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Torts - Survey of Illinois Law for the Year 1950-1951

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States Supreme Court, treating those orders received and shipped directly from the head office and not forwarded or handled by the Chicago office as being a form of interstate commerce, declared for an exemption from taxation. The test to be applied would, then, seem to turn on whether the sale is (1) made within the state, (2) is originated there by local agents even though accepted and filled outside, or (3) is completed there by some form of delivery made by or through the local agent, so as to constitute a local transaction. All other dealings would appear to be interstate in character, hence non-taxable.

TRADE REGULATION

Except for two decisions noted elsewhere, one dealing with the right of a person doing business under an assumed name to enforce the contracts so made,[62] and the other relating to the validity of the 1947 Price Posting Act, [63] it could be said that no issue of significance has developed in the field of trade regulation under state law.

VIII. TORTS

The derivative nature of certain tort causes of action is illustrated by two cases arising during the survey period. In the first, that of *Welch* v. *Davis*,[1] the Appellate Court for the Third District affirmed a judgment for defendant notwithstanding a verdict in favor of plaintiff in a wrongful death action, brought on behalf of a dependent daughter whose mother had been shot and killed by her second husband prior to the time he killed himself, because of a belief that an administrator can successfully sue only upon a showing that the decedent, if living, would have been able to recover. On the basis that the Married Women's

[62] See discussion relating to Grody v. Scalone, 408 Ill. 61, 96 N. E. (2d) 97 (1950) under the heading of Contracts, particularly notes 1 to 3, ante.

[63] Ante, this section, note 20, for the holding in Lombardo Wine Co. v. Taylor, 407 Ill. 454, 95 N. E. (2d) 607 (1950).

[1] 342 Ill. App. 69, 95 N. E. (2d) 108 (1950). On leave to appeal, the Supreme Court, 410 Ill. 130, 101 N. E. (2d) 547 (1951), not in the period of this survey, reversed and declared the child's action was not derivative, hence not barred by the fact that the mother, if she had survived, would have been unable to sue. See note in 40 Ill. B. J. 242.

Acts[2] had not disturbed the alleged common law rule prohibiting the maintenance of a tort action by a wife against her husband for personal injuries inflicted by him on her,[3] the court held the wrongful death suit to be derivative in character, hence barred by the same reasoning. In the other case, that of *Monken* v. *Baltimore & Ohio Railroad Company,*[4] however, the Appellate Court for the Fourth District permitted a husband to recover for the destruction of his automobile and an even larger sum for loss of his wife's consortium, growing out of a crossing collision, while simultaneously denying a recovery for personal injuries suffered by the wife, who drove the car in the husband's absence, because she was found to be guilty of contributory negligence. The holding was conditioned on the fact that it was made to appear that the wife was not then acting as agent or servant for her husband so as to prevent an application of the doctrine of imputed negligence.[5] There is occasion to doubt the validity of one or the other of these two decisions since it would seem as if the person seeking to recover on a tort committed by or against a third person must rest his action either on an independent right or else on one derived through another. If on the latter, the derivative right should be subject to all those defenses which would be available against a claim of invasion of the primary right.

Only one other case dealt with an issue of tort law not comprehended within the general topic of negligence and that was the libel suit entitled *Mitchell* v. *Tribune Company.*[6] The newspaper there concerned had published two stories relating to plaintiff in which it had given plaintiff's name, had included the nickname of "Chink," and had referred to him as "Negro." Plaintiff apparently believed these additions to his name to be libelous *per se,* possibly because he thought the appellation "Chink" was intended to represent him to be Chinese, which he

2 Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 1 et seq.

3 Main v. Main, 46 Ill. App. 106 (1892).

4 342 Ill. App. 1, 95 N. E. (2d) 130 (1950).

5 Palmer v. Miller, 380 Ill. 256, 43 N. E. (2d) 973 (1942).

6 343 Ill. App. 446, 99 N. E. (2d) 397 (1951). Leave to appeal has been denied.

was not, and so too with respect to "Negro." In a brief opinion, the Appellate Court for the First District held it proper to strike a complaint based on such allegations, but lacking in any statement of special damage, because the references were said not to be libelous *per se*,[7] without which plaintiff had no case. The printing of "fighting" words by way of characterization would seem, however, to be a developing form of actionable defamation.[8]

Negligence cases were both varied and interesting. The attractive nuisance case of *Smith* v. *Chicago & Eastern Illinois Railroad Company*[9] represents no new turn in the law on that subject but it does serve to emphasize a predilection on the part of Illinois courts in favor of the majority view with respect to liability for artificial accumulations of water so as to form attractive nuisances[10] while also providing a cautionary note regarding the proof necessary in such cases. The railroad there concerned had, at one time, created an artificial reservoir on its land, adjacent to a highway, for use in servicing its locomotives but had discontinued such use leaving the property open to fishermen, swimmers and the like who frequented the property. A pier which had, at one time, there been maintained had collapsed but the timbers had been allowed to remain and to project into the pond slightly below the surface of the water.[11] The decedent, a neighboring child under two years of age, was found floating on the surface of the water, within an hour after it had last been seen, bearing an extensive bruise on the side of its head. There was no medical testimony that death had been caused by drowning and it was problematical whether or not the child had fallen against the timbers of the pier and, knocked unconscious thereby,

[7] The court relied on Wright v. F. W. Woolworth Co., 281 Ill. App. 495 (1935).

