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Contracts - Survey of Illinois Law for the Year 1947-1948

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Illinois Compensation Act,⁴⁸ as well as the broad terms of the policy coverage,⁴⁹ required that result. From the standpoint of the carrier, such a decision does nothing to discourage the employer from engaging in indiscriminate hiring of minor employees. It should be said, however, on behalf of the minor employee that a firm public policy requires that he be protected against such hazards as can be anticipated. Among such hazards is the possibility that the employer may become insolvent and be unable to respond for the additional compensation. To hold otherwise would leave the minor without recourse against the carrier. It might be noted that the problem seems to have been handled more effectively in Wisconsin under an appropriate statute.⁵⁰

II. CONTRACTS

Only one case can be said to contain anything significant so far as general contract doctrines are concerned and even that is of limited appeal. In *Manthei v. Heimerdinger*¹ an argument arose as to whether a release given as to a common-law right of action for personal injuries growing out of an automobile accident should also operate to discharge a tavern proprietor from liability even though he had, in violation of the Liquor Control Act,² sold liquor to the already intoxicated tort-feasor. It is, without doubt, clear that a release of one joint tort-feasor will operate to discharge all others jointly responsible for the tort despite any contrary intention on the part of the contracting parties. If, however, the injury sustained may be said to be the result of two or more independent but concurring causes, then an area of doubt may exist as to whether the release of one serves to release all, especially so if the causes of action rest on different foundations and

⁴⁸ Ill. Rev. Stat. 1947, Ch. 48, § 163(a)(3).

⁴⁹ See paragraph I(a) of the standard form of workmen's compensation policy in use in Illinois.

⁵⁰ Wis. Stat. 1943, Ch. 102, § 102.62.

¹ 332 Ill. App. 335, 75 N. E. (2d) 132 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 358 and 43 Ill. L. Rev. 409.

² Ill. Rev. Stat. 1947, Ch. 43, § 94 et seq.

could be considered as separable. It was argued, in the case mentioned, that the wrong of the operator of the motor vehicle was distinct and independent from that of the tavern keeper, one wrong arising out of common-law duties and the other resting solely on statute, so that the release of the former should not serve to discharge the latter, but the court held otherwise. It indicated that, as the injury was a single and indivisible one and the statutory remedy was designed merely to insure compensation to the injured person, once compensation had been received, all claim under the statute was gone. There is authority to support the opposite result in other jurisdictions,³ and possibly so in this state,⁴ but the cogency of plaintiff's argument failed to convince the court. Other, and more specialized, contract problems are dealt with under appropriate groupings.

INSURANCE

Interpretation given to clauses commonly found in insurance contracts always merits attention as the outcome of a single case may have far-reaching effects. The case of *McDaniel v. Glens Falls Indemnity Company*,⁵ a case of first impression in this state, required consideration of an exemption clause in an automobile liability policy to the effect that the coverage was not to apply "while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor." The plaintiff, an Illinois resident, insured under such a policy which also provided for medical payments to herself and guests, planned to leave Los Angeles with her mother intending to drive on to Dallas, Texas. Desiring to have other passengers with her, she visited a travel agency which made a business of seeking transportation for clients in private cars between those points. She selected three from among several applicants and they paid her a total of \$30. While travel-

³ See, for example, *Philips v. Aretz*, 215 Minn. 325, 10 N. W. (2d) 226 (1943).

⁴ The cases in point are noted in 26 CHICAGO-KENT LAW REVIEW 358 at 360-1.

⁵ 333 Ill. App. 596, 78 N. E. (2d) 111 (1948).

ing through New Mexico, an accident occurred in which the insured and her mother were injured, both requiring medical attention and hospitalization. The insurer refused to pay plaintiff's claim based on the medical coverage clause and, in the suit which followed, disclaimed liability on the ground that the automobile was being used as a public or livery conveyance hence exempted them under the policy terms. Plaintiff recovered judgment in the trial court for her medical expenses but was denied allowance of attorney's fees. The insurer appealed and plaintiff filed cross-errors.⁶ The Appellate Court for the Second District, affirming the lower court ruling, held that the term "public conveyance," as used in the exemption clause, implied a holding out of the vehicle to the use of the general public for hire, which was not true of the case before it. Such decision follows a pattern already set by the majority of jurisdictions which have had occasion to pass on the point.⁷ Denial of recovery of attorney's fees was sustained on the ground that, the point never having before been presented in Illinois, the defendant had a right to have the court adjudicate the issue involved.

Another policy clause which came before a reviewing court for the first time in this state was involved in *Coulter v. American Employers' Insurance Company*.⁸ Plaintiff therein had been issued a standard automobile combination policy which included liability coverage for bodily injury caused by the use of his trucks while he was engaged in the scavenger business and particularly covered the "loading and unloading thereof." While so engaged, plaintiff parked his truck at the curb, entered a restaurant to make a garbage collection, picked up one container and started up the inside steps leading to a trap door opening onto the sidewalk.

⁶ The cross-error assigned failure to observe the provisions of Ill. Rev. Stat. 1947, Ch. 73, § 767, regarding the allowance of attorney's fees.

