case distinguishes this case on the basis that in the *Jacobs* case the employee was not warned. This does not seem to be a valid distinction, since liability where the owner is under a non-delegable duty is not based upon the fact that the owner warned or did not warn an employee but is based upon the contractor's negligence. Such negligence is admitted in the principal case.

It is probable that by weight of authority and by logic, the owner should be liable to the employee of an independent contractor where there is inherent danger. The employee is in no contractual relation with the owner, *Mallory* v. *Louisiana Pure Ice & Supply Co.*, supra, and at the same time is the one most likely to suffer injury. The contrary doctrine is based on the theory that such recovery would save the independent contractor from the consequences of his own negligence. *Salmon* v. *Kansas City*, supra. But this overlooks the reason behind the doctrine of non-delegable duty where work is inherently dangerous. The owner is held liable in order to make him hire responsible contractors for such dangerous undertakings. See note in 23 A.L.R. 1129 (1921). That the independent contractor is also liable for his negligence under such circumstances see *Warden* v. *Pennsylvania Rd. Co.*, 123 Ohio St. 304, 175 N.E. 207 (1931).

It is thus concluded that while the majority in the principal case reached the correct result in cases dealing with electricity they used the wrong theory and, it would seem, incorrectly stated that an owner under a non-delegable duty is not liable to an employee of his independent contractor.

JUSTIN H. FOLKERTH.

MUNICIPAL CORPORATIONS

POWER OF COUNCIL OF NON-CHARTER CITY TO AMEND OR REPEAL INITIATED ORDINANCES.

By virtue of an initiated ordinance adopted at the election on November 2, 1926, the people of Steubenville, Ohio, enacted legislation in regard to the municipal fire department. The provisions of the ordinance determined the number of the personnel of the department and also fixed the salaries and compensation of the officers and members thereof. Subsequently, the city council of Steubenville, which is a non-charter municipality, enacted several ordinances materially affecting the wages of the firemen and also the number of the members of the department. The relators, members of the department, whose salaries had been re-

duced by this legislation, brought an action in mandamus to compel the respondent as city auditor to issue warrants to the treasurer of the city for the payment of the unpaid compensation. The relators contended that such compensation was due them under the terms of the initiated ordinance which had been adopted by the electorate on November 2, 1926. The Court of Appeals of Jefferson County refused the writ of mandamus. The Supreme Court affirmed the decision of the Court of Appeals, holding that in the absence of provisions in the constitution or state law, limiting or controlling its power, a city council of a non-charter city has the power to amend or repeal an initiated ordinance theretofore adopted by the electors of such city. *State ex rel Singer, et al.* v. *Cartledge, City Auditor,* 129 Ohio St. 279, 2 Ohio Op. 157, 195 N.E. 237 (March 27, 1935).

Subsequent to the principal case, the question was presented for the decision of the Court of Appeals for the 9th District, as to the power of the city councils to repeal ordinances enacted by the councils, which ordinances had been approved by the people on a referendum vote. Relying on the decision of the Supreme Court in the principal case, the Court of Appeals held that the councils were possessed of that power. *Francisco* v. *Cuyahoga Falls, et,* 19 Abs. 666 (Decided July 8, 1935).

The people of Ohio have provided for the organization of municipalities by the terms of Article XIII, Section 6 of the Constitution of Ohio, which reads: "The General Assembly shall provide for the organization of cities, and unincorporated villages, by general laws: * * *." In the exercise and performance of this power and duty, the state legislature has delegated to the councils, legislative powers for the self-government of municipalities. Ohio G.C. Sec. 4206 states: "The legislative power of each city shall be vested in and exercised by a council, * * *." Ohio G.C. Sec. 4211 reads: "The powers of council shall be legislative only, * * *."

Although legislative powers for the government of municipalities have thus been delegated by the General Assembly to the city councils, the electorate has reserved legislative powers to itself by virtue of the provisions of Article II, Section 1, *f* of the Ohio Constitution. That provision stipulates: "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law." The General Assembly has authorized municipalities to exercise legislative action in regard to the creation and maintenance of municipal fire departments. Ohio G.C. Sec. 4393 provides:

"The council may establish all necessary regulations to guard against the occurrence of fire, * * * and for such purpose may establish and maintain a fire department, * * *."

