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Recent Illinois Decisions

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ADMINISTRATIVE LAW AND PROCEDURE—JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS—WHETHER A REQUEST FOR A SECOND REHEARING IS NECESSARY WHERE THE FIRST REHEARING RESULTED IN A MODIFICATION OF THE ORIGINAL ORDER—*Alton Railroad Company* v. *Illinois Commerce Commission*[1] involves one aspect of the exhaustion of administrative remedies doctrine which has not heretofore been decided in this jurisdiction. In 1933, certain railroads furnishing switching services to industries in Bloomington, Illinois, eliminated from their switching districts various concerns operating in the locality.[2] Subsequently the Bloomington Association of Commerce and several of the firms directly affected filed a complaint with the Illinois Commerce Commission alleging the above facts and requesting that the industries be restored to the district and thus obtain the benefit of the reasonable switching rates applicable thereto. Extensive hearings were held and finally, in 1940, the Commission entered an order dismissing the complaint and upholding the legality of the action taken by the railroads. An appeal was pursued in accordance with the Act[3] and the Circuit Court of McLean County set aside the decision, remanding the case to the Commission. This judgment was later affirmed by the Supreme Court.[4] Upon the remandment the Commission conducted more hearings and in 1945 rendered a ruling requiring the railroads to restore their switching districts as originally established, thus reinstating the eliminated firms, and also to fix a connecting line switching rate in accordance with specifications included in the order. A rehearing was granted at which time both parties were permitted to present additional testimony and exhibits. Thereafter, in 1947, a second order was entered incorporating by reference its 1945 predecessor but modifying it to allow the railroads (1) to take advantage of a statewide increase in freight rates which had become effective subsequent to its entry and (2) more time in which to comply with the Commission's mandate. The railroads still being dissatisfied, appealed to the Circuit Court of McLean County at which time the Commission filed a motion to dismiss, urging that the court did not have jurisdiction. It was

[1] 407 Ill. 202, 95 N. E. (2d) 76 (1950).

[2] This action forced those industries to pay a higher rate for the delivery of freight to and from their loading facilities.

[3] The Public Utilities Act, Ill. Rev. Stat. 1949, Vol. 2, Ch. 111⅔, § 72, sets out the procedure to be utilized in obtaining a judicial review of the Commerce Commission decisions. This procedure has not been supplanted by the Illinois Administrative Review Act since, as yet, Commerce Commission orders have not been brought within its scope.

[4] Alton Railroad Company v. Illinois Commerce Commission, 382 Ill. 478, 48 N. E. (2d) 381 (1943).

argued that since the railroads failed to request a rehearing subsequent to the entry of the 1947 order before appealing, a procedure which is required by the Act,[5] they had no standing in court. The trial court denied the motion but affirmed the Commission's decision on its merits. The railroads appealed to the Illinois Supreme Court, and upon the request of the Attorney-General appearing in behalf of the Commission that tribunal reversed the lower court and remanded with directions to grant the Commission's motion to dismiss the appeal for failure to request a second rehearing.

In order to provide for effective and orderly administrative process the courts have adopted the attitude that until an individual exhausts all of his administrative remedies the judiciary cannot intervene and grant relief. One phase of this principle concerns itself with the necessity of seeking a rehearing after an administrative tribunal has entered an adverse decision. While the law as to this particular point has never been entirely clear, it appears to be well settled that if the statute creating the administrative agency and its procedure requires a request for a rehearing before appeal to the courts, it is imperative that the party follow its mandate.[6]

Since the Public Utilities Act requires the pursuit of such a procedural step, the only question in this particular case is whether or not the railroads complied. After the 1945 order was entered they acted in accordance with the statute by filing the necessary petition. As a result of that hearing the 1947 decision was handed down. If it had merely affirmed the former, obviously an appeal would have been in order since all the statutory requirements had been met. However, the 1947 ruling was entered upon new evidence submitted during the rehearing and modified its predecessor in certain respects. The Supreme Court held that this modification resulted in an entirely new order different from the former and therefore an additional request for rehearing was necessary. Its rationale

[5] Ill. Rev. State 1949, Vol. 2, Ch. 111⅔, § 71, provides: "No appeal shall be allowed from any rule, regulation, order or decision of the Commission unless and until an application for a rehearing thereof shall have been filed with and acted upon by the Commission." The section continues "No person or corporation in any appeal shall urge or rely upon any grounds not set forth in such application for a rehearing before the Commission." In defining the purpose of this latter provision the Supreme Court, in the recent case of Granite City v. Illinois Commerce Commission, 407 Ill. 245, 95 N. E. (2d) 371 (1950), stated that it was to require the party contesting the decision of the tribunal to inform the Commission and the opposition wherein errors of law and fact were made in the ruling, thus presenting an adequate basis for a reconsideration. As a result, a petition for rehearing which merely made general allegations as to the invalidity of an order was not sufficient compliance with the Act and upon judicial appeal the party filing such petition would not be allowed to present specific objections to the Commission's decision.

