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MUNICIPAL CORPORATIONS — EFFECT UPON COLLECTION OF TORT JUDGMENTS OF CONSTITUTIONAL AND STATUTORY LIMITATIONS ON INDEBTEDNESS AND TAXING POWERS—In an effort to protect the taxpayer from the extravagance of municipal officials, two types of restrictions, in the main, have been imposed: those limiting the power to contract debts, and those restricting the power to levy taxes. Frequently in an effort to recover and collect a judgment against the city, one or the other of these restrictions is met. Courts seem to hold unanimously that debt limitations apply to the city's obligations in contract and not in tort, but they are divided as to the effect of tax limitations upon collection of a tort judgment. As an example of the debt limitation provisions, the Iowa Constitution,[1] forbidding indebtedness in excess of a fixed percentage of the assessed value of taxable property, reads "No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding. . . ." And the California Constitution,[2] limiting indebtedness in any one year to the income and revenue provided for that year, reads "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding. . . ." In spite of their apparent comprehensiveness, the fact that these restrictions speak of *incurring* and *assuming* debts has led the courts to hold unanimously that debt limitations apply to obligations voluntarily assumed and do not constitute a defense for a city that has reached the limit and is being sued in tort.[3] The Missouri court said,[4]

> "The word debt has a well recognized meaning in law distinguished from liability for damages. After a claim for damages is reduced to a judgment it becomes, in a technical sense, a debt, but it is a debt imposed by law, not one assumed by contract. What our Constitution aims to control is the action of the municipal corporation in the matter of contracting debts."

With tax limitations, the form of the provision is usually a little different. These read that: "No city, town, village, or other municipal corporation . . . shall levy or collect a higher rate of taxation . . . than . . . ."[5] or that "No municipal corporation shall be author-

[1] Iowa Constitution (1857), Art. 11, § 3.

[2] California Constitution (1879), Art. 11, § 18, as amended.

[3] "The courts are in harmony on the proposition that debt limit provisions do not apply to obligations sounding in tort." 37 L. R. A. (N. S.) 1097 (1912). Also see 94 A. L. R. 937 (1935). However, when a judgment has been recovered against the city in tort, it should be regarded as a part of the indebtedness. See City of Chicago v. McDonald, 176 Ill. 404, 52 N. E. 982 (1898).

[4] Conner v. City of Nevada, 188 Mo. 148 at 153, 86 S. W. 256 (1904).

[5] Alabama Constitution (1901), Art. 11, § 216.

ized to . . . levy any tax . . . to a greater extent, in one year, than. . . ."[6] or "The amount hereafter to be raised by tax for county or city purposes . . . shall not in the aggregate exceed. . . ."[7] As with debt limitations, tax limitations are unanimously held to apply to contractual obligations, and the city cannot tax above the limit to pay a contract judgment. However (while debt limitations were held not to preclude recovery in tort against the city), some courts feel that because of the difference in the wording of the provisions a different result should be reached in the case of a tax limitation. The Missouri court[8] voiced the distinction, saying that the debt limitation read "no . . . city shall be allowed to become indebted . . . [nor shall] any indebtedness be allowed to be incurred." This, it was said, had reference to "becoming indebted" and "incurring indebtedness" voluntarily by debts and actions ex contractu, whereas, the court pointed out, under the constitution, restrictions on taxes " 'shall apply to taxes of every kind and description whether special or general.' By what process of reasoning can we read into this limitation of rates the words 'except to pay judgments in tort'?" The courts, however, are divided on this point as to whether there is an implied exception in a tax limitation in favor of the power to levy taxes for the payment of tort judgments.

