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Article 9

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ready for trial. It was held that such announcement in effect constituted a plea. However, in *Miller* v. *People*,[41] where the accused voluntarily proceeded with the trial without being arraigned or entering a plea the court held that the conviction was a nullity. In spite of the similarity to the *Spicer* case, the court ignored the state's argument that the voluntary proceeding with the trial was tantamount to a plea.

The law in regard to arraignment has changed gradually. The reasons for the strictness of the common law in this area have disappeared. Substantive personal rights, once unknown, have been made available to those accused of crimes. Certainly criminal proceedings should not be affected by reason of technical errors in procedure which have not substantially prejudiced those basic rights of the accused afforded by present-day law. Such would be inconsistent with due administration of justice and fatal to efficient enforcement of the criminal code.

LESSOR'S LIABILITY UNDER DRAM SHOP ACT

The Illinois Dram Shop Act is a statute which, under certain conditions, imposes joint and several liability upon the tavern keeper and lessor of land used for the sale of intoxicating liquor. The Act is not a new one, having been enacted originally by the Illinois legislature in the nineteenth century. This comment is concerned with the lessor's, or land owner's, liability under the Act.

At common law, there was no remedy for injuries incident to intoxication resulting from the sale of liquor, either on the theory that there was a direct wrong or on the ground that there was negligence in the sale.[1] The Illinois legislature created a right of action by enacting the Dram Shop Act, or Civil Damage Act, as it is sometimes known. This Act gives a right of action for injuries resulting from the sale of intoxicating liquor against the owner of premises who knowingly permits the use of his property for such sale, and subjects the premises so used to a lien for the payment of a judgment recovered against the lessee-tavern keeper.[2]

[41] 47 Ill. App. 472 (1893).

[1] Schroder v. Crawford, 94 Ill. 357 (1880).

[2] Ill. Rev. Stat. (1951) c. 43, § 135. "Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling

The design of the legislature in passing the Dram Shop Act was to "mitigate the evils of the traffic or to compensate for the damage done by it."[3] In reviewing the decisions, it is found that the courts keep uppermost in mind the purpose of the statute: to suppress the liquor traffic and to protect the innocent persons injured thereby.

Although the lessor does not sell the intoxicating liquor, he is deemed to have subjected himself to the risk of liability to persons injured by the traffic, if he knowingly rents or permits his premises to be used for such purpose.[4]

Under the Illinois Act, ownership of premises alone does not impose liability on the lessor for damages resulting from the sale of intoxicating liquor. It must also be shown that the lessor had knowledge that intoxicating liquor was to be sold or was sold on his premises.[5] However, such knowledge of the lessor may be established by facts and circumstances and direct proof is not necessary.[6] The fact that a tavern keeper had been operating a tavern on the premises for several years is a circumstance from which the jury could reasonably infer that the owner had knowledge that the premises were being used for the sale of intoxicating liquor.[7]

Generally, the liability of the lessor depends first on the establishment of the liability of the lessee.[8] Where this is established, the Act gives the plaintiff three distinct remedies: (1) to sue the tavern keeper alone; (2) to sue the lessor alone; or (3) to sue the lessor and the tavern keeper jointly.[9]

Further, the Illinois Dram Shop Act provides for a twofold liability against the lessor for a person injured as a result of the sale of intoxicating liquor. First, it imposes a personal responsibility on the lessor who knowingly rents or permits his premises to be used for such sale and, secondly, it subjects the lessor's premises to a lien for the payment of a judgment recovered against the lessee.[10]

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or giving liquors aforesaid, as hereinafter provided; . . . recovery under this Act for injury to the person or . . . for loss of means of support resulting from the death or injury of any person, as aforesaid, shall not exceed $15,000; provided that every action hereunder shall be commenced within two years next after the cause of action accrued."

[3] Gibbons v. Cannaven, 393 Ill. 376, 387, 66 N.E. 2d 370, 375 (1946).

[4] Wall v. Allen, 244 Ill. 456, 91 N.E. 678 (1910).

[5] Eggers v. Hardwick, 155 Ill. App. 254 (1910).

[6] Ibid.

[7] Horrigths v. Troesch, 201 Ill. App. 433 (1916).

[8] Gibbons v. Cannaven, 393 Ill. 376, 66 N.E. 2d 370 (1946).

[9] Ill. Rev. Stat. (1951) c. 43, § 135.