[6] For a general discussion of the problem see Stason, "Timing of Judicial Remedies", 25 Minn. L. Rev. 560 at 570, and 42 Am. Jur., Public Administrative Law, § 202.

was based upon the fact that the issues resolved in the two decisions were dissimilar. Thus the Commission, in its 1945 order, simply found that the existing switching rates were reasonable. On the other hand, by allowing the railroads an increase in the general freight tariffs, the Commission, by its 1947 ruling, decided an entirely new issue, to wit: that in the light of the increase in freight rates the existing switching rates were adequate.

ADOPTION—CONSENT OF PARTIES—WHETHER NATURAL PARENT, HAVING EXECUTED CONSENT TO ADOPTION IN ACCORDANCE WITH STATUTORY REQUIREMENTS, MAY WITHDRAW SUCH CONSENT PRIOR TO ENTRY OF DECREE OF ADOPTION—In the recent case of *Dickholtz* v. *Littfin*,[1] the Appellate Court for the First District was presented, for the first time since the passage of the revised Illinois Adoption Act,[2] with the problem of the revocability of a consent to adoption given by a natural parent where the consent conforms to statutory requirements. The child there concerned had been born out of wedlock but the natural mother and the putative father shortly thereafter intermarried. Prior to the marriage, a petition for adoption had been filed together with a prepared form of appearance and consent signed by the natural mother. She thereafter attempted to revoke such appearance and consent, alleging the perpetration of various acts of a coercive nature which she claimed had been used to obtain her signature thereto. Petitioners, seeking the adoption, filed an answer in which they denied that any duress had been used to secure the consent and also charging the mother with being an unfit person to have custody of the child. The County Court dismissed the petition for adoption and ordered the child surrendered to the natural mother. Upon appeal, the Appellate Court affirmed the order.

In substantiating such decision, the court proceeded on the theory that the complete revision in the law produced by the Adoption Act of 1945 was intended by the legislature, among other things, to broaden the scope of the discretion which the trial court might exercise in adoption proceedings. From the vantage of that starting point, the court examined the facts, considered the welfare of the child, studied the effect of the intermarriage of the natural mother and the putative father upon the question of illegitimacy, noted the length of the child's residence with the petitioners, and agreed that the trial court had properly exercised its discretion in allowing the parental consent to be revoked. In reaching that result, the court said: "We do not think that the right to withdraw should be declared absolute, but rather that it must be left to the sound discre-

[1] 341 Ill. App. 400, 94 N. E. (2d) 89 (1950).

[2] Ill. Rev. Stat. 1949, Vol. 1, Ch. 4, § 1—1 et seq.

tion of the trial court depending upon the peculiar circumstances in each case.'"[3] The importance of the decision lies in the fact that it serves to place Illinois in line with the majority of other jurisdictions on the question as to the right to withdraw a consent prior to the time when the same has been acted upon.[4] By making that right depend on the discretion of the trial court, to be exercised according to the facts of each case, rather than by treating the same as an absolute right authorizing withdrawal solely at the whim of the consenting natural parent,[5] the court has done much to effectuate an acknowledged legislative purpose.[6]

BILLS AND NOTES—REQUISITES AND VALIDITY—WHETHER PERSONAL DEFENSES ARE AVAILABLE AGAINST AN ACCOMMODATION ENDORSER WHO HAS BEEN OBLIGED TO PAY THE HOLDER OF A CHECK FOLLOWING DISHONOR THEREOF BY THE DRAWER—The dispute in the case of *Schmelzle* v. *Transportation Investment Corporation*[1] grew out of an exchange of checks between the defendant and another who furnished two post-dated checks for the one in suit but who agreed not to deposit the defendant's check for collection until the post-dated checks had cleared. In violation of such agreement, the payee secured the plaintiff's accommodation, beneath the payee's signature, and secured cash for the check at another bank than the one on which the check had been drawn. The post-dated checks were not honored so the defendant, drawer of the primary check, ordered the drawee bank to stop payment thereon. The drawee bank refused payment as ordered, causing the holder bank to demand, and to receive, reimbursement from the plaintiff, who had acted as accommodation endorser. After taking a blank endorsement of the check, plaintiff proceeded against the drawer of the check and was met by the defense of failure of consideration. A summary judgment for the plaintiff in the trial court was affirmed by the Appellate Court for the Second District.

Plaintiff had claimed to be a holder in due course, so as not to be

[3] 341 Ill. App. 400 at 405, 94 N. E. (2d) 89 at 92.

[4] A minority of states regard the right to withdraw a consent as being absolute in character. For annotations on the general subject, see 156 A. L. R. 1011 and 138 A. L. R. 1038.

[5] In the case of Petition of Thompson, sub nom. Thompson v. Burns, 337 Ill. App. 354, 86 N. E. (2d) 155 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 308-13, the court held that an improperly executed consent was insufficient, but proceeded, by way of dicta, to imply that the right to withdraw the consent was absolute, at least until decree had been entered. The court in the instant case expressly rejected this dicta in favor of the majority rule.

