctrine lies at the root of our problem — to that doctrine we now turn.

II. *The Doctrine of Sovereign Immunity*

Although the state necessarily reserves to itself the disposition of the money which it collects by taxation, one of the chief services which people have always demanded from every government is that justice shall at all times be maintained. It results that the sovereign authority — be it king or assembly — has invariably found it necessary to recognize and give some sort of hearing to petitions for relief against itself.

Sir William Holdsworth has devoted forty-one pages of his great "History"[1] to a discussion of "The KING — The Development of the Legal Conception of the Prerogative — Remedies against the Crown." It is, we find, abundantly evident that never since the Great Charter of A.D. 1215 — and presumably never before it — has the Crown long maintained the position that justice was synonymous with the King's will. On the contrary, it is apparent that at least as early as the reign of Edward I (A.D. 1272-1307) the practice had become established that if a petition addressed to the King by a subject seemed to ask for nothing more than the petitioner might demand as of right from a fellow-subject the King would refer it to the regular judges with the endorsement — "Let Right be Done."[2] The King — in the Middle Ages as now — was an enterpriser and a proprietor as well as the executive head of the Government; and it resulted that the petitions thus referred to the judges dealt characteristically with what were

1. 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 4-45 (1926).
2. *Id.* at 9-12.

then regarded as property rights.[3] But, as Holdsworth points out, it is possible to regard many contracts as grants of rights incorporeal,[4] and many torts consist of nothing more than invasions of property,[5] hence these references of the petitions of right to the judges involved, in effect, an acceptance of the Crown's liability for what we should now regard as contracts and torts. Throughout the whole of this early period the King's position was primarily that of a great landlord, and his revenues chiefly derived from rents. But, with the passage of time, the Crown's revenues came increasingly to arise from taxes, and the Great Rebellion, the Restoration, and the Revolution, of the seventeenth century established the proposition that taxes could be levied only with the Commons' consent. This put the petitions of right in a new setting — for, obviously, an appeal for redress to be awarded out of a Treasury which can be replenished only by Act of Parliament is an appeal to the King sitting in his Courts of Justice to pay out money which only the King sitting in his two Houses of Parliament can raise and appropriate according to law. The dilemma which such petitions present is well illustrated by the famous case of *The Bankers*[6] in which the petitioning money-lenders sought to collect by legal process an annuity which Charles II "of our special grace, certain knowledge, and mere motion" had charged upon "the duty of excise upon beer, ale, and other liquors" twenty-three years before. The decision of the House of Lords in favor of the petitioners — rendered in A.D. 1700 after ten years of disputation among the great officers of state and the judges — may well be regarded as marking the final transfer of command over the economy from the land-owning to the mercantile class.

The century and a half which followed A.D. 1700 was an era of rising power on the part of popularly elected assemblies throughout the Anglo-American world. In A.D. 1637 a bare majority of seven out of twelve judges had overruled John Hampden's contention that he could not be compelled to pay "ship money" otherwise than pursuant to an Act of Parliament;[7] and the popular discontent evoked by this decision had contributed to the overthrow of Charles I. In A.D. 1765 the Stamp Act, passed by the King in Parliament to defray the expense of the French and Indian wars, was resisted by the American colonists on the ground that they could be taxed only with the consent of their own colonial assemblies, and resisted so vigorously that the tax had to

3. *Id.* at 12-29.
4. *Id.* at 17-18, 20-21.
5. *Id.* at 18-20.
6. The Case of the Bankers in the Court of Exchequer, and afterwards in the Exchequer-Chamber and Parliament, 14. How. St. Tr. 1-114. The case is summarized briefly, and with great clarity in 9 HOLDSWORTH, *op. cit. supra* note 1, at 32-39.
7. Hampden's Case, 3 How. St. Tr. 825-1316.

be given up.[8] In A.D. 1776 the Declaration of Independence alleged as one of its grievances against George III that he had given "his Assent to . . . Acts of pretended legislation. . . . For imposing taxes on us without our consent."[9] In A.D. 1787 the Constitution of the United States of America directed that[10] "All legislative Powers herein granted shall be vested in a Congress of the United States" and that[11] only "The Congress shall have Power to lay and collect taxes . . . to pay the Debts . . . of the United States [and] . . . to borrow money on the Credit of the United States. . . ." The Eleventh Amendment to the same Constitution directed that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States. . . ." Such a political environment was not favorable to the evolution of the idea of a judicial judgment collectible by legal process out of the treasury of the sovereign assembly. Although Congress — no doubt from the beginning — gave attention to claims for justice addressed to it by individuals, and although similar attention has from early dates been given by state legislatures and town meetings, it was not until the middle of the nineteenth century that the evolution of the law of judicial relief against the sovereign power was resumed. On February 24, 1855, Congress passed the first general statute authorizing the Court of Claims to entertain suits against the United States upon contracts.[12] On July 3, 1860, Parliament enacted the Petitions of Right Act,[13] thus codifying the law governing these proceedings, which had remained in neglected disorder ever since feudal times.

It is not, perhaps, wholly an accident that these legislative waivers of the right of the sovereign to be protected from law suits coincided with the reappearance of feudal ideas in the law. Certain it is that the second half of the nineteenth century saw a great revival of interest in the doctrines of the land law of the Middle Ages and the age of the Tudors, and a widespread use of these doctrines as a foundation for organizing the economy of large scale enterprise which was growing up. The Bar looked to the ideas of property, contract, and judicial justice as the sources of law and of wisdom, and the art of government by legislation was relegated to an inferior place. The law of torts and of agency was pressed into service for the purpose of defining the responsibility of the propertied to the unpropertied classes, and the century from A.D. 1850 to A.D. 1950 saw an uninterrupted evolution of doctrine along that line. But the State was not thought of

8. See 21 ENCYCLOPEDIA BRITANNICA 304 (14th ed. 1929).
9. See 7 ENCYCLOPEDIA BRITANNICA 125 (14th ed. 1929).
10. U. S. CONST. Art. 1, §1.
11. U. S. CONST. Art. 1, § 8.
12. 10 STAT. 612 (1855).
13. 23 & 24 VICT., c.34 (1860).

as an enterpriser or a proprietor — hence there was no pressure for the development of a law relative of torts and agency applicable to the State. People were content with legislation which provided judicial remedies for the protection of property from seizures by government and the collection of government debts. If an officer of the state did a wrong, or acted illegally, that, by definition, was an act outside his authority — and therefore something for which he was solely responsible and with which the public treasury was in no way concerned.[14] Although the facts of economic life and of legal administration have been out of harmony with this doctrine for some decades, that is still the prevailing philosophy of the taught and codified law.

It is, however, abundantly evident that the prevailing notions of sovereign immunity are in process of change. As early as June 13, 1939, the Legislature of New York enacted that:[15]

> The state hereby waives its immunity from liability and consents to have the same determined in accordance with the same rules of law as are applied to actions in the supreme court against individuals or corporations.

