Survey of Illinois Law for the Year 1953-1954

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SURVEY OF ILLINOIS LAW FOR THE YEAR 1953-1954*

VII. PUBLIC LAW

ADMINISTRATIVE LAW

It infrequently happens that a court is faced with the problem of deciding whether constitutional due process requires that some form of judicial review of administrative decisions be permitted because most legislation operating to create administrative tribunals either provides for judicial review or else is silent on the subject. Only when a statute expressly limits judicial review is any problem squarely presented and, in the past, such limitations have been the exception rather than the rule. In 1945, however, the Illinois legislature did incorporate such a provision in the Minimum Wage Act, a statute permitting the Department of Labor to investigate and fix minimum wages for women and children, for judicial scrutiny was there restricted to questions of law with the decision of the department on fact questions being made conclusive. The constitutionality of this particular provision was challenged in the case of Vissering Mercantile Company

* Parts I to VI of this survey appeared in the issue for December, 1954, Vol. 33, No. 1. Limitations of space prevented the full publication thereof in that number.

1 In the latter situation, some type of review is invariably obtainable through utilization of one or more of the common-law writs, hence the constitutional issue is never presented.


3 Ibid., Ch. 48, § 198.13.
v. Annunzio\textsuperscript{4} wherein the Supreme Court, on direct appeal, held the legislative attempt to limit judicial review violated the due process clause in both the state and the federal organic laws.\textsuperscript{5} The court there said that due process required some form of judicial review whenever an administrative body was acting in a quasi-legislative manner but not where it was exercising a quasi-judicial function.\textsuperscript{6}

The decision leaves three questions open for debate, to-wit: (1) how can it be determined whether an agency is acting in a legislative or a judicial capacity, (2) what is the logical significance of this distinction from the judicial review standpoint, and (3) what type of review of the facts would satisfy due process requirements? As to the first, it has been suggested that an administrative decision affecting the future conduct of a class of individuals would be legislative in nature whereas a determination as to the present rights of one individual or one corporation would be judicial. This test works with precision in the instant situation since a minimum wage order would regulate the future conduct of many employers, but the standard is not always so workable.\textsuperscript{7} Even if a satisfactory test might be evolved, the court fails to give any satisfactory reason why such a distinction should be made in the first place. Since either function is to be exercised by an administrative tribunal, the need for, or lack of need for, judicial supervision would appear to be the same in either situation. On the third point, while the court specifically states that due process demands that review be provided, it does not offer any indication as to the type of review which would be acceptable. Is a \textit{de novo} hearing required or will due process be satisfied


\textsuperscript{5} As the particular section was expressly declared to be severable, the balance of the statute was not affected and was, in fact, held to be valid.

\textsuperscript{6} The court cited Nega v. Chicago Railways Co., 317 Ill. 482, 148 N. E. 250 (1925), and People ex rel. Radium Dial Co. v. Ryan, 371 Ill. 597, 21 N. E. (2d) 749 (1939), as upholding this distinction.

\textsuperscript{7} For instance, in rate-making, elements of both the judicial function and the legislative function make themselves apparent, a single utility being involved but the rate being designed to have prospective effect.
merely by a review of the record, with the court determining whether or not there is evidence to support the findings of fact? The latter procedure is the type generally considered acceptable today and it would be reasonable to suggest that this was the mode which the Supreme Court had in mind for, if administrative agencies are to be established to cope with problems which courts are not skilled to handle, that purpose would be defeated by requiring the court to hold de novo hearings.

Interpretation of the Illinois Administrative Review Act was called for in two cases. In the first of these, that of Chicago College of Osteopathy v. Puffer, the plaintiff filed an application with the Department of Registration and Education for approval as a college whose graduates would be permitted to take the state medical examination. In accordance with the Civil Administrative Code, the Director appointed a medical examining committee to investigate the school, which committee, after holding hearings, made certain findings and recommended that the application be denied. The Director followed the recommendation and the plaintiff then filed suit under the Administrative Review Act requesting judicial relief. The trial court affirmed the Director’s decision but, upon appeal, the Appellate Court for the First District reversed. The defendant had contended throughout that the members of the medical examining committee were necessary parties who should have been joined with him as defendants. Answering that contention, the court pointed out that, while the Director must appoint a committee, the members thereof exercise no final decision-making power and, as it was the decision of the Director which was being reviewed, he was the only necessary defendant.