In the recent case of *Barker v. State ex rel. Napoleon*,[9] relator had a judgment, based upon tort, of $8,700 against the city of Santa Fe, New Mexico. He applied for an alternative writ of mandamus to compel the levy and collection of a tax to pay the judgment. The city answered that by statutory limitation it could levy taxes for general purposes not exceeding five mills on the dollar of assessed valuation, that it had levied to the limit, and that it would require all of the money so raised for its 1935 current municipal expenses. The district court issued a peremptory order compelling levy of the tax to pay the judgment in excess of five mills. The judgment was affirmed by the

[6] Arkansas Constitution (1874), Art. 12, § 4.

[7] New York Constitution (1821), Art. 8, § 10, as amended. In general for extracts from state constitutions dealing with tax limitations, see GRAY, LIMITATIONS OF THE TAXING POWER AND PUBLIC INDEBTEDNESS, §§ 2033-2053 (1906).

[8] State ex rel. Emerson v. Mound City, (Mo. 1934) 73 S.W. (2d) 1017 at 1024.

[9] 39 N. M. 434, 49 P. (2d) 246 (1935). Art. VIII, § 7 of the state constitution provided that municipal judgment creditors should not get execution, but the judgment "shall be paid out of the proceeds of a tax levy as other liabilities of . . . incorporated cities . . . and when so collected shall be paid by the county treasurer to the judgment creditor," although the ordinary city funds were required to be turned over to the city by the county treasurer. The court preferred to put its decision on the general ground that the tax limitations did not apply, saying (p. 441): "As we have found that relator is entitled to the writ as prayed for, we do not find it necessary to decide the constitutional question;" i. e., whether the clause is self-executing and plaintiff entitled under it to peremptory mandamus.

state supreme court, which said that limitations on the amount of municipal *indebtedness* did not apply to judgments for tort, and that therefore the limitation on the *tax rate* could not prevent the levy of a tax to pay a judgment in tort.

Supporting the result reached by New Mexico in the *Barker* case are the courts of Kentucky and Arizona. The Kentucky Constitution combined in one paragraph [10] a tax limitation and a debt limitation for cities. The court said concerning it that,[11]

> "[the city's] contention wholly ignores the . . . object of section 157, which was and is, not to shield municipal corporations from the liability imposed by law for wrongs occasioned by their negligence, but to protect them from their own improvident acts and extravagance. . . . the limitations . . . apply to indebtedness created . . . by contract. They have no application where the liability . . . is for a tort. . . ."

The Arizona court has stated,[12]

> "The general rule is that limitations of the nature set forth in the provisions above quoted [13] refer only to obligations voluntarily incurred by the municipality, and have no bearing upon judgments rendered against it by reason of its torts."

[10] Section 157: "The tax rate . . . shall not, at any time, exceed . . . seventy-five cents on the hundred dollars. . . . No county, city, town, [or] taxing district . . . shall be authorized or permitted to become indebted in any manner or for any purpose, to an amount exceeding. . . ."

[11] Menar v. Sanders, 169 Ky. 285, 183 S. W. 949 (1916). When thrown from his wagon, due to the condition of the streets, Sanders received injuries from which he died. His widow recovered as executrix; execution was returned "no property found," and she brought mandamus to compel a tax levy. This case was recently cited with approval and followed by the Kentucky court in City of Catlettsburg v. Davis Admr., (Ky. 1936) 91 S. W. (2d) 56 at 60.

[12] Town of Flagstaff v. Gomez, 29 Ariz. 481 at 485-486, 242 P. 1003 (1926).

[13] The court had quoted (29 Ariz. 481 at 485) Ariz. Rev. Stat. (1913), par. 1850 as follows:

> "The common council of every town shall have power to levy . . . in each year, the following taxes:
>
> First: Not exceeding four mills on the dollar . . . to defray the salaries of officers and the ordinary and contingent expenses of the corporation, not herein otherwise provided for.
>
> Second: Not exceeding twelve mills . . . for purpose of constructing and repairing streets, sewers, sidewalks . . . .
>
> Third: Not exceeding four mills . . . to defray the interest of the public debt of the town."

