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Torts - Survey of Illinois Law for the Year 1947-1948

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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).

if he should leave the car unlocked with the key in the ignition, in violation of a statute,[1] in case the car is stolen and, through the negligence of the thief, becomes the cause of damage to the property of another. According to the facts of that case, to-wit: *Ostergard* v. *Frisch*,[2] the defendant had parked his car on a city street one morning, with doors unlocked and key in the ignition, while in pursuit of his occupation. Subsequent events indicated that a thief had stolen the car, had collided with a parked automobile belonging to the plaintiff at a point some six or more city blocks away from the scene of the theft, and had then abandoned the vehicle. Plaintiff did not allege, but for that matter the defendant did not deny, that the thief was fleeing from the scene of the theft at the time the collision occurred. Upon a stipulation as to the facts and upon a trial without a jury, judgment was rendered for the plaintiff. The judgment was affirmed on appeal.

It is important to note, at the outset, that the Appellate Court for the First District assumed that the thief was fleeing from the scene of the crime at the time the accident happened as this would seem to have considerable bearing on the defendant's liability. The precise question involved, however, was one concerning the violation of a duty arising by virtue of statutory enactment. Stated differently, could it be said that defendant owed a duty to plaintiff and, if so, was the violation of the statute the proximate cause of the damage? The defendant, of course, relied primarily upon the contention that the act of the thief was the independent, intervening, direct and proximate cause of the harm inflicted. The Appellate Court, having examined the decisions from other jurisdictions, including contradictory utterances by the courts of Massachusetts, inclined toward the minority view on the subject as being best likely to serve the needs of this state. In the judgment of the court, the purpose underlying

[1] Ill. Rev. Stat. 1947, Ch. 95½, § 189(a), like § 92(a) in the Uniform Act Regulating Traffic on Highways, provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key . . ." Violation of the statute is declared to be a misdemeanor and subject to the penalty imposed by Section 234.

[2] 333 Ill. App. 359, 77 N. E. (2d) 537 (1948), noted in 36 Ill. B. J. 560. Niemeyer, P. J., wrote a dissenting opinion.

the enactment of the statute was to protect the public from just the type of mischief that had happened, thereby placing upon the owner of the vehicle the duty reasonably to foresee the possibility of theft if he left the car unlocked and with the key in the ignition and thus preventing a break in the chain of causation.

Too lengthy a discussion of the case would not serve the avowed purposes of this survey, but several points might well be noted. In the first place, the case was tried without a jury. A body of laymen might have dealt with the issue of foreseeability, one of the aspects of proximate causation, differently. Secondly, plaintiff's complaint was based on damage to property. The cases examined by the court all dealt with personal injury, so the view might well arise that the decision represents an unwarranted extension of liability. Third, since the decision was rendered, the Massachusetts court, confronted with a practically identical case,[3] reached a decision for the defendant and overruled a prior decision which had apparently given the Illinois court some guidance for its decision.[4]

In another automobile case, that of *Dyreson* v. *Hughes*,[5] a minor girl sued the owner of the car for injuries she received while riding as a guest therein. The complaint charged that the steering gear of the car was defective in that it would unexpectedly cause the front wheels to lock; that defendant knew of the defect; that he loaned the car to one Hughes, who invited the plaintiff to ride in it on the day the accident happened; that while Hughes was so driving the wheels locked, the car ran into a telephone pole, and plaintiff suffered injury. There were four counts in the complaint, the first two alleging negligence; the latter two charging wilful and wanton misconduct. The defendant contended that the first two counts did not comply with the

[3] Galbraith v. Levin, — Mass. —, 81 N. E. (2d) 560 (1948). Plaintiff therein was a pedestrian suing for personal injury.

[4] Malloy v. Newman, 310 Mass. 269, 37 N. E. (2d) 1001 (1941). The reason for incongruity in the decisions from Massachusetts may lie in the peculiar interpretation given to the vehicle registration law of that state. The driver of an unregistered automobile is regarded as a trespasser on the highway.

[5] 333 Ill. App. 198, 76 N. E. (2d) 809 (1948).

so-called "guest" statute,[6] while as to the latter two he claimed there was no direct connection between the parties to the suit nor any facts showing wilful and wanton misconduct. The trial court sustained defendant's motion to dismiss but, on appeal, the Appellate Court reversed when it conceived the complaint to be one stating a good cause of action.

It would appear from the opinion that the court considered the statute applicable to the set of facts before it, one unlike any prior case in Illinois, although it felt that the situation in *Bensman* v. *Reed*[7] was similar. Again, the cases cited from other jurisdictions were cases where a car in good working order was entrusted to a person whom the owner knew, or should have known, was inexperienced, incompetent or reckless. In the instant case, the driver was not alleged to be incapable, even though a minor, although the car was delivered in poor working condition. The court nevertheless said: "Certainly, if the plaintiff can prove that the defendant knew that the steering gear of his automobile was in such defective condition that it would lock, and the driver of the same would be unable to control it on a public highway, that this would be a reckless disregard of the rights of other people either riding in the car, or other people on the road, and he would be guilty of wilful and wanton misconduct in so allowing the car to be driven upon the highway in such condition."[8] No point seems to have been made over the minority of the plaintiff.[9]

Some negligence cases affecting railroads merit attention. The evidence in *Langston* v. *Chicago & North Western Railway Company*[10] showed that the defendant had synchronized its own warning signals with the operation of a stop and go light on a

[6] Ill. Rev. Stat. 1947, Ch. 95½, § 58a.

[7] 299 Ill. App. 531, 20 N. E. (2d) 910 (1939). Liability therein was imposed on a father who had loaned a competent automobile to his son, an incompetent driver by reason of defective eyesight.

[8] 333 Ill. App. 198 at 206, 76 N. E. (2d) 809 at 812.

[9] As to whether a minor can be the "guest" of the driver, see Fuller v. Thrun, 109 Ind. App. 407, 31 N. E. (2d) 670 (1941).

[10] 398 Ill. 248, 75 N. E. (2d) 363 (1947), affirming 330 Ill. App. 260, 70 N. E. (2d) 852 (1947). Wilson, J., dissented to the denial of rehearing.

nearby well-travelled parallel highway so that, when the highway signal for intersecting traffic was green, the motorist would be assured that there would be no train approaching or standing upon the railroad crossing. At the time of the accident, plaintiff had crossed the highway and proceeded toward the railroad crossing by virtue of the invitation offered by a green traffic signal. The night was foggy and the driver was unable to see that a train was crossing the road. As a result, the car was driven into the side of the train. The defendant had received judgment at the trial but this holding was reversed by the Appellate Court. Upon further appeal, the Illinois Supreme Court affirmed the latter decision. While it admitted that, as a matter of law, the railroad company did not owe the travelling public any duty to give warning of the presence of a train upon the crossing, it held the rule did not apply to the case before it because the defendant, by synchronizing the operation of its own warning system with the traffic lights, had invited the public to cross the tracks in reliance thereon.

In another crossing case, that of *Applegate* v. *Chicago & North Western Railway Company*,[11] the decedent was killed when he drove onto defendant's tracks shortly after a freight train had cleared the crossing. There was evidence that the flasher system had stopped signalling, luring the decedent onto the tracks in time to be struck by one of defendant's streamlined trains travelling at ninety miles per hour. Although the Appellate Court agreed that the engineer of the passenger train had complied with the statute concerning the giving of warning,[12] it declared that the defendant had an additional common law duty to give suitable and timely warning of the approach of the train and, since the warning sound had been obscured by the noise of the freight train, no effective warning had been given. As a consequence, the jury could infer negligence on the defendant's part.

Still another suit, that of *Carr* v. *Chicago & North Western*

[11] 334 Ill. App. 141, 78 N. E. (2d) 793 (1948). The court cited the preceding case with approval.

[12] Ill. Rev. Stat. 1947, Ch. 114, § 59.

Railway Company,[13] involved the same railroad. The plaintiff's truck had there been damaged when it had collided with a viaduct beneath which there was insufficient overhead clearance room. Plaintiff asserted a duty on the part of the defendant to maintain safe crossings, that is, ones which would be adequate to meet present-day conditions. When affirming a judgment for the defendant, the Apellate Court held that, despite a reduction in clearance from original measurements by reason of a repaving of the road, there was no burden on the defendant either to maintain the original clearance, to raise the viaduct, or to post signs showing the extent of the actual clearance.

Responsibility in tort on the part of a land owner became the matter of concern in *Jones* v. *20 North Wacker Drive Building Corporation*[14] where the plaintiff offered a novel argument in an effort to have herself classed as an invitee. The defendant operated an opera house and, at the request of a certain drama league, permitted persons appointed by the league to sell war bonds and stamps in the lobby of the theater. A practice had developed whereby the saleswomen were permitted to see the show, there being no call for their services during the course of the performance. Plaintiff, one of the saleswomen, while looking for a seat from which to view the performance, fell and suffered injury. She was awarded judgment by the trial court but lost on appeal. In an effort to impose an affirmative duty of care on the defendant, plaintiff claimed to be an invitee. Recognizing that, under the Illinois law, to be an invitee one must come upon the occupier's land with his invitation, either express or implied, for a purpose connected with his business, hence requires some showing of mutuality of interest, plaintiff argued that defendant had an interest in her endeavor to sell war bonds and stamps in aid of the war effort for, if it had not provided facilities for the sale thereof, a loss of patronage at the theater would have resulted. The court answered this contention by pointing out that there was no evidence in the record to support the claim. Plaintiff, being merely

[13] 333 Ill. App. 567, 77 N. E. (2d) 857 (1948).