Where the Administrative Review Act applies it is the sole and exclusive method for obtaining judicial relief, so it becomes important to determine whether or not the statute applies to a

9 3 Ill. App. (2d) 69, 120 N. E. (2d) 672 (1954). Leave to appeal has been granted.
11 Ibid., Ch. 110, § 265.
specific administrative decision for common-law writs are then no longer available. This precise problem was involved in the second of the cases, that of People ex rel. Vestuto v. O'Connor, a mandamus action brought to compel the relator’s reinstatement to a police department from which he had been discharged during the probationary period. The City Civil Service Act authorizes a department head to discharge an individual during the probationary period if he requests and receives the consent of the Civil Service Commission. The defendant therein had so requested and received permission to discharge the relator on the ground that the latter, as a youth, had been arrested, charged with burglary and malicious mischief, and had been committed to a parental school for a period of four months. The defendant argued that since the Civil Service Act provided for review in the fashion directed by the Administrative Review Act a mandamus suit was not an appropriate judicial remedy, but both the trial court and the Appellate Court for the First District took the position that it was the decision of the Police Commissioner, rather than that of the Civil Service Commission, which was being questioned so the matter did not fall within the statutory definition.

In arriving at that conclusion, the court apparently felt that unless the questioned decision has been preceded by some type of hearing at which a record has been made, the determination could not be considered an administrative decision within the terms of the review statute. It is true that that statute contemplates a review of that which occurred in the administrative stage and does not provide for a de novo hearing but this does not mean that a court, under the statute, can only review a certificate of evidence. In the instant case, the report and request made by

14 Ibid., Ch. 241/2, § 77a.
15 Ibid., Vol. 2, Ch. 110, § 264.
16 See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 272(b), which provides that the defendant does not necessarily have to file a transcript of the evidence. This would appear to mean that a court would still have jurisdiction to proceed even though it did not have the full record before it.
the Police Commissioner had been made part of the record, so the court could have reviewed the sufficiency thereof in the same manner as under a request for a writ of mandamus. Bearing in mind that it was the original intent, in enacting the Administrative Review Act, to provide for a uniform system of judicial review and to do away with inconsistencies and difficulties present under the older system which utilized common-law writs, it would seem that the statute should have been given a broad interpretation at the time of evaluating its scope.

CONSTITUTIONAL LAW

The cases involving questions of constitutional law are, with minor exceptions, of the run-of-the-mine character and are noteworthy only for their effect on specific statutes. In *People v. Illinois State Toll Highway Commission,* the constitutionality of the statute creating the defendant commission was contested principally on the ground that it authorized suits against the state in violation of the state constitution although nine other specific grounds of invalidity were assigned. The statute did, in fact, authorize suits by or against the commission, but the court held that, in view of the considerable autonomy enjoyed by the commission and the fact that the general funds of the state could never be reached to satisfy its obligations, any such actions as might be brought would not be suits against the state. This result appears to have left unanswered a vital question inasmuch as the commission does not appear to have been given a separate legal entity and is expressly designated as an instrumentality and administrative agency of the state. If the State of Illinois is not the defendant in any such suit, then who is? The cases cited by the court as having bearing on this point can be distinguished for, in each of them, there appears to have been a corporate defendant.

17 3 Ill. (2d) 218, 120 N. E. (2d) 35 (1954).
Although consideration of zoning laws is customarily included under another topic, the case of Midland Electric Coal Corporation v. Knox County,\(^{20}\) in which a county zoning ordinance was held invalid, is interesting because of the approach adopted by the court in reaching a decision. A well-recognized test of the validity of zoning laws lies in a comparison between the value of the property for its best use with its value for the permitted use. In the instant case, the court compared the value of the land for strip-mining, a one-time value, with its value for agricultural purposes, a continuing value. As might be expected, the two figures were grossly disproportionate and, on this basis, the court held the ordinance to be unreasonable. It would seem, however, that this result should be charged to the comparison of unlike things rather than to the zoning ordinance itself. The court was undoubtedly influenced by evidence in the record indicating that the land would have value of consequence for grazing and forestry purposes after mining operations had been completed, but this seems to be a tenuous premise inasmuch as there did not appear to be any finding, nor indeed any evidence, of the cost to put the land in a condition suitable for such use.