The court then stated: "It is further contended that paragraph 4840 . . . limits the amount of taxes to be raised in any year to an increase of ten per cent over the aggregate of the previous year's expenses," and set forth the general rule as quoted in the text.

There is, however, respectable authority seemingly contrary to the holding of the *Barker* case. Text writers who have discussed the matter,[14] have customarily used rather general language to the effect that a judgment creditor of a municipality is not entitled to a tax levy beyond the statutory or constitutional limit. However, they do not distinguish between judgment creditors in tort and in contract, and the cases cited in support of their statements of the law, while numerous, almost without exception involve judgments on contract and do not present squarely the problem of collecting a tort judgment.[15] Thus, we are left

[14] COOLEY, TAXATION, 2d ed., 738 (1886): "But *mandamus* will not lie to compel the levy of a tax in excess of the legal limitation; for, as has already been stated, this writ does not confer power; it only compels, in proper cases, the exercise of existing power. And it will not be employed to compel the payment of judgments or other demands to an extent that would deprive the municipality of means for ordinary and necessary municipal expenses."

GRAY, LIMITATIONS OF THE TAXING POWER AND PUBLIC INDEBTEDNESS, § 2016 (1906): "Where a judgment has been recovered against a city, county, or other municipal or governmental subdivision, the right of the creditor to compel the levy of a tax to pay his judgment must be exercised in subordination to the constitutional limitation on the tax rate. . . . However worthy his debt, he cannot compel the levy of a tax to pay it if such levy would increase the taxpayer's liability beyond the constitutional rate."

[15] 18 R. C. L. 282 (1917), referred to by some courts, reads: "if a municipality has no power, either by express grant or by implication, as from its general power of taxation, to pay the indebtedness by means of taxation the authorities cannot be required, on mandamus, to levy a tax for that purpose. . . . So, a judgment creditor of a municipality is not entitled to a mandamus to compel the levy of a tax in excess of the limit fixed by statute. . . ." But the cases cited to support this general statement deal with judgments in contract: United States v. County of Macon, 99 U. S. 582 (1878) (dealing with railroad bonds and tax limitations); Clay County v. McAleer, 115 U. S. 616 (1885) (a case involving a contract debt reduced to judgment); Stewart v. Jefferson Police Jury, 116 U. S. 135 (1885) (involving a claim for attorney's fees reduced to judgment).

GRAY, LIMITATIONS OF THE TAXING POWER AND PUBLIC INDEBTEDNESS, § 2016, notes (1906), cites: Arnold v. Hawkins, 95 Mo. 569, 8 S. W. 718 (1888) (deciding a county cannot levy taxes in excess of the constitutional limit to pay judgments against it founded on warrants issued to meet current expenses); Grand Island & N. W. R. R. v. Baker, 6 Wyo. 369, 45 P. 494 (1896) [Where the court said at page 375: "The facts connected with the judgments are not . . . sufficiently disclosed to definitely indicate the precise nature of the claims entering into them. . . . Inferentially it may appear that they were . . . largely upon warrants issued in payment for current expenses of the county. . . ." And at page 401 "It was not intended that a county powerless to legally contract debt which could not be paid out of the current revenue, because of its exhaustion in paying other expenses, could nevertheless by incurring such debts be permitted to employ unlimited taxation to defray those expenses which the constitution declares must be provided for by a limited tax."]; Board of Commissioners of Osborne County v. Blake, 25 Kan. 356 (1881) (dealing with a judgment on county warrants issued to pay current expenses); State ex rel. Wood v. Board of Liquidation, 40 La. Ann. 398, 4 So. 122 (1888) (where the headnote reads "Persons who deal with political or municipal corporations possessed of limited

