Discussion of Recent Decisions

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Courts—Courts of Limited or Inferior Jurisdiction—Whether the Municipal Court of the City of Chicago Has Jurisdiction Over a Transitory Tort Cause of Action Which Arose Outside of the City Limits—In the case of United Biscuit Company of America v. Voss Truck Lines, Inc.,1 the plaintiff sued the defendant to recover damages resulting

from a collision between two trucks. The trucks were driven by the servants of the litigants and the accident occurred near Braidwood, Will County, Illinois. The case went to trial without a jury before a judge of the Municipal Court of Chicago. That judge, on learning that the cause of action arose outside of the city limits of the City of Chicago, decided that the court had no jurisdiction over the subject matter of the suit and entered a judgment dismissing the action. It was stipulated on appeal from that judgment that there was no question as to the jurisdiction of the court over the person of the defendant and that the sole question was one as to whether or not the Municipal Court of Chicago had jurisdiction over the subject matter of the case. The Appellate Court for the First District affirmed the judgment of the lower court, thereby deciding that the court in question did not have jurisdiction over a transitory tort cause of action based upon events occurring outside of the city limits.2

The solution to the problem of whether or not the Municipal Court of Chicago possesses jurisdiction to hear and determine transitory causes of action originating elsewhere depends on whichever of two constitutional provisions is to be considered the basis for the establishment of that tribunal. The two possibilities are Section 1 of Article VI of the Constitution of 1870 on the one hand, and Section 34 of Article IV, the so-called "home rule" amendment, on the other. The first of these3 confers judicial power on certain specified constitutional courts but goes on to provide for the exercise thereof by other local tribunals which may be created by the legislature.4 It has been held to be the sole basis for the existence of city courts5 and, as these courts have been determined to possess only city-wide

2 A certificate of importance has been issued and the Supreme Court of Illinois is expected to hear the case at the September term. The issue in the case has become increasingly important since the decision in the case of Werner v. Illinois Central Railroad Co., 379 Ill. 559, 42 N. E. (2d) 82 (1942), which held that a city court has no jurisdiction over a tort cause of action which arises outside of the city limits.

3 Ill. Const. 1870, Art. VI, § 1, states: "The judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court, circuit courts, county courts, Justices of the Peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns."

4 Provisions for the creation of local or inferior courts have appeared in each of the Illinois constitutions. The earliest provision was Ill. Const. 1818, Art. IV, § 1, which reads: "The judicial power shall be vested in . . . such inferior courts as the general assembly shall, from time to time, ordain and establish." It was followed by Ill. Const. 1848, Art. V, § 1, which then read: "The judicial power shall be and is hereby vested in one supreme court . . . Provided, that the inferior local courts, of civil and criminal jurisdiction, may be established by the general assembly in the cities of this state, but such courts shall have a uniform organization and jurisdiction in such cities." The absence of a requirement for uniformity in the 1818 constitution had resulted in the creation of a series of local courts with varying jurisdiction. The present constitutional provision is set out in note 3, ante.

5 People ex rel. Beebe v. Evans, 18 Ill. 362 (1857).
jurisdiction, it follows that, because of the requirement for uniformity and the prohibition against local legislation, only city-wide jurisdiction could be given to local courts created thereunder. If, therefore, this constitutional provision controls, it comes as a necessary conclusion that the Municipal Court of Chicago can have only city-wide jurisdiction and may not hear transitory causes originating elsewhere.

If, however, the second constitutional provision forms the sole basis for the existence of the court in question, a different conclusion could well be reached. That provision allows the legislature to pass local laws for the City of Chicago in connection with a variety of subjects including the establishment of a municipal court, the jurisdiction of which was left to be determined by the general assembly. Nowhere in that provision is there any restriction on the nature of the jurisdiction which the general assembly might confer on the court so to be created. For that matter, there is nothing in the provision to indicate that it is to be subject to restraints contained in any other constitutional provision. As a state constitution is a limitation on the powers of a state legislature and not, generally, a delegation of powers to that body, the legislature is free to do anything not

6 City of Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237 (1906). In spite of this, the legislature by an amendment of the City Court Act adopted in 1943, set out in Laws 1943, Vol. 1, p. 578, deleted the words “arising in said city,” in an obvious attempt to give to the city courts a jurisdiction wider than the city limits. In the case of Govan v. Govan, 331 Ill. App. 372, 73 N. E. (2d) 163 (1947), tried before a city court subsequent to the amendment, a judgment based on a transitory cause of action was affirmed but the constitutionality of the amendment was not passed upon. It is understood that the Illinois Supreme Court, in a case entitled Turnbaugh v. Dunlop, No. 31639, not yet reported, held the present City Court Act, as so amended, to be valid and broad enough to permit a city court to entertain a transitory action in tort based on events arising outside of the city limits.

7 See Ill. Const. 1870, Art. IV, § 22, for the requirement as to uniformity, and Art. IV, § 22, for the prohibition against special legislation.

8 Ill. Const. 1870, Art. IV, § 34, added by amendment in 1904, states in part: “The General Assembly shall have power, subject to the conditions and limitations hereinafter contained, to pass any law (local, special or general) providing for a scheme or charter of local municipal government for the territory now or hereafter embraced within the limits of the city of Chicago and in case the General Assembly shall create municipal courts in the city of Chicago it may abolish the offices of Justices of the Peace, Police Magistrates and Constables in and for the territory within said city and in such case the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe; and the General Assembly may pass all laws which it may deem requisite to effectively provide for a complete system of local municipal government in and for the city of Chicago. No law based upon this amendment shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election.” The purpose of the referendum has been said to provide protection for the citizens of Chicago while, at the same time, replacing the necessity for uniformity and overcoming the prohibition against special legislation: City of Chicago v. Cook County, 370 Ill. 301, 18 N. E. (2d) 890 (1939).

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restricted by the constitution. One does not, therefore, have to look to that document so much to find authority for the creation of a Municipal Court for the City of Chicago as one must look to see to it that no limitation is placed therein on the powers of the legislature. For this, and other reasons, when the general assembly has concluded that a law is requisite, its conclusion should not be the subject of judicial review.\textsuperscript{10}

Another indication that the "home rule" amendment, later in point of time than the first of these provisions, was not designed to restrict the territorial jurisdiction which the general assembly could confer on the Municipal Court exists in the historical situation which gave rise to the adoption of that amendment. At the turn of the century, as now, the population of Chicago was greater in number than that of all the rest of the state when combined. It had problems unlike those of any other section of the state, and was constantly hampered in its actions by the restriction against special legislation. The justice of the peace system had proved its inadequacy while the creation of a typical city court, such as those which existed in other parts of the state, would not serve its need. The circumstance of the times dictates the belief that the framers of the "home rule" amendment contemplated a marked change in the local court system for Chicago. It can, therefore, be logically argued that it was the intention of the public, by amending the state constitution, to allow the legislature to confer that type of jurisdiction which it could well feel was necessary.

