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SPECIAL ASSESSMENTS FOR PUBLIC IMPROVEMENTS IN IOWA

PART V—REASSESSMENT, COLLECTION, LIABILITY, AND CONCLUSION

*Edward R. Hayes**

* Professor of Law, Drake University Law School.

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A. Reassessment and Curative Acts

The initial special assessment may fail to produce enough revenue to pay all claims of contractors or bond or certificate holders. This can happen because the assessment was insufficient, because portions of it were not paid and normal collection procedures have not obtained full payment, or because the assessment is invalid in whole or in part. May a reassessment of the benefited properties be made to clear up the deficiency? Will a curative or legalizing act bar assertion of the invalidity in defense to normal collection procedures? May the creditors hold the city or county liable for the deficiency? The first two of these questions are discussed in this section; the last question will be considered in a later section.

1. Reassessment

Since 1888 there has been some statutory authority for relevy, in street and sewer improvement projects, which now reads as follows:

> When by reason of nonconformity to any law or resolution, or by reason of any omission, informality, or irregularity, any special tax or assessment levied is invalid or is adjudged illegal, the council shall have power to correct the same by resolution and may reassess and relevy the same, with the same force and effect as if done at the proper time and in the manner provided by law or by the resolution relating thereto.[1]

Chapter 391 also contains authority to reassess where original assessments were adjudged void for "any jurisdictional defect, or other reasons, and the city adjudged liable to pay the same," and where property was originally assessed too little or too much;[2] neither Chapter 391A nor Chapter 417 has such provision. Both Chapters 391 and 391A call for payment of deficiencies in assessment from city or town funds when the deficiency results because an affected property is non-assessable or the amount assessable thereon is less than its share of the total assessment;[3] but the only similar provision under Chapter 417 permits but does not require a court which reduces one assessment on confirmation procedure to assess the deficiency to other property subject to assessment.[4] Sidewalk improvements handled under Chapters 391, 391A or 417 would be subject to the same reassessment provi-

[1] IOWA CODE §§ 391.84, 391A.36 (1962). These sections' ancestry can be traced to Iowa Laws c. 6, § 7, and c. 44, § 1 (1888). § 417.62 is of similar import, in different wording.
[2] IOWA CODE §§ 391.85-.86 (1962).
[3] *Id.* §§ 391.44, 391A.28.
[4] *Id.* § 417.60.

sions; it is not clear that reassessment would be authorized if the improvements are handled under Chapter 389.[5]

Drainage district improvements have a similar provision for reassessment to cure illegalities, and also authorizing reassessment where the first assessment was insufficient.[6] One other Chapter which does not provide for reassessment does cover deficiencies but calls for levy on all property in the city with credit to that already specially assessed.[7]

Several cases held that reassessment was permissible even though the defective procedure occurred before adoption of the statute authorizing reassessment. One of these involved an assessment which was under challenge at the time the 1888 legislation was adopted, and the Court had held the original contract to be void.[8]

To be valid, reassessment should conform to the substantive and procedural requisites which should have applied to the assessment it replaces. Thus, in one case a reassessment was invalid because lots under common ownership were assessed as a unit rather than separately.[9] There is no statutory limit with respect to the time in which a reassessment can be made, and no case appears to have considered the problem.[10]

Despite the seemingly sweeping language of the reassessment statutes, not all defects can be cured by reassessment. For example, reassessment is improper when the defect is a failure of the contractor to comply with his contract.[11] Several older cases invalidated reassessments where the original defects were "jurisdictional."[12] Section 391.85 permits reassessments where the original assessment was adjudged void "for any jurisdictional defect"; despite this it seems likely that some "jurisdictional" defects would be so gross the Court would not permit reassessment—on constitutional grounds if no other could be found.[13]

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[5] See *Id.* § 389.36. In Zalesky v. City of Cedar Rapids, 118 Iowa 714, 92 N.W. 657 (1902), the Court avoided deciding whether the reassessment statutes applied to the sidewalk improvement before it.

[6] IOWA CODE §§ 455.59 (deficiency levy), 455.109 (reassessment) (1962).

[7] *Id.* § 395.22 (flood protection).

[8] Gill v. Patton, 118 Iowa 88, 91 N.W. 904 (1902); Tuttle v. Polk & Hubbell, 84 Iowa 12, 50 N.W. 38 (1891). The latter case permitted reassessment as to a paving contract which had been held void in Coggeshall v. City of Des Moines, 78 Iowa 235, 41 N.W. 617, 42 N.W. 650 (1889). Cf. McManus v. Hornaday, 124 Iowa 267, 100 N.W. 33 (1904). See 14 MCQUILLAN, MUNICIPAL CORPORATIONS § 38.219 (3d ed. 1950).

[9] Gill v. Patton, *supra*, note 8. See Cavanaugh v. City of Des Moines, 179 Iowa 739, 162 N.W. 17 (1917).

[10] See 14 MCQUILLAN, MUNICIPAL CORPORATIONS § 38.224 (3d ed. 1950).

[11] Crawford v. Mason, 123 Iowa 301, 98 N.W. 795 (1904). See Atkinson v. City of Webster City, 177 Iowa 659, 158 N.W. 473 (1916).

[12] Howard v. County of Emmet, 140 Iowa 527, 118 N.W. 882 (1908) (defect held not so jurisdictional that curative act unconstitutional); Martin v. City of Oskaloosa, 126 Iowa 680, 102 N.W. 529 (1905) (defect held not jurisdictional); Zalesky v. City of Cedar Rapids, 118 Iowa 714, 92 N.W. 657 (1902).

[13] In Kaynor v. District Court, 178 Iowa 1055, 158 N.W. 557 (1916), the city had previously been enjoined from enforcing an assessment for a sidewalk built by the city after ordering the property owner to build under conditions it had no authority to impose. The council then attempted to reassess, and the property owner instituted action praying the council members be held in contempt for violating the injunction. The Court reversed a trial court decision for the council members, without reference to the ancestor of § 391.85 which had been enacted shortly before. The Court thought there was no right to assess, so no right to reassess. See Cavanaugh v. City of Des Moines, 179 Iowa 739, 162 N.W. 17 (1917), holding an assessment

As there is no general fund derived from ordinary taxes, to support drainage districts, a valid original assessment which turns out to be insufficient because certain costs which should have been considered were overlooked can be followed by a reassessment to cover the omitted items.[14] And reassessment has been allowed both in drain and in paving cases where the amount to be realized from the original assessment was reduced by court decisions that one property's assessment was excessive.[15] Under some circumstances the property whose assessment is reduced may be required to bear a proportionate part of the reassessment—this would not be true, of course, if the reduction is based on benefit received or on the twenty-five per cent of value rule.[16]

Where the original assessment is invalid, and is followed by reassessment, should the property owner be assessed for interest due on bonds or certificates from the date of the original assessment? An early case held that there could be no assessment of interest for periods prior to the reassessment,[17] and a later case indicates that the city itself is responsible for the interest prior to reassessment.[18] A different rule will probably apply to drainage district reassessments.

In one rather unusual case, after an assessment was held void bondholders obtained judgment in federal court against the city, conditioned on the city's reassessing the originally assessed property for the amount of the judgment. After reassessment pursuant to the judgment, and general failure to pay, much of the property eventually was sold at tax sale and the owners attempted to restrain issuance of tax sale certificates to the purchasers at the sale. While the Iowa Court indicated doubt that the federal court had had jurisdiction to order reassessment as it did, the Court held for the old property owners on the theories that any lien was lost before the sale so the sale was invalid, and that the sale was barred by the statute of limitations.[19]

If reassessment is proper and the board or council refuses to take appropriate action, mandamus will lie to compel it to reassess.[20]

2. Curative or Legalizing Acts

At every session of the Iowa Legislature a number of legalizing, or curative, acts are enacted. Prior to adoption of the statutes permitting re-

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void because laid against a quarter-section of land rather than against each lot therein, as unauthorized exercise of power, but observing that reassessment would be permitted if levied against each lot.