[6] To that extent, the case follows the view of Nelson v. Nelson, 127 Ill. App. 422 (1906), decided under an earlier statute, where the court held that the fact that the natural mother had given her consent in the mistaken belief of her impending death was insufficient to invalidate the same upon her subsequent recovery.

[1] 341 Ill. App. 639, 94 N. E. (2d) 682 (1950).

subject to the personal defense of failure of consideration existing between the drawer and the payee,[2] but the court properly took the position that he was not such since he had received the check, under the blank endorsement, knowing that it had been dishonored. For that matter, Section 142 of the Illinois Negotiable Instruments Act[3] was of little help to the plaintiff. That section, in essence, declares that an instrument is not discharged when paid by a party secondarily liable thereon. Instead, it directs that such person be remitted to his former position on the instrument as regards all prior parties. While the plaintiff, as an accommodation endorser, was a secondary party, it was not possible to remit him to any "prior position" for his signature was not in the chain of title.

No other section of the statute being applicable, and there being no Illinois precedent squarely in point,[4] the court proceeded to decide the case on the law merchant,[5] a body of law which holds that the accommodation endorser is subrogated to the rights of the holder whom he has paid off as against all who were parties prior to his accommodation.[6] Thus, even though the plaintiff could not technically be deemed to be a holder in due course he was, under the subrogation theory, entitled to rights equal to those of such a holder for he had no knowledge of any infirmities at the time of his accommodation endorsement.[7]

FIXTURES—REMOVAL—WHETHER OR NOT A RIGHT OF REMOVAL OF FIXTURES CONFERRED BY LEASE IS LOST BY REASON OF A FORFEITURE OF THE LEASEHOLD—The case of *Getzendaner* v. *Erbstein*[1] presented the Appellate Court for the First District with the necessity of ruling on a problem which

[2] Ill. Rev. Stat. 1949, Vol. 2, Ch. 98, § 78.

[3] Ibid., Ch. 98, § 142. The court, in circumventing the effect of this section, made no attempt to interpret that portion which provides an exception to the general rule laid down therein. The exception states that an accommodating party satisfying an instrument made or accepted for accommodation is not remitted to his former position on the instrument as are other secondary parties under similar circumstances. Literal interpretation of this section would indicate that it does not apply to the accommodation endorser.

[4] The court referred to the abstract opinion in Graves v. Neeves, 183 Ill. App. 235 (1913), but said it was not possible to tell therefrom whether the maker had claimed any special defense as against the payee. If not, the problem in the instant case would be an entirely new one for Illinois.

[5] Ill. Rev. Stat. 1949, Vol. 2, Ch. 98, § 244.

[6] See Lill v. Gleason, 92 Kan. 754, 142 P. 287 (1914). That decision confined the subrogation theory to instances where the accommodation endorser could be termed an "irregular" one. The instant case drew no such differentiation. In fact, the plaintiff's signature appeared beneath that of the payee. He would, therefore, normally be considered to be a "regular" accommodation endorser.

[7] For further discussion, see Chafee, "The Reacquisition of a Negotiable Instrument by a Prior Party," 21 Col. L. Rev. 538 (1921), and notes in 28 Harv. L. Rev. 102 and 39 Ill. B. J. 300.

[1] 341 Ill. App. 594, 94 N. E. (2d) 746 (1950). Niemeyer, P. J., wrote a dissenting opinion.

has been resolved in many jurisdictions[2] but which has never previously been decided in Illinois. A lessor had there given a lease for a term upon the understanding that the lessee was to add to the improvements but was to have the privilege of removing such additions "at the expiration" of the term so created. During the term, the lessor served the tenant with a statutory five-day notice for possession because of non-payment of rent[3] and followed up such notice with a forcible entry and detainer proceeding. A judgment for possession was duly obtained. When the tenant was served with a writ of restitution based on such judgment, she attempted to remove the fixtures which she had added pursuant to the lease but was forcibly prevented from so doing by the landlord. The tenant thereafter filed the instant action against the landlord to recover as for a conversion of the fixtures. A motion to strike the complaint for failure to state a cause of action was sustained but, on appeal from that ruling, the Appellate Court, with one judge dissenting, reversed and remanded the case.

The majority of the court recognized the doctrine that a tenant for a definite term is ordinarily aware that all of his rights under the lease will be extinguished on a day certain, hence is not prejudiced by a requirement that he remove any fixtures he wishes to retain during the defined period or else lose his rights therein.[4] Where, however, the tenancy comes to an end prior to the normal expiration of the lease, as by the successful prosecution of a forcible entry and detainer proceeding, the majority felt the same certainty of termination would not appear until after judgment had been rendered therein, hence it considered it proper to recognize a right of removal for a reasonable period after the date of such termination.[5] The dissenting judge, on the other hand, laid stress on the fact that the statutory right conferred on the tenant to remove his fixtures[6] is limited to those cases where the possession is retained lawfully by him in his character as a tenant.[7] He believed that, as the plaintiff had wilfully breached the contract, her possession was unlawful[8] especially after a judgment for possession had been obtained, hence she should not be entitled to a greater

2 See annotations in 6 A. L. R. (2d) 322, 39 A. L. R. 1099 and L. R. A. 1918A 835.

3 Ill. Rev. Stat. 1949, Vol. 2, Ch. 80, § 8.

4 O'Connell v. Fay, 186 Ill. App. 113 (1914).

5 There is dicta to that effect in Fellows v. Johnson, 183 Ill. App. 42 (1913), but the tenant there concerned had agreed to an earlier cancellation of the lease upon six months' notice. See also Berger v. Horner, 36 Ill. App. 360 (1889).