If the intention was merely to create a court similar to a city court, with territorial limitations necessarily imposed on its jurisdiction, there was no need for the judicial portion of the amendment as it was already within the power of the general assembly to create such a court. It is likewise difficult to become reconciled to the idea that the whole amendment, with its clauses allowing the setting up of a municipal court, was intended merely to give to the legislature the power to determine jurisdiction in other than territorial terms,\textsuperscript{11} particularly since there is no mention of such a restriction in the amendment. Knowing, as the framers did, that a tribunal of the character of a city court would prove as inadequate as the justice of the peace system had proved itself to be in the administration of justice for Chicago, they must have had something different in mind. The "home rule" amendment having been adopted to meet a new situation, one never before encountered in the judicial history of the state, is it not logical to suppose that the proposed municipal court was to possess a

\textsuperscript{10} People v. LaSalle Street Bank, 269 Ill. 518, 110 N. E. 38 (1915); Hirschback v. Kaskaskia Sanitary District, 265 Ill. 388, 106 N. E. 942 (1914); City v. Evans, 204 Ill. 32, 68 N. E. 208 (1903); Sanitary District v. Ray, 199 Ill. 63, 64 N. E. 1048 (1902).

\textsuperscript{11} But see Wilcox v. Conklin, 255 Ill. 604, 99 N. E. 669 (1912).
jurisdiction, and follow a practice, unlike that of any court theretofore existing? 12

But the matter need not rest entirely on inference. Impelling reason against a jurisdictional limitation of city-wide scope is to be found in the sections of the amendment relating to the assumption, by the new court, of the unfinished business being handled by the justices of the peace located in the city. The latter had exercised at least county-wide jurisdiction without question 13 so the new court, authorized by the amendment, necessarily had to possess an equivalent jurisdiction at the start in order to take over the work of the justices of the peace. There being no language indicating a desire to deny the exercise of such power after these cases were concluded, it can only be supposed the new court was to retain such jurisdiction. Why, then, should it be given jurisdiction for one purpose and not another?

The only really basic argument against the exercise of an extra-territorial jurisdiction by the Municipal Court of Chicago is the wording of the amendment making it possible to establish a court "in the city of Chicago." 14 It has been said that the word "in," as used in the phrase "in and for" as it relates to the creation of city courts, 15 is a word of art necessarily designed to confine the territorial jurisdiction to city limits. 16 But other cases do not treat the phrase as being one of art sufficient by itself to fix a territorial jurisdiction. 17 For example, in the recent case of Moffett v. Green, 18 the Illinois Supreme Court held that, although a justice of the peace is to serve "in and for" the township in which he was elected, yet he has county-wide jurisdiction. If the meaning of the phrase "in and for" as it relates to the jurisdiction of a justice of the peace is to be so extended, it is only fair to conclude that the court should reach the same result as to the identical word in the amendment relating to the Municipal Court of Chicago.

If, as has been pointed out, Section 34 of Article IV of the Illinois Constitution of 1870 is the only constitutional authority for the establish-

12 People v. Board of County Commissioners, 355 Ill. 244, 189 N. E. 26 (1934); Lott v. Davis, 264 Ill. 272, 106 N. E. 215 (1914).
13 Moffett v. Green, 386 Ill. 318, 53 N. E. (2d) 941 (1944); Tissler v. Rhein, 130 Ill. 110, 22 N. E. 548 (1889).
14 Ill. Const. 1870, Art. IV, § 34. Italics added.
15 Ibid., Art. VI, § 1. The text thereof is set forth in note 3, ante.
17 Herb v. Pitcairn, 392 Ill. 138, 64 N. E. (2d) 519 (1946); Moffett v. Green, 386 Ill. 318, 53 N. E. (2d) 941 (1944).
18 386 Ill. 318, 53 N. E. (2d) 941 (1944).
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ment of the Municipal Court of Chicago, logic would dictate that the legislature must be regarded as empowered to confer upon that court whatever jurisdiction it may please, subject to ratification by the people of Chicago, without limitation as to the type of action or the place of its origin, so long as the case be one of transitory character. Any attempt to resolve the problem, then, necessarily results in a return to the fundamental one of choosing between the two constitutional provisions aforementioned. There is little assistance to be gleaned from statements made by the Illinois Supreme Court in the past which may have bearing on the point. On various occasions, but in relation to totally different problems than the one which will now confront it, that court has stated that Section 1 of Article VI of the constitution is the sole basis for the legislative power to create local courts. If these statements are to control, the jurisdiction of the Municipal Court of Chicago would necessarily be limited. Other cases declare in no uncertain terms that Section 34 of Article IV, the "home rule" amendment, is the basis for the existence of the Municipal Court of Chicago. To add to the confusion, however, other conflicting statements have been made regarding its jurisdiction, so it is not possible to predict how the Supreme Court will eventually decide the issue. Despite this conflict and the apparent uncertainty existing in the mind of the Supreme Court, it would appear logical to believe that the inclusion of a

19 Care should be taken to distinguish the statute relating to the Municipal Court of Chicago, Ill. Rev. Stat. 1949, Vol. 1, Ch. 37, §§ 356-426, from the general statute as to other municipal courts, ibid., Ch. 37, §§ 442-504. The constitutional basis for the latter is necessarily to be found in Ill. Const. 1870, Art. VI, § 1, with its confining limitation that the legislature may create such inferior courts only "in and for" cities and incorporated towns. While the legislature may, and has, created municipal courts in other cities, the territorial jurisdiction thereof is confined by the constitutional language in much the same way as is true of the city courts. Arguments which may be advanced relating to the Municipal Court of Chicago are, therefore, generally inapplicable to other municipal courts located in Illinois.

20 Werner v. Illinois Central Railroad Co., 379 Ill. 559, 42 N. E. (2d) 82 (1942); City of Chicago v. Cook County, 370 Ill. 301, 18 N. E. (2d) 890 (1939); Wilcox v. Conklin, 295 Ill. 604, 89 N. E. 669 (1912); People v. Cosmopolitan Fire Ins. Co., 246 Ill. 442, 92 N. E. 922 (1910); People ex rel. Sadler v. Olson, 245 Ill. 288, 92 N. E. 157 (1910); Miller v. People, 230 Ill. 65, 82 N. E. 521 (1907); Rowe v. Bowen, 28 Ill. 116 (1862); People ex rel. Beebe v. Evans, 18 Ill. 362 (1857); Galpin v. City of Chicago, 169 Ill. App. 155 (1910), affirmed in 249 Ill. 554, 94 N. E. 961 (1910).