On August 2, 1946 Congress enacted the Federal Tort Claims Act,[16] which provides that:—

> . . . the United States district court . . . shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States for money only . . . on account of personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.[17]

And by the "Crown Proceedings Act, 1947"[18] the King of Great Britain in Parliament enacted that:—

> 2—(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:—
> (a) in respect to torts committed by its servants or agents;
> (3) Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute,

14. This curious lag of public law in following the well-established doctrines of private law with respect to the responsibility of a superior for the consequences of whatever is done by his subordinate in its interest is clearly pointed out in 9 HOLDSWORTH, *op. cit. supra* note 1, at 39-45.
15. Court of Claims Act; Laws of New York 1939, c. 860.
16. Act of August 2, 1946, c. 753 §§ 401-424; 60 STAT. 842-47 (1946).
17. *Id.* § 410.
18. 10 & 11 GEO. 6, c. 44 (1947).

> and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be as they would have been if these functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

In short, the economic functions of the modern state have become far too pervasive and vital to permit it any longer to disclaim responsibility for the acts of the officials by whom these functions are carried on. The representative legislature today — like the King in the middle ages — is compelled by its position to assume the duties of a *parens patriae*; and — again like the King in the middle ages— it is presented with so many petitions for justice that it must, perforce, refer them to professional judges to ascertain what their merits may be.

It is true, of course, that municipal corporations have never enjoyed sovereign immunity in the sense that they could not be summoned to answer in court. But they have enjoyed the other, and more substantial, aspect of sovereign immunity which results from the fact that their funds must be provided by taxes, and from the doctrine that only the electors or their representatives can raise, or authorize the disbursement of, tax funds. No municipal officer has any authority to disburse tax money unless the instructions given him by the electors or their representatives are strictly pursued; and from this it has been supposed to follow that no act of a municipal officer outside the strict limits of his instructions can have the effect of giving to anyone a claim upon the taxpayers' money which a judge can recognize and enforce. The conclusion is a plausible one — but it is not inevitable. It can be argued that tax money — like money voluntarily invested in business — ought rightly to be held responsible for the consequences of the activities which it supports. The issue which *The Bankers Case*[19] illustrates is a perennial issue, and every era must solve that issue afresh. We turn now to examination of that issue as it presents itself in municipal administration today.

III. *Enterprise, Money, and Things*

The idea of the dignity of the individual is basic to our scheme of economic, social, and political life. But the dignity of the individual does not reside in his capacity for enjoyment, or in prolonging his essentially transient existence for a few extra years. It resides in his character as a free agent able to choose, to pursue, and to give practical effect to, purposes; and his dignity rises in proportion as the purposes chosen, pursued, and given effect to, transcend the limitations of his own life. From this it results that every human life is an enterprise capable of either frustrating, helping, or merging with, the enterprises

19. *Supra* note 6.

of others; and the arts of business and politics are directed toward minimizing the mutual frustrations and enlarging the mutual helpfulness of the enterprises involved. The administration of justice — perhaps the first of the peaceful functions of government — is itself a collective enterprise and must be supported by drawing on the individual resources of the people. As other collective enterprises — such as roads, public services, and public schools — are undertaken, the share of the people's total energies which are devoted to common ends becomes larger and the share devoted to individual ends becomes less.

One of the greatest tools which mankind has devised for adjusting individual enterprise to common enterprise, and individual enterprises to one another, is money. Money is the instrument by which freedom within society is maintained. In simple economies the money function is normally performed by some one or more commodities — in recent centuries by silver and gold. But, just as Albert Einstein and his fellow-scientists have familiarized us with the notion that matter is primarily a reservoir of latent energy, so the bankers have demonstrated that the money function of commodities results from their capacity to stimulate human activity, and that commercial value is to be thought of as a fund of potential energy rather than a measure of mass. He who has "money in the bank" enjoys that sense of confidence which arises from the possession of an ample reserve of power. The bank account is potential energy which turns into kinetic energy as soon as it is spent in bringing to pass those activities on the part of others which the holder of the bank account desires to produce. These activities on the part of others tend, in turn, to bring things into being, and to move these things about from place to place. Thus the creditor's purposes, energized by the creditor's money, come to be realized in the visible world.

Legislatures, as everyone knows, are concerned with two types of activity — that of laying down rules of conduct and that of public finance. When a municipality taxes those who have money it transfers money from the taxpayers to itself. When it taxes those who do not have money it puts them under pressure to find it by selling either their property or their services to those who have. When it appropriates the money thus raised to specified purposes it starts a chain of human activity as a result of which those purposes will ultimately be achieved. State statutes and municipal ordinances may formulate the common purposes of a community. Only the raising and appropriation of money can put those purposes into effect. If these simple facts are held firmly before the attention it is believed that the true principles governing municipal liability in general assumpsit and tort will become clear.

IV. *Municipal Liability in General Assumpsit*[20]

In endeavoring to deal with a somewhat complex problem it is well to begin with the classic statements of our basic beliefs:

> A person who has been unjustly enriched at the expense of another is required to make restitution to the other.[21]

> In books of the Law, as in other books, and in common speech, "person" is often used as meaning a human being, but the technical legal meaning of a "person" is a subject of legal rights and duties. One who has rights but not duties, or who has duties but no rights, is, I suppose, a person.
> . . . As I showed at the end of the first chapter, a legal duty does not imply any exercise of will on the part of the one subject to the duty, and, therefore, for the existence of a legal duty, the person bound need not have a will; but in order that a legal right be exercised, a will is necessary, and, therefore, so far as the exercise of legal rights is concerned, a person must have a will.[22]

What do we mean, then, by saying that a person, as thus defined, has been "enriched." The answer, it is submitted, is that by "enriched" we mean that a larger stock of things, or a larger fund of potential energy, has been placed at the disposal of that person's will. All healthy human beings possess wills, and the wills of those who count in law and politics are pretty vigorous; but when we attribute personality to organizations, as distinguished from individuals, the problem becomes more complex.

> What is a corporation? In *the first* place, there must be a body of human beings united for the purpose of forwarding certain of their interests. *Secondly*, this body must have organs through which it acts; it must be an organized body of man; neighbors turning out to hunt down a robber do not form a corporation. The interests of an organized body of man cannot be effectually forwarded unless these interests are protected by the State; and to give this protection, legal rights must be created, and the organization through which the body is to act must be recognized by the State . . . A corporation is an organized body of men to which the state has given powers to protect its interests, and the wills which put these powers in motion are the wills of certain men determined according to the organization of the corporation.[23]

Private business corporations — at least as such organizations were conceived of when Gray composed the above-quoted passage—existed for the purpose of accumulating wealth for their shareholders. The

20. The treatment of this subject is the special contribution of Mr. McGrory.
21. RESTATEMENT, RESTITUTION § 1 (1937).
22. GRAY, NATURE AND SOURCES OF THE LAW 27 (2d ed. 1927).
23. *Id.* at 50-51.

shareholders subscribed a capital sum of money, a fund of potential energy, which the managers were expected to administer in such a manner that the money value of the fund would grow. As the fund grew beyond the size which the managers would need for the continuing conduct of the business the managers were expected to distribute portions of it from time to time as dividends to the shareholders. Private corporations, thus conceived of, presented all the characteristics of the classic "economic man." They were enriched by the accumulation of things and energy, in precisely the same manner as individuals, and any section of the American Law Institute's *Restatement of Restitution* can be applied to them as readily as to anyone else. But when we attempt to apply the *Restatement of Restitution* to municipalities difficulties arise. It is not as easy as in the case of a private business corporation to know whether the municipality is "enriched." The reason is that the municipality possesses a double character. Like the business corporation, it is an organized body of men. Like the business corporation, it must possess property, and potential energy in the form of funds. Like the business corporation it has a will. But, unlike the business corporation, its will is not to possess property or to accumulate potential energy. Its will is rather to raise the kinetic energies of the whole people, to modify the total environment within which these energies may express themselves, and to provide free areas and free services equally accessible to all. Whether or not, in any given case, these activities enrich the people may be a matter of dispute. What is clear is that the enrichment, if it exists, is not of the sort which can be identified, and measured, and made the subject of a suit in court.

