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Survey of Illinois Law for the Year 1954-1955

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VII. PUBLIC LAW

CONFLICT OF LAWS

In the field of Conflict of Laws, a rather curious decision was handed down by the Appellate Court for the First District in the case of *Simpson* v. *Simpson*.[1] Its impact is difficult to assess since the point for which it might be deemed important seems not to have been actually considered by the court, although a holding thereon is implicit from the result achieved. In the subject case, the plaintiff had obtained a divorce in Tennessee supplemented by an appropriate decree for the support of a minor child whose custody she had been awarded. The defendant, sometime thereafter, became a resident of Illinois and subsequently a decree was entered in Illinois adopting the Tennessee decree of divorce and order for child support, and, inter alia, setting forth verbatim the applicable Tennessee laws relating to interest.[2] Pursuant to the Illinois decree, a judgment was entered for support money in arrears dating back prior to the time the Illinois decree was entered, but the court refused to allow interest on each installment from and after the time it became due. The Appellate Court, however, held that the plaintiff should receive interest on successively maturing installments, and moreover, in the amount of six per cent per annum, the rate provided by the

* Parts I to VI of this survey appeared in the issue for December, 1955, Vol. 33, No. 1. Limitations of space prevented the full publication thereof in that number.

1 4 Ill. App. (2d) 526, 124 N. E. (2d) 573 (1955). Leave to appeal has been allowed.

2 Williams Tenn. Code Ann. 1934, Vol. 5, Tit. II, §§ 7301-2 and 7307-8.

Tennessee Code.[3] This result seems to be consistent with the general rules respecting damages, which state that the law of damages is deemed to be substantive and, normally, the law of the place where the cause arose would be applicable. However, this appears to be the first time that the precise point has been decided in Illinois, nor does a cursory inspection reveal any decisions thereon in other American jurisdictions.

CONSTITUTIONAL LAW

The field of constitutional law, although active during the survey period, has not produced any startling innovations, but some of the decisions are noteworthy for the manner in which they apply or define recognized principles. The first of these is *American Civil Liberties Union et al.* v. *The City of Chicago,*[4] which is treated herein in its entirety, since there are no other cases of importance involving questions of administrative law. In the subject case, the plaintiff questioned the validity of a municipal ordinance[5] which, in essence, permitted the censorship of motion picture films on the ground that they were immoral or obscene. The three principal objections raised by the plaintiff were that censorship is a prior restraint on free speech and always unconstitutional; that the standards, "immoral and obscene", are so vague as to violate due process of law; and that the scope of judicial review is inadequate. In answer to the first objection, the court took the position that the State had a legitimate interest to protect and concluded that some censorship was possible. As to the second objection, it was held that the word "obscene"—immoral was treated as a synonym—had acquired a relatively precise legal meaning, at least sufficient to meet the requirements of due process. The test laid down for obscenity was the effect of the work as a whole upon the normal average person; that is, whether its calculated purpose and dominant effect was to

[3] Ibid., § 7302.

[4] 3 Ill. (2d) 334. 121 N. E. (2d) 585 (1954), noted in 43 Ill. B. J. 504, 1954 Ill. L. Forum 678, 53 Mich. L. Rev. 1180, and 8 Vanderbilt L. Rev. 638. An appeal to the United States Supreme Court was dismissed for want of a final judgment: 348 U. S. 979, 75 S. Ct. 572, 99 L. Ed. (adv.) 470 (1955).

[5] Mun. Code Chicago 1939, Ch. 155, §§ 1 and 3.

arouse sexual desires to the extent of outweighing whatever artistic or other merit it may possess. It is to be noted that any test with respect to particular portions or the effect on particular persons was repudiated. On the third issue, the Supreme Court agreed with the plaintiff and remanded the case for further proceedings. On such further proceedings, it was ordered that the plaintiff not carry the burden of proving that the censor's action was arbitrary and unreasonable, but that therein it must affirmatively be made to appear that the film is within the proscription of the ordinance.

The principle[6] that the state has an interest in the welfare of children which, at times, may exceed that of the parents has received further impetus in the case of *People ex rel. Nabstedt* v. *Barger.*[7] Therein, an attack was made on Section 15 of the Family Court Act as amended,[8] which authorizes the appointment of a guardian for the purpose of consenting to the adoption of children where one or both parents are mentally ill. The court, although recognizing that the parent(s) had a remote interest in the event that they should recover, felt that the state's interest was paramount, and that such interest as the parent(s) might have was adequately protected by the conditions imposed, specifically, that the mental illness must have existed for the three years immediately preceding the appointment of the guardian and that two qualified physicians testify that the parent(s) would not recover in the foreseeable future.

