charges the public for using the pool has not influenced the courts' classification of swimming pool operation as governmental or ministerial.[7] In line with the majority view of municipal liability for nuisances,[8] recovery in tort has been allowed against a municipal corporation where the injury resulted from a nuisance connected with the pool.[9]

The *ratio decidendi* of the instant case is not impressive.[10] The court maintained that "Furnishing water to the inhabitants of a municipality for domestic purposes, and furnishing water to inhabitants * * * for the purpose of public swimming * * * are closely allied activities"; that, since municipal waterworks are universally classed as ministerial enterprises, municipal swimming pools must be ministerial and not governmental.[11]

In spite of the court's questionable rationalization, the decision is in harmony with the modern and desirable trend toward greater liability of municipal corporations for their agents' torts.[12] The possibility that increased liability may lead municipal corporations to increased inspection and care in the administration of public facilities makes this decision socially justifiable. T. B.

SALES—CONSTRUCTION OF CONTRACT TERMS AS TO TIME OF DELIVERY—"ON OR BEFORE AT BUYER'S OPTION"—[ARKANSAS].—A contract to sell goods called for immediate shipment of a part of the goods to a designated place, "balance as ordered within six months." A year after the stated period had expired, the seller sued the buyer, who had failed to order, for breach of contract. *Held,* for defendant, the buyer's right to order being construed as an option whereby he might advance the time for delivery, and the seller's duty to deliver during the period being absolute and not conditional on the buyer's order.[1]

The question confronting the courts in the construction of contracts of sale calling for delivery during a specified period "as ordered" or calling for delivery "on or before — at buyer's option" is whether an order or notice by the buyer is a condition precedent or a mere privilege of demanding delivery before the end of the period. The decision turns on the court's view of what the parties intended as deduced from the words of the contract and the circumstances surrounding the transaction. In the few cases construing contracts similar to the one involved in the instant case, where the

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Lake City (1926) 69 Utah 186, 253 Pac. 443, 51 A. L. R. 364; Belton v. Ellis (Tex. Civ. App. 1923) 254 S. W. 1023. Incidental profit is not sufficient to place a municipal pool in the ministerial class. Petty v. Atlanta (1929) 40 Ga. App. 63, 148 S. E. 747.

7. See cases cited supra, note 5.

8. Note (1931) 75 A. L. R. 1196.

9. Hoffman v. Bristol (1931) 113 Conn. 386, 155 Atl. 499, 75 A. L. R. 1191 (civil action for damages, dangerous diving board).

10. Hoggard v. Richmond (Va. 1939) 200 S. E. 610, 616. Contrast the more logical dissenting opinion. 200 S. E. at 616.

11. Id. at 615.

12. Note (1938) 24 Va. L. Rev. 430.

1. Pictorial Paper Package Corp. v. Swamp & Dixie Laboratories, Inc. (Ark. 1938) 122 S. W. (2d) 529.

nature of the article sold is determined and the place of delivery indicated, with only the time indefinite but fixed within a period certain, the courts have generally held that the buyer's right to order within the interval is an option which, if not exercised, leaves the duty on the seller to perform on the last day of the period to avoid being in default and to hold the buyer on the contract.[2] Similarly, where the seller has the option to deliver at any time during a period upon giving notice, failure to give notice does not relieve the buyer of the duty of accepting delivery on the last day.[3] Where the place of delivery is not stipulated, contracts with this same provision as to time of delivery are construed to require an order and shipping directions as conditions precedent to the seller's duty to deliver, and a failure to order is a breach of contract.[4]

The difference in result seems justifiable. Whereas in the absence of a stipulation as to place, delivery is impossible without further instructions, in contracts like that in the instant case the undertaking by the seller to deliver within the period is unequivocal and dependent on no other factors. It is well established that, absent special circumstances, a stipulated time for performance is of the essence of a contract and the other party's duty is conditioned on performance in or by that time.[5] It seems reasonable that the rule should apply in construing "on or before" and buyer's option contracts. S. F. T.

WILLS—FORGERY—ADMISSIBILITY OF TESTATOR'S DECLARATIONS MANIFESTING FRIENDSHIP—[Arkansas].—Proponent offered the testimony of himself and others to show the special regard of testatrix for himself as contrasted with the heirs. He opposed the admission in evidence of declarations of testatrix, outside the *res gestae*, which showed her friendly feeling toward contestants and were offered in corroboration of additional substantial evi-

2. Bennett v. Igleheart Bros. (1927) 37 Ga. App. 200, 139 S. E. 431; Phelps v. McGee (1856) 18 Ill. 155; North v. Kizer (1874) 72 Ill. 172; A. B. Hemenover v. Buckles (1922) 225 Ill. App. 392; Willmering v. McGaughey (1870) 30 Ia. 205, 6 Am. Rep. 673; Chandler v. Robertson (1840) 39 Ky. 291; Sousely v. Burn's Adm'r (1873) 73 Ky. 87; British Aluminum Company, Ltd. v. Trefts (1914) 163 App. Div. 184, 148 N. Y. S. 144; Rogers-Pyatt Shellac Co. v. Starr Piano Co. (1925) 212 App. Div. 792, 209 N. Y. S. 727; Cleveland & Co. v. Sterrett (1871) 70 Pa. 204; Conawingo Petroleum Refining Co. v. Cunningham (1874) 75 Pa. 138. Contra: Posey v. Scales (1876) 55 Ind. 282.

3. Horticultural Development Co. v. Loxley Farms Co. (1925) 214 Ala. 109, 106 So. 686; Duncan v. Allen (1926) 204 Ala. 551, 108 So. 357; Kirkpatrick v. Alexander (1877) 60 Ind. 95; Rickey v. Shinkle (1887) 36 Kan. 516, 13 Pac. 795; Crown Embroidery Works v. Gordon (1920) 190 App. Div. 472, 180 N. Y. S. 158; Livesley v. Strauss (1922) 104 Ore. 356, 206 Pac. 850; Brunswig Grain Co. v. Anchor Grain Co. (C. C. A. 5, 1926) 10 F (2d) 304.

4. Big Muddy Coal & Iron Co. v. St. Louis-Carterville Coal Co. (1913) 176 Mo. App. 407, 158 S. W. 420; Colvin v. Weedman (1869) 50 Ill. 311; Weill v. American Metal Co. (1899) 182 Ill. 128, 54 N. E. 1050; Percy Kent Co. v. Silberstein (1926) 214 N. Y. 440, 150 N. E. 509.

5. Sabin Robbins Paper Co. v. Cal Hirsch & Sons Mercantile Co. (Mo. App. 1924) 263 S. W. 479; Lokey v. Rudy-Patrick Seed Co. (Mo. App. 1926) 285 S. W. 1028; Williston, *Sales* (2d. ed. 1924) 1132, sec. 453a.