By the provisions of Ohio G.C. Sec. 4227-1 to 13, the legislature has stipulated the manner in which the powers of the initiative and referendum are to be exercised. The provisions of these sections have been limited in application by the terms of Ohio G.C. Sec. 4227-12 to non-charter cities, or to cities which have a charter but have made no provision therein regulating the manner in which the powers of the initiative and referendum are to be exercised. Thus cities having charters may if the people see fit, adopt their own regulations as part of the charter.

Nowhere in the statutes or Constitution of Ohio is there any express bestowal of power on city councils to repeal the legislation enacted by means of initiated ordinances. By the provisions of Article II, Section 1-*f* of the Ohio Constitution, there is expressly reserved to the people of a municipality the power to repeal an ordinance which has been passed by the city council. This reservation of power was intended to operate as a check on the abuse of powers originally bestowed on city councils.

Judge Day in dissenting from the opinion of the majority of the court in the principal case stated that, if councils may render null and void direct legislation of the people by repealing or amending such legislation, the result is that the people, who are the masters, have been rendered subservient to the will of their agents and servants, the city councils.

It is true that the people have the power at the municipal elections to defeat those councilmen who fail to listen to the vox populi, but they had that power long before the constitutional amendments providing for the initiative and referendum were adopted. By these amendments the people proclaimed their desire and intention to provide a further check, one which was to be more effective and more certain in its operation, for they had learned that the check provided by the elections at the polls did not always remedy existing evils. By reason of the fact that the people reserved to themselves the power to initiate and repeal legislation in order to protect their interests where legislation by the city councils failed to attain such purpose, can it not be reasonably inferred by the reservation of those powers they intended to deprive the city councils of any power to repeal or amend legislation enacted by means of initiated ordinances?

Even though a city council may in all honesty deem certain legislation outmoded and undesirable, where that legislation is the product of the direct action of the people it should remain as a part of the law until

such time as the people themselves have seen fit to repeal that law. Otherwise, a recalcitrant council could thwart the desires of the electorate by repealing an initiated ordinance immediately after its adoption.

The Supreme Court of Ohio in support of its opinion quoted with approval a statement appearing in the case of *Kadderly* v. *City of Portland*, 44 Ore. 118, 74 Pac. 710 (1903), which reads: "Statutes proposed and enacted by the people are subject to the same constitutional limitations as legislative statutes, and after their adoption they exist at the will of the legislature just as do other laws." This statement was made by the court in a general discussion of the extent of the power to legislate by means of the initiative and referendum, and it does not appear that the decision of the case in any manner rested on the determination of the question presented by the principal case, nor does it appear that there was any statutory or constitutional provision granting to the legislature of Oregon the power to repeal initiated legislation.

The Supreme Court also quoted from 2 McQuillan on Municipal Corporations 934, Section 867, as follows: "To render the power of initiative and referendum effective, the legislative power of the council is commonly restricted by the provision that no ordinance or amendment to an ordinance adopted by the electors shall be repealed or amended by the council, * * *." From the rule as stated by McQuillan, the Supreme Court infers that the initiated ordinances of a non-charter city may be repealed by the city council. The author of the text from which this quotation has been taken cites as authority for the rule which he expresses, the cases of *Dallas* v. *Dallas Consolidated Elec. St. Ry. Co.*, (Tex. Civ. App.), 158 S.W. 76 (1913); *Holland* v. *Cranfill* (Tex. Civ. App.), 167 S.W. 308 (1914); *State ex rel.* v. *MacQueen*, 82 W.Va. 44, 99 S.E. 666 (1918). In all of these cases there were express provisions in the city charters declaring that the city council is forbidden the right to repeal initiated ordinances. The cases cited do not involve the question presented by the principal case and are therefore no authority for the proposition that in the absence of express provisions in the city charter, a city council may amend or repeal initiated ordinances.

The case of *Allen* v. *Hollingsworth*, 246 Ky. 812, 56 S.W. (2) 530 (1933), was also cited by the Supreme Court in support of its decision. Although the Kentucky court in that case made a general statement in the course of its opinion, which statement supports the rule sought by the respondents in the principal case, it is submitted that such statement is purely dictum, for in that case a city charter fixed the salaries of a city board of commissioners. The court there held that the

municipality could enact ordinances which violates its charter. The case in no manner presents the question which has been raised by the principal case.