[14] 332 Ill. App. 382, 75 N. E. (2d) 400 (1947), noted in 36 Ill. B. J. 428.

a licensee for the purpose of the sale of bonds and stamps, remained a licensee when she attempted to see the performance.

The extent of the duty of a land owner to trespassing children was re-examined by the Appellate Court in the case of *Wood* v. *Consumers Company.*[15] While not a case of first impression, it is important and warrants attention. The facts, briefly stated, were that the plaintiff's son, a boy of seven, while searching for a place to skate and slide on a winter day, wandered onto certain premises where the defendant mined, washed and graded sand and gravel. In sliding down a sloping bank which led to a pool of ice-covered water, the boy slid out on the ice and, as it gave way, he drowned. When reversing a judgment for the plaintiff, the court took occasion to review many prior Illinois cases bearing on the point. As the pond was an ordinary body of water, it was said not to come within the orbit of the attractive nuisance doctrine for lack of any mechanical aspect. But, said the court, even if the pond was an attractive nuisance, there still could be no recovery because the pond itself was not visible from the boy's home or from any public place where he had a right to be. The remark was pure dictum, but there are few jurisdictions which still impose such a requirement before permitting recovery in attractive nuisance cases.

Dram shop cases, based on the Illinois statute,[16] often suggest new problems. The case of *Economy Auto Insurance Company* v. *Brown*[17] posed the question as to whether or not the right of action created by the statute could be utilized in favor of an insurance carrier. The plaintiff, having paid claims against its insured who had injured several people when driving his car while intoxicated, claimed a right of action against the tavern-keeper who sold the liquor on the theory that, in settling such claims, it had sustained a property damage within the purview of the statute. The trial court sustained defendant's motion to

[15] 334 Ill. App. 530, 79 N. E. (2d) 826 (1948). Leave to appeal has been denied.
[16] Ill. Rev. Stat. 1947, Ch. 43, § 135.
[17] 334 Ill. App. 579, 79 N. E. (2d) 854 (1948).

strike the complaint for failure to state a cause of action and dismissed the suit. The judgment was affirmed when the Appellate Court declared that the plaintiff, to recover, had to allege facts showing that the property loss was proximately caused by the intoxication of the insured, thereby disposing of the plaintiff's contention that the doctrine of proximate causation had no application to dram shop cases. As the test laid down required that the injury be the natural and probable consequence of the intoxication, the court found that any obligation to pay under the contract of insurance was not the natural and probable consequence thereof but rather the consequence of independent and intervening factors, the intoxication merely furnishing, at most, a condition for the operation of the contract. Furthermore, plaintiff had no right to subrogation inasmuch as the insured himself could have had no rights against the defendant.

In another dram shop case, that of *Howlett* v. *McGarvey*,[18] the plaintiff, mother of an eighteen year old girl who had been killed by an intoxicated motorist, sued the tavern-keeper for damage to her "property." The plaintiff did not claim any injury to her "person" or to her "means of support" but contended that the term "property," not being expressly defined in the statute, should be interpreted as meaning anything which the law has seen fit to recognize as being either the subject of a property right or that which possesses a pecuniary interest. She relied on interpretations provided by the courts in actions arising from wrongful death. The Appellate Court, however, reversing a judgment in her favor, held that, by reason of the strict construction required for a statute in derogation of the common law, the legislature did not intend to permit recovery for "pecuniary injuries," as is expressly permitted by the Injuries Act,[19] but rather contemplated injury to tangible real or personal property.

There is not much occasion to refer to the case of *Wendt* v.

[18] 334 Ill. App. 512, 79 N. E. (2d) 864 (1948), affirmed in 402 Ill. 311, 83 N. E. (2d) 708 (1949).

[19] Ill. Rev. Stat. 1947, Ch. 70, § 2.

Servite Fathers,[20] which deals with the tort liability of a charitable corporation for the negligence of its agents, for the case has already been noted elsewhere.[21] It might be said, however, that the courts of this state seem to be reaching toward a more just result in rejecting any thought of immunity where the charity carries insurance. There may yet come a day when that entire immunity will join other relics of the past in the museum of the law.

20 332 Ill. App. 618, 76 N. E. (2d) 342 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 279.

21 See section on Business Organizations, ante.