in doubt whether the statements were meant to be broadly inclusive or whether the writers failed to consider the possibility and policy of excepting tort judgments. Many courts have spoken strongly in general terms so as to imply that a tax should not be levied beyond the specified limit, even to pay a judgment in tort, but they were not faced with that question directly. For example, in considering an attempt by mandamus to force levy of a tax to pay a contract judgment, the Iowa court said,[16] "if the actual necessary expenses of running the city government required a levy of one per cent (the maximum rate allowed) there would be no liability for refusing to levy more, nor for a failure to set apart a portion of such levy in payment of a judgment."[17] In several Illinois cases dealing with the question, it did not appear whether the judgments in question and for which a levy was sought were tort or contract, but the court spoke so as to leave the impression it considered the tax limit must be enforced without exception.[18] The Nebraska case of *Chase County v. Chicago B. & Q. R. R.*[19] was an action to recover illegal taxes. The court held that when taxes levied by a county exceeded the maximum permitted by the constitution, the excess was for an illegal purpose. The county argued a statute required it to pay

power to contract debts, *must* rely for their payment upon the annual revenues provided for them by law. . . ."); City of Austin v. Cahill, 99 Tex. 172, 88 S. W. 543 (involving a claim for interest on bonds that had been reduced to judgment).

[16] Porter v. Thomson, 22 Iowa 391 at 395 (1867).

[17] But in Rice v. Walker, 44 Iowa 458 at 461 (1876), the court said, "Sections 496 and 497 of the Code confer no power whatever to levy a tax. They simply limit the amount which may be levied for two expressed objects. [By § 496 the taxing power of the city for general and incidental expenses was limited to 10 mills on the dollar, by § 497 the levy to create a sinking fund for gradual extinction of bonds and the public debt was limited to 2 mills on the dollar.] The power to levy, if it exists at all, must be found either in section 454 or section 495. If it is not found in the former, we think it is by plain implication in the latter. But in neither case is any limit imposed." The court decided that a levy "for judgment fund" was legal and that as to plaintiff's tort judgment, the defendant city treasurer pay "so far as he may be able to do so with funds in the city treasury collected either from the tax of 1874, levied 'for judgment funds,' or from the tax of 1875, levied 'for city judgment tax,' whether the same may have been transferred or credited to any other fund or not."

[18] People ex rel. v. Chicago L. S. & E. Ry., 270 Ill. 477 at 479, 110 N. E. 720 (1915). Plaintiffs filed objections to various taxes levied on their property. "Counsel agree that the question whether the clerk was right or whether the town of North Chicago should have been fixed upon as having the highest aggregate rate depends on whether judgments to the amount of $3907 against the city of West Hammond, not rendered for a bonded indebtedness or interest thereon, were to be included in the maximum rate of $1.20 on each $100 of taxable property allowed municipalities. . . . All taxes, no matter what their nature, purpose or form, except for the payment of bonded indebtedness and interest thereon, are expressly brought within that limitation, and the limitation cannot be avoided by permitting obligations to take the form of judgments. . . ."

[19] 58 Neb. 274, 78 N. W. 502 (1899).

judgments against it promptly and to levy a tax therefore, but the court held the statute should not be given an effect in conflict with a constitutional provision which allowed tax levies over the limit for only two purposes: first, to pay off a debt existing at adoption of the constitution (that validity of contract be not impaired); and, secondly, when authorized by the people.[20]

The courts that have specifically considered the problem are few. The Louisiana and the Missouri courts alone have been found to be in direct conflict with the courts of New Mexico, Kentucky and Arizona. In the case of *State ex rel. Folsom Bros. v. Mayor and Administrators of the City of New Orleans*,[21] the Louisiana court held that the limitation applied not only to future judgments in tort, but even to judgments already final when the state constitution was adopted limiting tax levies, since the United States Constitution only prohibited impairment of the obligations of contract. The early Missouri cases[22] supported the holding of the principal case, but recently the court reversed its previous decisions and took a squarely opposite position, saying,

> "Except, therefore, that the rendition of a judgment in actions for tort is not 'becoming indebted' or 'incurring indebtedness' beyond the constitutional limit, such judgment itself, the same as bonds, judgments *ex contractu*, or other obligations of the city, constitutes a debt of the city for all other purposes and is on equality when resort is had to taxation to pay the same."[23]

