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# Public Law - Survey of Illinois Law for the Year 1947-1948

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of the Appellate Court for the First District in the case of *Weil* v. *Levy*.[57] The court there indicated that a petition to sell decedent's real estate to pay debts was not barred by laches, even though filed thirteen years after decedent's death, provided it was filed within seven years following the granting of letters of administration. The decision apparently contradicts the leading Illinois cases on the point[58] and does not follow the rule now prescribed by a recent amendment to the Probate Act.[59] As it does not appear that reason dictates a change from the rule customarily applied, the action of the court in withdrawing the opinion is to be commended.

## VII. PUBLIC LAW

### CONSTITUTIONAL LAW

As was the case last year, the decision attracting the most public interest was that achieved by the United States Supreme Court in the McCollum case,[1] which tribunal, by a divided court, voted to reverse the holding of the Illinois Supreme Court.[2] The case, as is now well known, turned upon the right of the public school authorities to permit religious instruction on school premises under a "released time" arrangement. The majority were of the opinion that the plan pursued fell squarely under the ban of the First Amendment, as interpreted in *Everson* v. *Board of Education of Ewing Township*,[3] and violated the "wall of separation" between state and church. The dissenting opinion of Justice Reed, however, clearly points out the futility of supposing there can be such a separation so long as the two exist side by side. Interaction between the two is inevitable, so

57 332 Ill. App. (adv.) 468, 76 N. E. (2d) 192 (1947). The opinion was later withdrawn by order of court: 76 N. E. (2d) XV.

58 See cases cited in a criticism of the decision in 36 Ill. B. J. 426.

59 Ill. Rev. Stat. 1947, Ch. 3, § 379.

1 — U. S. —, 68 S. Ct. 461, 92 L. Ed. (adv.) 451 (1948).

2 See People ex rel. McCollum v. Board of Education, 396 Ill. 14, 71 N. E. (2d) 161 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 100-1, 35 Ill. B. J. 361.

3 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1946).

it was, by him, deemed better for the court to pick its way through the difficult and borderline cases by using formulae based on key concepts like "direct aid," "establishment of religion," "lack of consent," and the like.

To many of the commentators,[4] the decision provides no permanent test on the question of state intervention in the field of religious education. In no other field have the choices remained so difficult to make. At one extreme, such inescapable aids to education as the furnishing of police, fire, and health protection to places offering religious training are not open to serious question; at the other, the direct use of the public school facilities and administrative machinery to assist or promote religious instruction must now be regarded as phases of the forbidden "establishment of religion." Between these two poles, cases will vary according to whether such factors as the use of school property, supervision of religious teachers and curriculum by secular authorities, compulsion in choosing between secular and religious training, granting of school credits for religious study, and the like are present or absent. Only by reference to them, and to similar factors, will it be possible for the courts to breathe meaning into the concept of the "wall of separation" ordered by the Everson decision. Whether any further attempts will be made to compromise the declarations of principle there laid down is now doubtful, but assuredly the formula of the court will require repeated testing as further doubtful cases arise.

In dealing with constitutional questions on appeal, it is well-settled law in Illinois that an appellant who takes his case to the Appellate Court, where the errors assigned are within the jurisdiction of that court, thereby is deemed to have waived any constitutional issues in the case for the reason that, in this state, constitutional questions are to be reviewed by the state supreme court.[5] The Illinois practice on the subject has even earned rec-

[4] See, for example, 61 Harv. L. Rev. 1248, 4 Loyola L. Rev. 186, 46 Mich. L. Rev. 828, 9 Ohio St. L. Journ. 336, 57 Yale L. Journ. 1114.

[5] Ill. Rev. Stat. 1947, Ch. 110, § 199. The procedure is applicable to both civil and criminal cases: People v. McDonnell, 377 Ill. 568, 37 N. E. (2d) 159 (1941); People v. Terrill, 362 Ill. 61, 199 N. E. 97 (1935).