A novel, though unsuccessful, attack was made on the Retailer's Occupation Tax Act[9] in the case of *Diana Shoe Stores Company* v. *Department of Revenue.*[10] The plaintiff proceeded on the theory that no taxing or revenue statute may extend beyond the biennium of the General Assembly which enacted it, and

[6] For example, see People v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769 (1952), and Larson, "Child Neglect in the Exercise of Religious Freedom," 32 CHICAGO-KENT LAW REVIEW 283 (1954).

[7] 3 Ill. (2d) 511, 121 N. E. (2d) 781 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 249. See also Section V, Family Law, note 10.

[8] Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 209. See also ibid., Ch. 4, § 3—4½.

[9] Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 440 et seq.

[10] 5 Ill. (2d) 112, 125 N. E. (2d) 71 (1955).

relied on constitutional stipulations providing that all appropriations shall terminate at the expiration of the first fiscal quarter after the adjournment of the next regular session,[11] and that the General Assembly may tax occupations as it shall, *from time to time,* direct.[12] The plaintiff urged, and the court rejected, an inference that the two provisions were correlatives, and therefore, revenue measures were limited in the same manner as appropriations.

Regulations pertaining to loyalty were involved in two cases decided during the past year. In the case of *In re Anastaplo,*[13] an applicant for admission to the bar, after having passed the written examination, refused to answer questions concerning his communist affiliations, and the Committee on Character and Fitness refused to certify him for admission. After determining that the Committee neither exceeded its authority nor abused its discretion, the Supreme Court was faced with the contention that such inquiries violated the right of free speech under the first and fourteenth amendments to the United States Constitution. This contention was repelled on the grounds that the government's interest in the character of members of the bar was sufficient to justify any invasion which might have occurred, and also that the practice of law was a privilege upon which reasonable conditions might be imposed. In the other such case, that of *Chicago Housing Authority* v. *Blackman,*[14] the Supreme Court held invalid that part of the Housing Authority Act which requires tenants in public housing to execute a loyalty oath[15] for the reason that it fails to distinguish between knowing and innocent affiliation with communist groups. As such, the court felt it to be a purely arbitrary requirement, offensive to due process of law. The case is made more interesting by the fact

[11] Ill. Const. 1870, Art. IV, § 18.

[12] Ill. Const. 1870, Art. IX, § 2.

[13] 3 Ill. (2d) 471, 121 N. E. (2d) 826 (1954), noted in 50 Northwestern L. Rev. 94, 1955 Wash. U. L. Q. 83. Appeal and certiorari denied: 348 U. S. 946, 75 S. Ct. 439, 99 L. Ed. (adv.) 306 (1955); rehearing denied: 349 U. S. 908, 75 S. Ct. 579, 99 L. Ed. (adv.) 475 (1955).

[14] 4 Ill. (2d) 319, 122 N. E. (2d) 522 (1954).

[15] Ill. Rev. Stat. 1953, Vol. 1, Ch. 67½, § 25.01.

that the lease under which the tenants held possession had a fifteen day cancellation provision. It was nevertheless held that there could be no discrimination on this basis irrespective of whether or not any abstract right to occupy public housing existed.[16]

A successful attack was made on Section 10.2 of the Mutual Building, Loan, and Homestead Act,[17] in the case of *Gorham* v. *Hodge*,[18] on the theory that it violated an almost forgotten provision of the State Constitution.[19] This provision requires that acts of the General Assembly authorizing or creating corporations or associations with banking powers be submitted to a vote of the people at the next general election, which step was not taken. The court held that the investment certificates authorized by Section 10.2 were essentially deposits rather than loans and, therefore, a referendum was required.

Three cases dealt with statutes under which municipal authorities are attempting to alleviate conditions which have become acute in the past few years. An unsuccessful challenge was made on the law authorizing the construction of municipal parking facilities[20] in *City of Chicago* v. *Central National Bank of Chicago*.[21] It was there urged that a provision requiring the approval of a planning commission before the city could act amounted to an unconstitutional delegation of legislative authority. The contention was rejected since the approval of the commission was merely a contingent event making the law operative, a well-recognized method of exercising legislative power. The other two are simply a rehash of objections raised and holdings achieved in contests relating to other community improvement programs, and are mentioned only for their effect on the specific

[16] This result is in accord with that previously reached by the United States Supreme Court: Wieman v. Updegraff, 344 U. S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952).

[17] Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 222.2.

[18] 6 Ill. (2d) 31, 126 N. E. (2d) 626 (1955).

[19] Ill. Const. 1870, Art. IX, § 5.

[20] Ill. Rev. Stat. 1953, Vol. 1, Ch. 24, § 52.1—1.

[21] 5 Ill. (2d) 164, 125 N. E. (2d) 94 (1955).

statute involved. In *People ex rel. Gutknecht* v. *City of Chicago,*[22] the validity of the Urban Community Conservation Act[23] was upheld, the court concluding that the prevention of slums is a public purpose and is accomplished when redevelopment is achieved. Hence, the subsequent use of the property is immaterial. The validity of the Neighborhood Redevelopment Corporation Law[24] was challenged in *Zisook* v. *Maryland-Drexel Neighborhood Redevelopment Corporation*[25] for a whole host of reasons, none of which the court thought valid.

In one other case, that of *Figura, et al.* v. *Cummins,*[26] constitutional objections to a statute were sustained. Therein, that portion of the Industrial Home Work Act[27] which prohibits the processing of metal springs in the home was held invalid for violating the prohibition against special legislation.[28] Several other attacks made on Illinois statutes during the period of the survey were uniformly unsuccessful. In the case of *People* v. *Lewis,*[29] the Supreme Court upheld Section 216 of the Revenue Act of 1939,[30] which alters the method of computing the interest or premium due, in addition to the principal amount, when redeeming from a tax foreclosure sale in equity. The Supreme Court proved to be too formidable to be impressed by arguments challenging the Chicago Regional Port District Act[31] and the Lake Calumet Harbor Act[32] in the case of *People ex rel. Gutknecht* v. *Chicago Regional Port District*[33] and both acts were sustained. An attack on Section 4 of the Illinois Optometric Act as amended[34]

22 3 Ill. (2d) 539, 121 N. E. (2d) 791 (1954), noted in 43 Ill. B. J. 301, and 1954 Ill.. L. Forum 684.
23 Ill. Rev. Stat. 1953, Vol. 1, Ch. 67½, § 91.8 et seq.
24 Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 550.1 et seq.
25 3 Ill. (2d) 570, 121 N. E. (2d) 804 (1954).
26 4 Ill. (2d) 44, 122 N. E. (2d) 162 (1954).
27 Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 252(G).
28 Ill. Const. 1870, Art. IV, § 22.
29 5 Ill. (2d) 117, 125 N. E. (2d) 87 (1955).
30 Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 697.
31 Ill. Rev. Stat. 1953, Vol. 1, Ch. 19, § 152 et seq.
32 Ill. Rev. Stat. 1953, Vol. 1, Ch. 19, § 113 et seq.
33 4 Ill. (2d) 363, 123 N. E. (2d) 92 (1954).
34 Ill. Rev. Stat. 1953. Vol. 2, Ch. 91, § 105.4.

met with a similar fate in the case of *Roberts Optical Company* v. *Department of Registration and Education.*[35]

Two other cases within the subject field appear to merit brief consideration. In *Castle* v. *Hayes Freight Lines, Inc.,*[36] the United States Supreme Court affirmed the decision of the Illinois Supreme Court[37] which reached the conclusion that a state cannot suspend the right of an interstate carrier to operate under a federally granted license, even though such carrier habitually violates its motor vehicle laws with respect to total weight and load distribution.[38] Although discussed elsewhere in this survey, it is herein noted that Section 35 of the Business Corporation Act[39] was declared unconstitutional in the case of *Wolfson* v. *Avery.*[40]

MUNICIPAL CORPORATIONS

Although many cases in the course of a year raise questions of law concerning municipal corporations, few, if any, have any lasting effect on this field. One of these rare cases is *Baltis* v. *Village of Westchester,*[41] wherein the Supreme Court was faced with the question of whether or not a municipality is bound by its own zoning ordinances. The municipality had proposed to erect a standpipe in an area zoned for single family residences, and the court concluded that they might not do so in violation of their own zoning ordinance, at least when acting in a proprietary capacity. It is significant to note that the court expressly disclaimed any intention of deciding whether they might do so when acting in a governmental capacity. As a consequence of this decision, it appears that a municipality must now take the

35 4 Ill. (2d) 290, 122 N. E. (2d) 824 (1954).

36 348 U. S. 61, 75 S. Ct. 191, 99 L. Ed. (adv.) 101 (1954), noted in 33 N. Car. L. Rev. 621, 16 Ohio St. L. J. 270, and 30 Notre Dame Lawyer 477.

37 2 Ill. (2d) 58, 117 N. E. (2d) 106 (1954), noted in 39 Minn. L. Rev. 223, and 40 Va. L. Rev. 793.

38 The statute specifically involved is Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 229b.

39 Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.35.

40 6 Ill. (2d) 78, 126 N. E. (2d) 701 (1955). For a more detailed discussion, see Section I, Business Organizations, note 1.

41 3 Ill. (2d) 388, 121 N. E. (2d) 495 (1955), noted in 43 Ill. B. J. 317.

same steps, either by way of variation procedure or change in the zoning laws,[42] as would be required of an individual.

An interesting situation was presented in the case of *City of Chicago* v. *Wicky*,[43] in which the city had, pursuant to legislative authority,[44] enacted an ordinance making it unlawful to keep or operate devices commonly known as pinball machines.[45] A subsequent state taxing statute[46] required that such devices be licensed, and the argument was made that it repealed, by implication, the authority under which the city had acted. The court, however, thought otherwise, thus creating the anomalous situation of the state licensing that which is prohibited by the municipality.[47]

The right of an individual to use property contrary to the terms of a zoning ordinance was in issue in the case of *Village of Skokie* v. *Almendinger*.[48] Therein, the defendant had been operating a trailer park on the property in question prior to the enactment of the restrictive ordinance, though, at that time, he did not own the property and was, in fact, a trespasser thereon. Prior to the commencement of the present action, a suit by the village to enjoin said use, the defendant acquired title to the property. On appeal, the Appellate Court for the First District held that the prior owner had, by reason of the defendant's use and occupancy, acquired the right to a non-conforming use even though apparently unaware of its existence. It followed then that the defendant acquired the same right by his purchase.

A further encroachment upon the immunity of a municipal corporation from tort liability has been achieved in the case of *Tracy* v. *Davis*.[49] It has heretofore been decided that a school

[42] See, for example, Decatur Park District v. Becker, 368 Ill. 442, 14 N. E. (2d) 490 (1938).

[43] 4 Ill. (2d) 423, 123 N. E. (2d) 335 (1954).

[44] Ill. Rev. Stat. 1953, Vol. 1, Ch. 24, § 23—56.

[45] Mun. Code Chicago 1939, Ch. 193, § 26.

[46] Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 481b.1 et seq.

[47] An analogous situation is presented by the state and federal governments, with the latter licensing that which is prohibited by the former. For example, see United States v. Kahriger, 345 U. S. 22, 73 S. Ct. 510, 97 L. Ed. 754 (1953).

[48] 5 Ill. App. (2d) 522, 126 N. E. (2d) 421 (1955).

[49] 123 F. Supp. 160 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 175.

district might be held liable in tort if there were non-public funds available and public funds would not thereby be impaired.[50] In the instant case, the court concluded that it was not necessary to allege in a complaint that there were non-public funds available to satisfy a judgment which might be rendered. Hence, the complaint was held to be sufficient for the purpose of determining the question of liability of the school district. However, in recognition of the character of public funds and the immunity which they enjoy, the court further stated that any judgment so taken could be satisfied only from non-public funds.

One other case, that of *Schien* v. *City of Virden*,[51] contains a ruling which might be considered new, although its impact is rather narrow. The traditional rule with respect to property dedicated to a city for public purposes is that it is trust property and may not be leased or conveyed by the city.[52] However, in the subject case, the Supreme Court upheld a lease of such property to another municipal corporation, a fire protection district embracing the entire city. The result was predicated upon the fact that the lessee would continue to devote the property to public purposes and the city retained sufficient control to enable it to perform its trust.

TAXATION

The most significant development in Illinois taxation during the year has been the adoption of the Illinois Use Tax Act,[53] with a companion provision for a half cent additional Retailers' Occupation Tax for municipalities on a local option basis.[54] The

[50] Thomas v. Broadlands Community Consol. School Dist., 348 Ill. App. 567, 109 N. E. (2d) 636 (1952).

[51] 5 Ill. (2d) 494, 126 N. E. (2d) 201 (1955).

[52] See Illinois Central Railroad Co. v. State of Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

[53] Laws 1955, p. 2027, S. B. No. 510; Ill. Rev. Stat. 1955, Vol. 2, Ch. 120, § 439.1 et seq.