[14] Ames v. Board of Supervisors, 234 Iowa 617, 12 N.W.2d 567 (1944) (interest on bonds overlooked); Danielson v. Cline, 234 Iowa 167, 12 N.W.2d 254 (1943); Whitfield v. Grimes, 229 Iowa 309, 294 N.W. 396 (1940) (computation errors). See Whisenand v. Nutt, 235 Iowa 301, 15 N.W.2d 533 (1944). Reassessment was not permitted, in Deming v. Board of Supervisors, 237 Iowa 11, 21 N.W.2d 19 (1945), where the omitted item was a "fiscal agent's fee" which the Court felt was not properly a cost to the district.

[15] Chicago, M. & St. P. Ry. v. Mosquito Drainage Dist., 190 Iowa 162, 180 N.W. 170 (1920); Evening Star Lodge v. Robbins, 179 Iowa 537, 161 N.W. 680 (1917).

[16] Chicago, M. & St. P. Ry. v. Mosquito Drainage Dist., *supra*, note 15.

[17] Tuttle v. Polk & Hubbell, 84 Iowa 12, 50 N.W. 38 (1891).

[18] Barber Asphalt Paving Co. v. City of Des Moines, 191 Iowa 762, 183 N.W. 456 (1921).

[19] Holleran v. Toenningsen, 178 Iowa 1365, 161 N.W. 25 (1917).

[20] Whitfield v. Grimes, 229 Iowa 309, 294 N.W. 346 (1940); Crawford v. Mason, 123 Iowa 301, 98 N.W. 795 (1904). The Whitfield case also points out that the

assessment this was the only legislative device for overcoming defective procedure in special assessment matters; on occasions curative acts may still be used for that purpose.[21]

A curative act may be used to "validate any past act which the legislature might have authorized or make immaterial any requirement which might have been omitted from the original legislation."[22] It may be adopted even though litigation is in process challenging the procedure originally followed.[23]

Defective procedure cannot always be legalized. If the property owner has already successfully litigated the original assessment through the Supreme Court, one early case holds he cannot be made liable by adoption of a curative act;[24] the Mechanicsville legalizing act apparently assumes that the Court would so hold today.[25] Another decision, in an action against a city on special assessment certificates, where the contract for work was invalid because not approved by a sufficient number of council members but a legalizing act had been adopted, observed that it was doubtful whether a curative act could affect rights of a property owner under such circumstances—however, the case actually held that the city was not liable on contract because the debt limit would be exceeded, and was not liable on other grounds because it had not been asked to reassess.[26] And a legalizing act in another case cured a defective notice but could not validate the assessment because the contractor's performance substantially deviated from specifications.[27]

Legislative willingness to enact curative acts, and the ability of council or board to reassess, mean that in many instances defective procedure will not bar eventual assessment. Some alert objectors may be able to avoid

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statute of limitations begins to run against the bondholders when the bonds become delinquent, not when the board first failed to make an adequate levy.

[21] The 1963 Iowa Legislature enacted 37 curative acts, of which two related to street improvements. Iowa Laws ch. 368 (1963) legalized certain proceedings of the Denison city council. Ch. 369 legalized certain proceedings of the Mechanicsville town council setting up a street improvement program which was disapproved by the state appeal board and the disapproval upheld by the Court in Town of Mechanicsville v. State Appeal Board, 253 Iowa 517, 111 N.W.2d 317 (1961).

[22] 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 2213-2214 (3d ed. Horack 1943).

[23] Iowa Elec. Light & Power Co. v. Town of Grand Junction, 221 Iowa 441, 264 N.W. 84 (1936) (Court observing legalizing act doesn't invade province of judiciary; case involved municipal electric plant construction); Windsor v. City of Des Moines, 110 Iowa 175, 81 N.W. 476 (1900) (contract for municipal light plant); City of Clinton v. Walker, 98 Iowa 655, 68 N.W. 431 (1896) (street improvement). Other cases accepting the view from Sutherland, quoted in the text above, include: Polk County v. Basham, 234 Iowa 225, 12 N.W.2d 157 (1943) (tax deed); Witmer v. Peebles, 229 Iowa 404, 294 N.W. 563 (1940) (tax deed); Windsor v. City of Des Moines, 101 Iowa 343, 70 N.W. 214 (1897) (street paving); Richman v. Supervisors, 77 Iowa 513, 42 N.W. 422 (1889) (levee). See Howard v. County of Emmet, 140 Iowa 527, 118 N.W. 882 (1908) (drain); Tuttle v. Polk & Hubbell, 84 Iowa 12, 50 N.W. 38 (1891) (sewer, reassessed, but Court said Legislature could have legalized).

[24] McManus v. Hornaday, 124 Iowa 267, 100 N.W. 33 (1904).

[25] Iowa Laws ch. 369, § 2 (1963), provides that ch. 369 shall not authorize levy of special assessments against the property of the four property owners who had appealed to the state appeal board.

[26] Citizen's Bank v. City of Spencer, 126 Iowa 101, 101 N.W. 643 (1904).

[27] McCain v. City of Des Moines, 128 Iowa 331, 103 N.W. 979 (1905). In Dunker v. City of Des Moines, 160 Iowa 567, 142 N.W. 207 (1913), the Court was able to resolve a challenge to the assessment by finding that an existing city ordinance defining "adjacent property" covered the matter omitted in the resolution of

payment, at least for a time; and on occasion the obligation to pay interest may be shifted in part from the affected property to the city.

B. Collection

Most special assessment statutes contemplate that the county auditor or treasurer, or both, will be notified of special assessment levies; they will proceed to collect the assessments as other taxes are collected; and that assessed property may be sold at tax sale if payments are delinquent.[28] Despite this seemingly simple description of the process, the various statutes contain bewildering variations, many without apparent rhyme or reason. For example, one statute directs the assessment to be entered on "tax records,"[29] another on the "tax list,"[30] another on the "tax books,"[31] and another in "special assessment books."[32] In this section our concern is with the proper person or officer to receive payment; whether the assessment can be paid in full, and when, or whether it can be paid in installments, and when; interest and penalties that can be collected; whether the assessment results in a lien on property, and if so what priority does the lien take and is it affected by tax sale for other delinquent taxes or special assessments; various other aspects of tax sales; and the possibility that the assessment can be enforced in a suit brought by the state or by some private citizen.

1. To whom is payment made?

At one time municipal taxes and special assessments were collected by the city treasurer. This is no longer true except in the case of charter cities;[33] other municipalities and possibly one or more charter cities certify such taxes and assessments to the county auditor to be put on the tax list and collected by the county treasurer.[34] As the county treasurer has no authority to collect special assessments prior to the time the amount of the levy has been certified to him, a property owner who wants to pay his assessment before that time may pay it to the city treasurer.[35]

The treasurer could, at one time, retain a small portion of taxes collected for cities and towns, as compensation for his services.[36] Where a city had issued paving certificates to a contractor, it was held that collection of assess-

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necessity, so it was unnecessary to determine whether a legalizing act was applicable.

[28] However, no reference to this process appears in IOWA CODE §§ 368.26, 368.31, 368.33 or 368.45 (1962), which state that the city has power to assess certain costs but omits any reference to manner of collection.

[29] *Id.* § 100.29 (1962).

[30] *Id.* §§ 113.6, 358.18, 391A.25.

[31] *Id.* § 137.16. See § 420.257.

[32] *Id.* § 391.34. § 445.11 requires the auditor to record all special assessments of which he is informed in a "special assessment book."

[33] *Id.* § 420.257.

[34] *Id.* § 404.3, by its terms, applies to "all assessments and taxes of every kind and nature caused to be levied by the council, except taxes for the payment of bonds and the interest thereon." § 391.34 calls for certification to the auditor after contract letting of the resolution ordering work and the plat and schedule of proposed assessments, § 391.61 provides for certifying the levy, and § 391.58 makes the assessment, when levied and certified, payable to the county treasurer within 30 days after "date of such levy". §§ 391A.25 and 391A.32 are similar. See Shaw v. Des Moines County, 74 Iowa 679, 39 N.W. 101 (1888). Query, as to the Code sections referred to in note 28, *supra*.

[35] F. M. Hubbell, Son & Co. v. Hammill, 187 Iowa 1083, 175 N.W. 41 (1919).

[36] See IOWA CODE § 490 (Code Supp. 1913).

ments to pay these certificates was not collection of "taxes due" the city, so there was no right to retain.[37] Despite the extra work caused by the various special assessments, the treasurer is not entitled to retain for himself or for the county any portion thereof for the services rendered by his office.[38]

2. Is the assessment payable in full or in installments, and at what time is it payable?

A number of special assessment statutes do not provide for payment on an installment basis. For the most part these pertain to assessments which ordinarily are not substantial in amount.[39] Other statutes involving assessments that could be substantial grant the privilege of paying in installments where the amount due exceeds a specified minimum, usually ten or twenty-five dollars. The installment periods permitted range from three to twenty years, and usually annual payments are called for.[40]

Several statutes permit the property owner to pay assessments on an installment basis only if within a short period after the "date of such assessment" he files an agreement waiving any objections he may have to illegalities or irregularities as to such assessment.[41] Others use a reverse approach, and permit installment payments unless within that short period he has made such objections in writing; the failure to object is treated as an implied waiver.[42] Still others have no provision conditioning installment pay-

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[37] Barber Asphalt Paving Co. v. Woodbury County, 137 Iowa 287, 114 N.W. 1044 (1908). Even where retention was permissible, the assessment could not be increased to cover his "fee". Higman v. Sioux City, 129 Iowa 291, 105 N.W. 524 (1906).

[38] See IOWA CODE § 340.3 (1962).

[39] *Id.* §§ 100.29, 113.6, 137.16, 160.8, 317.21, 318.2, 368.31, 368.33, 368.45, 393.3, 394.9, 396.32, 409.30, 420.187, 420.190.

[40] Ten equal installments: *id.* §§ 311.17 (not less than $10), 357.20 ($10 or more), 358.22 (as to minimum, incorporates ch. 391, 391A); 368.26 (not to exceed ten years; no minimum); 391.59-.60 (not less than $25); 391A.30 (not less than $25); 401.10 (incorporates ch. 391). § 417.47 incorporates by reference § 391.60 but not § 391.59, making ambiguous the authority to permit installment payment in Des Moines under ch. 417. However, Iowa Laws ch. 344 (1965) provides that ch. 417 procedure is not the exclusive procedure applicable to cities of 125,000 or more people.

Installments not to exceed 20 years: § 389.4.

Not less than 10 nor more than 20 equal installments: §§ 455.64, 467A.35 (it is not clearly stated that these are to be annual; the sections also provide an option of three equal installments between the original levy made before work is done and 20 days after final acceptance of the work).

Not less than 5 nor more than 10 equal installments: § 420.255 (no minimum, but only if bond or certificate has been issued under ch. 396; installments may be due annually or biennially, but can run for no more than 10 years.

Not over 10 years: § 268.26 (no minimum).

Seven equal annual installments: § 389.33 (more than $25).

Five equal annual installments: § 202.4.

Three annual installments: § 391.59 (for oiling, oiling and graveling, shaling or chloriding streets; assessments must exceed $25).

Iowa Laws ch. 476, §§ 31-32 (1965), which permit establishment of public parking facilities on a special assessment basis with assessment against businesses, churches, schools and other private property other than one-family or two-family dwellings, incorporates by reference §§ 391.59-.60.

[41] Within 20 days: IOWA CODE § 311.17 (1962). Within 30 days: §§ 420.455, 455.64 (requires waiver be indorsed on improvement certificate or in separate agreement), 467A.35.

[42] Within 30 days: *id.* §§ 389.33, 391.51. §§ 358.22, 392.3, 401.10 and IOWA LAWS ch. 476, § 31 (1965), adopt § 391.59 by reference. The ancestor of § 391.59, IOWA CODE § 825 (Code Supp. 1913), required written waiver. A taxpayer, who had not waived, tendered payment in full 5½ months after levy; his tender was rejected

ment.[43] The Court apparently will construe waiver statutes liberally for the benefit of the property owner.[44] Sometimes the property owner waives by signing the assessment schedule with a waiver attached; if so, it may be necessary to prove that the waiver was attached when he signed.[45]

When is payment due? Some statutes do not state, nor do they say when the assessment is delinquent or what interest or penalties apply.[46] Perhaps the rules applicable to general real estate taxes determine these questions, but this is not clear.[47] Other statutes permit payment in full, sometimes without interest, within a short time after levy, or in full or the first installment by March 1 following the assessment—March 1 is the day the first half of the annual real estate taxes are due.[48] But there are exceptions to the use of the March 1 date.[49]

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because bonds had been issued when he did not pay within 30 days, the city claiming it was customary so to do. The Court said as long as he had not waived, he had the right to pay in full and, in effect, the bonds should not have been issued or their issue should not bar his right. F. M. Hubbell, Son & Co. v. Hammill, 187 Iowa 1083, 175 N.W. 41 (1919). § 389.9 indicates that ch. 391 provisions apply to "this section and sections 389.5 to 389.8, inclusive"; the section of this part of ch. 389 referring to installment payments is § 389.4. The ancestry of these provisions can be traced to Iowa Laws ch. 151, § 5 (1927), and it may be possible that they should be interpreted so that ch. 391 applies to §§ 389.1-.4, as well as to 389.5-.8.

[43] *Id.* §§ 357.20, 391A.30, 395.32, 417.47.

[44] Fitchpatrick v. Fowler, 157 Iowa 215, 138 N.W. 392 (1912).

[45] Guenther v. City of Des Moines, 197 Iowa 414, 197 N.W. 326 (1924). In Talcott Bros. v. Noel, 107 Iowa 470, 78 N.W. 39 (1899), the owner's signature to an installment agreement on an assessment certificate was binding on a subsequent purchaser of the land, even though the special assessment had not been certified, there was therefore no lien, and the purchaser had no actual knowledge—he was deemed to have constructive notice of the town records relating to improvement and assessment. This seems to expect a great deal. See also Inter-Ocean Reins. Co. v. City of Sioux City, 219 Iowa 998, 258 N.W. 907 (1935).

[46] IOWA CODE §§ 100.29, 113.6, 137.16, 160.8, 318.2, 368.26, 368.31, 368.33, 368.45, 409.30 (1962). §§ 393.3 and 394.9 appear to permit a due date to be set by ordinance.

[47] The sections referred to in note 46 provide for collection of the assessments "as other taxes". *Id.* § 357.20 specifies a due date if the assessment is less than $10; it permits payment of a larger amount in ten annual installments but does not say when the first is due; § 357.22 says installments due shall be collected "in the same manner as ordinary taxes." See § 358.18.

[48] Within 30 days, without interest; *id.* § 391.60, 391A.32, 395.32 (no reference to interest). See also § 389.33. Several statutes adopt § 391.60 by reference: §§ 392.3, 395.32, 401.10, 417.47; Iowa Laws ch. 476, § 32 (1965); and apparently § 389.9. Within 20 days, without interest: §§ 311.16, 455.63, 467A.34. March 1 is the date some full payments, and all first and most subsequent installments are due, under § 317.21, 389.33, 391.60 and sections adopting it by reference, 455.64.

[49] Under *id.* § 311.18 the first installment is due on the day the property owner agrees to waive objections, but subsequent installments are due on March 1 of each year. § 391A.30 says each installment is due January 1, to be paid with March ordinary taxes, but the first installment is due on January 1 following levy unless filed with the county auditor less than 30 days before January 1. §§ 420.255-.258 permit the council of a charter city to determine the due date and delinquency date by ordinance. And § 467A.35 uses October instead of March.

Although ordinary taxes are due by March 1, they are not delinquent until April 1, and there is also provision for payment in semi-annual installments, with the second installment not delinquent until November 1.[50] Two of the assessment statutes that specify a delinquency date follow this pattern,[51] without providing for semi-annual installments, however; others provide that the payment is not delinquent until March 1 following its due date—apparently a full year.[52]

Although a property owner has elected to pay on an installment basis, he may wish to pay all remaining installments at one time and discharge further obligation. Some statutes specifically authorize this, occasionally requiring the interest due to be figured for several months beyond the payment date.[53] The problem here is that bonds or improvement certificates may have been issued, to mature as installments are due; unless these can be called if payments are anticipated, some method for providing for the remaining interest costs will be required.[54] In one case where a treasurer permitted landowners to pay in full without requiring interest, the Court said the treasurer did wrong, but, as he was not an officer of the drainage district, no additional assessment could be levied to meet the unpaid bond interest.[55]

Appeal from an assessment suspends collection, and thus there is no delinquency as to the assessment involved while the appeal is pending.[56] But the appeal will deprive the appealing property owner of his privilege to pay on an installment basis, unless statutes specify otherwise.[57]

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[50] IOWA CODE §§ 445.36-.37 (1962).

[51] *Id.* §§ 317.21, 391A.31.

[52] Id. §§ 311.18, 389.34, 391.60 and sections adopting it by reference. Ch. 455 and 467A do not appear to set a "delinquency date". Hasty reading of § 311.18 might suggest that it applies to assessments of over $10, under § 311.17, but not to those of $10 or less under § 311.19. It should apply to both; all these sections were once IOWA CODE § 4710 (1924), and what is now § 311.18 followed what is now § 311.17 and what is now the first paragraph of § 311.19. But the section was repealed and reenacted in its present form in 1949, the Legislature locating these sections in the order they now appear in the Code, and adding the remainder of § 311.19, although there is no apparent necessity or reason for handling it in this manner. Iowa Laws ch. 129, §§ 19-21 (1949).

[53] IOWA CODE §§ 311.17 (pay balance any time, with interest for 30 days in advance), 391.62 (interest to date of payment); 391A.30 (interest to next June 1) (1962). § 417.47 incorporates § 391.60 but not § 391.62. §455.91 would seem to forbid anticipation unless authorized by the governing board of supervisors. See F. M. Hubbell, Son & Co. v. Hammill, 187 Iowa 1083, 175 N.W. 41 (1919).

[54] The form of bond called for by IOWA CODE § 396.11 (1962) does not include a provision for early payment. § 396.24, authorizing sale of refunding bonds, was deemed in Ballard-Hassett Co. v. City of Des Moines, 207 Iowa 1351, 224 N.W. 793 (1929), to permit call of bonds issued to finance building of Keosauqua Way, to be paid for by issuing refunding bonds. The Court pointed to what is now § 391.62, and may have thought this permitted some call of some bonds if a property owner should pay not yet matured installments.

[55] Whitfield v. Sears, 233 Iowa 887, 10 N.W.2d 564 (1943).

[56] Fidelity Inv. Co. v. White, 208 Iowa 519, 223 N.W. 884, 225 N.W. 868 (1929).

[57] Toben v. Town of Manson, 193 Iowa 750, 187 N.W. 599 (1922). Several statutes permit election of installment payments after final determination of any appeal. IOWA CODE §§ 391.91 (if appeal reduces assessment, or if objections are withdrawn within 30 days from assessment or are overruled by the council), 455.65, 467A.36 (1962).

3. What interest charges apply, before and after maturity; what penalties for delinquency?

As was noted above, some statutes provide a brief "grace period," in which the assessment may be paid in full without interest. Two statutes permit payment in three installments without interest if all are paid at the time specified therein and before the improvement involved has been completed and accepted.[58] Otherwise, before maturity interest usually runs from date of acceptance of the work;[59] at each installment payment it is computed on unpaid balance before payment, to the date specified in the statute and at the rate specified. Several statutes require figuring interest for thirty days beyond the payment date, while one specifies to June 1 following payment.[60] The statutory interest rate varies. Some specify six per cent, some "not more than six per cent," some "not more than four per cent," and two set no limit on interest rates.[61]

Once the obligation to pay has matured, and payment has not been made, most statutes specify that the delinquent amount shall bear the same interest and involve the same penalties as do "ordinary taxes" which become delinquent.[62] But several have no penalty provision applicable to delinquent special assessments.[63] In *Barber Asphalt Paving Co. v. District Court*,[64] a holder of assessment certificates which had been held valid by a district court in 1915 contended that the interest and penalties ran from that date rather than from the date in 1917 when the Supreme Court affirmed. The Court held that no penalty ran during the period; it stated that interest can be allowed, but may have meant the interest rate applicable before maturity rather than the increased rate applicable to delinquent taxes.[65]

4. Is the assessment a lien on property; and with what priority?

Although a number of special assessment statutes specify that the assessment is a lien upon affected property, some do not. Most that do not do provide that the assessment shall be collected as other taxes, but a similar provision appears in many instances where liens are specified. It is possible that those assessment statutes which fail to include a lien provision or fail to incorporate lien provisions from Chapter 391 create no lien for assessments made thereunder.[66] If an assessment statute provides for a lien,

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[58] IOWA CODE §§ 455.63, 467A.34 (1962).

[59] *Id.* §§ 391.58, 391A.30, 420.258. §§ 358.18, 392.3, 395.32 and 401.10 incorporate § 391.58, but § 417.48 does not and ch. 417 thus appears to set no starting date.

[60] Thirty days: *id.* §§ 311.17, 491.60. §§ 358.18, 392.3, 395.32, 401.10 and 417.48 incorporate 491.60. To June 1: § 391A.30.

[61] Six per cent: id. §§ 311.16-.17, 357.20, 391.58 (if not paid in installments?), 420.257. Not more than six per cent: §§ 389.33, 391.59 (if installment payments?). Not more than four per cent: §§ 455.63, 467A.34. No interest rate specified: §§ 391A.30, 417.48.

[62] *Id.* §§ 311.18, 389.34, 391.60, 391A.30, and sections incorporating 391.60. § 420.259 calls for the same interest rate but does not impose penalties. See Ankeny v. Henningsen, 54 Iowa 29, 6 N.W. 65 (1880).

[63] IOWA CODE ch. 455, 467A (1962), and see § 420.259.

[64] 181 Iowa 1265, 163 N.W. 214, 165 N.W. 345 (1917).

[65] IOWA CODE § 445.39 (1962) permits interest as a penalty, on delinquent taxes, of ¾% per month until paid; § 445.40 prescribes an additional penalty, on personal taxes, of 5%. See also § 445.20.

[66] Statutes which appear not to include lien provisions are: id. §§ 100.29, 113.6, 137.16, 317.21, 318.2, 368.26, 368.31, 368.33, 368.45, 409.30, 467A.32-.35, and ch. 401. Contrast with these sections §§ 160.8, 311.26, 357.22, 393.3, 394.9. If the statutes

when is it effective, how is it perfected, to what priority is it entitled, and can it be discharged or defeated other than by payment of the assessment plus any interest or penalty due?

Several statutes do not indicate any steps necessary to perfect the lien. Surprisingly, one of these is the drainage district statute.[67] Varying procedures are provided; most frequent is that of certification to a county official with the lien effective on certification. Some of these state that information of the lien must be placed on tax books or tax lists, but do not clearly make the effectiveness of the lien dependent on that action.[68] Anyone seeking to enforce the lien must prove that necessary statutory requirements to perfect the lien have been complied with, although the property assessed can be sold at tax sale for unpaid assessments even though no lien remains.[69]

Several statutes do not contain provisions giving special priority to their liens.[70] Several others which provide for a lien speak of collection of the assessment in the same manner as taxes, or "taxes for state and county purposes." It is not clear that these incorporate the lien priorities of such "taxes."[71] Most of the street and sewer liens are supposed to be prior and superior to all other liens except that for ordinary taxes, some with the admonition that the lien "shall be divested by any judicial sale."[72] The drainage district lien is a lien "as fully as taxes levied for state and county purposes."[73] Chapter 391A's lien has "the same preference and priorities as liens for ordinary taxes,"[74] and the lien for agricultural limestone sold on an installment basis is "by consent . . . to any lien or liens upon said real estate."[75] Despite the language of the drainage statute, the Court in a split decision has held its lien is inferior to the general tax lien, but equal in priority to other liens for other types of special assessments;[76] where liens for several types of special assessments compete, priority has been given on

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without lien specified are deemed to incorporate the lien applicable to "other taxes", probably § 445.28-.30, then in case of conflict with liens under ch. 391 or 455, the priorities might well go to the liens supported through ch. 445. See discussion of priorities, *infra*, at text supported by notes.