Aspects of the case of Vissering Mercantile Company v. Annunzio,\(^{21}\) under which Section 13 of the Minimum Wage Act\(^ {22}\) was held to be a violation of due process, have been discussed elsewhere in this survey.\(^ {23}\) It might be noted here that an attack was also made on Section 9 of the Act, one which provides in substance that, after a hearing and finding of non-compliance with a directory order, the Department of Labor may cause such fact to be published in the newspapers within the state. It was contended that this provision would violate the principle of separation

\(^{20}\) 201 Ill. (2d) 200, 115 N. E. (2d) 275 (1953), noted in 42 Ill. B. J. 648.
\(^{22}\) Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 198.13. The balance of the statute was permitted to stand.
\(^{23}\) See above, this section, notes 1 to 7.
of powers in that this publication would amount to the imposition of a penalty, a judicial function. The court disposed of this contention on the ground that any penalty which might result was imposed by the public and not by the administrative agency. It should be noted, however, as a dissenting judge pointed out, that the penalty would follow as a consequence of the exercise of a judicial function, to-wit: the hearing and finding of non-observance, and there would be no substantial difference between a direct or an indirect imposition of penalties. If the majority decision is followed to its logical conclusion, it would seem that the application of the principle of separation of powers has been limited to matters of form, a result unlikely to have been intended by the court.

That section of the School Code which provides for the annexation and detachment of territory of school districts, but makes no provision for the division of assets between the district gaining area and the one losing territory, was challenged in the case of People ex rel. Dixon v. Community School District No. 3 on the theory that the section violated due process requirements. The court noted that school districts, and presumably other bodies politic, are created by and exist at the sufferance of the legislature. It followed from this that such bodies have no property right in their existence of which they may be deprived in violation of due process of law.

Although discussed elsewhere, it is pertinent to note here that the statute providing for a "cooling off" period before the commencement of divorce and similar actions was held unconstitutional in People ex rel. Christiansen v. Connell. The specific defects found to exist lay in the fact that the statute was said to deprive persons of a prompt remedy for wrongs and that the

24 Ill. Const. 1870, Art. III.
26 2 Ill. (2d) 454, 118 N. E. (2d) 241 (1954).
27 See above, Section V, Family Law.
29 2 Ill. (2d) 332, 118 N. E. (2d) 262 (1954), noted in 1954 Ill. L. Forum 322.
judicial conferences therein authorized operated to violate the principle of separation of powers.

The Prevailing Wage Act\(^3\) was also subject to judicial criticism in *Bradley v. Casey*.\(^2\) It was said there that the statute would be invalid if applied to the state and other public bodies since that subject was not expressed in the title. The concluding paragraph of the 1951 amendment to the statute,\(^3\) one which provides that collective bargaining agreements for similar work should be considered to be the standard prevailing wage, was held invalid in that it constituted an improper delegation of legislative power to private parties.

Three other Illinois statutes suffered a similar fate during the past year. The Plumbing License Law\(^3\) was, in the case of *Schroeder v. Binks*,\(^3\) held to violate due process of law in that it was unrelated to the public health and vested in the master plumbers arbitrary control over those who might seek to enter the trade. The Motor Vehicle Use Tax Act\(^3\) was successfully challenged in *People ex rel. Schoon v. Carpentier*\(^3\) when the court concluded that the statute was not uniform in operation, hence violated the revenue article.\(^8\) The commerce clause of the federal constitution formed the stumbling block for the Uniform Act Regulating Traffic on Highways,\(^9\) a statute which provided that the license of a commercial vehicle operator should be suspended when the licensee had been found guilty of an habitual violation of the maximum weight and load limits. The court, in *Hayes Freight Lines v. Castle*,\(^4\) thought that this amounted to an unconstitutional impediment to interstate commerce and held the

\(^{31}\)415 Ill. 576, 114 N. E. (2d) 681 (1953).
\(^{34}\)415 Ill. 192, 113 N. E. (2d) 169 (1953).
\(^{35}\)Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 453.68 et seq.
\(^{36}\)2 Ill. (2d) 468, 118 N. E. (2d) 315 (1954).
\(^{37}\)Ill. Const. 1870, Art. IX, § 1.
statute invalid as so applied but it did indicate that it might be valid if applied solely to intrastate commerce.