[8] See, for example, Dilling v. Illinois Pub. & Ptg. Co., 340 Ill. App. 303, 91 N. E. (2d) 635 (1950).

[9] 343 Ill. App. 78, 95 N. E. (2d) 95 (1950).

[10] On that point, see note on Plotzki v. Standard Oil Co. of Indiana, 228 Ind. 518, 92 N. E. (2d) 632 (1950), in 29 CHICAGO-KENT LAW REVIEW 172.

[11] The presence of additional attractive features is important in view of the contrast provided by Peers v. Pierre, 336 Ill. App. 134, 83 N. E. (2d) 20 (1948), and Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114 (1895).

had ended up in the water. A judgment for the administrator of the child's estate, in a wrongful death action following the attractive nuisance theory, was reversed by the Appellate Court for the Third District because it found a fatal variance between the proof and the complaint which had charged the proximate cause of death had been by drowning. The court indicated that it could have reached the same result on the basis that the artificially accumulated water was not, *per se,* an attractive nuisance.[12]

Presence of a duty on defendant's part is, of course, an essential element in every negligence case. Carelessness on the part of a lender who had demanded that the borrower take out, and pay for, collision insurance on an automobile, which was mortgaged as security for the payment of both loan and insurance premium, back-fired in the case of *Schmidt* v. *Sinclair.*[13] The Appellate Court for the First District there found it to be the duty of, and not merely an act of accommodation on the part of, the lender to promptly procure and pay for the insurance. It was, therefore, found possible to subject him to liability for damages incurred when he failed to procure insurance for approximately thirty days after the loan transaction and, in the interim, the automobile, in the possession of the borrower, had become damaged in a collision. An attempt to avert liability on the theory that, if insurance had been promptly procured, it would not have covered the particular loss was rejected as being without merit.

Automobile guest cases also involve problems over the duty owned by the driver to his guest. In that regard, there has been difficulty in arriving at a satisfactory definition of wilful and wanton conduct for use in such cases because simple negligence will be inadequate for purpose of recovery.[14] The problem is

12 Reliance was placed on Wood v. Consumers Co., 334 Ill. App. 530, 79 N. E. (2d) 826 (1948).

13 342 Ill. App. 484, 97 N. E. (2d) 129 (1951).

14 Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 58a, denies the guest a right to recover against the owner or operator, for injuries arising from the operation of the automobile in which the guest is riding, unless the accident "shall have been caused by the wilful and wanton misconduct" of the driver of such vehicle.

particularly acute where the court is asked, as on a motion for judgment notwithstanding the verdict, to decide as a matter of law that the precise conduct on defendant's part was or was not wilful and wanton. A violation of a speed regulation[15] or a failure to apply brakes[16] will not, alone, establish a guest case but, according to *Levanti* v. *Dorris*,[17] a combination of these factors, especially when added to an attempt to negotiate a highway curve near a marked cross road and a traffic warning sign, in the face of cars approaching in full view, could well amount to wilful and wanton conduct on the part of the driver. A special finding of wilful and wanton misconduct, based on proof of that character, was there approved.

The defense of assumption of the risk, not entirely eliminated from the law, appeared in two rather novel situations. While certain types of workers may be said to assume risks inherent in their occupations, they are entitled to protection against unusual or extra-ordinary conditions of which the employer may be aware. A racing jockey sued a horse owner, in the first case, a negligence action entitled *Gray* v. *Pflanz*,[18] basing his claim on the theory that the proximate cause of his injury, produced when the horse he was riding crashed into a fence during the running of a race, was the owner's failure to warn him of an unusual peril, to-wit: that the horse was blind. A judgment for plaintiff was ordered reversed by the Appellate Court for the Fourth District when it failed to find evidence in the record that the defendant, who had hired the jockey to ride the race, was in any way aware of the horse's blindness, if in fact it was blind, or had represented its condition to be sound. Absent such knowledge or representation, the court said the risk was one inherent in the particular occupation for which no recovery could be permitted.