[67] IOWA CODE §§ 393.3, 394.9, 455.57 (1962).

[68] From date county auditor certifies to county treasurer: *id.* §§ 311.26, 417.45 (treasurer to spread on records in his office). From date certified to county auditor: *id.* §§ 389.35 (and placed on tax list?), 391.35, 391A.30, and possibly 160.8. §§ 358.22, 392.3, 395.12, and possibly 389.1-.4, incorporate ch. 391 or 391A procedure. From date schedule of assessments turned over to county auditor: *id.* § 357.22. See Frankel v. Blank, 205 Iowa 1, 213 N.W. 597 (1928).

Under § 420.260, in charter cities the lien is effective from the date of the council's resolution levying assessment. § 202.4 has no provision of the type described, but appears to require written consent of existing lienholders before it can become effective, at least as to them. Talcott Bros. v. Noel, 107 Iowa 470, 78 N.W. 39 (1899), was a situation where there was no lien because of failure to certify to the county auditor.

[69] Halvorson v. Mullin, 179 Iowa 293, 156 N.W. 289, 161 N.W. 309 (1917).

[70] IOWA CODE § 160.8, 357.22 (1962), and, surprisingly, the street and sewer statute applicable to cities of over 125,000 population, ch. 417.

[71] *Id.* §§ 311.26, 393.3, 394.9.

[72] *Id.* §§ 391.35, 420.260. § 389.35 is similar but omits the quoted admonition. §§ 358.22, 392.3, 395.12, and possibly 389.1-.4 incorporate ch. 391 or 391A.

[73] *Id.* § 455.57.

[74] *Id.* § 391A.30.

[75] *Id.* § 202.4.

[76] Ferguson v. Aitken, 220 Iowa 1154, 263 N.W. 850 (1935).

the basis of the filing date.[77] The Court has not passed on the specific language of section 391A.30, which seems to elevate its special assessment lien to equality with that for general taxes.

Special assessment liens are not discharged by the running of any certain period of time, and there is no statute of limitations which will bar a tax sale.[78] If the assessment is levied on property beyond the power of the council to assess, the lien will attach only to that portion of the property which could have been assessed.[79] Liens may also be lost by the failure of the county treasurer to take certain steps once taxes are delinquent, or by the sale of the property to discharge other tax claims.

Section 445.10 requires the treasurer, each year, to enter on the tax list for the current year unpaid general taxes on real estate from prior years. If he does not do this, the lien may cease. At one time this rule also applied to special assessments,[80] but this no longer is true.[81]

In *Harrington v. Valley Savings Bank* the Court announced as a rule, followed in only a few states, that if assessed property is sold at tax sale to satisfy claims for other taxes, and the purchaser gets a tax deed, he takes free from the special assessment lien, even though the improvement had been ordered before but was completed after the sale.[82] The Court was asked later to overrule this decision, which permits a purchaser to get the benefit of the improvement without paying for it, but refused to do so,[83] and has continued to adhere to the rule,[84] though occasionally finding situations where a sale and deed do not bar the lien for special assessments.[85] Before the deed is issued, it is possible that the property may be redeemed from tax

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77 Inter-Ocean Reins. Co. v. Dickey, 222 Iowa 995, 270 N.W. 29 (1936) (sewer and paving); City of Charles City v. Ramsay, 199 Iowa 722, 202 N.W. 499 (sewer and drainage district). See also Linn County v. Steele, 223 Iowa 864, 273 N.W. 920 (1937).

78 Fisk v. City of Keokuk, 144 Iowa 187, 122 N.W. 896 (1909). The lien for ordinary personal property and poll taxes has a limit of not more than 10 years. IOWA CODE 445.29 (1962).

79 Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 76 (1909). See City of Charles City v. Ramsay, 199 Iowa 722, 202 N.W. 499 (1925).

80 Holleran v. Toenningsen, 178 Iowa 1365, 161 N.W. 25 (1917). In Bankers Life Co. v. Emmetsburg, 224 Iowa 1287, 278 N.W. 311 (1938), and Bankers Life Co. v. Spirit Lake, 224 Iowa 1304, 278 N.W. 320 (1938), the Court said this meant cities' claims were voidable rather than void.

81 IOWA CODE § 445.15 (1962). See Polk County v. Basham, 234 Iowa 225, 12 N.W.2d 157 (1943).

82 Harrington v. Valley Sav. Bank, 119 Iowa 312, 93 N.W. 347 (1902). See 14 MCQUILLAN, MUNICIPAL CORPORATIONS § 38.319 (3d ed. 1950).

83 Montgomery v. City of Des Moines, 190 Iowa 705, 180 N.W. 723 (1921).

84 Tesdell v. Greenwalt, 228 Iowa 227, 290 N.W. 676 (1940); Fergason v. Aitken, 220 Iowa 1154, 263 N.W. 850 (1935) (lien of unmatured drain district assessments); Means v. City of Boone, 214 Iowa 948, 241 N.W. 671 (1932); Western Securities Co. v. Black Hawk Nat'l Bank, 211 Iowa 1304, 231 N.W. 317 (1931); Iowa Secuities Co. v. Barrett, 210 Iowa 53, 230 N.W. 528 (1930).

85 Flanders v. Inter-Ocean Reins. Co., 228 Iowa 926, 292 N.W. 795 (1940) (because of county treasurer's failure to bring forward the delinquent real property taxes for which the property was sold, a violation of § 445.10, there was no lien for general taxes at the time of sale; purchaser got only claim against owner, not right to tax deed, and lien for specials remains); Hawkeye Life Ins. Co. v. Munn, 223 Iowa 302, 272 N.W. 85 (1937) (only part of property subject to special assessment was sold for general taxes; lien, for entire assessment, applies to balance of property); Hawkeye Life Ins. Co. v. Valley- Des Moines Co., 220 Iowa 556, 260 N.W. 669 (1935) (because tax sale purchaser was employee of mortgagor, and the tax deed was assigned to the mortgagee, the Court held the effect was to pay the taxes and to

sale by its owner or by a lien creditor whose lien is junior to that of the taxes for which the sale was made; if so, the special assessment lien may remain effective.[86]

5. How are delinquent special assessments collected?

The only statutory method for enforcing a special assessment lien is through tax sale procedures.[87] Most special assessment statutes do not prescribe tax sale procedure but expressly or by implication call for use of the procedure applicable to ordinary taxes.[88] Several, principally street and sewer improvement statutes, do have detailed provisions regarding tax sale, but making applicable much of the law applicable to sale for nonpayment of ordinary taxes.[89]

As was noted above, a tax sale for nonpayment of ordinary taxes, at least after the purchaser or his assignee gets a tax deed, cuts off any lien for special assessments levied at the time the deed is issued. If there was no valid lien for the taxes for which the property was sold, then sale plus deed will not have that effect, except, perhaps, where the deed has subsequently been legalized by a curative act.[90] The same effect, of discharge of junior liens, would seem to follow if the sale is for delinquent special assessments; however, several statutes expressly preserve the lien as to any remaining unpaid installments and interest for that assessment.[91] Discharge of the junior lien can be prevented if the junior lienholders or others entitled to do so redeem the property from the holder of the tax sale certificate,[92] or if the sale can be set aside because of defects therein.[93]

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make the deed void, so the lien for delinquent special assessments was still in effect).

[86] Inter-Ocean Reins. Co. v. Dickey, 222 Iowa 995, 270 N.W. 29 (1936) (sold for delinquent general taxes; holder of special assessment certificates entitled to redeem); Gray v. Morris, 218 Iowa 540, 255 N.W. 631 (1934) (tax deed issued; redemption by certificate holder barred); Means v. City of Boone, 214 Iowa 948, 241 N.W. 671 (1932) (sold for general taxes; city levying special assessment could redeem, but not after tax deed given); Town of Story City v. Hadley, 214 Iowa 132, 241 N.W. 649 (1932) (sold for unpaid special assessments; town cannot redeem, after tax deed, unless sufficient showing of equitable circumstances to justify setting deed aside). See Teget v. Lambach, 226 Iowa 1346, 286 N.W. 522 (1939); McClelland v. Polk County, 225 Iowa 177, 279 N.W. 423 (1938).