6 Ill. Rev. Stat. 1949, Vol. 2, Ch. 89, § 34.

7 Savage v. University State Bank, 263 Ill. App. 457 (1931); Miller v. Bennett, 239 Ill. App. 306 (1925); Radcliff v. Hanger, 239 Ill. App. 292 (1925); Fellows v. Johnson, 183 Ill. App. 42 (1913).

8 Balaban & Katz Corp. v. Channel Amusement Co., 336 Ill. App. 113, 83 N. E. (2d) 27 (1948); Dreicke v. People's Lumber Co., 107 Ill. App. 285 (1903).

right than would be granted to a tenant who had fully performed his covenants.

There is some evidence of an effort on the part of the majority of the court to do substantial justice between the parties. Such being the case, the decision, if upheld, should go to alleviate some of the harshness of the common law rule which compelled a tenant to lose his right to remove his fixtures when, because of some act or omission, he had forfeited his interest under the lease.[9] Express language in the lease to that end would seem to be necessary, hereafter, if such a penalty is to be imposed on the defaulting tenant.

INTOXICATING LIQUORS—CIVIL DAMAGE LAWS—WHETHER OR NOT THE DRAM SHOP ACT ALLOWS A RECOVERY FOR INJURIES ARISING OUT OF AN ACCIDENT OCCURRING IN A SISTER STATE—For the first time in Illinois, a plaintiff requested that the Dram Shop Act[1] be given extraterritorial effect. In *Eldridge* v. *Don Beachcomber, Inc.*,[2] the following facts were alleged: that the plaintiff was a passenger in an automobile driven by Slaughter; that Slaughter while under the influence of intoxicating liquor purchased from the defendant in Chicago drove into the side of a truck in Hammond, Indiana; that the accident was due to Slaughter's intoxication; and that, by reason of the collision, the plaintiff was injured. The defendant moved for a dismissal of the suit, claiming that since the accident had occurred in Indiana an action under the Illinois statute could not be maintained. The trial court granted the motion and, upon appeal, the judgment was affirmed by the Appellate Court for the First District.

The court, in reaching its decision, alluded to the fact that the Illinois Dram Shop Act contains no specific provision extending its scope to instances where the act causing the injury occurred in a sister state. In refusing to extend the explicit words of the statute in such a situation the court recognized that its conclusion was supported by commonly accepted rules of statutory interpretation. Thus it is well established that a statute should not be given extraterritorial effect except where the legislature has expressly provided for such an extension.[3] Then, too, since the Act in

[9] Chicago Trust Co. v. 12-14 W. Washington St. Bldg. Corp., 278 Ill. App. 117 (1934).

[1] Ill. Rev. Stat. 1949, Vol. 2, Ch. 43, § 135, provides: "Every . . . person . . . injured, in person or property . . . by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication . . . of such person."

[2] 342 Ill. App. 151, 95 N. E. (2d) 512 (1950).

[3] Union Bridge & Construction Co. v. Industrial Commission, 287 Ill. 396, 122 N. E. 609 (1919).

question is to some degree penal in nature[4] and is in derogation of the common law, the strict construction utilized by the court appears to be appropriate. As the result of this decision both the intoxication and tortious act must occur within the boundaries of Illinois before an action under the Dram Shop Act can be maintained.

MUNICIPAL CORPORATIONS — PROPERTY — WHETHER STATUTE AUTHORIZING A MUNICIPALITY TO ACQUIRE LAND FOR PURPOSE OF PROVIDING OFF-STREET PARKING FACILITIES IS CONSTITUTIONAL—By passage of an ordinance, the City of Kankakee indicated its intention to exercise the special power of eminent domain allegedly conferred upon it and other Illinois cities by an amendment to the Cities and Villages Act,[1] with a view toward acquiring eight tracts of real estate in the business section of the city for use as off-street parking lots. Thereafter, certain persons, including the owner and operator of a private parking lot, filed suit to prevent the city officials from proceeding under the ordinance on the theory that the basic statute was void because it authorized the taking of property for a private use in violation of both the state constitution[2] and the Fourteenth Amendment to the United States Constitution. The trial court, after hearing evidence, decreed that the ordinance and Section 8 of the statute were invalid, upheld the constitutionality of the balance of the basic act, and issued the injunction. Both sides then took a direct appeal to the Illinois Supreme Court under a certificate that the validity of both a statute and an ordinance was involved. That court, in *Poole* v. *City of Kankakee*,[3] found the measures to be constitutional and ordered the injunction dissolved.

Starting from the premise that it is a legislative function to decide whether a public necessity exists[4] and that a court should inquire only as to whether or not the use authorized by the statute is a public one,[5] the court readily found that the statute contemplated a taking of land for a public purpose, The enormous increase, over the years, in the number of

[4] However, it is considered remedial to the extent that it cures a defect in the common law by allowing a recovery from one who would not have otherwise sustained any liability but who contributes to a certain extent to the resultant injury.

[1] Laws 1947, p. 499, as amended by Laws 1949, p. 563; Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, §§ 52.1—1 to 52.1—10.

[2] Ill. Const. 1870, Art. II, §13, and Art. IV, § 20, were particularly called upon to support the claim of unconstitutionality.

[3] 406 Ill. 521, 94 N. E. (2d) 416 (1950).

[4] Eckhoff v. Forest Preserve District of Cook County, 377 Ill. 208, 36 N. E. (2d) 245 (1941); Village of Depue v. Banschbach, 273 Ill. 574, 113 N. E. 156 (1916).

[5] People ex rel. Tuohy v. City of Chicago, 394 Ill. 477, 68 N. E. (2d) 761 (1946). All courts agree that the determination of whether a given use is or is not a public use forms part of the judicial function.

automobiles in operation has created traffic problems of national concern. Outmoded and narrow streets in business areas of cities are clogged daily by a degree of traffic congestion which strangles movement, harms business and directly affects the safety of those who must use the streets. In addition, emergency cars, ambulances, police, and fire vehicles are frequently delayed from reaching the scene of emergency or danger because of such conditions. Any legislative action of the type in question, being designed to alleviate traffic congestion, could well be said to be responsive to the public need.

It had also been urged that the statute improperly purported to give authority to the municipality to lease the parking lots so acquired, hence resulted in a taking for a private use. Any such use was said to be merely incidental to the public purpose manifested in the statute and would not result in creating purely private benefits.[6] In much the same way, the court overcame the argument that the use was necessarily private, because it enabled the municipality to enter into direct competition with individuals engaged in a private calling, by noting that the presence of private garages in the area did not prevent the operation of public garages if public necessity required their existence.[7] The legislature, by passing the basic statute, and the court, by holding it constitutional, have done much to bring about a solution for the problem which burdens every Illinois city.

MUNICIPAL CORPORATIONS—TORTS—WHETHER POLICE OFFICER OF MUNICIPAL CORPORATION IS IMMUNE FROM LIABILITY FOR HIS NEGLIGENCE WHEN OPERATING A MOTOR VEHICLE IN PERFORMANCE OF HIS DUTIES—The effect that a 1945 amendment to the Cities and Villages Act[1] is to have upon the personal liability of police officers has been indicated by the holding in *Both* v. *Collins*.[2] The plaintiffs there were injured when the automobile in which they were riding was struck by a police car negligently

[6] People v. City of Chicago, 349 Ill. 304, 182 N. E. 419 (1932); Barsaloux v. City of Chicago, 245 Ill. 598, 92 N. E. 525 (1910).

[7] Compare the instant case with the holding in People ex rel. Current v. Wood, 391 Ill. 305, 62 N. E. (2d) 809, 161 A. L. R. 718 (1945).

[1] Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 1—15. The statute makes a municipality having a population of 500,000 or over the indemnitor to a police officer against whom a judgment has been recovered for ". . . any injury . . . while the member is engaged in the performance of his duties as policeman . . ." For a discussion of a somewhat comparable problem relating to firemen, see note to Hansen v. Raleigh, 391 Ill. 536, 63 N. E. (2d) 851 (1945), in 24 CHICAGO-KENT LAW REVIEW 257-62.

[2] 339 Ill. App. 437, 90 N. E. (2d) 285 (1950). The facts in the later case of Erickson v. Fitzgerald, 342 Ill. App. 223, 96 N. E. (2d) 382, a case achieving the same result as the instant one, do not clearly indicate the nature of the function being performed by the police officer other than to note that he was "operating a police car in the performance of a governmental function."

operated by the defendant who was, at the time, on his way to a police station to interrogate a criminal suspect. The Appellate Court for the First District, after reversing a judgment in favor of the plaintiff on the ground of error not here pertinent, proceeded to dispose of a claim of immunity pressed on it by the defendant in order to aid the trial court in the conduct of the new trial there ordered. The defendant had relied primarily upon the case of *Taylor* v. *City of Berwyn*[3] in which the question had been presented as to whether or not a police officer, in fresh pursuit of certain felony suspects, was engaged in a governmental function. It having been decided that he was, the court then refused to hold him liable for injuries growing out of his negligent operation of a police car in the course of that pursuit. The doctrine of immunity from tort liability when engaged in performance of governmental functions is well established with regard to municipalities[4] as well as to other governmental agencies, but the Taylor case was apparently the first in which the immunity was extended to protect the negligent police officer personally.