21 City of Chicago v. Cook County, 370 Ill. 301, 18 N. E. (2d) 890 (1939); People ex rel. Soble v. Gill, 358 Ill. 261, 192 N. E. 193 (1934); Swigart v. City of Chicago, 223 Ill. 371, 79 N. E. 48 (1906).

22 Language in People v. City Court of East St. Louis, 338 Ill. 363, 170 N. E. 210 (1930); Israelstam v. U. S. Casualty Co., 272 Ill. 161, 111 N. E. 602 (1916); Morton v. Pusey, 237 Ill. 26, 86 N. E. 610 (1908); and in Miller v. People, 230 Ill. 65, 82 N. E. 521 (1907), would indicate that the Municipal Court of Chicago possess no more than city court jurisdiction. It has been said to have the same jurisdiction as a justice of the peace, according to Well v. Federal Life Ins. Co., 264 Ill. 425, 106 N. E. 246 (1914), but in Lott v. Davis, 264 Ill. 272, 106 N. E. 215 (1914), it was held to have a composite jurisdiction.
specific provision in the "home rule" amendment for the establishment of a Municipal Court of Chicago evidences an intention by the framers thereof that this authority should replace the earlier provision at least so far as a local court for Chicago is concerned.

Assuming, for the moment, that the legislature was granted the power to give to the Municipal Court of Chicago a jurisdiction not confined by territorial limits, the question then arises as to whether it has exercised that power and passed a statute which does confer extra-territorial jurisdiction. It would be well, in this regard, to give brief consideration to the Municipal Court Act itself and the construction which has been given to it. Passed in 1905 and submitted to the voters of Chicago during the same year, the statute makes no mention of the fact that civil actions must arise within the city limits in order for the court to possess jurisdiction over them. There is significance in the contrast provided by the fact that the City Court Act, at that time, included a definite limitation in the phrase "arising in said city." If it was the intention of the legislature to so limit the jurisdiction of the Municipal Court of Chicago, what explanation is there for the failure to include these important words? Is it not more reasonable to infer that it deliberately omitted the phrase because it did not mean to restrict such jurisdiction but, more nearly, considered the court it was creating to be one having general jurisdiction over transitory causes of action?

Probably the most conclusive argument of all is that the court itself has felt, throughout the years, that it did possess, and has exercised, such a jurisdiction. Actions often speak louder than words and at least two cases

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23 There is dicta in a line of earlier cases to the effect that the Municipal Court Act did not extend jurisdiction beyond the city limits, which might lead to the inference that the legislature did not exercise to the fullest the authority given to it by the amendment. See Wieboldt Stores v. Sturdy, 384 Ill. 271, 51 N. E. (2d) 268 (1943); People ex rel. Sokall v. Municipal Court of Chicago, 359 Ill. 102, 194 N. E. 242 (1935); Wilcox v. Conklin, 255 Ill. 604, 99 N. E. 669 (1912); People v. Cosmopolitan Fire Ins. Co., 246 Ill. 442, 92 N. E. 992 (1910); People ex rel. Sadler v. Olson, 245 Ill. 288, 92 N. E. 157 (1910); Miller v. People, 230 Ill. 65, 82 N. E. 521 (1907); Galpin v. City of Chicago, 159 Ill. App. 135 (1910), affirmed in 249 Ill. 554, 94 N. E. 961 (1910). The later cases would tend to indicate the opposite: City of Chicago v. Cook County, 370 Ill. 301, 18 N. E. (2d) 890 (1939); People ex rel. Soble v. Gill, 358 Ill. 261, 182 N. E. 193 (1934).

24 Ill. Rev. Stat. 1949, Vol. 1, Ch. 37, § 356 et seq. Section 357 thereof describes the subjects of action which the Municipal Court of Chicago is empowered to hear and determine. It may be noted, for example, that the court does not possess a general equity jurisdiction, nor may it grant divorces. A city court, by contrast, may deal with such matters, subject to the territorial limitations imposed upon it.

25 Both the statute and the constitutional amendment relating to it were held valid in City of Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237 (1906), and in People ex rel. Soble v. Gill, 358 Ill. 261, 192 N. E. 193 (1934).

26 Ill. Rev. Stat. 1941, Ch. 37, § 333 to § 355a, but particularly § 333. That statute had been enacted on May 10, 1901.
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exist in which the Municipal Court of Chicago has taken jurisdiction over tort and contract actions arising outside of the city and in which judgments have been reviewed on appeal without any mention of a possible jurisdictional question. Unquestionably, jurisdiction to hear and determine a cause of action cannot be given either by the consent of the parties or by their failure to raise the issue, so that a case decided by a court without jurisdiction over the subject matter results only in a judgment that is null and void. It being the well understood duty of a court, if it finds it lacks jurisdiction, to dismiss the case, can it be said that the judgments in the two cases mentioned were null and void and that both the Municipal Court of Chicago and the Appellate Court were derelict in their duty by passing on the matters brought before them without raising the jurisdictional issue? The answer would seem to be an obvious and a resounding "No!"

There are practical, as well as legal, reasons why the decision in the instant case should be reversed. No small matter of expense to residents of Chicago is at stake. If they may not, in cases of this kind, turn to their own relatively inexpensive tribunal, they will be forced to use the more costly services of the Circuit, Superior or County Courts of Cook County. Even more harmful would be the time-consuming delays which would be forced upon them by the over-crowded calendars of these other and understaffed state courts. Delayed justice being, at best, an inferior brand of relief, it is to be hoped that the Illinois Supreme Court will not force Chicagoans to tread again the road to constitutional revision in order to obtain that which is already their constitutional right.