[54] Laws 1955, p. 437 at p. 440, S. B. No. 694; Ill. Rev. Stat. 1955, Vol. 1, Ch. 24, § 23—111.

general structure[55] of the Illinois Use Tax Act, though rather curious, constitutes an ingenious and skillful attempt to bring interstate transactions within the general orbit of the Retailers' Occupation Tax Act[56] without running afoul of the constitutional problems which it was designed to meet.[57] Although in substance purporting to tax the initial use of all tangible personal property, whether acquired in an interstate or intrastate sale, the Act, in its present form, would apply only to interstate sales. The tax is imposed upon the user, rather than upon the retailer as in the case of the Retailers' Occupation Tax, though the retailer is made the agent of the state to collect and remit the tax. Nevertheless, the retailer need not remit that portion of the tax which pertains to a transaction upon which the retailer is obligated to and does in fact pay the Retailers' Occupation Tax.[58]

Several cases under the Retailers' Occupation Tax Act[59] should be noticed in passing. One of these is the case of *Ruby Chevrolet, Inc.* v. *Department of Revenue,*[60] in which the Supreme Court held invalid a rule of the Department of Revenue which permitted retailers to exclude from sales, in making a return for Retailers' Occupation Tax purposes, the value of traded-in property until such property is sold. The Court characterized the rule as an attempted assumption of legislative power without any basis in the statute, and as such, invalid. Thereafter, the General Assembly promptly amended the Act so as to exclude from the op-

[55] The Use Tax Act follows as closely as possible the Illinois Cigarette Use Tax Act, Ill. Rev. Stat. 1955, Vol. 2, Ch. 120, § 453.31 et seq., the validity of which has been sustained by the Illinois Supreme Court: Johnson v. Halpin, 413 Ill. 257, 108 N. E. (2d) 429 (1952). Certiorari denied: 345 U. S. 923, 73 S. Ct. 781, 97 L. Ed. 1355 (1953).

[56] Ill. Rev. Stat. 1955, Vol. 2, Ch. 120, § 440 et seq.

[57] First and foremost is the authority to levy such a tax. For example, the only basis for the tax is that the use of the property in question is a "privilege" within the purview of Section 1 of Article IX of the Illinois Constitution of 1870. Although in connection with the Cigarette Use Tax Act, the use of cigarettes was held to be a "privilege", it remains to be determined whether that appellation will be applied to the eating of food or the wearing of clothing.

[58] The provisions with reference to retention of the tax by the retailer also create problems. Section 7 of Article IX of the Illinois Constitution requires that all taxes "levied for State purposes shall be paid into the State Treasury", and Section 6 of that Article forbids "commutation" of taxes.

[59] Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 440 et seq.

[60] 6 Ill. (2d) 147, 126 N. E. (2d) 617 (1955).

eration of the tax any amount allowed as a credit for tangible personal property taken in trade.[61] It should be noted that said amendment probably does not apply to the newly adopted Use Tax Act, of which mention has heretofore been made.

Two interesting decisions have been handed down by the Illinois Supreme Court dealing with the applicability of the Retailers' Occupation Tax Act to certain transactions in interstate commerce. In *Superior Coal Company* v. *Department of Revenue*,[62] the Supreme Court upheld the imposition of the tax on the sale of coal in Illinois at the mine to an interstate carrier, some of such coal being intended for consumption within the state, and some of it being consigned to users outside the state. Although the court seemingly based its decision in large measure upon the rather indefinite and inconclusive character of the arrangement by which certain shipments were consigned without the state,[63] it employed as an alternative basis for its decision the now familiar but not too clearly defined doctrine that the mere fact that a tax falls upon interstate commerce does not necessarily invalidate the tax as an interference with such commerce.[64]

In contrast with this more liberal approach toward the taxation of interstate commerce is the majority opinion, two justices dissenting, in *Mississippi River Fuel Corp.* v. *Hoffman*.[65] There the court held exempt from taxation sales of gas by an interstate pipeline company directly to large industrial users. Although the two dissenting justices apparently agreed that the sales were made in interstate commerce, they took the position that the imposition of the tax would not "unduly burden interstate commerce", but merely require such commerce to bear its fair share of the tax burden. On the other hand, the majority seemed unwill-

[61] Laws 1955, p. 2037, S. B. No. 796; Ill. Rev. Stat. 1955, Vol. 2, Ch. 120, § 440. The pertinent material is contained in the second of three sections numbered 440.

[62] 4 Ill. (2d) 459, 123 N. E. (2d) 713 (1954).

[63] It was thereby able to distinguish earlier cases, particularly Nudelman v. Globe Varnish Co., 114 F. (2d) 916 (1940).

[64] See, for example, McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940).

[65] 4 Ill. (2d) 468, 123 N. E. (2d) 503 (1955), noted in 43 Ill. B. J. 671. Schaefer, J. filed a dissenting opinion in which Hershey, J. concurred.

ing to attempt a precise definition of such phraseology, and made the observation that "The present case involves the sum of $1,000,000, which in our view represents a substantial burden upon the payor regardless of size or resources."[66]

Questions involving notice and hearing with respect to Illinois property taxation made news in two cases. In *Dietman* v. *Hunter*,[67] the county supervisor of assessments had increased the assessed valuation, as return by the township assessor, on a number of tracts of real estate without giving notice and an opportunity to be heard to the owners of the properties affected. One of the owners filed a representative suit to enjoin the extension and collection of the tax contending that he had been deprived of property without due process of law by reason of the failure to give notice prior to the increases. The Supreme Court unanimously rejected this contention upon the ground that due process entitles a taxpayer only to be heard, and to be heard once, prior to the time that the assessment becomes final, and that such opportunity was available before the Board of Review. Certainly the reiteration of so oft enunciated a doctrine[68] would not seem worthy of comment, except for doubts and confusion which have been created by earlier Illinois decisions, particularly the two decisions in the St. Louis Merchants' Bridge Co. cases.[69] The doctrine apparently laid down in those cases was that although the taxpayer was not entitled to notice or opportunity to be heard before the assessor performed his function, nevertheless where such assessment had been made, the taxpayer was entitled to notice before the supervisor of assessments could increase the assessment. In a rather well written opinion, the court pointed out that in the St. Louis Merchants' Bridge Co. cases, the court had been led into error in applying to the field

66 4 Ill. (2d) 468, 477, 123 N. E. (2d) 503, 508 (1955).

67 5 Ill. (2d) 474, 126 N. E. (2d) 228 (1955).

68 See, for example, Hagar v. Reclamation Dist. No. 108, 111 U. S. 710, 4 S. Ct. 663, 28 L. Ed. 569 (1884), and Weyerhaueser v. Minnesota, 176 U. S. 550, 20 S. Ct. 485, 44 L. Ed. 583 (1900).

69 St. Louis Merchants' Bridge Co. v. Eisele, 263 Ill. 50, 104 N. E. 1013 (1914), and People ex rel. Eisele v. St. Louis Merchants' Bridge Co., 268 Ill. 477, 109 N. E. 311 (1915).

of real property, where no return is filed or self-assessment made by the taxpayer, a doctrine laid down at an early date with reference to assessment of personal property; namely, that where a personal property tax return has been made and *accepted* by the assessor, such acceptance constituted an assessment, and the valuation could not be increased without prior notice to the taxpayer.[70] The court unequivocally overruled the St. Louis Merchants' Bridge Co. cases, but apparently did not therein disturb the existing rule with respect to the taxation of personal property, though it rather carefully refrained from including in its opinion anything which might embarrass the court in later repudiating this aspect of the doctrine as well.

In the case of *People* v. *Jennings,*[71] on the other hand, the majority of the court indicated that it was not going to curtail by judicial decision the complete notice and hearing provided by statute, even though not required by constitutional mandate. In that case there had been a complete failure to publish in a newspaper for the year 1951 the list of personal property assessments, as required by Section 103 of the Revenue Act of 1939.[72] The court concluded that the language thereof was mandatory rather than directory and held that the assessment was invalid.[73]

VIII. TORTS

The continuing evolution of the law of torts has produced several important developments during the past year. Of prime importance is the case of *Kahn* v. *James Burton Company,*[1]

[70] Perhaps the principal case enunciating this doctrine is Tolman v. Salomon, 191 Ill. 202, 60 N. E. 809 (1901), a case in which the taxpayer was unsuccessful because of failure to allege affirmatively that his valuation had been accepted by the assessor.

[71] 3 Ill. (2d) 125, 119 N. E. (2d) 781 (1954). Maxwell, J. and Hershey, J. dissented.

[72] Ill. Rev. Stat. 1955, Vol. 2, Ch. 120, § 584.

