Justice and the Supremacy of Law (1927), 106, note 3, 108, citing *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970 (1890); *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431 (1913). And while a general definition of "legislation" may be given, its application is difficult. See *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 Sup. Ct. 67, 53 L. Ed. 150 (1908).

It has been held that "the legislative power of a state may control the question of grades and crossings of its streets," and that a city ordinance requiring a railroad to construct and maintain a viaduct is valid without notice and hearing. *Chicago, B. & Q. R.R. v. Nebraska*, 170 U.S. 57, 75, 18 Sup. Ct. 513, 42 L. Ed. 848 (1898). If a municipal corporation acting under authority delegated by the state legislature need give no notice and hearing while ordering the construction of a viaduct, it might be argued that the State Highway Commissioner should be likewise privileged when acting under power given him by the state legislature, and when giving the same order. This may have been the reasoning of the dissenting justices in the present case who seemed to rely entirely on the above decision. In passing an ordinance the municipality is usually said to be exercising a "legislative" and not a quasi judicial function. See *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607 (1888); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 313, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908); *Atlantic Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548, 555, 34 Sup. Ct. 364, 366 (1914); cf. *Health Department of City of New York v. Rector*, 145 N.Y. 32, 39 N.E. 833 (1895). To exempt similarly the proceedings of the State Highway Commissioner would be to place them in the "legislative" category. The majority opinion in its refusal to do this would seem to indicate a desire to restrict this use of the word "legislative" as a device for avoiding notice and hearing.

MISHA RUBIN

Contracts—Impossibility—Frustration—[Ontario].—The defendant corporation contracted to withdraw from a manufacturers' association and to employ plaintiffs for one year if plaintiffs would withdraw from their labor union. Immediately upon the beginning of performance of the contract, the union called a strike in which several of the contracting employees were intimidated or assaulted. The police failed to give adequate protection. Plaintiffs worked for a period of time at the end of which the defendant entered into an agreement with the union and dismissed the plaintiffs because they were not reinstated by the union. *Held*, that the defendant was not liable for failing to employ the plaintiffs for one year, there being an implied condition in the agreement that if the existence of an independent shop became impossible, performance would be excused. *Ziger v. Shiffer & Hillman Co.*, [1933] 2 D.L.R. 691.

Under early common law it was generally stated that a promisor was not excused from his promise unless he had expressly provided for the contingency rendering performance impossible. *Paradine v. Jane*, Aleyn 26 (K.B. 1647). Three definite exceptions were soon grafted upon this general rule. 1. A change in domestic law will excuse performance. *United States v. Dietrich*, 126 Fed. 671 (C.C.D.Neb. 1904); *Baily v. De Crespigny*, 4 Q.B. 180 (1869). 2. The death or illness of a party who has contracted to render personal service will excuse performance. *Spalding v. Rosa*, 71 N.Y. 40 (1877); *Poussard v. Spiers & Pond*, 1 Q.B.D. 410 (1876). 3. The destruction of the subject matter, without fault of either party, will excuse performance. *Stewart v. Stone*, 127 N.Y. 500, 28 N.E. 595 (1891); *Taylor v. Caldwell*, 3 B.& S. 826 (Q.B. 1863).

In a few cases the destruction of the expected value of the contract was held to excuse performance. *Krell v. Henry*, [1903] 2 K.B. 740; *Alfred Marks Realty Co. v. Hotel Hermitage*, 170 App. Div. 484, 156 N.Y.S. 179 (1915). A still further category of cases, and the one into which the present case must fall, to be sustained, excuses performance where there is a destruction of the means of performance. *Earn Line S.S.Co. v. Sutherland S.S.Co.*, 254 Fed. 126 (D.C.S.D.N.Y. 1918), affd. 264 Fed. 276 (C.C.A. 2d 1920); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458 (1916); *Kinzer Construction Co. v. State*, 125 N.Y.S. 46 (Ct.Cl. 1910); *Horlock v. Beal*, [1916] 1 A.C. 486. See 3 Williston, Contracts (1920), 3288, § 1935.

If the absence of interference by the union be considered the "means" to performance of the contract, the strike called by the union could be considered a destruction of such means. But a strike, even though unexpected, does not excuse performance in other types of contracts. *Barry v. United States*, 229 U.S. 47, 33 Sup. Ct. 681, 57 L. Ed. 1060 (1913); *Morse Dry Dock & Repair Co. v. Seaboard Transportation Co.*, 154 Fed. 90 (D.C.S.D.N.Y. 1907), reversed on other grounds, 161 Fed. 99 (C.C.A. 2d 1908); but see Geismer v. L.S.& M.S.Ry. Co., 102 N.Y. 563, 7 N.E. 828 (1886). The strike in the present case must have been not only expected but almost uppermost in the contemplation of the parties; it was an inevitable result of performance of the contract. Yet the defendant was excused from performance because of the existence of the very thing for which in effect it had contracted. The severity of the strike may have greatly increased the difficulty of performance but such could hardly have been considered an "unanticipated circumstance" that would excuse performance. 3 Williston, Contracts (1920), 3337, § 1963. But see 47 Harv. L. Rev. 702 (1934).

GEORGE HERBOLSHEIMER

Corporations—Pre-emptive Rights—Treasury Stock—[New York].—Plaintiff was a shareholder in the American Metal Co. which held 1,685 of its shares as "treasury stock." Defendants, directors in the company, without offering to the other shareholders an opportunity to subscribe for a *pro rata* share of the treasury stock, turned it all over to themselves at a price of $70 a share, thus obtaining control of the company. The company was thereafter sold to another corporation for a sum equivalent to about $661 for each share. Plaintiff then sued for damages resulting from defendants' refusal to allow him to subscribe for a *pro rata* share of the treasury stock. *Held*, the plaintiff had a "pre-emptive right" to at least an offer of the stock before the directors sold it to themselves. *Hammer v. Werner*, 239 App. Div. 38, 265 N.Y.S. 172 (1933).

It is well settled that a stockholder, in order to protect his proportionate interest in the management and assets (which might include a surplus) of the corporation, has the pre-emptive right to be offered a ratable amount of additional shares in the corporation when issued by the directors. *Kingston v. Home Life Ins. Co. of America*, 11 Del. Ch. 258, 101 Atl. 898 (1917); *Stokes v. Continental Trust Co.*, 186 N.Y. 285, 78 N.E. 1090 (1906); Berle and Means, The Modern Corporation (1st ed. 1932) 144; Morawetz, The Preemptive Right of Shareholders, 42 Harv. L. Rev. 186 (1928); Drinker, The Pre-emptive Right of Shareholders to Subscribe to New Shares, 43 Harv. L. Rev 586 (1930).

As an exception to this rule, it is generally stated that stockholders have no pre-emptive right to subscribe to a *pro rata* share of an issue of treasury stock, i.e., those shares which have been issued and repurchased by the corporation. *Borg v. Interna-*