R. T. NELSON

INFANTS—PROPERTY AND CONVEYANCES—WHETHER A BONA FIDE PURCHASER FROM AN INFANT'S TRANSFEEE IS TO BE PROTECTED IN CASE OF DISAFFIRMANCE BY THE INFANT OF HIS CONTRACT OF SALE—In the Arkansas case of Jones v. Caldwell, a minor, by his next friend, brought an action

27 In Rapers v. Holmes, 292 Ill. App. 116, 10 N. E. (2d) 707 (1937), the court dealt with a tort cause of action arising in Indiana. The earlier case of Israel v. Selman, 263 Ill. App. 351 (1931), involved a contract cause of action based upon a contract made, and to be performed, in Ohio.
29 A press release issued by the Chief Justice of the Municipal Court of Chicago indicates that there has already been a decline of from 10 to 15 per cent. in the filing of civil tort and contract cases by reason of the decision in the instant case. The release estimates that the Municipal Court will lose from 15,000 to 20,000 such cases a year if the decision is affirmed.
30 Ill. Const. 1870, Art. II, § 19, promises to all citizens the right to obtain "justice freely, and without . . . delay."
1 — Ark. —, 225 S. W. (2d) 323 (1940).
to recover possession of an automobile which he had sold to a third party who had, in turn, sold it to the defendant. The latter had purchased in good faith, for value, and without notice of the incapacity of the vendor's transferor. Despite a jury verdict for the defendant, the trial court, on plaintiff's motion for judgment non obstante veredicto, set the general verdict aside and entered judgment for plaintiff. Upon appeal, the Supreme Court of Arkansas reversed, holding that the defendant was entitled to an instruction that if the jury found that the defendant had purchased the automobile in good faith, for value, and without notice of the seller's defect in title by reason of the original purchase from a minor, the verdict should be for the defendant. The court specifically relied on Section 24 of the Uniform Sales Act as the basis for refusing to follow what had previously been the acknowledged common-law rule followed in that state.

The common-law rule had clearly allowed an infant not only to disaffirm his contract, even though the rights of innocent third parties had intervened, but also permitted him to act to regain his property. Other jurisdictions as well as Arkansas have followed this principle. In Hovey v. Hobson, for example, the Supreme Court of Maine, in a case concerning the disaffirmance of a deed of an insane person, after declaring that the acts of lunatics and infants were to be treated as analogous and subject to the same rules, went on to state that the rights of an infant and of an insane person to avoid a deed or contract was an absolute right, was superior to all equities of other persons, and could be exercised against bona fide purchasers from the grantee. Massachusetts had likewise held, at least as to transfers of realty, that the absolute and paramount right of the infant or the insane person to avoid a contract could be exercised against even an innocent purchaser for value from the incompetent person's grantee.

It is true that the aforementioned cases specifically dealt with transfers of realty, but the courts concerned did not limit the principle expressed to such circumstances. A reading of the cases would disclose that the attitude expressed therein was, ostensibly at least, intended to apply as a general rule based upon social, economic, and moral concepts concerning infants, and not upon the nature of the subject matter involved. Application of

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5 53 Me. 451, 89 Am. Dec. 705 (1866).
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the principle to cases involving other than realty transactions may be
typified by the holding in *Downing v. Stone*. It was held therein that a
contract for the sale of goods made by an infant was voidable during the
infant's minority, so that, upon his election to avoid the contract and upon
giving notice to his vendee of such recission, tendering the return of the
consideration received if he still had it, the matter would stand as if no
sale had ever been made. The infant might then follow the property he
had delivered to the vendee, into whomsoever's hands it may have passed,
with full right to recover it in kind or to maintain trover for its conversion
if possession was denied to him.

The foregoing discussion serves to exemplify the attitude of the com-
mon law toward the problem of disaffirmance of contracts made by infants.
The court in the instant case found a basis for a contrary holding in Section
24 of the Uniform Sales Act. That section states, in substance, that where
one who has acquired a title to goods, but which title is voidable in nature,
transfers such title prior to the time when his title has been avoided, the
one who takes from him gets a good title provided the taker acts in good
faith, pays value, and has no notice of the defect in his transferor's title.
The word "infant" does not expressly appear in the section, so the ques-
tion becomes one of whether or not an infant's contract comes within its
terms by inference. In that connection, it may first be noted that the term
"voidable," as employed in the section, is used without any qualifying
clause. It may be reasonably inferred, from this fact, that the framers of
the statute used that term in its ordinary legal connotation, intending
thereby to include all contracts considered voidable, for whatever reason,
at the time of the enactment of the section. Certainly, this line of reason-
ing would bring the contracts of infants within the purview of Section 24,
for they have generally been regarded to be voidable, rather than void.

A second argument offered to support the holding in the instant case
was adduced from a reading of the whole of the Uniform Sales Act. The
Arkansas court noted that the legislature had expressly excluded infants

7 *47 Mo. App. 144 (1891).
8 The language of the Downing case is not only clear but also comprehensive.
Language more colloquial in character, but to the same effect, was employed in
Mellott v. Love, 152 Miss. 860, 119 So. 913 (1929). It was there said, in a case
concerning an infant who disaffirmed his purchase of shares of stock in a bank,
that the infant's right to avoid a contract because of infancy was not affected by
the fact that the rights of third parties had intervened.
9 Unif. Laws Anno., Vol. 1, § 24. The section has most often been applied to trans-
fers of title in cases wherein fraud has been involved. In that regard, the New
York court concerned in the case of Neal, Clark & Neal Co. v. Tarby, 99 Misc. 380,
163 N. Y. S. 675 (1917), stated that the section merely restated the common law
which accorded protection to the innocent party against one whose actions had
placed the offender in a position to do wrong.
from the workings of the act wherever it had clearly desired to do so.\textsuperscript{10} The absence of express exclusionary language in Section 24 was held to be indicative of an intention that it should be applied to infants' contracts as well as to those of admittedly competent persons. The argument might be weakened to some extent by a firm policy of according to infants a favored position in law which might be taken to require an express legislative mandate for inclusion, rather than an implied exclusion, of infants under the section in question. Further guidance in this connection, however, is offered by Professor Williston, whose role in both the drafting and the adoption of the Uniform Sales Act is well known. Specifically commenting upon Section 24, he once wrote: "In a few classes of cases, however, the law as distinguished from equity gives a special right of avoiding a transfer of title, a right which has been held to exist not simply against the first taker of title, but against any subsequent transferee irrespective of bona fides or value. This has been the privilege of infants and in jurisdictions where the contract of a lunatic is regarded as analogous to that of infants the same principle has been applied. In regard to such cases this section of the Sales Act works a change in the law. It is desirable that at some time the title to goods bought from an infant or lunatic should be protected and the advantage to trade and stability of titles justifies the diminution in the privilege of infants and lunatics."

Similar reasoning underlies the instant case and supports, at least in part, a few of the decisions relied upon by the Arkansas court as authority for the position it adopted. The first, and perhaps the principal, of these authorities is the case of \textit{Casey v. Kastel}.\textsuperscript{12} In that case, an infant sought to disaffirm his contract for the sale of stock certificates, made through an agent, and thereby affect the rights of third parties. The New York court, applying Section 24 of the Uniform Sales Act, treated the sales contract as being only voidable in nature and, as it had not been avoided by the infant before a bona fide purchaser for value had taken title without notice, it held the latter had obtained a good title. The second of these cases, that of \textit{Carpenter v. Grow},\textsuperscript{13} concerned a situation somewhat more akin to the instant case than the one involved in the Casey decision. The minor there concerned had purchased an automobile and had paid for the same by way

\textsuperscript{10} The court called particular attention to Section 2, one which deals with capacity to contract and with liability for necessaries: Unif. Laws Anno., Vol. 1, \S 2. That section expressly includes infants among those who are required to pay only a reasonable price for necessaries furnished, as distinguished from other parties who would, generally, have to pay the contract price.

\textsuperscript{11} See Williston, Sales, Vol. 2, \S 348, p. 349.


\textsuperscript{13} 247 Mass. 133, 141 N. E. 889 (1923). The Uniform Sales Act was adopted by that state in 1909.
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of a trade-in plus cash and notes. The vendor having resold the automobile received in trade from the infant, the court limited the infant’s recovery against the vendor to the money advanced. It stated that while the avoidance of the infant’s contract had caused the contract to be void ab initio, the Uniform Sales Act had deprived the infant “of any rights against the defendant’s transferee.”

Where the question of the applicability of Section 24 of the Uniform Sales Act to infants’ contracts has been directly raised, courts of accepted authority have recognized the protection afforded by it to third persons who have acted in a bona fide fashion. The same result was achieved in the Iowa case of *Kuemth v. Means*, but no mention was made therein of a possible application of Section 24 to the situation there at hand. The problem involved concerned three infants who had entered into a partnership agreement. Two of the infants attempted to avoid a contract which had been made, on behalf of the partnership, by the third. The court, speaking of the right to so avoid as applied to the adult party who had contracted with the infants, said: “The right of a minor to pursue his property upon disaffirmance into the hands of a third party may not be predicated upon the mere fact of his minority. Such right of pursuit must be predicated not only upon minority and disaffirmance, but upon some form of fraud chargeable to the third party. Where a minor parts with his property on a contract valid until disaffirmed, the third parties, becoming innocent purchasers thereof for value are entitled to protection as such. If a minor seeks recourse beyond the party with whom he contracts, he must connect such third party in some manner by notice or otherwise with the contract which he disaffirms.”

The precise question here involved does not appear to have arisen in Illinois to date, but the state has adhered to common-law doctrines, particularly as they bear on the general problem of avoidance of infants’ contracts. It has been held that contracts concerning the sale of personality may be avoided by the infant either during or after minority and that

14 247 Mass. 133 at 137, 141 N. E. 859 at 861.
15 206 Iowa 539, 218 N. W. 907 (1928). Section 24 of the Uniform Sales Act could have been cited, as it had been adopted in Iowa as early as 1919.
16 206 Iowa 539 at 547, 218 N. W. 907 at 911.
17 The following cases illustrate the general state of the law in Illinois as to avoidance of contracts made by infants: Wuller v. Chuse Grocery Co., 241 Ill. 395, 89 N. E. 796 (1909); Fuller v. Pool, 258 Ill. App. 513 (1930); Crandell v. Coyle Electrical School, 256 Ill. App. 322 (1930); Collins v. Peter’s Real Estate Corp., 252 Ill. App. 348 (1929); Kulpers v. Thome, 182 Ill. App. 28 (1913); Pennsylvania Corp. v. Purvis, 128 Ill. App. 367 (1906); Ashlock v. Vivell, 38 Ill. App. 57 (1890). In Fuller v. Pool, 258 Ill. App. 513 (1930), the court cited with approval a statement made in 14 R. C. L. p. 242 to the effect that upon disaffirmance of a contract by an infant, the rights of the parties are as if the contract had never existed.
there is, for this purpose, no distinction in law between executory and executed contracts. For that matter, it was said in Hunter v. Egolf Motor Company,\(^1\) that a minor was not precluded from asserting his right to disaffirm a contract by the fact that the disaffirmance might operate injuriously and unjustly against the other party. These holdings, of course, grew out of situations which concerned only the infant and his other contracting party, but they may be indicative of a desire to provide a far-reaching protection for the infant. If the infant is to be protected to the fullest extent, it could be argued that similar results should be obtained in cases of resale of the chattels by the infant’s transferee, particularly where only the return of the specific chattel would serve to mitigate the situation. But the dangers involved in such a possibility should be weighed against the benefits to be derived from a contrary rule, one which could be built around a comparable interpretation of the Illinois statute. The problem is, then, one of setting a fair limit upon the extent of the protection to be afforded to infants while at the same time not acting to deprive innocent third persons of their rights. As stability of titles is a prerequisite, in a commercial world, to sound business dealings, there would seem to be much justification for fixing that limit at the precise point established by the instant case.

R. L. ENGBER

Joint Tenancy—Creation and Existence—Whether or Not the Leasing of a Safety Deposit Box Under a Joint Tenancy Lease Establishes a Joint Tenancy in the Contents of Such Box—By its decision in the case of In re Wilson’s Estate,\(^1\) the Illinois Supreme Court has placed a novel interpretation on an Illinois statute regulating joint tenancies\(^2\) at least insofar as such statute applies to the contents of safety deposit boxes. The proceeding there involved was instituted by two of the beneficiaries under a will to compel the wife of the testator, who acted as executrix of the estate, to include, in her inventory of the estate, the contents of two safety deposit boxes as well as the balance on deposit of a joint bank account. Both the safety deposit boxes and the bank account were held in joint tenancy by the testator and the executrix. Despite this, the beneficiaries, who were children of the testator by a former marriage, contended that the personal property contained in the boxes and the balance of the bank account were the sole property of the testator. The widow-executrix,

1\(^{18}\) 268 Ill. App. 1 (1932).
1\(^{1}\) 404 Ill. 207, 88 N. E. (2d) 662 (1949), noted in 38 Ill. B. J. 228, affirming 33\(^{6}\) Ill. App. 18, 82 N. E. (2d) 684 (1948).
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on the other hand, contended that, as the property in question was held under joint tenancy agreement made between the testator, the widow, and the bank, the entire property in question passed to her by right of survivorship. In further support of her claims, the widow offered a note or memorandum found in one of the boxes which bore the signature of the testator and purported to create a joint tenancy in the contents thereof. The trial court found in favor of the executrix, but its judgment was reversed and the cause was remanded by the Appellate Court for the Second District.3

Upon further appeal by the executrix, the Illinois Supreme Court affirmed the judgment of the Appellate Court insofar as it had held that no joint tenancy had been created over the contents of the safety deposit boxes but it reached the conclusion that the balance on deposit in the bank account had passed to the widow-executrix as survivor. The significance of the case lies in the fact that the court held that neither the leasing agreement with the bank for the rental of the safety deposit box nor the note found therein were sufficient to constitute that "instrument in writing" made necessary by the statute prescribing the method for the creation of a joint tenancy in personal property.