As neither the officer nor the municipality, after the holding in the Taylor case, would be liable to respond in damages to the injured person, the legislature, in 1943, enacted a provision which repealed any immunity favoring the municipal corporation for injuries caused by the negligent operation of motor vehicles driven by members of police departments while on duty,[5] but presumably left the officer still protected. The statute was again amended in 1945, this time to make it apply to "any injury" inflicted by the police officer, whether by motor vehicle or not, but the corporate liability was changed to that of indemnitor on any judgment pronounced against the officer.[6] It would seem that the legislative intent must have been to extend the liability of the police officer, and correspondingly lessen the immunity, otherwise there could be no judgment requiring indemnity. Whether or not the statute nullified the holding in the Taylor case, the instant case has certainly operated to minimize the scope thereof for it establishes liability on the officer's part for injuries resulting from his negligent operation of a motor vehicle when not in "fresh pursuit". By implication, at least, it also casts doubt upon the continued validity of the holding in the Taylor case and, when a proper situation arises, may help lead to the reversal thereof.

3 372 Ill. 124, 22 N. E. (2d) 930 (1939).

4 In general, see Green, "Freedom from Litigation," 38 Ill. L. Rev. 355 (1944).

5 Ill. Rev. Stat. 1943, Ch. 24, § 1—15. The statute then provided that only the municipality was to be liable for "any injury . . . caused by the negligent operation of a motor vehicle by a member of the police department."

6 Laws 1945, p. 477.

VENUE—NATURE OR SUBJECT OF ACTION—WHETHER OR NOT AN OBJECTION TO VENUE MAY BE RAISED BY A DENIAL TYPE OF ANSWER—The plaintiff in *Dever* v. *Bowers*[1] filed a complaint in a wrongful death action in Gallatin County against two defendants, neither of whom were residents thereof. The complaint charged that the death occurred in a collision at an indicated point on an Illinois highway. That highway followed the county line between Gallatin and White counties but, at the trial, there was evidence that the accident had happened on that part of the road located in White County.[2] The defendants, without utilizing any preliminary motion, filed an answer categorically denying each paragraph of the complaint. The ensuing trial resulted in a verdict and judgment for the plaintiff. On appeal therefrom, the defendants assigned error on the ground the trial court was without jurisdiction as the record showed that the deceased had crossed the center line of the road into White County prior to the moment of the collision, hence no part of the transaction out of which the action arose had occurred in Gallatin County. The Appellate Court for the Fourth District, nevertheless, affirmed the judgment in favor of the plaintiff.

The defendants had argued that no preliminary motion to test the jurisdiction was necessary as they had a right to raise the matter by an answer,[3] event though an attack might have been offered by a motion based on Section 48 of the Civil Practice Act.[4] They also relied on the proposition that a failure to raise a defense of the type in question by motion did not preclude them from raising that defense by answer.[5] The court, while not accepting the premise that a motion under Section 48 would be a proper way to raise an objection to venue,[6] agreed that the defendants

[1] 341 Ill. App. 444, 94 N. E. (2d) 518 (1950).

[2] If the accident had occurred in Gallatin County, plaintiff's choice of place for suit would have been proper under the election provided by Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 131, which permits the bringing of suit where one or more of the defendants reside or where "the transaction or some part thereof occurred out of which the cause of action arose."

[3] Defendants undoubtedly labored under the belief that, by denying the allegations in the complaint in categorical fashion, they thereby denied every allegation set forth in the complaint, including the venue allegations, so as to raise an issue concerning venue or jurisdiction.

[4] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 172(b), indicates the use of a motion where the "court has not jurisdiction of the subject matter . . ."

[5] Ibid., Ch. 110, § 172(4), so states.

[6] There would seem to be some confusion over the meaning to be ascribed to certain of the grounds listed in the statute to support a motion filed under Section 48 of the Civil Practice Act. The court in the instant case, with all correctness, indicated that the specific ground that "the court has not jurisdiction of the subject matter" relates only to matters concerning inherent jurisdiction, or the power to hear and determine the type of case presented, as distinguished from jurisdiction in terms of venue. See 21 C. J. S., Courts, §§ 15c and 23. For confusion as to the meaning of the words "capacity to sue," used in Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 172(c), see Classen v. Heil, 330 Ill. App. 433, 71 N. E. (2d) 537 (1947), and comments thereon in 26 CHICAGO-KENT LAW REVIEW 38-9 and 36 Ill. B. J. 194. Elaboration upon statutory language may be desirable in the interest of clarity.

had the right to preserve the venue objection by answer, particularly since the statute now permits the pleading of matter in abatement, such as lack of venue, along with matter in bar of the action.[7]