[87] Hawkeye Life Ins. Co. v. Valley-Des Moines Co., 220 Iowa 556, 260 N.W. 669 (1935).

[88] *E.g.*, IOWA CODE §§ 311.18, 455.62 (1962).

[89] *Id.* §§ 391.64-.68, 391A.34, 420.261-.263.

[90] Flanders v. Inter-Ocean Reins Co., 228 Iowa 926, 292 N.W. 795 (1940), held the lien for delinquent general taxes had ceased, because of the treasurer's failure to bring the delinquencies forward on his books, as required by what is now IOWA CODE § 445.10 (1962); thus the lien for special assessments was not cut off. When the Legislature legalized deeds based on such sales, the Court held the tax deed cut off the owner's title so he could not convey by quit-claim deed. Witmer v. Peebles, 229 Iowa 404, 294 N.W. 563 (1940). See Polk County v. Basham, 234 Iowa 225, 12 N.W.2d 157 (1943).

[91] IOWA CODE §§ 391.65, 391A.34, 420.263 (1962).

[92] Inter-Ocean Reins. Co. v. Dickey, 222 Iowa 995, 270 N.W. 29 (1936). See also Whisenand v. Clark, 227 Iowa 800, 288 N.W. 915 (1940); Anderson v. Cameron, 122 Iowa 183, 97 N.W. 1085 (1904). See Fidelity Inv. Co. v. White, 208 Iowa 519, 223 N.W. 884, 225 N.W. 868 (1929).

[93] Warn v. Tucker, 236 Iowa 450, 19 N.W.2d 291 (1945) (but property owner had to pay tax sale purchaser the amount paid plus 5% interest); Teget v. Lambach, 226 Iowa 1346, 286 N.W. 522 (1939) (holders of drainage district bonds not disqualified to bid at tax sale); McClelland v. Polk County, 225 Iowa 177, 279 N.W.

When general taxes are involved, the county may have a duty to see that the sale is for the full amount of delinquent taxes, interest, and penalties, especially if the property has been offered for sale for several years without sufficient bids being submitted.[94] The county is not required to bid on delinquent special assessments; perhaps it may be able to, where the assessment is by or on behalf of some county office or officer.[95] Several statutes permit, but do not require, a city to bid on delinquent specials,[96] and several cases have held that a city had a duty to bid because of recitals in bonds it had issued.[97] Thus, the sale may be for less than the delinquent special assessments, and bondholders and certificate holders may be without remedy.[98]

Section 446.7 provides that no property against which the county holds a tax sale certificate shall be offered or sold at tax sale. The court in a split decision has held that this applies only to certificates for sales for general taxes; perhaps this is true where the sale was under Chapters 391, 391A or 420 only.[99]

Statutes may permit direct action against certain property owners, usually railroads or transient companies.[100] If a special assessment certificate is payable only from the assessment on a particular tract of land, the holder may be able to sue either to enforce the lien or to collect the underlying debt.[101]. Statutes of limitations may bar recovery based on the underlying debt.[102]

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423 (1938) (equity will not intervene, where tax sale had defect, when titleholder offered to pay the taxes "actually paid" by purchaser which were a "valid lien"); Hawkeye Life Ins. Co. v. Valley-Des Moines Co., 220 Iowa 556, 260 N.W. 669 (1935). See Harris v. Evans, 196 Iowa 799, 195 N.W. 178 (1923).

94 IOWA CODE §§ 446.16-.19 (1962). See Witmer v. Polk County, 222 Iowa 1075, 270 N.W. 323 (1937).

95 See *id.* ch. 569.

96 *Id.* §§ 391.66 (where bonds had been issued), 391A.34 (same), 420.262.

97 The concept was started in Hauge v. City of Des Moines, 207 Iowa 1209, 216 N.W. 689, 224 N.W. 520 (1929), and was followed in First Nat'l Bank v. Town of Elliott, 211 Iowa 341, 233 N.W. 712 (1930). Cases finding no duty (special assessment certificates had been issued) are: Inter-Ocean Reins. Co. v. City of Sioux City, 219 Iowa 998, 258 N.W. 907 (1935); Morrison v. Culver's Estate, 216 Iowa 676, 248 N.W. 237 (1933).

98 Lenehan v. Drainage Dist. No. 71, 219 Iowa 294, 258 N.W. 91 (1934).

99 Bennet v. Greenwalt, 228 Iowa 1113, 286 N.W. 722 (1939).

100 *E.g.*, IOWA CODE §§ 391.40, 391.77 (1962); see City of Oskaloosa v. Oskaloosa Traction & Light Co., 141 Iowa 236, 119 N.W. 736 (1909).

101 Talcott Bros. v. Noel, 107 Iowa 470, 78 N.W. 39 (1899). A suit against the property owner was unsuccessful, on the theory he had no personal liability. Morrison v. Culver's Estate, 216 Iowa 676, 248 N.W. 237 (1933). See also Iowa Pipe & Tile Co. v. Culbahan, 125 Iowa 358, 101 N.W. 141 (1904).

102 Talcott Bros. v. Noel, *supra,* note 101 (period of limitation had not run). Other cases involving aspects of statutes of limitations in special assessment matters, mostly mandamus actions against county officials, are: Board of Supervisors v. Board of Supervisors, 234 Iowa 123, 12 N.W.2d 259 (1943) (when period started); Whitfield v. Grimes, 229 Iowa 309, 294 N.W. 345 (1940) (same); Whisenand v. Van Clark, 227 Iowa 800, 288 N.W. 915 (1940) (no statute of limitations on tax sale for nonpayment of drainage district assessments); Lenehan v. Drainage Dist. No. 71, 219 Iowa 294, 258 N.W. 91 (1934) (when period started); Stockholders Inv. Co. v. Town of Brooklyn, 216 Iowa 693, 246 N.W. 826 (1933) (same); Barber Asphalt Paving Co. v. City of Des Moines, 191 Iowa 762, 183 N.W. 456 (1921) (same); Holleran v. Toenningsen, 178 Iowa 1365, 161 N.W. 25 (1917).

C. Liability of Governmental Body to Special Assessment Creditors

When work is done, if contracted for, the contractor wants to be paid. To the extent the work is financed by special assessments, the governmental body authorizing the work may have no liability to pay except from funds collected on such assessments. Because collections may take years, immediate payment of the contractor sometimes is made from the proceeds derived by sale of bonds or certificates, or the contractor may take bonds or certificates and hold them or attempt to sell them himself. Can these creditors, contractors, bondholders, or certificate holders, successfully assert payment claims against the governmental body involved beyond the funds derived from special assessments?

The contractor is normally not entitled to a payment different than that called for in his contract. Thus, if the contract calls for the city to issue to the contractor certificates in anticipation of assessment, he may not compel the city to pay from its general fund instead.[103]

When the contractor, or certificate holder, or bondholder, is unable to collect all that his contract expects special assessments to pay for, his ability to collect the balance from the appropriate governing body depends on various factors. If the assessment levied was insufficient, or the city was negligent in carrying out its part of the assessment procedure and caused loss thereby, the city may itself be liable.[104] Bonds issued by a city may contain a recital that "all acts, conditions and things required to be done precedent to and in the issuing of this series of bonds have been done—as required by law." If this recital is incorrect, and part of the assessment is not paid because of the incorrect fact, the city may be deemed to have breached its recital and to be liable for the amount unpaid thereby.[105] Bonds issued by a county and assessment certificates should not contain such a recital, and if they do the recital is ineffective.[106] Because of the recital in its bonds the issuing city may have a duty to bid on property up for tax sale to insure that it is sold for the amount of the assessment.[107]

If the assessment is uncollectible because it is invalid, other questions must be considered before determining what the city's liability is. Several early cases held the city liable to the contractor where the work done was intended to be paid for by special assessment but the city had no authority to assess for it—the cases involved preparatory grading, and a sewer adjacent to the state capitol.[108] Somewhat later cases said the city would be liable

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[103] Polk County v. City of Des Moines, 210 Iowa 342, 226 N.W. 718 (1930) (county paved road along city limits pursuant to contract with city).