[10] Ill. Rev. Stat. (1951) c. 43, § 136. "For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of

This section of the Illinois Dram Shop Act, enabling the plaintiff, on the strength of his judgment against the lessee, to perfect a lien on the property in which the liquor was sold, has been held by the United States Supreme Court to be a proper exercise of the police power of the state, and not in violation of the due process clause of the federal or state constitution.[11] In discussing the statute, the Supreme Court stated that the Act has the effect of making:

> . . . the tenant the agent of the landlord for its purposes, and through this agency, voluntarily assumed, the landlord becomes a participant in the sale of intoxicants and is responsible for the consequences resulting from them.[12]

It was further held in *Gibbons v. Cannaven*,[13] that the lessor had no right to notice of the action against the occupant nor any right or opportunity to appear or defend therein nor to appeal from such judgment. In overruling the contention of the lessor that this interpretation was in violation of the due process clauses of the federal and state constitutions, the court said:

> . . . The [lessor] overlooks the fact that traffic in intoxicating liquors is only a legitimate business within the conditions prescribed by the legislature in permitting their sale. In the exercise of the police power, the legislature may enact laws for the purpose of protecting the health, morals and safety of the people, either by prohibiting traffic in intoxicating liquors or licensing it or permitting it under any conditions which, in their judgment, they may approve.[14]

In holding that the property owner in the *Gibbons* case did not have an interest sufficient to permit him to appeal where a judgment was rendered against the lessee alone, the lessor not being joined, the court departed from the line of decisions which have held that a party not of record can maintain an appeal if he can show a direct interest in the judgment, or that he would benefit by reversal.[15] It has been said that:

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alcoholic liquor under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of alcoholic liquors, or shall knowingly permit the same to be used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises."

[11] Gibbons v. Cannaven, 393 Ill. 375, 66 N.E. 2d 370 (1946); Flaherty v. Murphy, 291 Ill. 595, 126 N.E. 553 (1920); Eiger v. Garrity, 246 U.S. 97 (1918); Wall v. Allen, 244 Ill. 456, 91 N.E. 678 (1910).

[12] Eiger v. Garrity, 246 U.S. 97, 103 (1918).

[13] 393 Ill. 376, 66 N.E. 2d 370 (1946).

[14] Ibid., at 383 and 373.

[15] Hotchkiss v. Calumet City, 377 Ill. 615, 37 N.E. 2d 332 (1941); Lenhart v. Miller, 375 Ill. 346, 31 N.E. 2d 781 (1940).

It is difficult to call the property owner's interest anything less than direct when it is so probable that the plaintiff will be forced to collect the judgment from the property owners because of the inability of tavern keepers as a class to meet such judgments.[16]

What the court is actually holding, however, in prohibiting the property owners from making an appeal, is that the Dram Shop Act gives the plaintiff three distinct remedies, one of which is to sue the tavern keeper alone. Thus, to allow the property owner to appeal a judgment obtained against the tavern keeper alone, would deprive the plaintiff of one of the remedies which the legislature has given the plaintiff—the right to sue the tavern keeper alone. The property owner cannot intervene in the original action against the tavern keeper; he cannot appeal a decision against the tavern keeper; and, if he is sued on the judgment against the tavern keeper, he cannot question the merits of the judgment. It would seem that basic notions of justice would require that a party who might be compelled to pay a judgment should have an opportunity to defend in the original action.

The property owner, however, is not entirely defenseless, for it has been held that, in the subsequent action on the original judgment against the tavern keeper, the lessor may deny: (1) the existence of the judgment or that any part remains unpaid; (2) that a lease was made for the use of the premises as a tavern; or (3) that the property was so used with his knowledge, if a lease was not made for the use of the premises as a tavern.[17]

The most frequently disputed issues of fact are settled in the original action; i.e., whether the injury was caused by a person who became intoxicated in the tavern on the property owner's premises; the extent of the plaintiff's injuries; the existence of acts by the plaintiff contributing to the intoxication of the tortfeasor;[18] and the existence of a provocation of assault, if any.[19] Consequently, the lessor's liability is ordinarily settled in the original judgment against the tavern keeper.[20]

In addition, although it has been said that the Dram Shop Act is penal in character and should be strictly construed, the courts in recent years have given this rule of strict construction mere lip service.[21]

[16] 14 Univ. Chi. L. Rev. 80, 82 (1946), noting Gibbons v. Cannaven, 393 Ill. 376, 66 N.E. 2d 370 (1946).

[17] Eiger v. Garrity, 246 U.S. 97 (1918).

[18] Bowman v. O'Brien, 303 Ill. App. 630, 25 N.E. 2d 544 (1940).

[19] Hill v. Alexander, 321 Ill. App. 406, 53 N.E. 2d 307 (1944); Pearson v. Renfro, 320 Ill. App. 202, 50 N.E. 2d 598 (1943).

[20] Garrity v. Eiger, 272 Ill. 127, 111 N.E. 735 (1916).