The present Illinois statute abolishes the right of survivorship by way of joint tenancy in personal property except in the special instances therein enumerated, to-wit: property held by executors and trustees, and in cases where, by will or other instrument in writing, there is an expressed intention to create a joint tenancy in the personalty with the right of survivorship. A separate provision of the statute permits a bank to accept deposits payable on demand to one or more, and to accept a receipt or acquittance of any one or more as a full discharge from all, so long as an agreement providing for such payment is signed by all of the parties, either at the time the account is opened or thereafter. A similar provision exists covering the payment of dividends or earnings of stock jointly held where there is an agreement in writing signed by such joint owners. The court had little difficulty, therefore, in reaching the conclusion that the money remaining on deposit in the joint bank account belonged to the widow-executrix in her own right. As the account had been carried in the names of both the executrix and the testator, under an agreement in writing which the parties had entered into with the bank, the balance of the account obviously fell within the statutory exception outlined above.4

The question of ownership of a quantity of currency and of certain bearer bonds found in the safety deposit boxes presented a more difficult

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3 336 Ill. App. 18, 82 N. E. (2d) 684 (1948), noted in 37 Ill. B. J. 212.
4 See also Reder v. Reder, 312 Ill. 209, 143 N. E. 418 (1924); Illinois Trust & Savings Bank v. Van Vlack, 810 Ill. 185, 141 N. E. 546 (1923); Erwin v. Felter, 283 Ill. 96, 119 N. E. 926, L. R. A. 1918E 776 (1918).
The precise issue faced by the court was whether either the rental contract with the bank, under which these boxes had been rented, or a note found in one of the boxes, constituted a written instrument within the statutory provision, that is one which not only created the estate but also served to express an intention of giving to it the incident of survivorship.

The existence of a leasing agreement purporting to create a joint tenancy in the contents of the safety deposit box has generated a problem which has been litigated in a number of American jurisdictions with considerable lack of unanimity in the holdings pronounced by the various courts. In one of the earliest cases, that of *Mercantile Safety Deposit Company v. Huntington*, it was held that the presence of a joint ownership of a safety deposit box, under a leasing agreement with a bank, indicated nothing as to the ownership of the contents, for the only inference to be drawn from such joint ownership of the box was that the parties had an intention to qualify each of the depositors for access to the box and no more. The independent ownership of property by one of the parties was said not to be altered by the act of placing such property in a safety deposit box rented under a joint tenancy lease. That action has been held insufficient to establish joint ownership even where the parties are husband and wife. Not even the presence of an express recital to the effect that the contents of a box leased by husband and wife were the joint property of both lessees and should, upon the death of either party, pass to the survivor was regarded as being sufficient, in the Arkansas case of *Black v. Black*, to establish common ownership of the contents. The clause was there said to be for the protection of the lessor and merely determined, as between the lessor and lessees, that the lessees were joint tenants. It has also been held that, where either party has a right to surrender the box to the lessor, the rental agreement would not even serve to create a joint tenancy as to the box, much less of its contents.

The contrary view, one holding that the leasing of a safety deposit box under a joint tenancy rental agreement does establish joint ownership in the contents of such box, rests on the theory that the lease does disclose an intention on the part of the lessees to establish such a relationship. A

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5 89 Hun. 465, 35 N. Y. S. 390 (1895).  
6 Much the same view is expressed in the later cases of Security First National Bank of Los Angeles v. Stack, 32 Cal. App. (2d) 586, 90 P. (2d) 337 (1939), and Richards v. Richards, 141 N. J. Eq. 579, 58 A. (2d) 544 (1948).  
8 199 Ark. 609, 135 S. W. (2d) 837 (1940).  
perfect illustration of this view may be observed in the case of *Graham v. Barnes*\(^\text{10}\) where it was held that negotiable bonds owned by an intestate and placed in a safety deposit box leased in the joint names of the intestate and his mistress, became the sole property of the mistress by right of survivorship upon the decease of the intestate. Other cases reach the same result in the absence of any statute regulating joint tenancies\(^\text{11}\) but they may turn on the precise language of the agreement.\(^\text{12}\)

In electing to adopt the first of these views, to-wit: the mere fact that persons lease a safety deposit box as joint tenants does not, in and by itself, create a joint tenancy in the contents thereof, the Illinois court reasoned that, to fulfill the requirements of the statute, it was essential that the written instrument purporting to create the joint tenancy relationship had to be one in the form of a conveyance of an interest in the property. A rental agreement could hardly accomplish this result as it would be a writing entered into between the bank on the one hand, as lessor, and the husband and wife on the other, as lessees, rather than between a vendor and vendees. Furthermore, no specific property would be described in a leasing contract covering a safety deposit vault whereas it would be essential, in order to create a joint tenancy in personal property, for that property to be definitely described in the instrument evidencing the ownership. While the decision in the instant case merely purported to invalidate the attempted creation of a joint tenancy by reason of the particular leasing agreement therein involved, it would be reasonable to conclude that it is not possible, in Illinois, to utilize a safety deposit box lease as an instrument by which to establish a joint tenancy relationship as to the personalty contained therein,\(^\text{13}\) for the reasoning of the court, in reaching that result, would be

\(^{\text{10}}\) 259 Mass. 534, 156 N. E. 885 (1927).

\(^{\text{11}}\) See *Brown v. Navarre*, 64 Ariz. 262, 169 P. (2d) 85 (1946); *Lilly v. Schmock*, 297 Mich. 513, 298 N. W. 116 (1941), where the court stated that there was no statute or court decisions in the jurisdiction forbidding the creation of a right of survivorship in personalty when done by the express act of the parties; *In re Petersen's Estate*, 239 Mich. 452, 214 N. W. 418 (1927).