ognition in the federal courts.[6] The United States Supreme Court, by granting certiorari in *Parker* v. *People of the State of Illinois*,[7] appeared to have determined to re-examine the question and to investigate whether the federal formula should be strictly construed when applied to limit the right to bring up constitutional questions in any but the statutory manner. Specifically, the petitioner therein had been held in contempt for failing to produce certain evidence in connection with pending litigation and had been sentenced to jail for that contempt. He sought writ of error from the Illinois Supreme Court against this order, urging constitutional grounds. His request was refused. On the same day the Illinois Supreme Court announced its decision, the trial court, in petitioner's presence and over his objection, amended the original order to make it conform to Illinois law and recommitted the petitioner. No attempt was made to seek review of the amended order before the Illinois Supreme Court but instead petitioner took an appeal to the Appellate Court where he was unsuccessful.[8] A further writ of error was sought from the Illinois Supreme Court, but that tribunal, applying the rule above mentioned, affirmed the contempt order.[9] Petitioner then came into the United States Supreme Court, seeking a review of the affirmance of the amended order. That court, despite the dissent of three of the justices, held that the case fell squarely under the rule in question and that a separate, although perhaps futile, appeal was necessary to preserve the procedural right to raise constitutional questions thereafter. The dissenters pointed out that the decision only served to magnify the hypertechnical Illinois procedure in a way entirely inconsistent with the spirit of the case of *Marino* v. *Ragen*[10] and amounted to as effective a denial of constitutional rights as any outright substantive denial could do.

[6] Central U. Teleph. Co. v. Edwardsville, 269 U. S. 190, 46 S. Ct. 90, 70 L. Ed. 229 (1925).

[7] — U. S. —, 68 S. Ct. 708, 92 L. Ed. (adv.) 685 (1947).

[8] People v. Parker, 328 Ill. App. 46, 65 N. E. (2d) 457 (1946).

[9] 396 Ill. 583, 72 N. E. (2d) 848 (1947).

[10] 332 U. S. 561, 68 S. Ct. 240, 92 L. Ed. (adv.) 203 (1947).

MUNICIPAL CORPORATIONS

Powers conferred upon municipalities came into consideration in two significant cases. In the first, that of *Ambassador East, Inc.* v. *City of Chicago*,[11] the Supreme Court had occasion to interpret the addition, made in 1947, to the statute relating to landlord and tenant which purported to confer authority on cities to create temporary rent commissions during the housing emergency.[12] Pursuant to that statute, the City of Chicago had adopted an ordinance limiting the amount of increase which was permissible in the charges made by hotels for accommodations rented on a weekly or monthly basis, as well as in cases where the occupant had been in possession for a period of ninety days or more. The validity of the ordinance was successfully challenged when the hotel in question was able to show that, by the definition of housing accommodations contained in the statute itself,[13] establishments commonly known as hotels were specifically excluded from the intended control. An argument offered by the city, to the effect that the regulation could be supported under the power to promote health,[14] was also held ineffective to support the ordinance.

The second case, that of *Federal Electric Company, Inc.* v. *Zoning Board of Appeals*,[15] concerned the scope of the zoning power. It appeared therein that a radio broadcasting corporation had, prior to the adoption of any zoning ordinance, erected two towers which exceeded the height limit subsequently imposed. The village ordinance, when adopted, permitted a continuation of the non-conforming use but forbade any "expansion" thereof. Subsequent thereto, the corporation permitted an advertiser to use the towers in question for display purposes and large neon signs were erected. Proceedings were begun by the municipality

11 399 Ill. 359, 77 N. E. (2d) 803 (1948).
12 Ill. Rev. Stat. 1947, Ch. 80, § 48 et seq.
13 Ibid., § 49(2).
14 Ibid., Ch. 24, § 23—81.
15 398 Ill. 142, 75 N. E. (2d) 359 (1947).

to force a removal thereof, but the Supreme Court held the ordinance inapplicable for the purpose inasmuch as the signs in question did not constitute any "expansion" of the original nonconforming use. The public health argument again failed to impress the court.

An ingenious criticism was offered, but failed to succeed, in *Westerhold* v. *Hale*.[16] The attack was there directed, by the owner of land in a drainage district, against a statutory provision which had purported to authorize the municipal body to accept construction work done pursuant to the exercise of federal authority.[17] It was claimed that the provision in question violated the state constitution in that (1) the legislature was empowered only to construct drains, ditches and levees solely for agricultural, sanitary and mining purposes,[18] and (2) it would permit the public officials to abdicate their duties in favor of federal regulation. The first argument proceeded on the theory that, to permit the district in question to accept the federal project, would result in carrying it into construction aimed solely at the improvement of navigation on the Mississippi River. The court nevertheless held that while the purpose of the federal law was to promote flood control it did extend to cover improvements in agricultural and sanitary facilities. The second was answered by saying there was nothing, for the present, in the federal regulations under which the work would be done which would require the local officials to deviate, in any way, from their established duties.