[21] Howlett v. Doglio, 402 Ill. 311, 83 N.E. 2d 708 (1942); Lester v. Bugni, 316 Ill. App. 19, 44 N.E. 2d 68 (1942); Osborn v. Leuffgen, 302 Ill. App. 206, 23 N.E. 2d 757 (1939); Hyba v. C. H. Horneman, Inc., 302 Ill. App. 143, 23 N.E. 2d 564 (1939).

The courts, however, have placed some limitations on the lessor's liability. In *Blackwell v. Fernandez*,[22] it was held that an owner is not responsible for the death of a person caused by the act of one who had become intoxicated on liquor purchased by his roommate, when he had shared it with such roommate in his own room and not in the place where purchased. The court in reaching this conclusion quoted from *Cruse v. Aden*:[23]

> . . . the Dram Shop Act does not apply to persons who are not either directly or indirectly . . . engaged in the liquor traffic, and that the right of action given by said section . . . is not intended to be given against a person who, in his own house, or elsewhere, gives a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness, and without any purpose or expectation of pecuniary gain or profit.[24]

Also, although the statute expressly imposes liability upon any person owning, renting, leasing, or *permitting* the occupation of his premises for the sale of intoxicating liquors, the statute was held not to apply to a person owning realty as a successor trustee in his representative capacity.[25]

And the statute was held not to apply to a person having only a reversionary and contingent interest,[26] and to a mortgagee,[27] since such persons have not control over and are not responsible for the letting of the property. However, the court refused to hold a person who, though not owning the premises, had full control and management of the property with a right to rent and select tenants, as if the owner of the premises, and who executed a lease of the property as a tavern in his own name as lessor, describing himself as the agent of the lessor.[28] Also, it has been held that a lien of judgment obtained under the Dram Shop Act does not take priority over a mortgage on the premises executed and recorded before the rendition of the judgment creating the lien.[29]

What may seem a surprising result was reached in *Gunderson v. First National Bank*,[30] where it was held that the landlord was not liable for injuries resulting from an assault inflicted by the lessee, who was intoxicated on his own liquor, since there was no selling or giving of liquor to the tavern operator within the meaning of the Act. However, a lessor was

[22] 324 Ill. App. 597, 59 N.E. 2d 342 (1945).

[23] 127 Ill. 231, 20 N.E. 73, at 77 (1889).

[24] Ibid., at 239 and 77.

[25] O'Connor v. Rathie, 298 Ill. App. 489, 19 N.E. 2d 96 (1939).

[26] Castle v. Fogerty, 19 Ill. App. 442 (1886).

[27] Bell v. Cassem, 158 Ill. 45, 41 N.E. 1089 (1895).

[28] Osborn v. Leuffgen, 302 Ill. App. 206, 23 N.E. 2d 757 (1939).

[29] Bell v. Cassem, 158 Ill. 45, 41 N.E. 1089 (1895).

[30] 296 Ill. App. 111, 16 N.E. 2d 306 (1938).

held liable where the lessee, who was *not* intoxicated, struck and injured the plaintiff, who, being intoxicated on the liquor sold to him by the tenant, provoked the assault.[31]

The court's decision in the *Gibbon's* case, that the lessor cannot intervene and become a party in the action against the tavern keeper nor appeal from the judgment against the tavern keeper, emphasizes vividly the problem which the lessor faces in defending against an action based on the act. Thus, most lessors, realizing the danger involved when leasing to a tavern keeper, usually require the tavern keeper to carry liability insurance protecting both the tavern keeper and lessor jointly.

It is submitted that it might be highly practicable and certainly more equitable to all parties concerned if there were a requirement that the lessor be joined in the original action against the lessee. The Iowa Supreme Court, in construing the Iowa Dram Shop Act amplified this view in *Buckham v. Grape*.[32] The court, on rehearing, said:

> . . . The property owner could have been made a party to the original action, and the rule requiring him to be joined therein in order to bind him by the judgment would, in all cases, operate so as to secure the ends of justice, and in no case work hardship. Before his property can be reached under the statute, an issue must be joined and tried involving his knowledge of the sales of intoxicating liquor upon his property. These issues may be tried in the original case. Why not determine all the issues which the property owner may raise, in an action against the vendor. . . ? If he be made a party to the action, he would be bound by the judgment, and, without further proceedings, it could be declared a lien upon his property. By this practice justice could be done to all parties, and they would be relieved of litigating two cases, when all their rights could be and ought to be settled in one. . . .[33]

[31] Thompson v. Wogan, 309 Ill. App. 413, 33 N.E. 2d 151 (1941).

[32] 65 Iowa 535, 22 N.W. 664 (1885).

[33] Ibid., at 539–540 and 665.