Three statutes were unsuccessfully contested on the ground that they created improper classifications and were, for that reason, essentially special legislation enacted in violation of the state constitution. In the case of Elgin Storage & Transfer Company v. Perrine, the Illinois Motor Carrier Property Act came under fire but the court, in accord with recognized principles of statutory interpretation, construed the statute so that no improper classifications resulted. The degree of classification provided in that portion of the Revised Cities and Villages Act which permits municipalities with a population in excess of 500,000 to investigate law enforcement was held to be reasonable in DuBois v. Gibbons since the court felt that there was a real difference in the situations of the classes there created. A similar attack on another part of the same statute fared no better in the case of Spalding v. Granite City. The questioned portion of the statute permitted municipalities to construct sewerage systems and to issue revenue bonds for particular localities within municipal limits. The court again thought a reasonable difference in situations existed.

Two unsuccessful attacks were also waged on statutes relating to revenue and the collection thereof. In Department of Revenue v. Warren Petroleum Corporation, the Private Car Line Companies Act was charged with violating both the revenue article of the state constitution and the equal protection clause of the federal constitution on the theory that it served to

41 Ill. Const. 1870, Art. IV, § 22.
42 2 Ill. (2d) 28, 116 N. E. (2d) 868 (1953).
44 Ibid., Vol. 1, Ch. 24, § 23—111.
45 2 Ill. (2d) 392, 118 N. E. (2d) 295 (1954).
47 415 Ill. 274, 113 N. E. (2d) 567 (1953).
49 Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 372.1 et seq.
50 Ill. Const. 1870, Art. IX, § 1.
51 U. S. Const., 14th Amend.
discriminate between foreign corporations and domestic ones, the former being taxed at a state average rate whereas the latter would be taxed at a local rate. The court, however, pointed out that such discrimination as might exist would not necessarily be harmful to the foreign corporation and also that strict mathematical equality is not necessary so long as the tax rests on some reasonable basis. The statute permitting the sale and assignment of special assessment judgment liens was challenged in People ex rel. Drobnick v. City of Waukegan. The basis of the attack was that it allowed the collection of taxes by private parties, but the court thought that the sale itself was a collection and any subsequent enforcement of the lien by the assignee was not considered to be a collection of taxes as understood in the constitution.

In closing this section, it might be appropriate to note that the case of City of Chicago v. Willett Company seems to have been finally interred with the latest holding of the Illinois Supreme Court. After two trips to the state supreme court and one to the United States Supreme Court, not counting a clarifying opinion in between, it has finally been decided that the municipal license tax there imposed on carters is constitutional and the offending carrier now appears destined to be obliged to pay the penalty for its non-observance thereof.

MUNICIPAL CORPORATIONS

Except as to matters already noted, about the only case which could be said to possess value in the field of municipal corporations is the rather obvious holding of the Supreme Court

54 1 Ill. (2d) 311, 115 N. E. (2d) 785 (1953).
55 See the prior report in 406 Ill. 288, 94 N. E. (2d) 195 (1950).
56 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 559 (1953).
57 409 Ill. 480, 101 N. E. (2d) 205 (1951). The clarifying opinion was provided in response to a request set out in 341 U. S. 913, 71 S. Ct. 734, 95 L. Ed. 1349 (1951).
58 See above, Section II, Contracts, notes 26 to 29, for a discussion of the case of Greene v. City of Danville, 350 Ill. App. 440, 113 N. E. (2d) 348 (1953), in which leave to appeal has been denied, on the point of the possibility of establishing
in the case of *City of Chicago v. Sachs*\(^5^9\) wherein the issue turned on the applicability of a municipal zoning ordinance to the use which defendant made of certain real estate. The ordinance in question specifically mentioned, among permissible uses, such things as grade schools, high schools, colleges, and universities. The defendant operated a kindergarten play school for the benefit of those of pre-school age and was convicted of having violated the ordinance in question. The court agreed that defendant’s use was not included in the categories mentioned but then concluded that the ordinance was invalid, when so applied, because it tended to create arbitrary distinctions where no real differences existed. The conviction was, therefore, reversed.

**PUBLIC UTILITIES**

Issues relating to segregation were involved in the case of *Illinois Central Railroad Company v. Illinois Commerce Commission*,\(^6^0\) a case in which a petition had been addressed to the commission requesting that the carrier be directed to cease, in its interstate operations originating in Illinois, from assigning passengers to specific cars within the state in a manner which separated passengers on the basis of race or color, and also from using a car-card system which accomplished this result. The commission issued such an order but, on appeal, the Supreme Court reversed, holding that the state commission had no jurisdiction over the practice of a railroad as to seating passengers travelling in interstate commerce and a determination as to whether or not the particular rule was discriminatory rested with the Interstate Commerce Commission. It should be noted that the carrier in question makes no discrimination as to its intrastate passengers for to do so would violate local law.\(^6^1\)

\(^{59}\) 1 Ill. (2d) 342, 115 N. E. (2d) 762 (1954).

\(^{60}\) 2 Ill. (2d) 382, 118 N. E. (2d) 435 (1954).

A decision of first impression, although of rather specialized interest, may be found in the case of *Mandel Brothers, Inc. v. Chicago Tunnel Terminal Company*. The tunnel company there concerned, a public utility operating an underground railway, filed a revised rate schedule with the Illinois Commerce Commission which would have resulted in almost doubling the cost of transporting coal. The commission temporarily suspended the increased rate schedule and conducted a hearing, at which the complainant, a customer, appeared to oppose the increase, but thereafter found the increase to be just and proper. On appeal by the customer, the commission’s order was set aside. Thereafter, the customer filed a complaint for reparations, being the difference between the sum paid and the old rate which had prevailed before the controversy arose. This complaint was denied and, upon appeal, the question was raised as to whether or not a rate which had been approved by the commission after a hearing could be termed excessive even though such rate had been set aside upon judicial review. The Supreme Court held it was proper to deny reparations, noting a distinction between a situation in which the carrier establishes its own rate, later successfully challenged, and one wherein the commission fixes the rate by its own order; reparation being allowed in the former situation but not in the latter.

Far more important is the holding of the Supreme Court in the case of *Mississippi River Fuel Corporation v. Illinois Commerce Commission*. The corporation there concerned had contracted individually with twenty-three large industrial users of natural gas to furnish them with supplies and also furnished gas, as required, to two public utilities who served the public generally. The state commission found the supplier to be a public utility within the meaning of Section 10 of the Public Utilities Act and ordered it to comply with appropriate regulations. The circuit

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62 2 Ill. (2d) 205, 117 N. E. (2d) 774 (1954).
64 1 Ill. (2d) 509, 116 N. E. (2d) 394 (1953), noted in 1954 Ill. L. Forum 141. Schaefer, Ch. J., wrote a dissenting opinion concurred in by Hershey, J.
court reversed the commission and, upon further appeal, the Supreme Court affirmed. Without pursuing the facts recited in the majority opinion and in the dissent, it might be sufficient to say that the arguments for and against the decision came close to check-mate, for they are pretty well in balance. The decision, then, must be said to revolve around policy as viewed by a majority of the judges. Prior Illinois decisions, cited on both sides, did not meet the instant case on all fours, so any analogy or interpretation would be colored by an advocate's understanding of public policy as applied to corporations engaged in a type of business usually serviced by utilities and considered to be public in character. It might be noted, however, that if the supplier in question should extend its services to any considerable degree, the holding might well be re-appraised and the judgment then might be to the contrary.

TAXATION

Notice has already been taken of the fact that certain of the taxing statutes were subjected to attack on constitutional grounds but it might be considered appropriate, at this point, to emphasize that the Private Car Line Companies Tax Act was sustained in the case of Department of Revenue v. Warren Corporation against an attack predicated primarily upon the equal protection provisions of the Fourteenth Amendment; that certain provisions of the Revised Cities and Villages Act relating to the sale and assignment of special assessment judgment liens were upheld in the case of People ex rel. Drobnick v. City of Waukegan; that in City of Chicago v. Willett Company the Supreme Court disposed of several additional objections urged against the validity of a municipal ordinance taxing carters; but that the Motor

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66 See above, this section, particularly notes 36 to 38 and 48 to 57.
70 1 Ill. (2d) 456, 116 N. E. (2d) 365 (1954).
71 1 Ill. (2d) 311, 115 N. E. (2d) 785 (1953).
Vehicle Use Tax Act\(^7\) was successfully challenged, in *People ex rel. Schoon v. Carpentier*,\(^7\) because it lacked the degree of uniformity required by the revenue article of the state constitution.\(^7\)

Turning to matters of taxation proper, the Supreme Court, in *Gaither v. Lager*,\(^7\) held that proceedings conducted under the so-called Scavenger Act\(^7\) were as much subject to the "strict construction policy" traditionally applied as were tax deeds resulting from county court sales. The underlying tax proceeding was, of course, an involuntary one,\(^7\) brought before the court by means of a suit for possession. The notice given by the purchaser was held not to comply with Section 263 of the Revenue Act\(^7\) in that it did not specify the particular years for which the taxes were delinquent and also because it did not specify whether the sale was for general taxes, for special assessments, or both. The legal correctness of the decision probably cannot be assailed. Certainly, the provisions with reference to notice in perfecting a tax deed pursuant to the Scavenger Act are identical with those applicable to perfecting a deed under a county court sale, hence the court cannot be criticized for giving such language the same meaning in both contexts. However, the effect of the decision would seem to be such as to deprive diligent public officials, determined to realize a portion at least of the taxes and special assessments upon delinquent properties, of what had been supposed to be an effective implement, particularly since it had been commonly believed that the equity foreclosure proceedings provided for by the Scavenger Act, and the procedure for perfecting title pursuant thereto, would not be subject to strict technical limitations. It may be anticipated, then, that the effect of the

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\(^7\) Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 453.68 et seq.

\(^7\) 2 Ill. (2d) 468, 118 N. E. (2d) 315 (1954).

\(^7\) Ill. Const. 1870, Art. IX, § 1.

\(^7\) 2 Ill. (2d) 293, 118 N. E. (2d) 4 (1954), noted in 42 Ill. B. J. 720.

\(^7\) Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 716a.

\(^7\) It would seem clear that the decision holds no implications with reference to those voluntary proceedings which are customarily utilized for clearing the lien of unpaid taxes, and sometimes special assessments.

\(^7\) Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 744.
instant decision will be to discourage purchasers at involuntary sales and limit proceedings under the statute to voluntary ones.\textsuperscript{79}

Two cases called for further clarification of issues arising under the Retailers' Occupation Tax Act.\textsuperscript{80} In the case entitled \textit{The Burrows Company v. Hollingsworth},\textsuperscript{81} the Supreme Court indicated that sales to persons who re-transfer personal property in the course of service occupations are not taxable unless the person transfers tangible personal property both (1) for use or consumption, and (2) not for resale in any form as tangible personal property. It had been the position of the Department of Revenue that, by its holding in the case of \textit{Modern Dairy Company v. Department of Revenue},\textsuperscript{82} the Supreme Court had obviated the second of these requirements. The case was one involving sales made by pharmaceutical and similar supply houses to doctors and hospitals, with the latter furnishing these supplies to patients, some of whom paid therefor either specifically or as a part of the service rendered but others of whom did not pay at all, i. e., were charity cases. It seems to have been conceded by all parties that, with reference to sales of tangible personal property later applied or distributed to charity patients, the tax would be applicable.\textsuperscript{83} With reference to supplies applied or furnished to paying patients, however, the court held, in effect, that these were resold by the doctor or hospital, and that, accordingly, the sale to the doctor or hospital was not a sale at retail within the purview of the Act.

Another facet of the case may be of even broader scope and significance. The question concerned the effect to be given to a permanent injunction under circumstances where it was later

\textsuperscript{79} The hope of securing legislative relief against the doctrine of strict construction, as applied to equity foreclosurers, is probably remote in view of the reluctance of legislators to sponsor or support legislation which might result in certain of their constituents losing property for failure to pay taxes. The burden thus imposed upon other taxpayers seems to be lost sight of when legislation of this type is under consideration.

\textsuperscript{80} Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 440 et seq.

\textsuperscript{81} 413 Ill. 292, 112 N. E. (2d) 706 (1953).

\textsuperscript{82} 413 Ill. 55, 108 N. E. (2d) 8 (1953).

\textsuperscript{83} The case of \textit{Modern Dairy Co. v. Department of Revenue}, 413 Ill. 55, 108 N. E. (2d) 8 (1953), specifically so held.
found that the injunction had been issued in reliance upon an erroneous construction of the law. Usually, in that event, the rights and obligations of the parties would be determined as if no injunction had ever been issued. The Supreme Court, however, as to this aspect of the case, held without equivocation that the doctrine of res judicata prevented retroactive taxation of those transactions which were covered by the injunction and which had been entered into prior to its actual modification.

In the second case, that of Material Service Corporation v. Hollingsworth, the Supreme Court enunciated what would seem to be a necessary concomitant of the position mentioned above with reference to the juridical effect of a permanent injunction predicated upon an erroneous construction of the law. The materialman there concerned, selling to building contractors, had enjoyed the benefit of such a permanent injunction and contended that the court issuing the injunction had no power to modify it, where there had been no change in the facts or in the statutory law, but only a change in the position of the Supreme Court as to what the law was. This conclusion was rejected when the Supreme Court said a lower tribunal would have jurisdiction "to modify or vacate its injunction to meet changing conditions of fact or of law, legislative or judicial."

TRADE REGULATION

Cases based on the Illinois Fair Trade Act seldom arise, so it is worth mentioning that, in Sunbeam Corporation v. Central Housekeeping Mart, the Appellate Court for the First District there pointed out that an inference based on the statute would support the view that a manufacturer would be permitted to enter into a contract with a wholesaler containing a stipulation to the effect that the wholesaler should sell only to those retailers who would agree to resell the articles involved at fair trade prices only. Refusal on the part of the manufacturer there concerned

84 415 Ill. 284, 112 N. E. (2d) 703 (1953).
85 415 Ill. 284 at 288, 112 N. E. (2d) 703 at 705.
to sell its products to a retailer who was unwilling to enter into such an agreement, or to comply with fair trade prices set by the manufacturer, was said not to constitute an unlawful boycott.

VIII. TORTS

While Illinois courts have decided many cases in the past year involving interesting questions of tort law few of these cases were in any way novel and only one case can be said to be of paramount importance. That case was the one entitled Amann v. Faidy¹ wherein the Supreme Court ruled that a cause of action would lie for the wrongful death of a child who was negligently injured while *en ventre sa mere* but who was subsequently born alive only to die thereafter as a result of the injury so inflicted. The case has already received so much attention that further comment on the holding would be superfluous.

It is still too early to say that a cause of action will lie in Illinois for a negligent injury resulting in an interference with contract rights,² but a recent case appears to have taken a step in that direction. In *American Transportation Company v. U. S. Sanitary Specialties Corporation*,³ the plaintiffs were lessees of certain premises which they used as a place in which to store voting machines in performance of a contract with a municipality. It was alleged there that certain contractors, employed by the lessor to remodel the premises, had trespassed upon the demised premises and performed their work in such a negligent fashion that the premises were rendered unfit for storage, causing the municipality to cancel its contract with the plaintiffs. The Appellate Court for the First District held that, on these facts, a cause of action had been stated against the contractors.⁴


² The leading Illinois case of Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924 and 54 N. E. 524 (1898), established the rule that liability for interference with commercial contracts would depend upon a showing that the defendant had acted maliciously.

³ 2 Ill. App. (2d) 144, 118 N. E. (2d) 793 (1954).