[73] It was also held that a complete failure to publish was not cured by a later section of the act which protects the assessment from attack by reason of certain errors in publication: Ill. Rev. Stat. 1955, Vol. 2, Ch. 120, § 587.

[1] 5 Ill. (2d) 614, 126 N. E. (2d) 836 (1955), reversing 1 Ill. App. (2d) 370, 117 N. E. (2d) 670 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 348, and 30 Notre Dame Lawyer 326. Hershey, J., filed a dissenting opinion in which Davis, J., concurred.

wherein the Supreme Court apparently abandoned the attractive nuisance doctrine. The defendants therein were a contractor in control of the premises and his supplier of lumber, who had negligently piled lumber at the site of a construction project. The plaintiff, an eleven year old child, was injured while playing thereon. The court held the lumber dealer liable, though not in control of the premises, on the ground that it knew or should have known that children played in the area and was therefore bound to pile the lumber in a careful manner. The contractor was also held liable, despite the fact that the plaintiff was a trespasser, on the ground that a duty of care was created by the knowledge that children played in the vicinity and might come upon the premises. The court expressly refused to apply the attractive nuisance doctrine and all of its ramifications, and dealt with it as an ordinary problem of negligence with attractiveness being merely a factor in determining foreseeability.

The extent of a duty of care was also involved in two other cases. Despite a prior decision to the contrary,[2] the Appellate Court for the First District held, in the case of *Rotheli* v. *Chicago Transit Authority*,[3] that a public carrier ceases to owe an extraordinary duty of care to a transferring passenger who has reached a place of safety. The court seemed to feel that it was too great a burden to require the carrier to exercise extraordinary care while the transferring passenger crosses streets and mingles with other pedestrians. A greater duty than ordinary care was prominent in the case of *Fortney* v. *Hotel Rancroft, Inc.*,[4] in which the plaintiff, a guest of the hotel, was attacked by a stranger upon entering his room. The Appellate Court for the First District held that an innkeeper in these circumstances owes its guests a "very high degree of care", but upon rehearing this statement was modified to a "high degree of care". But what-

[2] Feldman v. Chicago Railways Co., 289 Ill. 25, 124 N. E. 334, 6 A. L. R. 1291 (1919).

[3] 5 Ill. App. (2d) 190, 125 N. E. (2d) 283 (1955). Kiley, J., filed a concurring opinion reconciling the two cases since, though not stressed in the Feldman case, the passenger had not reached a place of safety.

[4] 5 Ill. App. (2d) 327, 125 N. E. (2d) 545 (1955).

ever language is used, it seems that an innkeeper must do everything in its power to prevent an attack by strangers upon a guest while asleep or upon entering the room.

Questions relating to proximate cause were generated in four cases. In *Walters* v. *Christy*,[5] the defendant, while making alterations to a building, boarded up the rear windows and constructed a solid wooden front. Burglars were thus able to enter the plaintiff's adjoining premises undetected, but the Appellate Court for the Third District held that there was no duty on the defendant to protect plaintiff's property. The court further stated that, even assuming negligence, proximate cause was lacking since it was not reasonably foreseeable that burglars would intervene as a consequence of the negligence. On the other hand, a chemical fog created by the defendant in a mosquito spraying operation was held to be the proximate cause of plaintiff's injury in the case of *King* v. *Mid-State Freight Lines, Inc.*[6] Therein, the car in which plaintiff was riding struck the rear of a truck which was moving slowly because of the fog. The court was of the opinion that the defendant's negligence was the proximate cause of the injury since the slowing down of the truck, even if an intervening independent force, was reasonably foreseeable.

An attempt to stretch the result obtained in *Ney* v. *Yellow Cab Company*[7] was unsuccessful in the case of *Barton* v. *Williams*,[8] wherein the plaintiff argued that a father, who permitted his car keys to be accessible to his minor daughter, should have foreseen that she would drive his car without a driver's license and negligently harm someone. The statute violated,[9] however, pertained to drivers, rather than owners as in the Ney case,[10]

[5] 5 Ill. App. (2d) 68, 124 N. E. (2d) 658 (1955).

[6] 6 Ill. App. (2d) 159, 126 N. E. (2d) 868 (1955). Leave to appeal has been denied.

[7] 2 Ill. (2d) 74, 117 N. E. (2d) 74 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 313, 42 Ill. B. J. 580, and 1954 Ill. L. Forum 347, affirming 348 Ill. App. 161, 108 N. E. (2d) 508 (1953). In this case, the defendant's driver, in violation of a statute, left the automobile with the motor running, thus enabling a thief to steal the car and injure the plaintiff in the getaway.