[20] There is also the Alabama case of Speed v. Cocke, Admr., 57 Ala. 209 (1876). The court decided the contract on which plaintiff based his claim against the county was not valid since made under statutes passed to aid in prosecuting the Civil War, but went on to say that the court of county commissioners was not authorized to levy a specific tax for payment of any particular claim but only a percentum annually on the state assessment; if it had exercised this power to the maximum, its authority was exhausted and there was no right to mandamus compelling the court to levy a tax. These statements were made in considering a claim based on contract, and further, a different case is, of course, presented (where there was no power to tax for payment of any particular claim) from the situation where a local unit can tax for particular claims but a limit is imposed; the one case does not present the question whether the limit on an admitted power is applicable—there is no power at all.

[21] 32 La. Ann. 709 (1880). Plaintiffs had tort judgments against the city for damages done to their property by a mob in 1873, the judgments becoming final in 1874 and 1879. The constitution of 1879 limited the power of the municipality to tax for any purpose to 10 mills on the dollar.

[22] Thus, "It is clear that this was not the purpose of the constitutional provisions. The language used demonstrates that they were not written and enacted to exempt municipalities from responsibility for tortious acts, but as a due guard to improvidence and thoughtlessness. . . . the sections apply only to an indebtedness resulting from contractual relations and . . . are not relevant to a judgment obtained . . . for a pure tort." State ex rel. Pyle v. University City, 320 Mo. 451, 8 S. W. (2d) 73 (1928).

[23] State ex rel. Emerson v. Mound City, 335 Mo. 702 at 712, 73 S. W. (2d) 1017 (1934).

The reasoning of the *Barker* case might be criticized in that the court seems to say that tort judgments are excepted from the operation of *debt* limitation provisions and *therefore* the tax limitation is not applicable, and many of the authorities the court cited as supporting its view dealt with debt limitations.[24] A debt limitation never operates to affect the city's power to tax. A limit on the power to tax is no limit upon the amount of indebtedness. The restrictions are different in their character; the taxpayer cares particularly for the bill he must finally pay each year; he is not so immediately concerned if the debts of the city are increased. The one limitation protects him now; the other only prevents the running up of a large debt that must be met sometime in the future by him or succeeding taxpayers. One is a direct limitation, the other indirect.[25] The limitations, as was noticed, are also worded differently, one usually reading that "the city shall not be allowed *to become* indebted," implying a limitation upon its voluntary action which the recovery of a judgment in tort against the city would not violate, the other reading "no tax shall be levied beyond . . ." and which mandamus to force the city to levy might be felt to violate.

However, recognizing these distinctions, there is much to be said for the result of the *Barker* case, and while argument cannot be made directly from the treatment of debt limitation provisions, argument by analogy is sound. The purpose behind such limitations was to curb municipal extravagance, not to give the city an "out" to escape paying tort judgments. To allow mandamus to pay a tort judgment does, it is true, increase the taxpayer's burden but only justifiably so, since the city should pay its tort obligations, and the increase would probably be consonant with legislative intent. Tax limitation statutes were adopted against the background of debt limitations and their interpretation, and legislators probably felt subconsciously that the provisions would apply only to contract obligations. Without a resort to mandamus to compel taxes to pay his judgment, one, who is perhaps maimed for life, is nearly helpless to collect when the city needs annually for current governmental purposes all the taxes within the limit. As to the powers of execution against a city, one author says,

> "At common law a judgment creditor was allowed to levy on property that a municipality held in its private capacity. . . . But property held for a public purpose was exempt. . . . An unusued

[24] Barker v. State ex rel. Napoleon, 39 N. M. 434 at 436-437, 49 P. (2d) 246 at 248 (1935).