The significance of the case, however, lies in the fact that the court, while it recognized that the defendants were entitled to proceed as they had done, found the denial form of answer insufficient to raise any issue as to matters relating to venue.[8] In that regard, the court required that the answer should disclose compliance with certain particulars both as to form and allegation, namely: (1) the objection to venue should be separately designated;[9] (2) the answer should be specific as to the facts pertaining to the matter in abatement;[10] and (3) the objection raised had to be insisted upon at the trial on the merits in order that there be no waiver of the defense.[11] The particularity required of defenses in abatement under the former procedure[12] has not, apparently, been changed in any substantial fashion by anything to be found in the Civil Practice Act.[13]

WILLS—CONSTRUCTION—WHETHER OR NOT BEQUEST OF MONEY ON DEPOSIT INCLUDES MONEY CONTAINED IN TESTATOR'S SAFETY BOX LOCATED IN VAULT OF A BANKING INSTITUTION—The Supreme Court of Illinois, having granted leave to appeal from the decision of the Appellate Court for the First District in the case of *Lavin* v. *Banks*,[1] followed up that action by reversing the decision of the Appellate Court. The case had re-

[7] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 167(3).

[8] See Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856 (1906), to the point that a denial type of answer, comparable to the general issue of the common law pleading system, does not serve to formulate any issue as to matters properly presentable under a defense in abatement.

[9] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 167(1).

[10] Gillian v. Gray, 14 Ill. 416 (1853).

[11] The possibility that an error in venue may be cured by a failure to assert the same is acknowledged by Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 135.

[12] People's Bank of Bloomington v. Wood, 193 Ill. App. 442 (1914), provides a good illustration of the meticulousness required in dilatory pleading.

[13] The defendants in the instant case apparently recognized the error in venue prior to pleading, hence were in a position to take advantage thereof during the pleading stage. If the error had not become apparent until during the course of the trial, and there was no culpable negligence on the part of the defendants in not ascertaining the facts prior to that time, the trial court might have, in keeping with the spirit of the Civil Practice Act, permitted withdrawal of the answer to the merits or the amendment thereof, so as to allow assertion of the defense in abatement thus disclosed. The factual situation, however, suggests that it might be desirable to amend the venue provisions of the Civil Practice Act to assimilate civil procedure with the rule formerly existing as to criminal prosecutions for crimes committed on or near county lines: Ill. Rev. Stat. 1945, Ch. 38, § 704.

[1] 406 Ill. 605, 94 N. E. (2d) 876 (1950), reversing 338 Ill. App. 612, 88 N. E. (2d) 512 (1949), criticized in 28 CHICAGO-KENT LAW REVIEW 175.

quired a construction of a provision in a testator's will, one by which he had bequeathed to his wife "all monies on deposit in my name in any bank or banking institution," as the same might have bearing on the right to a substantial amount of cash found in a safety deposit box rented by the testator in the vault of a safety deposit company which was a wholly-owned subsidiary of, and located within premises operated by, a banking institution. The trial court had decreed that the money in question did not pass to the widow. The Appellate Court, affording a liberal construction in favor of the widow because she was the legatee named to receive the disputed bequest,[2] reversed and adopted the opposite construction on the ground that the ordinary testator would not distinguish between a bank and its subsidiary safety deposit company, particularly when the latter was to all appearances a component part of the former.[3] The Supreme Court, however, reversed and reinstated the trial court decision.

It decided that the controlling rule of construction to be applied was one which called for the giving of an ordinary meaning to the words employed by the testator in order to determine his intent at the time of making the bequest in question.[4] It reasoned, in the light of this principle, that the term "money on deposit" in a bank described more nearly the customary relationship of debtor and creditor which arises between a bank and a depositor whereby the bank assumes control over the money so deposited and, in return, gives the depositor the right to withdraw not the same money but an equivalent amount from the account. The dissimilarity between this relationship and the one which exists between a box renter and a safe deposit company, one under which the customer places valuables in a receptacle for safekeeping but, more significantly, retains complete control over his property, is quite marked. The cash in question may have been deposited, *i. e.* placed in the safety deposit box within the bank building, but it was not "on deposit" in the bank in the usually accepted sense of that term.

2 See 69 C. J., Wills, § 1151. The Supreme Court refused to apply this rule because the record did not reveal the value of the property the widow would take under the will nor the value which would attach to her interest if there had been no will or if she had renounced its benefits. The rule that favors a construction which most nearly conforms to the law of inheritance, ilustrated by Dahmer v. Wensler, 350 Ill. 23, 182 N. E. 799, 94 A. L. R. 1 (1932), was said to be inappropriate for the same reasons.

3 The Appellate Court had relied on Ill. Rev. Stat. 1949, Vol. 2, Ch. 114, § 334 et seq., which regulates the keeping and letting of safety deposit boxes but which is expressly made inapplicable to state and national banks whose vaults are deemed an integral part of the banking business, as justifying the result attained.