[8] 4 Ill. App. (2d) 266, 124 N. E. (2d) 356 (1955). Leave to appeal has been denied.

[9] Ill. Rev. Stat. 1955, Vol. 2, Ch. 95½, § 73.12.

[10] Ill. Rev. Stat. 1955, Vol. 2, Ch. 95½, § 189.

and the court easily distinguished the two situations. The Scaffolding Act[11] furnished the requisite legal duty in the case of *Fetterman* v. *Production Steel Company of Illinois*,[12] wherein it was held that under its provisions an iron worker employed by a general contractor could recover for injuries sustained when he fell from a faulty scaffold which had been erected by a subcontractor. The fact that the injured person was not one for whose use the scaffolding was primarily erected and the fact that it was not used in a normal manner were held not to absolve the subcontractor from liability inasmuch as customs in the trade made both of these events foreseeable.

Persons consenting to criminal conduct resulting in their injury are confronted with another decision denying recovery. In the case of *Castronovo* v. *Murawsky*,[13] the Appellate Court for the Second District denied recovery for a woman's death caused by a criminal abortion[14] which was negligently performed. There being no indication that granting recovery would reduce criminal abortions, the court relied upon prior authority[15] and concluded that there is no tortious conduct if the plaintiff consents.[16]

Also worth noting are several miscellaneous cases dealing with problems of contributory negligence and immunity from tort liability. In the case of *Illinois Bell Telephone Co.* v. *Chas. Ind Co.*,[17] the Appellate Court for the Second District held that a telephone company, the owner of underground cables, was not

11 Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 60 et seq.

12 4 Ill. App. (2d) 403, 124 N. E. (2d) 637 (1955). Leave to appeal has been denied.

13 3 Ill. App. (2d) 168, 120 N. E. (2d) 871 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 181.

14 Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 3.

15 For example, see Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286 (1902), where the plaintiff, wounded while participating in a charivari party, was denied recovery because he and the defendant were engaged in an unlawful enterprise.

16 The opinion does not clearly distinguish between: (a) consent to the operation, which is a defense to an intentional tort, and (b) assumption of the risks of the operation, which would be a defense to a negligent operation. See Restatement, Torts, 1948 Supp., § 60, comment b.

17 3 Ill. App. (2d) 258, 121 N. E. (2d) 600 (1955), noted in 33 CHICAGO-KENT LAW REVIEW 281.

contributorily negligent in failing to inform an excavator of the cables since the court thought it was the excavator's duty to inform itself of prior underground installations. The United States District Court for the Northern District of Illinois, in the case of *Tracy* v. *Davis*,[18] refused to dismiss a tort action against a school district merely because the complaint did not allege that there were non-public funds available to satisfy a judgment. It concluded that the plaintiff could maintain his action and obtain a judgment, though satisfaction might be had only from non-public funds. In *Cawley* v. *Warren*,[19] plaintiff sued an Illinois state's attorney, an assistant state's attorney, and the foreman of a grand jury for indicting her wrongfully and allegedly violating her civil rights. The United States Court of Appeals for the Seventh Circuit dismissed the suit since it thought all of the defendants were judicial officers of the State of Illinois. As such, they were entitled to the same immunity from civil suits as judges.

With respect to legislation, the laws relating to wrongful death were amended to preclude the contributory negligence of one beneficiary of the action from being a defense to the whole action. However, the pecuniary injuries of such beneficiary are not recoverable, and he cannot share in any amount that is recovered in the action.[20]

[18] 123 F. Supp. 160 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 175. For a more detailed discussion, see Section VII, Public Law, note 49.

[19] 216 F. (2d) 74 (1954).

[20] Laws 1955, p. —, H. B. No. 565, and H. B. No. 777; Ill. Rev. Stat. 1955, Vol. 1, Ch. 70, § 2. This amendment applies to a wrongful act, neglect, or default occurring after June 30, 1955.

A comment in 44 Ill. B. J. 176 expresses doubt that the contributory negligence amendment is the law because the later amendment, H. B. No. 777, does not repeat the contributory negligence provision contained in the earlier amendment, H. B. 565. Examination of Ill. Rev. Stat. 1955 casts a doubt upon this doubt. The later amendment as therein reported repeats in identical language the contributory negligence provision contained in the earlier amendment.