⁴ The court seemed to rely heavily upon the allegation that a trespass was committed, finding support for its decision in two prior Illinois cases in each of which
By the holding in *Ney v. Yellow Cab Company*, that diversity of opinion which existed between the Appellate Courts of the state was ended when the Supreme Court decided that the conduct of a motorist in leaving his vehicle unattended with the motor running and the key in the ignition, thereby enabling a thief to steal the car and injure another, would present a problem of proximate causation which would have to be determined by a jury.

Somewhat disturbing in its implications is the case of *Bonnier v. Chicago, Burlington & Quincy Railroad Company*. In that case, the defendant to a Federal Employers' Liability Act suit had contended that no recovery should be allowed because the plaintiff was, at the time of injury, violating a federal statute prohibiting the stealing, possessing or carrying away of goods in interstate commerce. The Supreme Court, reversing an Appellate Court holding which had given judgment notwithstanding a verdict for the plaintiff, cited Illinois cases dealing with violations by plaintiffs of traffic regulations, delivered the usual discourse on the difference between a condition and a cause, and concluded that it was for the jury to decide whether the plaintiff's illegal conduct was the proximate cause of the injury.

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7 That conduct is prohibited by Ill. Rev. Stat. 1953, Vol. 2, Ch. 95 1/2, § 189.


10 The Court failed to make any distinction between the relative immorality involved in violating a traffic regulation as contrasted with the violation of a theft provision. Also to be noted is the possibility, mentioned in the Appellate Court opinion, that part of the federal statute involved might impose liability without criminal intent. On a related matter, the Appellate Court for the Second District, in a case decided too late to be included in this survey, denied a cause of action for wrongful death against one who had negligently performed an abortion on the ground that the dead woman had consented to the act: *Castronovo v. Murawsky*, 3 Ill. App. (2d) 168, 120 N. E. (2d) 571 (1954).
Still another question of proximate cause plagued an Illinois court in the case of *Semeniuk v. Chentis*, a case wherein the plaintiff claimed to have been injured by a BB pellet fired by a seven-year old boy from an air rifle sold by the defendant-merchant to the boy's parents. The Appellate Court for the First District held that a cause of action had been stated against the merchant because it was alleged that the vendor knew, at the time of the sale, that the rifle was to be given to the boy and he then knew, or ought to have known, of the lad's inexperience.\(^1\)\(^2\)

Two attractive nuisance cases should be mentioned. In the first, that of *Ellison v. Commonwealth Edison Company*, the Appellate Court for the First District held the doctrine inapplicable to a retaining wall on defendant's land which was inadequate to prevent youngsters from scaling the wall and swimming in a public canal abutting the premises. In the other, that of *Kahn v. James Burton Company*, the same court decided that lumber piled on a vacant lot adjacent to a construction project would not amount to an attractive nuisance.

In closing this survey, it might be appropriate to note that the liability of a motion picture theater operator appears to have been extended by the decision of the Appellate Court for the First District in the case of *Davis v. Theatre Amusement Company*. The plaintiff in that action claimed that he had slipped upon debris in an unlighted aisle of the theater. In affirming a judgment of the trial court for plaintiff, the reviewing tribunal concluded, apparently for the first time in this state, that a theater aisle in total darkness, except for the illumination provided by the showing of a motion picture, would create an inherently dangerous condition, particularly when cluttered by debris.

\(^{11}\) 1 Ill. App. (2d) 508, 117 N. E. (2d) 883 (1954), noted in 28 Temple L. Q. 156.
\(^{12}\) The liability of a vendor for the sale of a firearm directly to a minor appears to be well established in most American jurisdictions: 20 A. L. R. (2d) 119. Where, however, the sale is to an adult, as occurred in the instant case, liability would seem to rest upon a precarious foundation.
\(^{13}\) 351 Ill. App. 58, 113 N. E. (2d) 471 (1953). Leave to appeal has been denied.
\(^{14}\) 1 Ill. App. (2d) 370, 117 N. E. (2d) 670 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 348. Leave to appeal has been granted.
\(^{15}\) 351 Ill. App. 517, 115 N. E. (2d) 915 (1953), noted in 32 CHICAGO-KENT LAW REVIEW 270. Leave to appeal has been denied.