⁷ See *Marks v. Home Fire & Marine Ins. Co.*, 52 App. D. C. 225, 285 F. 959 (1923); *Park v. National Casualty Co.*, 222 Iowa 861, 270 N. W. 23 (1936); *Elliott v. Behner*, 150 Kan. 876, 96 P. (2d) 852 (1940); *Wood v. Merchants Ins. Co. of Providence*, 291 Mich. 573, 289 N. W. 259 (1939); *Pimper v. National American Fire Ins. Co.*, 139 Neb. 109, 296 N. W. 465 (1941).

⁸ 333 Ill. App. 631, 78 N. E. (2d) 131 (1948).

As plaintiff pushed the trap door upward a pedestrian, passing close by, was tripped and injured. The insurer, although notified of the accident and of the fact that suit was threatened, ignored the several notices and refused to defend, claiming the accident did not fall within the loading and unloading provision of the policy. Plaintiff settled the pedestrian's suit and then brought the present action to recover the amount so paid together with attorney's fees. Plaintiff's judgment was affirmed by the Appellate Court for the Second District which ruled that the accident fell within the policy coverage.

Defendant had relied on the case of *Ferry v. Protective Indemnity Company of New York*,⁹ a decision squarely in point, where the court had said that, to bring the accident within the "loading and unloading" clause, there had to be a connection between the accident and the use of the vehicle insured. To that end, the vehicle would have to be "directly connected with the work of loading or it must have been an active factor in the operation."¹⁰ This view was rejected as being unsound and unsupported by the weight of authority, the Illinois court preferring to be guided by the rule announced in *State ex rel. Butte Brewing Company v. District Court of Second Judicial District*¹¹ and followed in subsequent cases.¹² Three points were said to be important in defining the area of coverage. These were first, the intention of the parties to the contract; second, that "loading" and "unloading" embrace more than the mere placing of goods on or off the truck and may be said to include removal from resting point to truck or vice versa; and third, accidents occurring along the line having some causal relationship with the insured vehicle as such are within the boundaries of the clause.¹³

The problem concerning just what acts are necessary to ac-

⁹ 155 Pa. Super. 266, 38 A. (2d) 493 (1944).

¹⁰ 155 Pa. Super. 266 at 269, 38 A. (2d) 493 at 494.

¹¹ 110 Mont. 250, 100 P. (2d) 932 (1940).

¹² *Babien v. National Casualty Co.*, 143 Ohio St. 215, 54 N. E. (2d) 798 (1944); *Pacific Auto. Ins. Co. v. Commercial Casualty Ins. Co. of New York*, 108 Utah 500, 161 P. (2d) 423, 160 A. L. R. 1251 (1945).

¹³ 108 Utah 500 at 509, 161 P. (2d) 423 at 427, 160 A. L. R. 1251 at 1257.

compish a change of beneficiary under a life insurance policy reappeared in *Young v. American Standard Life Insurance Company*.¹⁴ There the insured was covered by two group policies under certificates numbered 3603 and 7492 respectively. Plaintiff, the insured's daughter, had been named beneficiary under both certificates but, immediately before the insured's death, an attempt had been made to change the beneficiary to one Alice Ellen Smith. The master policy, under which the certificates were issued, permitted change of beneficiary on the filing of a written request signed by the insured member and forwarded through his union, such change becoming effective only when received at the home office of the insurer.

The insured had died in the early hours of the morning of October 22, 1943. On that day, at about 8:45 a. m., the insurer received at its home office an undated request postmarked in Chicago on October 21st, apparently originating with and being signed by the insured, designed to change the name of the beneficiary on the second certificate. The request bore the legend, supposedly written by the insured, that it was "understood that such change shall not become effective until endorsement has been made."¹⁵ The form was incomplete, however, in that blanks for the date and a statement as to the relationship of the proposed beneficiary to the insured were not filled in. The company promptly sent the request form to an officer of the union, holders of the master policy, asking that the insured be requested to supply the missing information. In short order, the attorney for the proposed beneficiary returned the request, the form having been completed to show the name of the proposed beneficiary with the added words "or my estate," the relationship was indicated by the word "fiance," and the date was given as "10/8/1943." No notice of the death of the insured had reached the company, but it still refused to alter the beneficiary provision because the wording to "Alice Ellen Smith or my estate" was regarded as indefinite or alternative.

¹⁴ 398 Ill. 565, 76 N. E. (2d) 501 (1948), noted in 34 Va. L. Rev. 471, in part affirming 331 Ill. App. 5, 71 N. E. (2d) 828 (1947).

¹⁵ 398 Ill. 565 at 568, 76 N. E. (2d) 501 at 503.

It so notified the attorney, sending along a new form for proper completion. No other request reached the insurer. When plaintiff sued on the certificates, the insurer filed a cross-complaint in interpleader and the case was transferred to the equity side of the court which held in plaintiff's favor. The Appellate Court reversed as to the first certificate but affirmed the holding on the second. On further appeal, the Illinois Supreme Court reinstated the trial court decree favoring plaintiff as to both certificates.