There are three principal types of transactions out of which claims of a quasi-contractual nature against a municipality may arise. These are:

First:—Cases where a municipality has acquired property upon a promise to pay for it, which payment cannot lawfully be made out of municipal funds.

Second:—Cases where a municipality has borrowed money outside its debt limit or for a purpose for which it is not authorized to incur debt.

Third:—Cases where work has been done or services rendered pursuant to a contract made by municipal officers without statutory authority or without the formalities required by law.

These three situations we shall now take up in the order named.

First:—Cases where a municipality has acquired property upon a promise to pay for it, which payment cannot lawfully be made out of municipal funds.

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to return it, a constructive trust arises.[24]

If this section from the *Restatement of Restitution* is applied to the situation under discussion, it seems clear that the municipality may be required to return to the vendor in specie the property which it has received. Such appears to be the well-settled law.[25] But of course if the property purchased is consumed so that it cannot be recovered the seller is necessarily left without relief.[26]

Seeond:—Cases where a municipality has borrowed money outside its debt limit or for a purpose for which it is not authorized to incur debt.

In this case — although it is clear that no debt can arise which is chargeable upon the taxpayers — it seems clear that the municipality receives the borrowed money upon a constructive trust for the lender,[27] which may be enforced in equity as far as the money can be traced. Thus, if the money is used to discharge a pre-existing valid debt of the municipality, the lender will be subrogated to the debt so discharged.[28] If the money is used in building a schoolhouse, the lender will have an equitable lien on the building.[29] But if the money is spent in constructing a highway,[30] or a levee[31] the lender will necessarily be left without relief. The schoolhouse is corporate property used in conducting a corporate enterprise, and is therefore to be treated like any other property acquired by a corporation by the use of third parties' funds. The highway and the levee are alterations imposed upon the natural landscape to facilitate the life of the people. They are not anyone's property, and no lien upon them can arise.

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24. RESTATEMENT, RESTITUTION § 160 (1937).
25. Chapman v. County of Douglas, 107 U.S. 348 (1882); Municipal Security Co. v. Baker County, 39 Ore. 396, 65 Pac. 369 (1901); Superior Mfg. Co. v. School Dist. No. 63 Kiowa City, 28 Okla. 293, 114 Pac. 328 (1910); General Elec. Co. v. Fort Deposit, 174 Ala. 179, 56 So. 802 (1911); American-LaFrance & Foamite Industries, Inc. v. Arlington County, 169 Va. 1, 192 S.E. 758 (1937).
26. Litchfield v. Ballon, 114 U.S. 190 (1885).
27. RESTATEMENT, RESTITUTION, § 160 (1937).
28. RESTATEMENT, RESTITUTION § 162 (1937). "Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder."
29. Calloway Bank v. Ellis, 215 Mo. App. 72, 238 S.W. 844 (1922); Nuveen v. Board of Pub. Instruction of Gadsden City, 88 F.2d 175, *cert. denied*, 301 U.S. 691 (1937); RESTATEMENT, RESTITUTION § 161 (1937): "Where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises."
30. Hovey v. Commissioners of Wyandotte County, 56 Kan. 577, 44 Pac. 17 (1896).
31. Newport v. Railway Co., 58 Ark. 270, 24 S.W. 427 (1893).

Third:—Cases where work has been done or services rendered pursuant to a contract made by municipal officers without statutory authority or without the formalities required by law.

It not infrequently happens that material is delivered, labor done, or services rendered under what purports to be a municipal contract but which is in fact executed by an unauthorized officer, or after failure to advertise for competitive bids, or otherwise in a manner which does not conform to law. In such a case there can, of course, be no successful suit on the contract, which does not bind the municipality, and the question arises whether the contractor is entitled to any other relief. It seems clear, in accordance with the doctrines which have just been illustrated, that the contractor may recover his materials if he can identify them, and that if the materials or work have gone into property which the municipality owns in its corporate capacity the contractor should have an equitable lien thereon. But if the materials, the labor, or the services have gone into public works, or have merely been consumed in public activity, there is no physical object upon which a lien can be asserted, and the contractor must necessarily go without compensation unless he can claim it from the taxpayers or from some existing fund. The decisions on this situation are not in harmony, and it is impossible to deduce any settled principle from the mere study and comparison of the reports. Nevertheless, we submit that it is possible to demonstrate the true principles which should control the subject, and this we shall now attempt to do.

An individual, as we have already stated, is enriched whenever his stock of useful physical objects or his fund of money is increased. The people — unlike an individual or a corporation — cannot be enriched in this manner; because money has no meaning except as it expresses the relationships between individuals and corporations; and because the people, except as they are organized into corporations, possess no common will which can be exerted upon things. But the people, like an individual, may be enriched in another manner; that is, by improving their health, their strength, or their intelligence, or by creating an environment more favorable to their activities; and it is for these purposes that many municipal enterprises are carried on. It is the function of the taxing authorities to determine in what direction the collective expenditure of individual energies will tend most to enrich the people; and the law, it is submitted, has no other means of measuring the extent to which any activity has enriched the people except by reference to the amount of public money which has been appropriated to its support.

It seems clear, therefore, that no contractor can demand a reward from a municipality for any addition which he has made to its public—

as distinguished from its corporate — resources except out of money which has been lawfully appropriated to bring that addition to the public resources to pass.[32] But where money has been duly appropriated to pay for a specific project, the more numerous authorities, so far as the authors have been able to discover them, hold that the contractor is entitled to fair compensation out of the appropriation, notwithstanding irregularities in the contract pursuant to which the work was done.[33] In view of the conflict of decision on this issue, we venture to explore its merits in more detail.

Every appropriation of public money, it is submitted, creates a trust of which the officers authorized to disburse the appropriation are the trustees. Everyone familiar with financial processes will recognize that appropriations differ in the degrees of discretion with which the disbursing officers are entrusted. In some cases the appropriation is placed at the disbursing officer's disposal, with authority to expend it as he deems expedient in effectuating his department's mission. In others the appropriation is accompanied by a mandate to apply it toward achieving a specified result. In the former case it may be that the disbursing officer's decisions are properly to be regarded as sub-appropriations which are legally ineffective unless the formalities prescribed for selecting public employees and public contractors are pursued. In the latter it would seem that the municipality is enriched unjustly if it retains the money after the project for which it was lawfully appropriated has been achieved.[34]

32. May v. City of Chicago, 222 Ill. 595, 78 N.E. 912 (1906); Stratton v. City of Detroit, 246 Mich. 139, 224 N.W. 649 (1929); Sleight v. Board of Education, 10 N.J. Misc. 523, 159 Atl. 707 (1932); Adalian Bros. v. City of Boston, 323 Mass. 629, 84 N.E.2d 35 (1949). The contrary interpretation of the Indiana statutes by the United States Circuit Court of Appeals for the Seventh Circuit in Ohio Oil Co. v. Michigan City, 117 F.2d 391 (1941) does not seem convincing.

33. Peterson v. City of Ionia, 152 Mich. 678, 116 N.W. 562 (1908); Nebraska Bitulithic Co. v. City of Omaha, 84 Neb. 375, 121 N.W. 443 (1909); Konig v. Mayor and City Council of Baltimore, 128 Md. 465, 97 Atl. 1837 (1916); Omaha Road Equipment Co. v. Thurston County, 122 Neb. 35, 238 N.W. 919 (1931); Smith v. Town of Vinton, 216 La. 9, 43 So.2d 18 (1949). *Contra*, Robert G. Lassiter v. Taylor, 99 Fla. 819, 128 So. 14 (1930); Federal Paving Corp. v. City of Wauwatosa, 231 Wis. 655, 286 N.W. 546 (1939); Probst v. Menasha, 245 Wis. 90, 13 N.W. 2d 504 (1944). The majority view is in harmony with the American Law Institute's UNIFORM COMMERCIAL CODE, § 8-202, which states that the rule of negotiability of investment paper "applies to an issuer which is a government, governmental subdivision or agency only if either there has been substantial compliance with the legal requirements governing the issue or the issuer has received substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money."

34. The suggested distinction can be illustrated by reference to Illustration 2 under Section 62 of the *Restatement of Restitution*, which reads as follows:

> "2. In State X a statute provides that no contract for work to be done for a municipality where the contract price exceeds $10,000 shall be made unless it has been passed upon at a regular session of the municipal council duly called. A contracts with the City of Y for dredging for the price of $50,000, the contract being approved only by the municipal officers. Upon completion of the work, A is not entitled to

The authors submit, in short, that a municipality is enriched either (1) by an increment to its corporate property, (2) by an increment to its corporate funds, or (3) by the accomplishment of any project to achieve which a corporate appropriation has been made.

V. *Torts*

Our law, as we have said already, conceives of each individual life as an enterprise which realizes itself in the material world by exerting its will upon the disposition of energy and things. In the course of this enterprise it competes for the control of things and energy with other enterprises; it exchanges things and energies with them; and it associates itself from time to time with other enterprises in the pursuit of common ends. The American Law Institute's *Restatements of Contracts* and *Restitution* deal with exchanges between enterprises. The *Restatement of Torts* deals with the rules by which the competition of enterprises is regulated under our law.

The *Restatement of Torts* is applicable impartially to all adult individuals, whatever their official or private positions. The restraints and obligations which it imposes fall into two broad classifications, (1) restraints on the freedom of personal conduct, (2) obligations resulting from the control of land. Inasmuch as corporations are incapable of personal conduct, but do exert effective control of land as organizations, the obligations arising from the control of land are applicable to them directly while the doctrine of *respondeat superior* determines the extent of their liability for individual torts.

The present authors entertain a definite theory as to the premises from which the principle of *respondeat superior* is derived. It is not, in their view, derived from the idea that the superior is a participant in his subordinate's misconduct, an idea which in most cases is contrary to the fact. It is not properly derived from the idea that the superior is more wealthy than the subordinate. It is derived, in each

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reasonable compensation from Y although he believed that the council had approved the contract or although he did not know of the statute." If this illustration assumes that neither the contract nor the specific dredging project itself has been passed upon by the municipal council the present authors would agree with the authors of the *Restatement.* But if it be assumed that the municipal council has appropriated $50,000 to carry out the specific dredging project in question, but has not approved the terms of the contract under which it was executed, then the present authors would disagree with the authors of the *Restatement,* and would contend that *A* is entitled to reasonable compensation out of the $50,000 appropriated to the project by Y. Such a case would seem to be analogous to that presented by Womack-Rayburn Co. v. Town of Worthington, 262 Ky. 710, 91 S.W.2d 13 (1936), in which it was held that where money had been given a town for the express purpose of improving a road outside its boundaries, the town could bind itself by contract to pay the money to the company which had made the improvement, although it could not lawfully have bound itself to make a similar payment out of tax funds.

case where it is applied, from one or both of two facts which inhere in the conception of command and subordination, (1) the fact that the superior has provided the subordinate with either the means or the opportunity of committing the tort in litigation, (2) the fact that at the time of the alleged tort the subordinate's attention was necessarily and properly occupied in the pursuit of the enterprise in which his superior was engaged. Every ship-captain, every engine-driver, every operator of a motor-truck, every fireman, policeman, and ditch-digger is by the nature of his employment set the task of achieving a defined objective with the minimum expenditure of energy and of time. This enterprise, which his employer has set for him, properly takes precedence in his mind over other enterprises, and therefore characterizes the whole course of conduct out of which any tort which he may commit must arise. If his activities in his employment result in a wrong to some competing enterprise, it is his employer's enterprise which has wronged it, and therefore his employer's enterprise which must pay.

The peculiar difficulty which has always arisen in applying the law of torts to municipalities arises from the fact that the enterprises of municipalities are both competitive and altruistic — that they seek at the same time to accumulate things and energy from the activities of individuals and to distribute things and energy freely among the people at large. Municipal officers and employees will everywhere be found engaged in both these activities; and municipal land is held, sometimes for corporate purposes, sometimes for general public use. The distinction between the "governmental" and the "proprietary" functions of a municipality, therefore, corresponds with a fact which must exist in any society which conceives of each individual life as an enterprise distinct from that of all other lives. However difficult it may be to define this distinction, however much it may have been misunderstood or misapplied in past decisions, it is a distinction which cannot be escaped. In the hope of contributing to the clarification of this subject and developing what seem to us to be the true principles upon which the issues involved ought today to be dealt with, we shall pursue the following five lines of thought:—

(1) The history of the law of municipal tort liability in New Jersey.

(2) The law governing tort liability in admiralty of public vessels as established by the Supreme Court of the United States.

(3) The New York law of municipal tort liability as developed under a statute waiving sovereign immunity.

(4) A brief survey of the present state of the law of public tort liability throughout the country.

(5) A brief survey of the application of the principles of insurance and responsibility to the problem in hand.

These five lines of thought will be found to converge upon a common conclusion to which we hope to enlist the reader's assent.

(1) *The history of the law of municipal tort liability in New Jersey.*[35]

The case of *Freeholders of Sussex v. Strader*,[36] decided in 1840, marks the first reported occasion in New Jersey in which it was urged that a municipal corporation should be held to answer for its tort. Suit was there brought to recover damages for injury to a team of horses resulting from the defective condition of the abutments of a county bridge. Recovery was denied, the Supreme Court of New Jersey announcing for the first time the broad rule that no civil action will lie on behalf of an individual who has sustained special damage by reason of the neglect of a municipal corporation to perform a public duty. This doctrine has never been abandoned in New Jersey,[37] and is — of course — an intelligible and defensible rule of law.

In *Condict v. Mayor & Aldermen of Jersey City*[38] the Court of Errors and Appeals purported to apply this doctrine by holding that a municipality was not legally responsible for the death of an individual caused by the carelessness of a municipal trash collector in dumping the contents of his cart.

> "The true principle on which a municipal corporation is exempted from liability in such cases is that . . . the corporation is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants of the community, and that persons employed in the performance of such duties, though employed by the corporation, act as public officers charged with a public service."[39]

Whatever may be the intrinsic merits of this proposition, it is obviously a different one from that laid down in *Freeholders of Sussex v. Strader*. It is one thing to say that a municipality is not legally liable for failure to complete successfully an enterprise projected for the public welfare. It is quite another to say that it is not legally liable if, in the course of pursuing a public enterprise, it inflicts damage on an individual who happens to stand in the way.

The case of *Mayor of Jersey City v. Kiernan*[40] holds that, although a municipality is not liable for a defect in the construction of a sewer which results in a breach which spills sewage over the plaintiff's land,

35. The treatment of this subject is the special contribution of Mr. Geller.
36. 18 N.J.L. 108 (Sup. Ct. 1840).
37. The rule is reaffirmed in Bisbing v. Asbury Park, 80 N.J.L. 416, 78 Atl. 196 (Ct. Err. & App. 1910).
38. 46 N.J.L. 157 (Ct. Err. & App. 1844).
39. *Id.* at 160.
40. 50 N.J.L. 246, 13 Atl. 170 (Sup. Ct. 1888).

it is liable if, after notice, it allows the breach and the spillage of sewage to go on.

In *Hart v. Chosen Freeholders of the County of Union*[41] the defendant municipality was held liable for personal injuries resulting from the plaintiff's falling into a hole which the defendants had dug in a highway. The court said:—

> "We have not been pointed to any precedent extending exemption from liability to cases of active wrongdoing nor are such precedents to be discovered."[42]

Why *Condict v. Mayor & Aldermen of Jersey City* might not have been cited as such a precedent is not altogether clear.

In *Karpenski v. Borough of South River*[43] an electric light wire maintained by the municipality for the purpose of public and private lighting was negligently allowed to hang close to the ground while charged with a deadly current. The plaintiff suffered personal injuries from coming in contact with this wire. It appeared that the defendant charged private consumers for electricity, though whether or not this paid the full cost of the service does not appear.

> "This brings us to a consideration of the demurrer which is principally directed to the fact that the acts of the borough which are alleged to have been negligently performed are acts of a public and governmental nature for which no action can be maintained. . . . The operation of an electric lighting plant for the furnishing of light to private consumers for gain cannot, in any sense, be the performance of a governmental function."[44]

The demurrer was accordingly overruled. So far as can be ascertained from the report, the action was of such a character that a judgment for the plaintiff would have become a charge upon the general credit of the borough, and would not have been collectible out of the revenues of the electric light department alone.

In *Olesiewicz v. City of Camden*[45] the municipality was held legally responsible for the negligent operation of its steam roller, while employed in street construction, partly on account of the municipality and partly on account of others without regard to whether a profit for the taxpayers was derived.

> "The fact is undisputed that the appellant embarked upon a private enterprise, presumably for profit, or, if not, at least for the sake of economy, in having the work done cheaper and better, than by letting

41. 57 N.J.L. 90, 29 Atl. 490 (Sup. Ct. 1894).
42. *Id.* at 93, 29 Atl. at 491.
43. 83 N.J.L. 149, 83 Atl. 639 (Sup. Ct. 1912).
44. *Id.* at 151, 83 Atl. at 641.
45. 100 N.J.L. 336, 126 Atl. 317 (Ct. Err. & App. 1929).

> it out on contract to a successful lowest competitive bidder as required by statute. It is not essential that the municipality carried on the enterprise for profit in order to hold it amenable for the acts of its servants engaged to do the work, it is sufficient if it derives some special benefit or advantage."[46]

And in *Morgenweck v. City of Egg Harbor*[47] the municipality was held responsible for the negligent operation of a truck in the service of its sewer department where a charge was made for sewer service without regard to whether or not the charge covered the cost of the sewer service.

> "In view of the circumstances disclosed by the testimony in this case, it is quite clear that the defendant appellant was engaged in the business of operating a sewerage plant for profit, and it is unimportant whether or not the business yielded a profit to the defendant appellant."[48]

Finally, in *Vickers v. City of Camden*[49] it was held that the fact that the traffic lights at an intersection were showing green in both directions did not make the municipality liable for the resulting automobile collision, absent a showing that the municipal officers were aware of the defect in the lights.

The law of New Jersey, which we have thus sketched very briefly, may be regarded as typical of that prevailing in most of the United States. It raises legal issues which need to be thought through afresh. The first of these issues relates to the responsibility of the municipality for damage to individuals resulting from the failure to maintain a safe and wholesome environment within which individuals may pursue the personal enterprises of their daily lives. The second relates to the responsibility of the municipality for damage to individuals resulting from municipal enterprise pursued at the expense of the taxpayers for the public good.

New Jersey has never departed from the doctrine of *Freeholders of Sussex v. Strader*[50] which held that the funds of a municipality will not be answerable for damage to an individual resulting from the failure of the municipality to provide adequately for the public safety and convenience. This doctrine seems to the present authors to be sound. To hold otherwise is to make the whole people responsible for the safety of each individual,—a doctrine which in the past has been characteristic only of the law of ships and armies, societies in which the individual life is merged in the collective

46. *Id.* at 340, 126 Atl. at 319.
47. 106 N.J.L. 141, 147 Atl. 468 (Ct. Err. & App. 1929).
48. *Id.* at 143, 147 Atl. at 469.
49. 122 N.J.L. 14, 3 A.2d 613 (Ct. Err. & App. 1939).
50. 18 N.J.L. 108 (Sup. Ct. 1840).

enterprise and everyone is expected to act only in response to command.

With respect to harm resulting from activities which the municipality sets in motion, the law of New Jersey is that the funds of the municipality will be answerable *except* where the harm occurs (1) without the knowledge of the responsible municipal officers, and (2) results from an activity pursued exclusively for public benefit without adding anything to the municipality's corporate property or corporate funds. It is submitted, with deference, that this exception, though long established, is without merit; and that it results from the misconception that enterprise, and the effort to earn or conserve money, are synonymous terms. Surely the rights of a citizen who has had trash dumped upon him by a servant of the people of Jersey City, engaged in keeping their city as clean as they think it should be, do not depend on whether the servant's wages are paid by an *ad valorem* levy on real property or by a service charge to each householder per barrel of trash. Surely the rights of a man who has been led to a hospital bed by a light set up in the effort to provide everybody with a system of public speedways do not depend on whether the speedway and the light are paid for by a toll, by a tax on gasoline, by a tax on motor-cars, or by a tax on real property. The doctrine of *Condict v. Mayor & Aldermen of Jersey City* and *Vickers v. Camden* amounts to saying that enterprise pursued for public—as distinct from corporate—benefit carries with it no public responsibility for private wrong. To say this is to repudiate the basic presupposition of the American legal system: "The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[51]

(2) *The law governing tort liability in admiralty of public vessels as established by the Supreme Court of the United States.*

It may not be uninstructive to refer at this point to the analogy afforded by the American maritime law.

For centuries it has been the well settled doctrine that a ship involved in collision as a result of bad navigation is liable *in rem* for damage to the other vessel, her cargo and passengers, and that this liability attaches to the vessel itself as an actor regardless of whether those responsible for her navigation are the owner's agents or not.[52] If those in charge of the navigation are in fact agents of

51. Preamble to the Constitution of the Commonwealth of Massachusetts.
52. Harmoney v. United States, 2 How. 210 (U.S. 1844); The China, 7 Wall. 53 (U.S. 1868).

the owner, personal liability attaches to the owner as well. In accordance with these principles the Supreme Court of the United States decided, as long ago as 1900, that the City of New York was legally responsible for damages caused by the collision of its fire-boat with another vessel in New York Harbor notwithstanding that the fire-boat was on its way to help fight a fire at the moment of the collision and that, under the state law as it then stood in New York, this was a "governmental activity" supported wholly out of taxation, for which the city incurred no legal liability of any kind.[53]

On March 3, 1925, Congress enacted that "A libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States."[54] On July 7, 1942, the *Cavalier,* a Canadian vessel, while en route from Canada to Jamaica, was ordered by the United States Naval authorities to enter Delaware Bay. Upon approaching the Bay, the *Cavalier* received further instructions from the naval authorities that in her transit of the waters constituting the entrance to the Bay, the *Cavalier* was to follow directly astern of the patrol boat YP 249, a public vessel of the United States. While following directly astern of the YP 249, as ordered, the *Cavalier* struck a submerged wreck and sustained serious damage. The Supreme Court held the United States liable.[55] "It needs no extended citation of authority to show that where a tug negligently grounds its tow, the tug and its owner are liable for the damage resulting therefrom. . . . The fact that the Cavalier was not fastened to the YP 249 by a tow rope is irrelevant . . . for all practical purposes she was as firmly fastened to the stern of the YP 249 as if she had been in tow."[56]

It is not easy to quarrel with the Supreme Court's conclusion that the *Cavalier* was in tow. But the towage, if it was such, was not for the convenience of the *Cavalier.* The towage was for the convenience of the United States. The United States was exercising sovereignty's highest prerogative, that of command. If it is not beneath the dignity of the United States of America to accept responsibility for the consequences of an error of its ship of war, committed under such circumstances, surely it cannot be beneath the dignity of a municipality to accept responsibility for the errors of its policemen, or even of its trash collectors and traffic lights.

(3) *The New York law of municipal tort liability as developed under a statute waiving sovereign immunity.*[57]

53. Workman v. New York City, 179 U.S. 552 (1900).
54. Act of March 3, 1925, c. 428, § 1, 43 STAT. 1112, 46 U.S.C.A. § 781 (1944).
55. Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945).
56. *Id.* at 228-29.
57. The remainder of the discussion of torts is the special contribution of Mr. Shaffer.

In 1939—climaxing a long evolution of legal doctrine[58]—the State of New York enacted the following statute:—

> "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article."[59]

In 1945, in a suit against New York City the New York Court of Appeals ruled as follows:—

> "None of the civil divisions of the State—its counties, cities, towns and villages—has any independent sovereignty. . . . The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed. . . . On the waiver by the State of its own sovereign dispensation, that extension was naturally at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees,—even if no separate statute sanctions that enlarged liability in a given instance."[60]

It accordingly held the city liable to compensate the plaintiff for personal injuries caused by a runaway police horse.

In New York, therefore, both the state and its municipalities are civilly liable in tort in like manner as are private corporations and individuals. But, since the state and its municipalities do not bear the same relationship to citizens as do private corporations and individuals, this doctrine still leaves undecided precisely what the extent of the substantive responsibility of the state and its municipalities may be. One proposition seems established—both the state and its municipalities are responsible for damage done to individuals as a result of prosecuting their enterprises, whether "governmental" or not. Thus they are liable for damage done by a runaway police horse[61] for damage done by a false traffic signal,[62] and for damage done

58. For a review of the earlier history see Lloyd, *Municipal Tort Liability in New York*, 23 N.Y.U.L.Q. REV. 278 (1948).

59. Court of Claims Act, Laws of New York, 1939, c. 860, § 8.

60. Bernadine v. City of New York, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945).

61. Bernadine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

62. Foley v. New York, 294 N.Y. 275, 62 N.E.2d 69 (1945). This decision is in harmony with Canadian Aviator Ltd. v. United States, 324 U.S. 215 (1945), note 55, *supra*, and is in striking contrast with Vickers v. Camden, 122 N.J.L. 14, 3 A.2d 613 (Ct. Err. & App. 1939), note 49 *supra*. Quite apart from statute or controlling precedent, it is submitted that the result in *Foley v. New York* is clearly correct. A traffic light is intended to be a mechanical giver of commands and permissions. If such commands and permissions are negligently given, liability should be imposed for the consequences. Probably New York would impose liability, even where the traffic

a policeman who is kept armed by the municipal officers— even when he employs the weapon in an unprovoked insane assault.[63] The question which the New York decisions leave not wholly settled is how far the state and its municipalities are liable for the consequences of failure to make a success of free public services provided at the taxpayers' expense. On the one hand, the Court of Appeals has decided that a city charter providing that the city "shall maintain" a fire department does not make the city liable for failing to put out a particular fire.[64] On the other, the same court has twice held the state responsible for failure to post signs adequate to warn motorists of curves and intersections calling for reduced speed and a cautious approach.[65] The absence of such signs—not the curves and intersections—was apparently treated as a physical defect in the highway, for which also the state is held liable,[66] although it is not apparent that an "individual or corporation" would be liable for defects in a roadway across his property over which the public had a legal right to pass without toll. Perhaps the business of offering public speedways for gasoline locomotives is regarded in New York as an enterprise which, once undertaken, must be pursued to successful completion, just as a municipality is there held liable if its police, after taking an ill and helpless man into custody, neglect to provide him with necessary medical care.[67]

(4) *A brief survey of the present state of the law of public tort liability throughout the country.*

No one desiring to become thoroughly familiar with the subject which we are discussing should omit to study the *Symposium on Governmental Tort Liability* published by the New York University Law Review in November 1954.[68] He will learn that public liability for damage done to private persons by official action has long been an integral principle of the French legal system;[69] that the British Parliament enacted the same principle in 1947;[70] that the government of the United States has adopted it in large measure, though not

light failed to give any signal (see cases cited note 65, *infra*). But it is submitted that the failure of a traffic light to give any signal should not impose liability to persons to whom, in effect, no command or permission is given.