The records reveal no cases in which the question was directly presented to the courts as to the power of city councils of non-charter cities to repeal initiated ordinances. The fact that many city charters have provisions relative to the power of council to repeal the direct legislation of the people should bear no weight in the decision of the question under discussion, for in Ohio by the very statute which gives effect to the constitutional provision reserving powers of initiative and referendum, the General Assembly has delegated the power to charter municipalities to regulate the manner in which such powers of direct legislation are to be exercised. As to non-charter cities, the statutes of Ohio make no provision whereby city councils are granted the power to repeal initiated ordinances, nor are the city councils granted the power to reenact their own legislation which has been repealed by the people in the exercise of their rights of the referendum. The constitutional provision which reserves to the people the power to legislate by direct action also bestows on the General Assembly the right to regulate the manner of exercising those powers. From the mere fact that the legislature has not spoken in regard to the subject of repealing ordinances which have been initiated by the people of a non-charter city, is it reasonable to infer that the people of Ohio in granting the legislature the right to regulate the manner of exercising the rights of the initiative thereby granted to their city councils the power to repeal the legislation which they themselves have enacted?

Referring to the power of the legislature or other agent of the people to enact laws, and to the power of the people to enact legislation directly by exercising the powers of the initiative, Judge Wilkin in *Pfeifer* v. *Graves, Sec'y. of State*, 88 O.S. 473, 104 N.E. 529 (1913), said: "* * * The first is a delegated power—from the people to their legislative agents or representatives. The second is a reserved power; it comprehends all of the sovereign power of legislation not thus delegated. Instinctively the legal mind affirms that the delegated power is to be strictly construed with reference to the purpose for which it was granted. But on the contrary, the reserved original power is not to be restricted by any limitations except such as are imbedded in the federal constitution." The decision of the Supreme Court in the principal case indicates a departure from the spirit in which the provisions of Article II of the Ohio Constitution, dealing with the powers of the initiative and referendum, were first construed and interpreted by that court in *Pfeifer* v. *Graves, supra.*

The question raised in the principal case is one of considerable magnitude, and it merits unusual consideration by reason of the fact that it deals with a constitutional provision which purports to reserve rights and powers to the people, not as individuals, but as a body politic. The General Assembly ought to enact legislation at the earliest possible moment for the purpose of preventing the repeal or modification by the councils of non-charter cities of initiated ordinances and ordinances approved by a referendum vote. Such legislation would secure to the people of non-charter cities the protection which they intended to provide to themselves when they enacted the constitutional provisions with regard to the initiative and referendum.

JAMES R. TRITSCHLER.

PERSONAL PROPERTY

BAILMENTS—STATUS OF OWNER OF AUTOMOBILE PARKING LOT—LIABILITY FOR THEFT.

One Sheehan parked his car in defendant's parking lot and received a parking ticket for which he paid the requisite fee. The ticket disclaimed any liability on the part of defendant for theft. The car was stolen, even though Sheehan had locked it. One of the two attendants in charge at the time saw the thief driving the car away, but was unable to overtake him. Plaintiff insurance company, having paid Sheehan for his loss, seeks to recover the value of the car. The Court of Appeals, in reversing a judgment of the Municipal Court of Cleveland, held that defendant, a bailee for hire, was not negligent and therefore not liable for the theft of the car. One judge dissented. *Syndicate Parking, Inc.* v. *General Exchange Ins. Corp., et al.*, 17 Ohio Abs. 596 (1934).

The court, without discussing the point, proceeded upon the assumption that the transaction in question constituted a bailment for hire. Whether or not there was a bailment depends upon the extent of control exercised by defendant over the car. Some courts have held that though a fee is charged, if the owner can remove the car at will, there is merely a license to park and not such a surrender of control as to constitute a bailment. *Lord* v. *Okla. State Fair Ass'n.*, 95 Okla. 294, 219 Pac. 713 (1923); *Thompson* v. *Mobile Light and Railway Co.*, 211 Ala. 525, 101 So. 177, 34 A.L.R. 921 (1924); and see *Suits* v. *Electric Park Amusement Co.*, 213 Mo. App. 275 (1923). In none of these cases was there any condition precedent to the owner's right to possession. But where a condition precedent, such as the presentation