[104] First Nat'l Bank v. Town of Elliott, 211 Iowa 341, 233 N.W. 712 (1930); J. W. Turner Improvement Co. v. City of Des Moines, 155 Iowa 592, 136 N.W. 656 (1912). See Bankers Life Co. v. Emmetsburg, 224 Iowa 1287, 278 N.W. 311 (1938); McInerny v. Reed, 23 Iowa 410 (1867).

[105] First Nat'l Bank v. Town of Elliott, *supra*, note 104; Hauge v. City of Des Moines, 207 Iowa 1209, 216 N.W. 689, 224 N.W. 520 (1929).

[106] Mitchell County v. Odden, 219 Iowa 793, 259 N.W. 774 (1935); Morrison v. Culver's Estate, 216 Iowa 676, 248 N.W. 237 (1933). See Tuttle v. Polk & Hubbell, 92 Iowa 433, 60 N.W. 733 (1894).

[107] Morrison v. Culver's Estate, *supra*, note 106; Hauge v. City of Des Moines, 207 Iowa 1209, 216 N.W. 689, 224 N.W. 520 (1929). *But see:* Inter-Ocean Reins. Co v. City of Sioux City, 219 Iowa 998, 258 N.W. 907 (1935).

[108] Polk County Sav. Bank v. State of Iowa, 69 Iowa 24, 28 N.W. 416 (1886) (cetificate holder sued state, as landowner; held, city, not state, is liable); Scofield & Cavin v. City of Council Bluffs, 68 Iowa 695, 28 N.W. 20 (1886); Bucroft v. City of Council Bluffs, 63 Iowa 646, 19 N.W. 807 (1884).

where, because of defective procedure, the assessment was invalid.[109] But more recent cases have taken the position that, where the defect in procedure occurred before the contract was let, the contractor ran the risk of uncollectability, and if the assessments are uncollectible he has no valid claim against the city either—whether he tries to claim on his contract, in quantum meruit, or on a quasi-contractual theory.[110] The later cases could be interpreted as overruling most of the earlier decisions, although the Court does not purport to do so; two of the later cases may be distinguishable because of possible fraud or collusion between contractor and city officials or employees. As was noted earlier, there is statutory authority for city liability where affected property is nonassessable, or was assessed less than its share of the assessment.[111]

Although an asessment is invalid, in some circumstances a valid reassessment may be made. For this reason a contractor suing a city after property owners have invalidated the assessment from which he expected payment is sometimes told to give the city an opportunity to reassess.[112] His claim may also be denied when the invalidating factor is his own failure to perform in compliance with the specifications in his contract.[113] Defects in performance sometimes give rise to suits by the city against the contractor; damages to the city itself cannot exceed the cost of discovering the defect (and repairing it, if the city does so), but the city may also proceed in the same action as representative of the affected property owners.[114]

Suits on bonds issued for drainage district work are more difficult to maintain than on those issued by municipalities. In two cases the Court has held that neither the district nor the county are liable on such bonds; members of the county or district board authorizing the issue are not personally liable, and they are subject to judgment only in their official capacity;

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[109] Barber Asphalt Paving Co. v. City of Des Moines, 191 Iowa 762, 183 N.W. 456 (1921); First Nat'l Bank v. City of Emmetsburg, 157 Iowa 555, 138 N.W. 451 (1912); Iowa Pipe & Tile Co. v. Culbahan, 125 Iowa 358, 101 N.W. 141 (1904) (dicta).

[110] Lytle v. City of Ames, 225 Iowa 199, 279 N.W. 453 (1938); Sioux City v. Western Asphalt Paving Corp., 223 Iowa 279, 271 N.W. 624 (1937); Horrabin Paving Co. v. City of Creston, 221 Iowa 1237, 262 N.W. 480 (1936); Johnson County Sav. Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705, 237 N.W. 507 (1931) (3 judges dissenting). See Stockholders Inv. Co. v. Town of Brooklyn, 216 Iowa 693, 246 N.W. 826 (1933).

[111] See note 3, *supra*, and text supported thereby.

[112] Citizens' Bank v. City of Spencer, 126 Iowa 101, 101 N.W. 643 (1904). See Crawford v. Mason, 123 Iowa 301, 98 N.W. 795 (1904).

[113] Crawford v. Mason, *supra*, note 112. In Atkinson v. City of Davenport, 117 Iowa 687, 84 N.W. 689 (1900), the city was held entitled to offset against the contractor's claim damages for his failure to perform another paving contract as per its specifications. See also City of Des Moines v. Horrabin, 204 Iowa 683, 215 N.W. 967 (1927). However, a decision, in action by property owners to invalidate assessments for nonperformance, is not res judicata on the question of compliance with specifications when the contractor sues the city. Western Asphalt Paving Co. v. City of Marshalltown, 203 Iowa 1324, 206 N.W. 956, 214 N.W. 687 (1907).

[114] Sioux City v. Krage, 225 Iowa 1154, 281 N.W. 828 (1938); Sioux City v. Western Asphalt Paving Corp., 223 Iowa 279, 271 N.W. 624 (1937). See Lytle v. City of Ames, 225 Iowa 199, 279 N.W. 453 (1938); City of Charles City v. Rasmussen, 210 Iowa 841, 232 N.W. 137 (1930).

and proper venue for the action is in the county where the district is, though the bonds call for performance elsewhere.[115] Apparently the chief remedy for contractors or bondholders in cases involving drainage districts is mandamus to compel making of an adequate assessment or reassessment; this will succeed only when the original assessment was insufficient or invalid—the fact that tax sale did not produce the amount for which the property was assessed is no basis for a claim.

D. Competing Creditors of the Same Assessment

When collection in full of a special assessment proves to be impossible, and no governmental body can be compelled to make up the difference, there may be competition between various bondholders or certificate holders for the amount available. The problem may be complicated by differing maturity dates of the claims, especially if those of early maturity have been paid in full. Two recent cases illustrative of this problem give possibly conflicting answers.

In the first case an investor acquiring special assessment certificates of different maturity dates had put them in a trust and had sold interest-bearing trust certificates maturing at times comparable to the maturities of the assessment certificates. Because of the depression, the trustee was unable to collect the full amount of the assessment certificates, and holders of later maturing trust certificates contended that those whose certificates had matured and had been paid in full must return part of the payments received, so that all certificate holders would share pro rata in the proceeds realized. The Court agreed.[116]

Two years later another case came to the Court. Seventy street improvement bonds had been issued, payable in series, and forty-nine had been paid in full. When the next series matured, and its holders demanded full payment, it was apparent that not enough could be collected to pay in full this series and the two remaining series; holders of the later maturing bonds argued that the funds remaining should be pro-rated. The Court disagreed, saying that each series should be paid at maturity, and in full if possible regardless of possible loss to holders of subsequent series. One judge dissented, arguing that the earlier case required pro-rating. The majority thought it was distinguishable, apparently because of the trust certificates involved.[117]

E. Liability for Special Assessments Between Owners of Different Interests in the Assessed Property

Disputes as to responsibility for payment of special assessments may arise when the assessed land has divided ownership interests. Does the cost fall on landlord or tenant, on grantor or grantee, on life tenant or remainderman; should it be charged against the principal or the income of a trust? Often the agreement between parties or the will or trust deed will determine the question; at times interpretation is necessary, however.

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115 Mitchell County v. Odden, 219 Iowa 793, 259 N.W. 774 (1935); Board of Supervisors v. District Court, 209 Iowa 1030, 229 N.W. 711 (1930).

116 Iowa-Des Moines Nat'l Bank v. Dietz, 225 Iowa 566, 281 N.W. 134 (1938).

117 Shaw, McDemott & Sparks, Inc. v. Town of Danbury, 227 Iowa 415, 288 N.W. 435 (1940).

Leases making the tenant responsible for "all taxes" have been held to include responsibility for special assessments, although in one case the assessment was levied during the last year of a ten-year lease, and the tenant had arranged for the assessment to be collectible on the installment basis over a period running long after the lease would expire.[118] However, although a lessee may owe a duty to the lessor to pay the assessment, in one case the Court (two judges dissenting) held that neither a city nor a contractor could assert the tenant's liability.[119] Why neither qualified as a third-party beneficiary is not clearly explained.