[25] The distinction between present thrift and provision for the future is appreciated by those who have watched a plan for civic improvement fail when it provides an immediate tax to finance it and be approved upon a popular referendum when it is to be financed by a bond issue.

vacant lot outside the corporate limits is private property.[26] . . . The Maryland court has decided that as a matter of policy no property of a municipal corporation can be reached by creditors. . . . In such a situation the creditor's only remedy is mandamus. . . . Statutes having the same effect are found in Michigan . . . Illinois . . . Pennsylvania . . . Louisiana . . . Wisconsin. . . ."[27]

In actions ex contractu, the creditor contracted and dealt with the city in view of the limited power to tax; in tort, the transaction through

[26] Citing Murphree v. City of Mobile, 108 Ala. 663, 18 So. 740 (1895).

[27] 27 MICH. L. REV. 218 at 219 (1928). And see Fordham, "Methods of Enforcing Satisfaction of Obligations of Public Corporations," 33 COL. L. REV. 28 (1933). At p. 54 he says:

"A few broad generalizations may be ventured. Execution, and garnishment where the corporation is not the garnishee, are useful only to the extent that the debtor has property not used and not held for use in the performance of corporate functions. Equitable relief is likewise of scant utility. It is the writ of mandamus, an effective specific remedy, which has best served the creditor's purpose. The most significant phase of its exercise is the coercing of tax levies."

Courts refusing mandamus but realizing the judgment creditor's position have indicated various other more or less effective methods of caring for his interests. In speaking of a contract judgment creditor in Chicago & A. R. R. v. People, 177 Ill. 91 at 92-93, 52 N. E. 439 (1898), the court said:

"It might be very convenient and desirable to raise as much as the law will permit and expend it for other purposes, and make an additional levy to pay the judgment; but the statute can not be evaded in that way. The only difference in respect to the judgment is, that a legal liability has been fixed and the city is bound to pay it, and, being bound to keep within the limitation, must abate from the sums which the officials would like to expend, sufficient to bring the entire levy within two per cent."

In refusing mandamus, the Alabama court said:

"The creditor must await payment from the county treasury until his claim becomes payable in the order of its registration, from the funds raised by taxation." Speed v. Cocke, Admr., 57 Ala. 209 at 221 (1876).

Thus if the creditor lives long enough and the county current expenses are low enough so that it can pay off prior registerees, payment is eventually assured. In Iowa a statute imposed individual liability on officers if it was within their power to levy taxes to pay a creditor and they refused to do so, and the court in refusing mandamus to a judgment creditor said:

"after demand the duty was a continuous one, and, if not then practicable, the levy ought to have been made as soon as the law would allow. . . . And . . . officers, under the pretense of providing for 'current expenses,' must not cover up funds not necessary for that purpose, and which should be applied to the payment of the creditors of the corporation. They must act in good faith." Porter v. Thomson, 22 Iowa 391 at 395-396 (1867).

But this is not particularly helpful to the creditor.

which he recovered was not of the judgment holder's choosing.[28] The better view would seem to be that in case of tort if there is a general taxing power the limitation ought not to apply; the justification would be that there is general power to tax, a limitation thereon, but not one meant to apply to this case, and therefore there is still power to tax to pay a tort judgment.[29] Corrupt officials cannot profit so much by evading tax limitations as by avoiding debt limitations, and abuse of the power to levy taxes would be more promptly made the subject of complaint by the taxpayer. Such an increase in revenues would not create opportunities for abuse and extravagance by the city fathers.[30] The result is better in accord with the recent tendency in the law to shift the burden from the individual to the larger group, noticeable

[28] A note in 20 ST. LOUIS L. REV. 287 (1935), speaking of State ex rel. Emerson v. Mound City, 335 Mo. 702, 73 S. W. (2d) 1017 (1934), says, "In support of its contention, the Court refers to the general legal principle that a cause of action is merged in the judgment." But the Louisiana court held (see note 21 ante) that the form of action was not merged in judgment, so that a subsequent constitutional provision limiting the city's power to tax was not impairment of obligation of contract, since the judgment was based on tort and judgments were not contracts. And where hardship results, the cause of action is not merged. It would seem that the form should not be merged here. Of course, if plaintiff upon recovering his tort judgment takes scrip or other evidences of indebtedness of the defendant city and thereby consents to relying on the city's credit, it might well be said that the fact his recovery was in tort is no longer material. "A judgment creditor of a municipal corporation is not obliged to accept scrip or other evidences of indebtedness for his judgment, nor is he required to demand the issue thereof, but may demand that the taxing officers levy a special tax to pay his judgment. . . ." 51 L. R. A. (N. S.) 146 (1914).

[29] "But mandamus does not lie unless the duty to make the levy is clearly imposed by statute, either expressly or by implication, and hence the writ does not lie to compel a municipality to levy a greater tax than allowed by the constitution or statutes to levy, or to compel the levy of a special tax when the general levy is so close to the limit that the special levy would, when added to the general levy, exceed the limit. . . ." 6 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 2536 at p. 300 (1928). To imply that the limitation applies to tort judgments seems begging the question.

[30] Some, however, might point out that the city could avoid the limitations put on it by intentionally creating tort actions, proceeding to inflict damage upon property by a civic improvement and letting injured owners recover in tort rather than including in the budget an amount to provide compensation for eminent domain and thereby increasing the requisite tax levy over the limit. As to this when used to avoid a debt limitation, see Keller v. Scranton, 200 Pa. St. 130 at 135, 49 A. 781 (1901), where the city went ahead to erect a viaduct that would render it liable to damage suits of more than $100,000, although it was already indebted to the limit. The court stated:

> "It is true the constitution does not exempt municipalities, how great soever their indebtedness, from liability for wrongful and tortious acts. But it does not authorize the voluntary assumption of obligation to pay money by the scheme of a tort. The distinction between real . . . torts and voluntary acts under the technical name of torts done . . . for accomplishment of a purpose prohibited to be done by contract, is clear and substantial."

both in judicial decision and social legislation,[31] although it may well be questioned whether such a modern trend (if so strong a word is justified) can be used to interpret statutes that may have been passed at the end of the last century. It is at least significant that the three courts supporting this view dealt with the quesions in 1916,[32] 1926[33] and 1935.[34]

[31] Feezer, "Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases," 78 UNIV. PA. L. REV. 805 at 808-809 (1930):

> "The 'humanitarian' social conscience of today is apparently much more concerned with the poor devil who gets injured by our modern devices than was the social conscience of the Victorian period. . . . Since cases indubitably are being decided from time to time with results contrary to earlier cases where the objective situation is equivalent, and since *social* duty concepts are so changing as to bring this about, is it fair to suppose that such a factor as capacity to bear the loss may be contributory to the formulation of new rules of *legal* duty?"

And at page 816, the author quotes from POUND, THE SPIRIT OF THE COMMON LAW 185, 189 (1921):

> "Eight noteworthy changes in the law in the present generation, which are in the spirit of recent ethics, recent philosophy and recent political thought, will serve to make the point. . . .
>
> "Seventh, we may note an increasing tendency to hold that public funds should respond for injuries to individuals by public agencies; that the risk of injuries to individuals inherent in the operations of government are not to be borne exclusively by the luckless individual on whom loss happens to fall."

While this tendency is directed more particularly at the *liability* of the municipal corporation, might it not lie back of the interpretation given by Barker v. State ex rel. Napoleon to the powers of collecting a judgment based upon tort?

[32] Menar v. Sanders, 169 Ky. 285, 183 S. W. 949 (1916).

[33] Town of Flagstaff v. Gomez, 29 Ariz. 481, 242 P. 1003 (1926).

[34] Barker v. State ex rel. Napoleon, 39 N. M. 434, 49 P. (2d) 246 (1935).