\(^{\text{13}}\) See *In re Jirovec’s Estate*, 285 Ill. App. 113, 3 N. E. (2d) 102 (1936), where the Illinois Appellate Court held that the application card for the lease of a safety deposit box signed by the co-renters and bearing the stamp “either or survivor” was not sufficient to create a joint tenancy in the contents of the box, but was merely an expression of an intention to authorize the bank to allow access to the
applicable to all such leasing agreements, no matter how detailed or comprehensive they may be.

The court was, however, confronted with a much more difficult problem when it had to determine the effect of the note which had been signed by the deceased and left in the safety deposit box. That note merely stated that there was a certain sum in the box and that such money was held in joint tenancy by the maker and his wife, but the query was whether this note represented such an "instrument in writing" as would satisfy statutory requirements. For this purpose, the court considered the meaning of the words "instrument in writing" to be the equivalent of such a written instrument as would comply with the requirements of the statute of frauds insofar as it relates to conveyances of personalty upon a consideration not deemed valuable in law. The last mentioned statute requires that transfers of goods and chattels, without a consideration deemed valuable in law, must be by will or deed, as in the case of real property, or by possession remaining bona fide in the donee. By application of this interpretation to the note concerned in the present case, the court readily found that there was no conveyance of property present, words of transfer being lacking, in addition to which the note did not even express an intention to create a joint tenancy relationship.

It may be inferred, from this reasoning, that if the language of such a note were comprehensive enough it might be sufficient to establish a joint tenancy over the contents of a safety deposit box. Perhaps the court had in mind the written agreement which had been presented to the Illinois Appellate Court in the case of In re Koester's Estate. The written agreement there concerned had provided that all property placed or contained in the safety deposit box, whether put there before or subsequent to the making of the agreement, should belong to the lessees jointly with right of survivorship. That writing was held to be such an instrument as would comply with statutory requirements. The facts of that case, however, dis-

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14 The note read: "There is $37,000 in this box and it is a joint tenancy between my wife Mary Aldah Wilson, and myself. E. G. Wilson, M.D. 6-11-46." See 404 Ill. App. 207 at 209, 88 N. E. (2d) 662 at 663.


16 In Napier v. Eigel, 350 Mo. 111, 164 S. W. (2d) 608 (1942), the court found that a note left in a safety deposit box designating that certain funds in the box were for the emergency use of the deceased and her surviving sister did not serve to establish a joint tenancy in the funds upon the happening of the contingency.

17 286 Ill. App. 113, 3 N. E. (2d) 102 (1936). The note there concerned was a separate agreement signed by the husband and wife, but executed at the time the leasing agreement was made with the bank.
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Close that securities had been purchased by each of the parties from their individual funds and had been placed in the box subsequent to the date of the written agreement. The Appellate Court indicated that the written agreement was operative on such after-acquired property, even though such property was originally purchased from the sole funds of one of the parties. In view of the fact that in that case, as in the present one, there was no specific description of the property nor any separate conveyance, it would seem that the contract there involved would be inadequate in the light of the present decision by the Supreme Court.

Even supposing words of conveyance were present, there is some question as to whether such a writing would have created a joint tenancy in the contents of a box. It is fundamental to the proper creation of a joint tenancy at common law that there be unity in the four elements of title, interest, time and possession, so that the joint tenants must have the same interest, accruing under the same conveyance, commencing at the same time, and hold under the same undivided possession. An intention alone, no matter how emphatically expressed, is not sufficient to create rights; for to create such intended rights the intent must be carried into effect by acts which are legally capable of accomplishing the intended purpose. How, then, can one already holding title expect to create a joint tenancy in personalty by his own unilateral act? Should he not be required to follow the time-honored method utilized in real estate transactions, under which he divests himself of his individual title to a disinterested third person and receives a reconveyance to himself and his joint tenant? Only in that fashion may the four unities be preserved.

It is true that it was not necessary for the court, in the instant case, to decide whether it was essential that the four unities be preserved as the instrument itself was found to be insufficient, making recourse to the subsidiary problem unnecessary. It may be noted, however, that the court may have intimated that the four unities might be necessary for it cited a case to this effect. In this regard the court would appear to be contradicting itself, as well as disagreeing with the reasoning of the Appellate Court in the Koester case, for the four unities were not discussed as being an essential attribute to the creation of a joint tenancy relationship either in the instant case or in that case. On the contrary, it might be argued that as the statute enacted to govern the creation of joint tenancy in per-

20 Reference was made in the opinion to the holding in Hood v. Commonwealth Trust & Savings Bank, 376 Ill. 413, 34 N. E. (2d) 414 (1941).
personal property does not mention the need for the four unities, it may, by superseding the common law, have, by its very silence, obviated the necessity for these formalities. That argument may not prove to be successful, if the court should extend its process of interpretation. It has imposed the requirement that the writing be in the form of a conveyance, although a perusal of the statute will reveal that the word "conveyance" is lacking in its context. If the court continues to think in terms of the four unities, a unilateral agreement by one already holding title may also, by interpretation, prove insufficient unless it can operate as a will.

There is enough in the decision to disquiet the peace of mind of persons who have attempted to establish joint tenancy relationships in personal property. As the statute now stands, the result attained is logical and sound, but may not be the one expected. The legislature, which saw fit to abolish the right of survivorship in personal property, except in the instances enumerated, should consider a revision of the statute. Despite the reticence with which the law recognizes the ownership of property in joint tenancy, a vast amount of wealth is now represented by personal property of a kind particularly adaptable to storage in safety deposit box facilities. If joint tenancy ownership thereof requires full compliance with the details made necessary for joint tenancy ownership of real property, it is time the legislature said so.

W. P. McCray

Municipal Corporations—Use and Regulation of Public Places, Property, and Works—Whether or Not a Municipality Is Liable for Negligently Failing to Correct a Defective Automatic Traffic Control Device—The Illinois Supreme Court, in an unprecedented decision in the case of Johnston v. City of East Moline, affirmed a decision of the Appellate Court for the Second District which had upheld a trial court decision to the effect that a city is liable for damages arising from an automobile accident proximately caused by the malfunctioning of a traffic signal. The plaintiff’s complaint charged that she, as a passenger in the automobile of another, had entered a partially controlled street intersection at the invitation of a green light when the car in which she was riding was violently struck by another automobile which had entered the intersection from a transverse direction then uncontrolled because of a failure in the operation of the traffic light. The plaintiff predicated her suit upon the alleged negligence of the city in failing to repair the malfunctioning traffic light for a period of six days after notice of the defect. The city dis-

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claimed liability on the ground that the maintenance and operation of traffic signals constituted a governmental function for which there could be no liability in damages. All courts concerned with the particular case, in holding for the plaintiff, ruled that the conduct of operating and maintaining highway traffic signal lights was non-governmental rather than governmental in character, as a consequence of which the defendant could be held liable for its negligence in failing to readjust or repair the light within a reasonable time.

