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legislature left the law unchanged except for the passage of an act designed to establish an annuity and pension plan for employees of municipally-owned public utilities.[65] The plan proposed thereby should now leave no uncovered public employees in the state.[66]

VIII. TORTS

Novelty in the field of tort law has been provided by both cases and statutes.[1] In *Mower* v. *Williams*,[2] for example, the liability of a highway maintenance man for negligence was considered. The defendant was charged with driving a snow plow into an intersection and in the path of plaintiff's vehicle. The plaintiff was denied recovery when the court described the defendant's duty to maintain the highway as one requiring the exercise of discretion and judgment, calling it a "governmental" one as distinguished from a ministerial duty. While "governmental" may not be the proper term to use when speaking of the duty of an individual, since it produces confusion with the immunity granted to municipal organizations engaged in that type of function, it is clear that the court has established a precedent whereby those charged with the maintenance of highways may escape liability for negligence because of the "judgment" required of them. One might well inquire if any act can be more "ministerial" than that of driving a truck on a highway, even though a snow plow be attached. The reason underlying a grant of immunity, to-wit: the necessity for freedom of action, can scarcely be cited as sufficient to allow a highway employee to ignore the obligation to use due care while driving on the highway. The case of *Lythell* v.

65 Laws 1949, p. 1222, H. B. 691; Ill. Rev. Stat. 1949, Vol. 2, Ch. 111⅔, § 153 et seq.

66 In Chicago, B. & Q. R. Co. v. Illinois Commerce Commission, 82 F. Supp. 368 (1949), the federal district court enjoined the state commission from attempting to require the restoration of train service in the field of interstate commerce.

1 The case of Gorczynski v. Nugent, 402 Ill. 147, 83 N. E. (2d) 495 (1949), affirming 335 Ill. App. 63, 80 N. E. (2d) 418 (1948), dealing with the liability of a race-track for injury to a minor stable boy, has been discussed above under the heading of Labor Law. The case of Moore v. Moyle, 335 Ill. App. 342, 82 N. E. (2d) 61 (1948), is commented upon in the section dealing with Corporations, ante.

2 402 Ill. 486, 84 N. E. (2d) 435 (1949), reversing 334 Ill. App. 16, 78 N. E. (2d) 529 (1948). Crampton, J., dissented.

City of Waverly,[3] however, followed traditional doctrines in absolving the city from liability for the death of a boy, killed when a tree fell on him as he was playing marbles in the park, for the maintenance of parks has long been regarded as a governmental function.

The degree of care required of spectators at, and operators of, exhibitions came up for review in *Tomlin* v. *Miller*.[4] The plaintiff stood near a fence watching a rodeo staged by the defendant when a bronco jumped the fence and dislodged a fence pole which struck and harmed the plaintiff. The Appellate Court, holding that the evidence sustained a finding that the plaintiff was not contributorily negligent in taking up a position near the fence, said that the failure of the operator to take measures sufficient to insure the safety of the spectators could constitute negligence. Both "high degree of care" and "reasonable care" were phrases used by the court in describing the duty of the operator.

Attempts to make the doctrine of res ipsa loquitur apply to cases involving the breakage of bottle goods seem to be becoming more frequent. Two such cases reached appellate reviewing courts in the last year. In one, that of *Mabee* v. *Sutliff & Case Company, Inc.*,[5] it was held that the res ipse loquitur presumption could not be allowed where the plaintiff was injured by the breaking of a jug of sulphuric acid as it was being carried into the home, following delivery to the doorstep, for the defendant was said to have lost all control over the jug at the time of the occurrence. In the other, that of *Roper* v. *Dad's Root Beer Company*,[6] the court recognized that the thing need not be under the management and control of the defendant at the time of the accident, for control at the time of the negligent act, at least where carbonated beverages are concerned, is sufficient. Recovery was denied, however, because the victim had not eliminated the possi-

[3] 335 Ill. App. 397, 82 N. E. (2d) 207 (1948).

[4] 335 Ill. App. 267, 81 N. E. (2d) 760 (1948). Leave to appeal denied.

[5] 335 Ill. App. 353, 82 N. E. (2d) 63 (1948). The holding therein was affirmed in 404 Ill. 27, 88 N. E. (2d) 15 (1949), not in the period of this survey.

[6] 336 Ill. App. 91, 82 N. E. (2d) 815 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 182.

bility of negligent handling by others between the time the bottle left the control of the defendant manufacturer and the time of its explosion.

Bottled goods of still another type are apt to precipitate cases predicated on the Dram Shop Act.[7] One case of interest on that subject, the case of *Bell* v. *Poindexter*,[8] involved the liability of the tavern owner and operator for injuries caused by one who had consumed liquor which had, in fact, been purchased from the tavern operator by another. It was said that a cause of action had been stated when it was alleged that the intoxicated person had been present at the time of the purchase and the operator knew, or had reasonable ground to believe, that he would consume part or all of the liquor sold.[9]

The peculiar rule in Illinois which requires that a plaintiff, suing for negligence, must show freedom from contributory negligence occasionally gives a deserving plaintiff difficulty. When a personal representative sues because of the death of the victim, he sometimes finds himself without the means to prove that the deceased was exercising due care at the time for his own safety except as he may have advantage from proof of the deceased person's prudent habits. The case of *Sawyer* v. *Fleming*,[10] however, serves to remind the trial lawyer that proof of habit is not available where the defendant can produce eyewitnesses, even if they be the defendant's own employees. Another court, discussing much the same problem in a case charging the defendant with wilfull and wanton misconduct, pointed out that, in order to succeed, the plaintiff must allege and prove freedom from contributory wilfull and wanton misconduct.[11] There is reason to suspect that this will be news to many lawyers who have heretofore supposed that the matter was taken care of by an allegation of freedom from contributory negligence.

[7] Ill. Rev. Stat. 1949, Vol. 1, Ch. 43, § 135.

[8] 336 Ill. App. 541, 84 N. E. (2d) 646 (1949).

[9] Discussion of another Dram Shop Act case, that of Howlett v. Doglio, 402 Ill. 311, 83 N. E. (2d) 708 (1949), is to be found in the section on Damages, ante.

[10] 336 Ill. App. 268, 83 N. E. (2d) 360 (1949).

[11] Prater v. Buell, 336 Ill. App. 533, 84 N. E. (2d) 676 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 253.

The legislature has seen fit to declare that dog owners may no longer avoid liability for the animal's first bite, tradition to the contrary notwithstanding, for a new section charges the owner for any injury caused by the dog to one who is where he has a legal right to be.[12] Aircraft owners have also been subject to a financial responsibility law, somewhat akin to the one applicable to motorists. A security deposit or evidence of insurance coverage is required from owners of aircraft involved in accidents when damage in excess of $50 has been caused.[13] While placing them on the same plane as automobile owners, the legislature considerately enacted a "guest statute" exemption in all cases except those growing out of wilfull and wanton misconduct in the operation of the aircraft.[14]

[12] Laws 1949, p. 42, H. B. 225; Ill. Rev. Stat. 1949, Vol. 1, Ch. 8, § 12d.

[13] Laws 1949, p. 329, S. B. 530; Ill. Rev. Stat. 1949, Vol. 1, Ch. 15½, § 22.42a et seq.

[14] Laws 1949, p. 334, S. B. 231; Ill. Rev. Stat. 1949, Vol. 1, Ch. 15½, § 22.83.