4 Stagg v. Phenix, 401 Ill. 134, 81 N. E. (2d) 565 (1948).

WILLS—REQUISITES AND VALIDITY—WHETHER AN AGREEMENT DESIGNED TO EXTINGUISH A MORTGAGE DEBT UPON THE DEATH OF THE MORTGAGEE IS TO BE REGARDED AS A TESTAMENTARY DISPOSITION REQUIRING ATTENTION TO THE FORMALITIES OF A WILL—The administrator of a mortgagee's estate sought, in *Miller* v. *Allen*,[1] to forecolse a purchase money mortgage which provided that the note secured thereby should be considered as fully paid on the mortgagee's death, if such death occurred before full payment of the debt had been made. The defendant-mortgagor, who relied on the provision for discharge as a defense to the suit, had been a tenant on the mortgagee's farm for more than twenty years prior to the time when it was conveyed to him on purchase money mortgage and this rather unusual agreement was made.[2] When reversing a trial court decision in favor of plaintiff, the Appellate Court for the Fourth District rejected the argument that the provision for discharge of the mortgage constituted an attempted testamentary disposition which was ineffective because of non-compliance with statutory requirements relating to wills.[3] It was, instead, held that a mortgage containing such a stipulation amounted to a valid contract conferring a present, binding right on the promisee-mortgagor over which the promisor-mortgagee no longer had any control.[4]

The decision marks acceptance by Illinois, with possible reservations, of a majority view which upholds the validity of agreements of this character provided the same are contemporaneous with the creation of the debt or legal obligation.[5] The court was, however, faced with the apparently contrary precedent of *Jennings* v. *Neville*.[6] In that old case, a father who held several notes of his son had agreed that, in case the son should pay two bequests upon the father's death, the notes should be cancelled. It was there held that, even though the agreement was executed on the same day as the giving of the notes, the agreement was testamentary in character and, being such, was ineffectual because not executed according to the statute relating to wills. The court in the

1 339 Ill. App. 471, 90 N. E. (2d) 251 (1950). Leave to appeal has been denied.

2 It would appear, from the synopses of the cases dealing with such agreements as listed in 127 A. L. R. 635, that the creditor and debtor are more often related to one another as, for example, father and son.

3 Covenants in a mortgage made binding on a mortgagee are rare, but would usually be upheld, even without the mortgagee's signature, on the same basis as is used in case of covenants or assumption agreements in a deed poll. The absence of signature and attestation, however, would prevent the instrument from operating as a will: Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 194.

4 Although most decisions upholding the validity of such agreements have been predicated on the theory that the agreement constitutes a valid and enforcible contract, validity has sometimes been justified on the theory that a valid gift has been made thereby: 127 A. L. R. 635.

5 The cases adopting both the majority and the minority views on this problem are collected in an annotation in 127 A. L. R. 635.

6 180 Ill. 270, 54 N. E. 202 (1899).

instant case, declaring that the Jennings case was not a precedent and that "no exact precedent" had been directed to its attention,[7] dismissed that case with an observation to the effect that the parties in the Jennings case were attempting to put into effect a prior will which had been destroyed, from which it could be inferred that a testamentary disposition was intended by the agreement. The court also observed that the notes giving rise to the son's legal obligation were not conditioned in any manner at the time of their execution. By contrast, it was said that the note and mortgage in the instant case "contained the precise conditions relating to payment of such obligations."[8]

Language utilized by the court in the instant case certainly does not make it any too clear why the holding therein did not, in effect, amount to a refusal to follow the position taken by the former Illinois Supreme Court in the Jennings case.[9] Certain of the vague distinctions which the court draws would seem to indicate that an agreement to extinguish, at the death of the creditor, a contemporaneously incurred debt would have to be executed as a will in order to be valid, if the parties to the agreement had a testamentary intent at the time of the making thereof, but not if they were simply in a bargaining frame of mind. Such an intent, apparently, would have to be established by extrinsic evidence for the existence of such an agreement, by itself, would ordinarily tend to prove merely a contractual state of mind. Yet the nature of the agreement is so unusual, even foreign to the customary creditor-debtor situation, as almost to force the conclusion that the creditor's primary purpose was one of testamentary character. In addition, while it is clear that, to be valid, the agreement must be made contemporaneously with the debt, the exact meaning to be given to the term "contemporaneously" is not made too clear. The decision in the Jennings case would seem to make it evident that such an agreement is not necessarily valid even though it be made on the same day that the legal obligation is incurred.

[7] No mention was made of two Appellate Courts decisions dealing with the same type of problem. In May v. May, 36 Ill. App. 77 (1890), a maker of notes defended against a suit thereon, after his father's death, on the ground that the father, payee, had agreed that at the payee's death the notes were to be discharged. The court there held the transaction to be an incomplete gift, there being an intention to give but no delivery. Mathews v. Mathews, 86 Ill. App. 654 (1900), upholds the validity of an agreement between a father and son to the effect that a note of the son held by the father would be cancelled on the father's death. That agreement was held to be neither a gift nor a testamentary devise but a valid contract. While the holding therein would seemingly contradict the decisions in the May and Jennings cases, the opinion makes no mention of either of these cases.

[8] 339 Ill. App. 471 at 474, 90 N. E. (2d) 251 at 253.

[9] The present court, judged by its denial of leave to appeal from the instant decision, may also be indicating a willingness to reject the former holding.