Courts have always taken the position that municipal corporations, at least as to defects in the surfacing of streets, would be exposed to liability for neglect. Such liability has generally been viewed as arising by necessary implication from the fact that municipal corporations are usually invested with exclusive authority and control over the streets within the corporate limits. Possessing the means for the construction and repair of such streets, it is only fitting that municipal duty should arise, in favor of the public, to keep the streets in a reasonably safe condition. As a necessary corollary thereof, a corresponding liability exists to respond in damages to those who might be injured by a neglect to perform that duty. But the duty has been extended beyond mere responsibility for care over the surface of the travelled way, for Illinois courts have generally been quite liberal in their interpretation of what constitutes a street and its appurtenances. It has been held, for example, that municipalities may be liable for damage caused by negligence in repairing water mains, in permitting uninsulated electric wires to so obstruct the public streets as to render them dangerous, in not preventing the falling of defective awnings, in allowing a trash fire set by a street sweeper to ignite the clothing of a child, in not repairing or removing a traffic signal platform which contained acid so that the same might not splash on and burn a pedestrian, and for allowing a metal "stop" sign to become loose so that it might fall and strike a child playing on the street.

In contrast, however, the regulation of traffic upon the street has generally been considered to be a governmental function, with the attendant effect that the municipality is not liable for injuries or damages which may arise out of negligence in the control of such traffic. A municipal cor-

2 In general, see 63 C. J. S., Municipal Corporations, § 782.
3 Browning v. City of Springfield, 17 Ill. 143 (1850).
5 Village of Palatine v. Siter, 225 Ill. 630, 80 N. E. 345 (1907).
6 Hanrahan v. City of Chicago, 278 Ill. 400, 124 N. E. 547 (1919).
7 Roumbos v. City of Chicago, 332 Ill. 70, 163 N. E. 361 (1928).
poration, for example, is said not to be liable for the acts of its officers when attempting to enforce police regulations nor is it liable for the wrongful or negligent acts of its police officers while they are acting in the performance of their public duties. In that regard, courts have held that devices installed by the municipality to aid or assist the police in regulating traffic are installed and operated under an exercise of the governmental function so that the municipality is relieved from liability arising from a negligent installation or operation of such a device, provided the same does not actually constitute a physical defect in the street itself. In Kirk v. City of Muskogee, for example, an Oklahoma court once stated that "a municipality is liable for damages sustained from defects in its streets, but there is a clear distinction between the failure of a city to keep its streets in a safe condition as regards physical defects therein, and failure or neglect in regulating traffic thereon." Cases from other jurisdictions, with similar fact situations to the instant case, hold that, as regulation of traffic is a governmental function, any traffic signals installed to assist in such regulation are no more than mechanical substitutes for police officers so as to be within the general immunity provided for acts done pursuant to such governmental function.

It would appear, from its decision in the instant case, that the Illinois court refuses to follow a well-ordered path of legal logic established in other jurisdictions where governmental immunity has been permitted to attach to inanimate or mechanical signals designed to regulate traffic. It is difficult to determine why a municipality should be immune from liability for injuries produced by the negligence of its human officers engaged in the regulation of traffic but be exposed to liability where the same function is being exercised by mechanical traffic signals. As the job being done is the same in both cases, any difference in the result must be attributed to some other factor. The court in the instant case hints at a distinction but does not, as is so often the case, make that distinction clear in precise words. It mentions that traffic signals perform their functions in a ministerial or non-discretionary manner. It is self-evident that an inanimate regulator does not have the ability to exercise any discretion.

11 183 Okla. 536, 83 P. (2d) 594 (1938).
12 183 Okla. 536 at 537, 83 P. (2d) 594 at 595.
13 Dorminey v. City of Montgomery, 232 Ala. 47, 166 So. 689 (1936); Avey v. City of West Palm Beach, 152 Fla. 717, 12 So. (2d) 881 (1943); Sandman v. Sheehan, 279 Ky. 614, 131 S. W. (2d) 484 (1939); Auslander v. City of St. Louis, 332 Mo. 145, 56 S. W. (2d) 778 (1932); Hodges v. City of Charlotte, 214 N. C. 737, 200 S. E. 891 (1939); Vickers v. City of Camden, 122 N. J. L. 14, 3 A. (2d) 613 (1939); Martin v. City of Canton, 41 Ohio App. 420, 180 N. E. 78 (1931).
It merely blinks or buzzes at regularly fixed intervals and is totally lacking in the ability to change its procedures as the needs of the traffic might demand. By contrast, an officer set to directing traffic, while performing the same function, may exercise discretion for his procedures may be changed to fit the occasion. Therein may lie the clue.

It has been the custom in the past for some jurisdictions, including Illinois, to utilize a distinction between discretionary and ministerial powers in determining whether a particular municipal function is governmental or proprietary in character. If the former, immunity from tort liability exists; if the latter, it does not. Such reasoning proceeds on the basis that an exercise of discretion is the main element called for in the discharge of legislative or judicial powers, by reason of which they are purely governmental in nature. Ministerial powers, on the other hand, have no such connotation. If this test be applied to the regulation of traffic on streets and highways, one is forced to conclude that the promulgation of all regulatory measures calls for the exercise of discretion so, if the pattern of logic is followed, should be classified as being governmental in character. The Illinois court, however, carries the reasoning process one step farther. It now requires that the element of discretion must be present in all phases of the function, that is not only in the promulgation of the regulation but also in the mode of putting such regulation into operation. As the complete element of discretion is lacking in the case of a mechanical traffic regulator, immunity from tort liability must also be absent. One hesitates to say how far that thought may be carried but the instant case clearly indicates that when, in Illinois, a traffic signal has been installed it immediately becomes an appurtenance to the street or highway for which the municipality must become responsible. When it ceases to function properly and becomes a physical hazard to traffic, the municipality which negligently allows the signal to continue in that status must expect to be liable for any injury caused thereby.

J. E. STRUNCK

14 The extent to which that distinction may be pushed, entirely out of all proportion to its proper functioning, may be observed in the holding in Mower v. Williams, 402 Ill. 486, 84 N. E. (2d) 435 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 103, where a highway maintenance employee, charged with driving a snow plow, was absolved from liability for colliding with a passenger vehicle because engaged in a "governmental" function. Crampton, J., dissented. The amount of "discretion" involved in the act of driving a truck, with snow plow attached, on a public highway may be classed as negligible.