If the lease contains an option to purchase, and a special assessment is levied after the term of the lease begins but before the option is exercised, the Court has twice held that the tenant must assume liability for the assessment to get specific performance of the option provision.[120] The Court felt that the option price was computed without anticipation of the improvement or its cost, and to get the equitable relief of specific performance the tenant must act equitably regarding the assessment.

In the one case involving life tenant-remainder interests, the Court held that the life tenant should pay any interest due on the assessment, the remainderman any principal, and if refunds were made on the assessments they should be distributed in proportion to payments though the life tenant had died and her share had to go to her estate.[121] One trustee asking for instructions whether to charge special assessments to income or to principal was told to charge them all to income, because the trust deed provided that "all taxes and assessments" on the property were to be paid from income.[122] The Court thought that taxes might not include special assessments, but "assessments" must do so.

A number of cases involve sales of land while assessment procedures are pending but before the stage of procedure has been reached at which a lien is obtained. Where the contract does not specifically cover this item, most cases make the argument that there has been a breach of the covenant against liens or encumbrances. The argument usually fails.[123] In one case where the special assessment was a lien and the grantee had agreed to assume it, after he paid the amount originally assessed he objected to paying the amount called for in a later reassessment made necessary because another's assess-

118 Vorse v. Des Moines Marble & Mantel Co., 104 Iowa 541, 73 N.W. 1064 (1898); Cassady v. Hammer, 62 Iowa 359, 17 N.W. 588 (1883).

119 Chicago, R.I. & P. Ry. v. City of Ottumwa, 112 Iowa 300, 83 N.W. 1074 (1900).

120 Nelson v. Robinson, 189 Iowa 1076, 178 N.W. 416 (1920); King v. Raab, 123 Iowa 632, 99 N.W. 306 (1904).

121 Cooper v. Barton, 208 Iowa 447, 226 N.W. 70 (1929).

122 In re Trust of Shurtz, 242 Iowa 448, 46 N.W.2nd 559 (1951).

123 Frankel v. Blank, 205 Iowa 1, 213 N.W. 597 (1928) (the assessment had been made by January and the seller had signed waiver of objections to get benefit of the installment payment privilege; the premises were to be free and clear of liens and encumbrances by June but because the city had not certified proceedings to the county auditor by June, held, though the assessment was unpaid it was neither lien nor encumbrance); Kleinmeyer v. Willenbrock, 202 Iowa 1049, 210 N.W. 447 (1926) (improvement prior to sale, assessment after sale, no incumbrance); Johnston v. Robertson, 179 Iowa 838, 162 N.W. 66 (1917); Cornelius v. Kromminga, 179 Iowa 712, 161 N.W. 625 (1917) (Court attempts also to distinguish between "ordinary taxes" and "special assessments"); Halvorson v. Mullin, 179 Iowa 293, 156 N.W. 289, 161 N.W. 309 (1917); Cemansky v. Fitch, 121 Iowa 186, 96 N.W. 754 (1903).

ment was excessive. The additional assessment was more than the original assessment. Again, the grantee was unable to shift the assessment burden to his grantor.[124] A grantor may retain responsibility for the assessment, either because it is a lien and he has agreed to transfer free of liens, or though not a lien he has agreed to be burdened by it. If he is responsible, he has standing to object to the assessment despite his sale of the assessed property.[125]

In one rather unusual case, despite a grantor's failure to assume the assessment burden the grantee was able to shift part of the burden to him. In this case the grantor had previously exchanged properties with the city, and the city had agreed to build a river wall to protect grantor's property, but to assess the cost of construction on a front foot basis. Thereafter, grantor transferred part of his property protected by the wall to grantee, but the wall abutted entirely on the part transferred. The Court felt that in equity the assessment should be apportioned over the entire tract as it was platted when the contract for building the wall and assessing the cost thereof was executed.[126]

CONCLUSION

Introducing this series of articles on special assessment financing of Iowa public improvements, I observed that "this is an area which many lawyers, representing both affected taxpayers and affected municipalities, approach with some trepidation."[127] These articles explain why that is so. For many major, expensive, improvements, two or more alternative procedures may be available, each of which differs in some significant way and many minor ways from the others. When the legal adviser who has become familiar with the techniques and rules applicable to one type of improvement is asked to work with another type, he finds many variations from the pattern he knows. Most of them are minor, often with little if any justification for the variance, but he must spend time familiarizing himself with them or bring in an outside expert if his clients are to be properly served. The 1965 Iowa Legislature, adding a new category to the improvements for which special assessments could be levied, chose to incorporate into the applicable procedure, by reference, most of the procedures applicable under Chapter 391.[128] Isn't it time for the Legislature to restudy the entire area of special assessments, to eliminate unnecessary variations or to establish uniform procedures?

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[124] Evening Star Lodge v. Robbins, 179 Iowa 537, 161 N.W. 680 (1917).
[125] Christenson v. Board of Supervisors, 174 Iowa 724, 156 N.W. 810 (1916).
[126] Stodola v. City of Cedar Rapids, 192 Iowa 1025, 183 N.W. 607 (1921).
[127] 12 DRAKE L. REV. 3 (1962).
[128] Iowa Laws ch. 476 (1965) (public parking facilities).

THE APPRAISAL REMEDY FOR DISSENTING SHAREHOLDERS IN IOWA AND THE DE FACTO MERGER DOCTRINE: RATH v. RATH PACKING COMPANY

*T. James McDonough**

The Statutory Appraisal Remedy in General

The statutory appraisal remedy granted to dissenting shareholders to a corporate merger had its beginnings in *Lauman v. Lebanon Valley RR*,[1] where a shareholder who objected to the merger of the corporation in which he held stock with another, the latter surviving, was awarded the value of his stock in lieu of shares in the surviving corporation. The decision was based primarily upon the premise that the dissenting shareholder should not be forced into a new corporation, his property in one corporation taken from him, and the stock of another imposed upon him by way of compensation.[2]

The economic realities of the period of industrial expansion following the Civil War required the amendment of general corporation statutes to allow actions such as charter amendments to change purposes, mergers, or sales of assets by corporations not originally envisaged without the unanimous consent of all shareholders.[3] The dicta of *Lauman* was influential, and with the amendments to the statutes allowing such changes with less than a unanimous vote came the appraisal statutes. Today every state but West Virginia has an appraisal statute.[4]

Typically, those statutes vary widely from state to state, and appraisal rights may exist in situations which vary from merger and consolidation[5] to any fundamental amendment of the articles of incorporation.[6]

In Iowa, unusual for its two general incorporation laws,[7] the transactions which give rise to the appraisal remedy are: a plan of merger or consolidation under either act,[8] or any sale or exchange of substantially all

* Associate Professor of Law, University of South Dakota. B.A., University of Iowa; J.D., University of Iowa.

1 6 Pa. 42 (1858).

2 6 Pa. 42, 46. "He may object that it is a violation of the contract of association by which he and his associates agreed to become one corporate company for a given purpose: that he united in the association for one purpose, then agreed on . . . . This is a violation of chartered contracts: not the supposed one between the government and the corporators, but the one between the corporators themselves."

3 Levy, *Rights of Dissenting Shareholders To Appraisal and Payment*, 15 Carn. L. Q. 420 (1930); Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes*, 23 Law & Contemp. Prob., 307 (1958). See also the comments of Mr. Justice Brandeis' dissent in Leggett v. Lee, 288 U.S. 517 (1933).

4 See Appendix, Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L. J., 222 (1962).

5 E.g., Del. Code Ann. tit. 8, §262(b) (Supp. 1964), §253(d) (e) (Supp 1964).

6 E.g., Tenn. Code Ann. §48-712(1955) but not less than par value if the market or book value be less.

7 Iowa Code, ch. 491 (1962), hereafter referred to as the Old Act, and ch. 496A (1962), hereafter referred to as the New Act.

8 Iowa Code §491.112 (1962) of the Old Act and Iowa Code §496A.77(1) (1962) of the New Act. Under the New Act, a two-thirds vote of all shares outstanding