One other drainage case merits brief recognition. The appellee, in *Okaw Drainage District* v. *Two Mile Slough Drainage District*,[19] sought to exercise its statutory right to recover for the value of the benefit conferred upon appellant, another drainage district, by virtue of improvements made by the appellee.[20]

16 397 Ill. 567, 75 N. E. (2d) 27 (1947).
17 Ill. Rev. Stat. 1947, Ch. 42, § 166.1.
18 Ill. Const. 1870, Art. IV, § 31.
19 398 Ill. 174, 75 N. E. (2d) 333 (1947).
20 Ill. Rev. Stat. 1947, Ch. 42, § 220.

It was admitted that the improvement was, to some extent, beneficial to the appellant and, on the basis thereof, the county court fixed an award. The Supreme Court found it necessary to reverse the holding because the evidence was not of sufficiently definite nature to establish any exact proportion for the distribution of the cost of the improvement and it was not proper to assess any precise sum simply on the basis that "some benefit" had accrued. As the "just proportion" of the cost of the improvement was to serve as the basis for liability, a judgment based on an estimation could not be permitted to stand.

### PUBLIC UTILITIES

War-time restrictions on transportation served to create the only noteworthy case in the field of public utility law during the period of this survey. According to the facts in *Illinois Central Railroad Company* v. *Illinois Commerce Commission*,[21] the carrier in question had suspended the operation of certain passenger trains between Effingham and Indianapolis pursuant to a general order of the Office of Defense Transportation. Approximately six months later, the general order was revoked but service was not restored. The commerce commission then cited the carrier for failure to restore service and, over the carrier's contention of absence of public convenience as well as great financial loss, ordered that service be provided. The circuit court affirmed the order and the Supreme Court did likewise, pointing out that the war-time regulation called for, and required, only a "discontinuance" of service during the period of the national emergency and not an "abandonment." The latter is permissible only in the event the carrier complies with the procedure fixed by statute.[22] Refusal of the commission to give attention to evidence offered by the carrier regarding absence of public convenience and loss in operation was also held proper as being outside the scope of the citation proceeding and competent only in support of an abandonment action.

[21] 398 Ill. 19, 75 N. E. (2d) 23 (1947).
[22] Ill. Rev. Stat. 1947, Ch. 111⅔, § 49a.

TAXATION

As has long been the case, the Supreme Court reports contained the usual number of decisions on objections to tax rates and similar problems, but practically all involved well-settled principles. The case of *Chicago & North Western Railway Company* v. *Drainage District No. 1*,[23] however, might be considered to possess some interest. The district there concerned had levied a drainage assessment and had, in due course, deposited the tax list with the clerk as required by statute.[24] Notice was mailed by the clerk to the taxpayer but not until more than two months had elapsed after the date of filing and long after the ten-day period fixed by law within which to appeal to the county court for relief from the assessment.[25] The land owner did not appeal to the county court but instead filed an independent suit in equity to restrain the enforcement of the assessment, claiming the same was illegal. A decree dismissing the suit was upheld on the ground that the land owner had an adequate remedy at law by way of objection to proceedings by the county collector brought to enforce the tax, particularly since the failure to appeal had in no way made the tax levy res judicata for no jurisdiction had been acquired. The case is remarkable only because of the intimation therein, easing the effect heretofore given to the statute by prior cases,[26] that the taxpayer cannot be precluded from a clear right to litigate the validity of the assessment through any default of the public official.

## VIII. TORTS

Perhaps the most important case which developed in the field of tort law during the past year presented the novel problem as to the liability to be imposed on the owner of an automobile

23 398 Ill. 232, 75 N. E. (2d) 283 (1947).

24 Ill. Rev. Stat. 1947, Ch. 42, § 103.

25 Ibid., § 110.

26 See Geitl v. Com'rs of Drainage District No. 1, etc., 384 Ill. 499, 51 N. E. (2d) 512 (1943), where appeal to the county court was denied because not filed in the ten-day period, and Schwartz v. Com'rs of Big Lake Special Drainage Dist., 307 Ill. 209, 138 N. E. 665 (1923).