[15] Bartolucci v. Falleti, 382 Ill. 168, 46 N. E. (2d) 980 (1943).
[16] Clarke v. Storchak, 384 Ill. 564, 52 N. E. (2d) 229 (1944).
[17] 343 Ill. App. 355, 99 N. E. (2d) 398 (1951). Leave to appeal has been denied.
[18] 341 Ill. App. 527, 94 N. E. (2d) 693 (1950).

An attempt was made in the second case, that of *Meyer* v. *Riverview Park Company*,[19] to extend the doctrine of the case of *Neering* v. *Illinois Central Railroad Company*,[20] one which would hold a carrier liable for injury done to a passenger by the criminal assault of a trespasser or the like, permitted to intrude upon a railroad station, to a case involving a dispute between two patrons of the same ride in defendant's amusement park. Following one seemingly insignificant assault over a tussle for a seat, the plaintiff shortly thereafter placed himself in a position where he could be, and was, severely injured by his original assailant. He sued the amusement park owner on the theory that it had the duty, by reason of its knowledge of the prior altercation, to protect him, a fare-paying passenger, from further assaults. The court held that one element of the Neering doctrine required that the passenger should, himself, exercise due care to avoid assault, which element it found to be lacking in the instant case inasmuch as plaintiff, instead of seeking protection from defendant's employees had deliberately exposed himself to the possibility of danger. Recovery was, therefore, denied.

Railroad and highway crossing collisions occur most frequently because both the train and the automobile involved are in motion at the time but the presence of a stalled automobile on a track at a highway crossing is not an unknown phenomenon and more than one serious accident has been caused thereby. The case of *Janjanin* v. *Indiana Harbor Belt Railroad Company*,[21] dealing with that type of situation, is interesting because the court said it could find no state authority as to the degree of duty on the part of the autoist to discover the perilous nature of his predicament, and to abandon his effort to preserve his property in the interest of saving his life or limb, in the face of an onrushing train. The railroad had there urged adoption of the federal

[19] 342 Ill. App. 379, 96 N. E. (2d) 379 (1950). Leave to appeal has been denied.

[20] 383 Ill. 366, 50 N. E. (2d) 497 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 152.

[21] 343 Ill. App. 491, 99 N. E. (2d) 578 (1951). Leave to appeal has been denied.

view on the subject,[22] one which requires the driver to vacate, rather than to remain in, a position of known danger so as to make him guilty of contributory negligence if he does not leave but continues in his effort to rescue his property. It sought, in that fashion, to provide support for the action of a trial judge in denying a new trial and entering judgment for the defendant carrier notwithstanding a verdict for the driver-plaintiff. The Appellate Court for the First District, however, disapproved that view of the law, except as it might be applied in cases where the crossing is located on a little traveled road in a rural area where the likelihood of a stalled car is relatively rare, and preferred to hold that it was equally the duty of the railroad to be alert for the possibility, in well populated areas, so at to be able to prevent harm to the stalled car and its driver if conscious of his presence in time to avoid injury. The court did not advocate adoption of a "last clear chance" doctrine but did say it was irrational to expect that a reasonable man would immediately abandon his stalled automobile, to remove himself from a place of potential danger, when by dint of some effort he might not only preserve his own property but also prevent injury to others in the event a train was derailed by the collision, particularly where he was given no special warning of the approach of the train. It refused, therefore, to conclude that the decedent, killed in such a collision, was guilty of contributory negligence as a matter of law and ordered the verdict reinstated.

This survey might well be closed with a word of caution to some, if not all, members of the Illinois bar in whose interest it is prepared. Personal injury lawyers in the Chicago area must certainly take note of the holding in *Schuman* v. *Chicago Transit Authority*.[23] The Supreme Court there held the notice provisions of the statute creating the transit authority[24] to be constitutional

22 See Gulf, M. & O. R. Co. v. Freund, 183 F. (2d) 1005 (1950). Johnsen, J., wrote a dissenting opinion.

23 407 Ill. 313, 95 N. E. (2d) 447 (1950).

24 Ill. Rev. Stat. 1951, Vol. 2, Ch. 111⅔, § 341.

and affirmed a judgment dismissing the cause for non-compliance with the statute. The case also indicates that the furnishing of an accident report to the authority is not the type of notice required by law,[25] but that formal notice, of the sort customarily used in cases involving personal injury claims against municipalities,[26] is to be desired. Prompt preparation and service of such a notice may be vital to the success of the client's cause.

25 See also Hayes v. Chicago Transit Authority, 340 Ill. App. 375, 92 N. E. (2d) 174 (1950).

26 Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 1—11. See also Kennedy v. City of Chicago, 340 Ill. App. 100, 91 N. E. (2d) 138 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 380-1, on the type of notice required in suits based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 512 et seq.