63. McCrink v. New York, 296 N.Y. 99, 71 N.E.2d 419 (1947).

64. Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945).

65. Eastman v. State, 303 N.Y. 691, 103 N.E.2d 56 (1951); Canepa v. State, 306 N.Y. 272, 117 N.E.2d 550 (1953).

66. Doulin v. State, 277 N.Y. 558, 13 N.E.2d 472 (1938).

67. Dunham v. Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1952).

68. 29 N.Y.U.L. REV. 1321-1461 (1954).

69. Schwarz, *Public Tort Liability in France*, 29 N.Y.U.L. REV. 1432 (1954). See also Jacoby, *Federal Tort Claims and French Law of Governmental Liability: A Comparative Study*, 7 VAND. L. REV. 246 (1954).

70. Wade, *Liability in Tort of the Central Government of the United Kingdom*, 29 N.Y.U.L. REV. 1416 (1954).

yet completely;[71] and will find a brief summary of the present state of the law in each of the forty-eight states.[72] The essay last cited makes it apparent that the state of the law in New Jersey[73] is a fair average sample of the law prevailing in all the states outside New York. The following passage from that essay deserves quotation both because it sums up the present state of affairs very clearly and because it provides a starting point from which to look ahead:—

> "It is notable that the traditional common-law distinction applicable to municipal corporations, under which there is no liability for harms committed in the course of performing "governmental" (sometimes called "public") functions, whereas liability is imposed for similar harms arising in performance by the municipality of "proprietary" (sometimes called "private," "corporate," or "ministerial") functions, has not in general been applied in tort suits against the states. States are usually deemed immune regardless of what kind of functions they are performing. Why this is so of the state, and not of its municipal subdivisions such as townships, counties, school districts, improvement districts, highway departments, universities, and the like, makes for interesting but baffling speculation. What justifies differences in the rule as between different agencies of government, all acting for the state, and why the dividing line is put at one place in one state and at another elsewhere, seem sometimes to be questions answered more by accident than by reason."[74]

Speculation as to why the states are altogether immune from tort actions, while the municipalities are immune in only some cases, may be interesting—especially in New York City—but will hardly be baffling to those who have even a superficial acquaintance with the history of Anglo-American law. The Declaration of Independence wound up by asserting that "these United Colonies are, and of Right ought to be, Free and Independent States" and the law has ever since proceeded on the assumption that each state was a sovereign, and heir to all the privileges and immunities of the British Crown. Municipalities, on the other hand, have never been thought of as sovereigns. The original New England towns were not even corporations, but were merely partnerships in the maintenance of a few limited services, and wherever municipalities have been incorporated they inherited the traditional British position of a corporation, which was that of associates in a common enterprise who had been granted the legal privilege of confronting the sovereign and their fellow-subjects as a single organic person[75] pursuant to the

71. Gellhorn and Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U.L. REV. 1325 (1954).
72. Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363 (1954).
73. *Ibid.*
74. *Id.* at 1366.
75. See GRAY, NATURE AND SOURCES OF THE LAW (2d ed. 1927).

"special grace, certain knowledge, and mere motion" of the Crown.[76] Such organizations were naturally thought of as capable of suing and being sued like other persons, and the idea that municipal corporations enjoy legal immunity not accorded to others is a fairly new one in legal history, as has been pointed out.[77] That idea doubtless took its origin in the fact that municipal corporations were found in practice to be exercising the sovereign prerogatives of levying taxes and of making laws. To the extent that they continued to present the appearance of collective enterprises their legal responsibility continued. The legal immunity of the states continues because they have not characteristically engaged in business. With possible exceptions, unknown to the present authors, no American state has ever played the part of an enterpriser in economic production. The most that the states have done has been to organize, to invest in, and sometimes to guarantee the credit of, stock corporations and their modern successors, the "authorities." So far as we are aware, the tort liability of stock corporations was never questioned, nor is the tort liability of "authorities" questioned today.

Nor are the reasons for the present state of the law obscure. The Federal Government has waived its sovereign immunity because, having become a vast business enterprise which impinges everywhere in the economic life of all the people, it finds itself confronted with a multitude of demands for justice to which Congress and the Executive cannot attend. These are the same reasons which have brought to pass the waiver of sovereign immunity by the British Crown. The states, with few exceptions, have not waived immunity, because they do not present themselves as engaged in enterprise. The municipalities, in most cases, cling to their "governmental" immunities because they are small. It is frightening to the householders of a small community to consider what the taxes to pay for the consequences of one serious automobile collision might be.

(5) *A brief survey of the application of the principles of insurance and responsibility to the problem in hand.*

If it be true, as we have contended, that a municipality which supports enterprises likely to cause harm to others ought to be responsible for harm caused by such enterprises, whether "proprietary" or "governmental;" and if it be true that such a rule would expose the taxpayers of small municipalities to risks which they ought not to be asked to carry, it is suggested that the true solution

76. See original charter of Dartmouth College, quoted in Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 524 (U.S. 1819).

77. Lloyd, *Municipal Tort Liability in New York*, 23 N.Y.U.L.Q. REV. 278, 279 (1948), citing Steele v. Company of Western Navigation, 2 Johns. 283 (N.Y. 1807); People v. Albany, 11 Wend. 539 (N.Y. 1834); Martin v. Mayor of Brooklyn, 1 Hill 545 (N.Y. 1841).

of the dilemma lies in holding the municipality responsible for private harm caused by its activities and permitting it to purchase insurance against this liability precisely as private enterprisers now do. The dilemma is not different from that which confronted small business and manufacturing enterprises around the turn of the century, and the business partners and small corporations of that era solved it in the same way. Then, as now, the employee of the enterprise was legally liable for the harm done by his activities, but there was a tacit agreement that he could not, and ought not to be asked to, carry the burden of this risk alone. Then, as now, it was thought that the risk should be born by the enterprise, but the risk was large enough to threaten even the enterprise with disaster unless the enterprise was very large. Then it became customary for business enterprises to protect themselves and their employees by insurance against tort liability just as municipalities might do today. All that is needed today to set the same chain of cause and effect in motion is to apply the doctrine of *respondeat superior* to all municipal enterprise, however financed.

The injustice and, indeed, irrationality of the present practice is concealed by the fact that it is not customary to bring actions of tort for negligence against public employees, so that the suggestion that actions might lie against the employing municipalities seems dangerous and strange. Yet the law is clear that individual public employees are liable in tort for damage caused by their negligence,[78] and they are, in most cases, much more exposed to ruin by a substantial tort judgment than are the municipalities which they serve. The idea that there is any fixed principle of law that judgments in tort can never be charged against taxpayers simply does not correspond with the fact. That there is no such principle in New Jersey, where municipalities are not liable for torts in the course of "governmental" activity we have already shown.[79] In the City of Boston, where this is written, the Metropolitan Transit Authority, and the Boston Elevated Street Railway Company, its predecessor, have been paying tort claims for the last three decades—yet for nearly the whole of that period the enterprise has been run at a deficit which has been made up by the taxpayers of the fourteen municipalities which the system serves.

It is very evident that the idea of dealing with this problem by means of liability insurance is gaining ground.

> "Many statutes authorize the state or designated agencies or subordinate units to pay for liability insurance with public funds, with

78. For illustrations see Askay v. Maloney, 92 Ore. 566, 179 Pac. 899 (1919); Florio v. Mayor and Aldermen of Jersey City, 101 N.J.L. 535, 129 Atl. 470 (1925). Note that the latter decision is from New Jersey where the municipality itself is not liable in such a case.

79. *Supra* p. 767.

> the double admonition that the state does not thereby waive its tort immunity and the insurer must contract not to plead the immunity as a defence to liability on the policy. Others provide that the state or its subdivision waives its immunity but only to the extent of the insurance coverage. Some enactments apparently require state employees to carry and pay for their own liability insurance, as when they are hired to drive publicly owned vehicles, the cost of premiums being presumably made up to them by slightly increased salaries. Nearly all the states today require that school bus operations be covered by liability insurance, and the same requirement for other publicly owned motor vehicles is becoming increasingly common."[80]

It is to be regretted that this movement does not seem to be taking advantage of an insurance principle which has been well known for centuries to professionals, but which is not as familiar to the general public as it ought to be.

People who insure their automobiles against collision are familiar with the "deductible"—the clause which requires the insured to carry the first $50 or $100 of loss. The principle is an old one and, in other forms, has been practiced upon for centuries in marine insurance. It is well known in all fields of insurance that the bulk of the claims, and the bulk of the expense for claims adjustment, arise in connection with partial losses, and that care on the part of the insured is greatly stimulated if he bears the first part of any loss. Furthermore, from the standpoint of the person insured, his need is not to be protected against the small misfortunes which attend every normal activity. His need is to be protected against the disasters which would permanently alter his way of life. In accordance with these thoughts it is here suggested that it would conduce to responsibility on the part of public employees, and realism on the part of juries in reaching verdicts, if statutes and insurance contracts were so adjusted as to produce these results:—(1) Each municipal employee would be held responsible for the first $50 or $100 of any tort claim resulting from his activities; (2) The municipality employing him would accept full responsibility for all tort claims beyond this; (3)

80. Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1365, 1413 (1954). It is undoubtedly true that many states today require that school bus operations be covered by liability insurance; but Mr. Shaffer is inclined to question the statement that this is true of "nearly all." Furthermore, there is great variation in the scope of the insurance required. Some states require insurance only against the claims of passengers. Others require it against all claims resulting from the operation of the bus. The following are some of the school bus statutes: ARIZ. CODE ANN. § 54-434 (Supp. 1951); FLA. STAT. ANN. § 234.03 (1943); GA. CODE ANN. § 32-429 (1952); GA. CODE ANN. § 32-431 (1952); ILL. ANN. STAT. § 122.29-11a (Supp. 1954); LA. REV. STAT. ANN. § 17:159 (West 1951); MISS. CODE ANN. § 6336-19 (Supp. 1954); NEB. REV. STAT. § 79-489 (Supp. 1953); N. J. STAT. ANN. § 18:14-12 (Supp. 1954); N.C. GEN. STAT. § 115-45.1 (Supp. 1953); OHIO REV. CODE SERV. ANN. § 3327.09 (Baldwin 1954); S.C. CODE § 21-840.1 (Supp. 1954); VT. REV. STAT. § 10,172 (1947); VA. CODE § 22-284 (1950); WYO. COMP. STAT. ANN. § 67-647 (Supp. 1953).

The municipality would insure itself against the contingency that the total of all the tort claims which it might have to pay in any year would exceed a fixed maximum—say a sum equivalent to one dollar per thousand in the tax rate on real estate. The authors are informed that many large business enterprises insure themselves in this manner and that the total cost of their tort and workmen's compensation liabilities is thereby much reduced.

This closes our discussion of the doctrine of *respondeat superior.* It remains to add a word with regard to municipal liability resulting from the control of land. We believe it is generally recognized that the municipality carries the same responsibility as any other landowner for private nuisances occurring on the land which it controls.[81] With respect to land owned by the municipality in its corporate character and employed in the conduct of public enterprise, however financed, no reason is perceived why its liability to tresspassers, to licensees, and to persons visiting on business should be other than that defined in the American Law Institute's *Restatement of Torts.*[82] With respect to land held in trust for the free use of the public—principally highways and parks—the situation of the municipality is unique. There is no real analogy to be found in private law. If such areas were left unimproved—merely open to public travel and relaxation—no basis for municipal liability in respect to them would appear. The complications of the problem arise from the fact that such areas are customarily made into fields of public enterprise—such as the construction of facilities for high-speed travel or particular forms of entertainment. When this occurs the extent of municipal liability is not infrequently defined by statute. In the absence of statute the choice would seem to lie between the still prevalent conception—as illustrated by New Jersey,—that there is no liability to individuals for failure to achieve complete success in the prosecution of a public enterprise, and the contrary view which appears to be winning acceptance in New York.[83]

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81. Jeakins v. City of El Dorado, 143 Kan. 206, 53 P.2d 798 (1936).

82. RESTATEMENT, TORTS §§ 343, 344 (1934). For illustrations of the application of the principle of the first of these sections to municipalities see Bell v. City of Pittsburgh, 297 Pa. 185, 146 Atl. 567 (1929); Flesch v. City of Lancaster, 264 Wis. 234, 58 N.W.2d 710 (1953).

83. *Cf.* RESTATEMENT, TORTS §§ 342, 345 (1934). These sections deal with the liability of "a possessor of land" to gratuitous licensees and to persons entering as of right. It may be doubted whether a municipality is the "possessor" of public highways and parks. Nevertheless, it may be thought that the doctrine of these sections is applicable in principle to municipal liability in regard to them. In the following cases municipalities were held liable as "proprietors" with respect to parks: City of Waco v. Branch, 117 Tex. 394, 5 S.W. 2d 498 (1928); City of Sapulpa v. Young, 147 Okla. 179, 296 Pac. 418 (1931).

VI. *Conclusion*

To sum up:—

The contribution which we have endeavored to make to this discussion may be stated thus:— The law of the past has concentrated too much on the accumulation of things, and of potential energy in the form of credits, as the end of economic life. Such accumulation is indeed a necessary step in the process of purposeful existence, but it is not the end. These accumulations are caught up and stored out of the total stream of life and energy so that they may be channelled toward their possessor's purpose—but to achieve that purpose they must be released back into the stream.

A municipality is therefore enriched, not only when its property and funds are added to, but whenever a purpose has been accomplished to achieve which it has appropriated funds.

Every municipal activity is an enterprise, whether directed toward accumulating things and energy or distributing energy and things to the whole people. In their competitive relations with private enterprises all municipal enterprises, of whatever character, are properly subject to the general principles of the law of torts.

When a municipal enterprise intended to distribute some benefit freely to all the people fails to provide that benefit in a particular instance, the question whether the individual who is disappointed has a legal grievance can be answered only by resort to interpretation of statutory law.

The risk of tort liability being a normal incident of all activity, insurance against that risk should be regarded as a normal incident of municipal activity of every kind.