Since the endorsement on the policy changing the beneficiary could not have been made during the insured's lifetime, for he was dead when the original request first reached the company, the rule generally applicable would be that the rights of the named beneficiary were fixed in accordance with the facts as they existed at the time of the policyholder's death, which rights could not be altered by any action of the company taken thereafter.¹⁶ The proposed beneficiary contended, however, that as the insured had done all he could to effect a change of beneficiary, but had died before formal completion of that change, a court of equity should view the change as accomplished.¹⁷ While the court was willing to accept that view as valid,¹⁸ it was of the opinion that the insured had fallen far short of doing all he could as the original request bore no date, the relationship of the proposed beneficiary had not been given, both matters being treated as important, and he had not, though required by the master policy, transmitted the request for change through the union. Some point was also made of the fact that the insured had embodied a condition into the request to the effect that the change was not to be effective until endorsement had been made. These omissions were regarded as sufficient to convince the court that the attempted change was ineffective.

¹⁶ *McEldowney v. Metropolitan Life Ins. Co.*, 347 Ill. 66, 179 N. E. 520 (1932); *Freund v. Freund*, 218 Ill. 189, 75 N. E. 925 (1905).

¹⁷ In other words, the requirement of endorsement of change of beneficiary on the policy is merely a provision for the benefit of the insurer and subject to waiver, either express or implied.

¹⁸ See *John Hancock Mut. Life Ins. Co. v. Douglass*, 156 F. (2d) 367 (1946); *Prudential Ins. Co. v. Moore*, 145 F. (2d) 580 (1944); *Sun Life Assur. Co. v. Williams*, 284 Ill. App. 222, 1 N. E. (2d) 247 (1936).

Mention should be made of the case of *Tomerlin v. Lancashire Indemnity Company*¹⁹ wherein the court ruled that, under the Illinois Insurance Code,²⁰ a non-resident plaintiff might serve a foreign insurer licensed to do business in Illinois by delivering summons to the Director of Insurance even though the cause of action arose wholly without the state. After removal of the case to the federal court, the defendant moved to quash process and return and sought dismissal on an alleged lack of jurisdiction over the person of defendant. The company relied on *Morris & Company v. Skandinavia Insurance Company*,²¹ a case in point but one involving a Mississippi statute of similar wording, wherein the United States Supreme Court had held the service of summons to be ineffective. The court in the instant case point out, however, that the defendant in the cited case was not then, nor had it prior thereto been, doing business within Mississippi but had merely entered into a re-insurance contract in New York with insurers of property in Mississippi and had appointed a statutory agent in the last-named jurisdiction only because the same was necessary to engage in the re-insurance business. It consequently justified denial of the motion on the ground that the Illinois legislature, when adopting the statute in question, had in mind the then present state of the Illinois law on the subject as declared by our courts. In this connection it particularly relied on the decision in *Illinois Life Insurance Company v. Prentiss*²² where the rule had been laid down that, an action on a life insurance policy being transitory, an Illinois company could properly be sued in another state where it did business and had agents upon whom service could be obtained even though the cause of action had arisen under an Illinois contract of insurance with an Illinois resident. From that premise, the court went on to say that had

¹⁹ 76 F. Supp. 168 (1948).

²⁰ Ill. Rev. Stat. 1947, Ch. 73 § 724.

²¹ 279 U. S. 405, 49 S. Ct. 360, 73 L. Ed. 762 (1929). See also *Morris & Co. v. Skandinavia Ins. Co.*, 51 F. (2d) 346 (1936), where it was held that service of summons on the insurer's statutory agent in Illinois was likewise ineffective but the court indicated that had the insurer actually been doing business in Illinois the service of summons would have been good.

²² 277 Ill. 383, 115 N. E. 554 (1917).

the legislature intended that foreign insurers licensed and doing business in Illinois were not to be subject to suit in Illinois by non-residents on actions arising elsewhere, it would have used more limited language instead of the broad and unqualified terms in which the present statute is couched.²³

SALES

The dearth of significant cases in the law of sales, conspicuous in recent years, still seems to continue. The only noteworthy case, and that because of the novel factual situation, was the decision in *Standard Oil Company of Indiana v. Daniel Burkhartsmeier Cooperage Company*.²⁴ Plaintiff there, a dealer in petroleum products, requested defendant, engaged in the business of cleaning and reconditioning used steel barrels, to supply a quantity of such reconditioned barrels. The written order carried the legend: "To be thoroughly cleaned and painted. These barrels are to be entirely satisfactory in every respect or they will be returned for full credit at no expense to us. For resale." Defendant accepted the order and delivered a number of these steel barrels to plaintiff, who, in turn, sold and delivered one of them to a customer for the storage of fuel oil. After the barrel had been placed in the customer's cellar, the customer's twelve-year old son lit a match and caused an explosion with severe injury to himself. The explosion was attributable to the fact that the barrel had originally been filled with a highly inflammable and explosive lacquer, the residue of which, although easily detectable, remained in the barrel because defendant had failed to clean it away. