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Contracts - Survey of Illinois Law for the Year 1955-56

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simply because some sharp edged cutting tools, such as butcher knives, were used in the kitchen.

While the law is clear that an employer who has paid workmen’s compensation to his employee is entitled to a statutory lien upon any judgment which the employee might recover on account of the injury, the action which the employer may take to protect his lien is not so clear. This uncertainty was alleviated to some extent when the Appellate Court for the First District, in the case of *Sjoberg v. Ryerson & Son, Inc.*, determined that an employer had the right to intervene in a proceeding instituted by his employee against a third party tortfeasor but that such intervention did not include the right to participate in the conduct or trial of the suit. Another interesting procedural question was involved in the case of *A. C. F. Industries, Inc. v. Industrial Commission*, where the first order of the commission had been reversed by the Circuit Court of Cook County and the case sent back to the commission. Review of the second order of the commission was then sought in the Superior Court of Cook County. The Supreme Court there concluded that orderly judicial procedure demanded that a second review of the same proceeding should be obtained in the same court in which the first review was had.

II. CONTRACTS

Although no new precedents appear to have been established in the field of contracts during the preceding year, the case of *Pure Milk Association v. Kraft Foods Company* embodies an unusual application of the law relating to assignments. The plaintiff therein, a marketing association, had agreements with various dairy farmers to market their milk through the association which agreements provided that the association might author-

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51 S Ill. (2d) 552, 134 N. E. (2d) 764 (1956).
1 S Ill. App. (2d) 102, 130 N. E. (2d) 765 (1955).
ize the purchaser of the milk to remit the dues of the members directly to the association. In the alternative, the association was empowered to collect the full amount due to each member from the purchaser and pay over to the member the sum received less any amount which the member might owe the association. The defendant, a purchaser of the milk, refused to abide by the first-mentioned provision and the plaintiff thereupon notified the defendant that it elected to collect the entire amount due to its members. When the contract came before the Appellate Court for the Second District, it held the latter provision valid, but the former was thought to be unenforceable because it amounted to a partial assignment which could be enforced in equity only if both assignor and assignee were joined.

Doctrines having bearing on the law relating to specialized types of contracts,\(^2\) or quasi-contractual obligations, are discussed separately hereafter under appropriate classifications.

**INSURANCE**

A result that appears to be unique in the annals of Illinois law was reached by the Appellate Court for the Third District in the case of *Taylor v. John Hancock Mutual Insurance Company*,\(^3\) a suit to recover on an insurance policy providing benefits for accidental death. It seems that the deceased and two other men conspired to burn a building belonging to one of the conspirators to collect the insurance thereon. After spreading gasoline on the floors of the building, they withdrew but the deceased re-entered to obtain some bed spreads for himself. The fire started prematurely from unknown causes and the deceased was trapped in the building. The defendant's plea to the effect that death was caused by non-accidental means, namely, the criminal conspiracy, fell upon deaf ears, and the plaintiff was allowed to recover on

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\(^2\) No cases of consequence relating to bills and notes or contracts for the sale of personal property were determined during the survey period.

\(^3\) 9 Ill. App. (2d) 330, 132 N. E. (2d) 579 (1956), noted in 2 Villanova L. R. 133. Hibbs, J. filed a dissenting opinion.
the ground that the premature start of the fire and not the criminal act caused the death of the insured.

A somewhat unusual situation was presented to the Appellate Court for the Third District in the case of *Krutsinger v. Illinois Casualty Company.* The plaintiffs therein, having recovered a judgment against the defendant’s insured, sought to enforce said judgment against the defendant. The insurance policy contained the usual provision to the effect that the insurer shall have the exclusive right to defend suits and negotiate settlements. Because of the present defendant’s inaction, the insured had undertaken the defense of the original suit and had participated in settlements negotiated by other insurers. The court, however, held that the provision in question could not be asserted to deny liability where the insurer had had every opportunity to exercise the rights there given and any disadvantage it suffered was due to its own inaction.

In the case of *Iowa National Mutual Insurance Company v. Richards,* the United States Court of Appeals for the Seventh Circuit concluded that an insurance agency which procures insurance under the assigned risk plan does not become the agent of the insurer to whom the risk is ultimately assigned. Hence, the doctrine that the principle is charged with the knowledge of his agent was held inapplicable to such a situation.

**QUASI-CONTRACTS**

Two cases within the year possess a degree of interest with reference to doctrines in that field of law devoted to implied promises, both of which reflected upon the rights and duties existing between principals and their agents or brokers. In one case, that of *Kantoff v. Sedlak Motor Sales, Inc.*, an insurance broker who had acted as agent for the insured in placing a substantial life

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5 229 F. (2d) 210 (1956).
7 8 Ill. App. (2d) 8, 130 N. E. (2d) 289 (1955). Leave to appeal has been denied.
insurance policy sued to recover the amount he had advanced on behalf of the insured by way of payment for the initial premium. Finding that the insured, who had not requested the agent to make such payment, had nevertheless ratified the act by retaining the policy, hence had received a benefit, the court then proceeded to the question of the measure of recovery. The trial court gave judgment for the amount advanced less the sum of the commission paid the plaintiff by the insurer but the Appellate Court for the First District reversed when it held that the broker was entitled to complete reimbursement without deduction. It was enabled to reach that determination by recourse to the holding of the Supreme Court of Washington in the case of O’Reilly v. Miller.

The second of the cases, that of Schloz v. Clements, dealt with an endeavor on the part of a purchaser of real property to recover, from the seller’s broker, the amount of a down payment on the purchase price following the purchaser’s election to renounce the express agreement with the seller because of the latter’s inability to make prompt delivery of a merchantable title. While, under the contract, the amount of the down payment would have eventually gone to the seller, or be used for the seller’s credit, the facts disclosed that the fund had been received, and held, by the defendant broker until a short time after notice of revocation, at which time it had been distributed principally toward the satisfaction of the broker’s claim for commissions. The theory of the action became tangled because assertions had been made that fraud and misrepresentation had been practiced on the purchaser by the broker. In addition, it appeared that the express contract between the seller and the buyer still remained in existence. For these reasons, the Appellate Court for the Second District reversed a judgment which had ordered the broker to repay the

8 A benefit voluntarily conferred without request would ordinarily not give rise to an implied in law promise to reimburse for the worth of such benefit: Volt Rubber Co. v. Peoria Coca Cola Bottling Co., 280 Ill. App. 14 (1935).
9 148 Wash. 277, 268 P. 869 (1928).
10 7 Ill. App. (2d) 510, 130 N. E. (2d) 1 (1955).
11 Where the entire relationship between the parties is covered by an express contract, there is little opportunity in law for the creation of an implied promise: Walker v. Brown, 28 Ill. 378 (1862).
purchaser for so much of the down payment as remained in the broker's hands, the court saying that plaintiff's claim, if any should have been directed against the seller rather than against the seller's broker.

If the original theory of the case had been carried out, it is doubtful that the result there achieved would have been proper for protection against suit is not accorded to one who has received money on behalf of another who is not entitled thereto unless the agent-recipient can show that, prior to demand, he had paid the money over to his principal so that it could be said the agent had received no benefit therefrom. A mere giving of credit to the principal for the money so received, without any change of position, would not be sufficient in law to defeat an implied contract on the agent's part to make reimbursement for the money paid to him.

SURETYSHIP

Difficulties arising in the application of doctrines of suretyship law were made apparent through the medium of four recent cases, two of which dealt with questions as to whether or not a suretyship relationship existed between the parties and two with the scope or extent of the obligation which had been entered into. The defendants in the case of Werner v. Steele, seeking the benefit of the doctrine that a surety is discharged in the event an extension of time has been granted the principal debtor without obtaining the surety's consent thereto, were faced with a provision in the note in question to the effect that all signers were "principals" and, as such, had agreed that no extension of time should operate to release any of the parties from their obligation to make payment. By invoking the familiar parole evidence rule, the Appellate Court for the Fourth District was able to say the several

12 Smith v. Bender, 75 Ill. 492 (1874); Wheeler v. Cannon, 84 Ill. App. 591 (1899).
16 Myers v. First National Bank of Fairbury, 78 Ill. 257 (1875).
signers could not be permitted to contradict their status in relation to the noteholder although it did recognize that, as between the several signers, the provision would not be conclusive.\footnote{17 McKee v. Gaulrapp, 367 Ill. 321, 11 N. E. (2d) 380 (1937).}

By way of contrast, in the case of Zapalski v. Underwriters at Lloyd's, London,\footnote{18 9 Ill. App. (2d) 311, 132 N. E. (2d) 785 (1956). Leave to appeal has been denied.} the dispute was one as to whether or not the plaintiffs were persons entitled to have the benefit of the surety's obligation under a fidelity bond designed to insure against the misapplication of money paid to building contractors who were members of the association which had given the bond as primary obligor. The plaintiffs, asserting they had paid money to a defaulting contractor who was a member of the association in question, were met with the defense that, at the time the money had been handed over and apparently up until the time the greater portion of the funds had been misappropriated, the builder had not yet joined the association, hence was not one whose fidelity had been guaranteed in this fashion. Since the bond was not conditioned to limit liability to only those funds paid to the builder after he had become a member of the association, the Appellate Court for the First District was able to construe the ambiguity in the instrument to the disadvantage of the compensated surety and thereby reach the conclusion that the plaintiffs were members of the class covered by the bond.

The extent of the surety's liability upon a bond given to support the issuance of an injunction writ\footnote{19 Ill. Rev. Stat. 1955, Vol. 1, Ch. 69, §§ 8-9.} became the focal point in the case of United Mail Order, Warehouse & Retail Employees Union, Local 20 v. Montgomery Ward & Co., Inc.\footnote{20 6 Ill. App. (2d) 477, 128 N. E. (2d) 645 (1955). The decision therein was later affirmed by the Illinois Supreme Court at a time subsequent to the period of this survey: 9 Ill. (2d) 101, 137 N. E. (2d) 47 (1956). For other aspects of this case, see Section I, Business Organizations, note 44.} The bond there concerned had stated a penal sum of $1,000 but the union had sued for, and recovered, a judgment in a much larger sum on the theory that it had sustained damages in excess of that amount from the alleged wrongful issuance of the injunction. There being no cove-
nant in the bond to pay the amount of all damage sustained, and the measure of the liability having been specified at the penal sum of $1,000, the Appellate Court for the First District rather quickly concluded that the obligor could not be held, either in debt or in assumpsit, for anything more than the penalty amount. In *Davis v. Moore*, on the other hand, the obligee under an appeal bond given in connection with a forcible entry and detainer suit was permitted to bring suit to have the bond reformed to include a covenant to pay the rent accruing during the pendency of the case, and to then enforce such covenant, on the theory that all statutory requirements concerning appeal bonds are parts of the bond whether recited therein or not. A judgment in favor of the obligee for the amount of the unpaid rent as well as for costs in relation to the appeal was affirmed by the Appellate Court for the Fourth District.

III. CIVIL PRACTICE AND PROCEDURE

AVAILABILITY OF REMEDIES

Cases illustrating the structure of the judicial department of the state, or the functions to be performed by judicial officials, are relatively rare but could be of profound importance since it is basic law that courts and judges may validly act only in their respective jurisdictional spheres. In that connection, it had one time been understood that Illinois courts were denied the right to entertain jurisdiction over wrongful death cases involving non-residents, based on deaths occurring outside the state, except in those instances where a denial of jurisdictional power could result in a denial of relief. That view had been exposed to a degree of criticism as the result of the outcome of two earlier cases, one arising under a comparable statute of a sister state and the other

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21 7 Ill. App. (2d) 519, 130 N. E. (2d) 117 (1955).
1 An instance of the seldom used original jurisdiction of the Supreme Court may be found in the case of People ex rel. Castle v. Daniels, 8 Ill. (2d) 43, 132 N. E. (2d) 507 (1956).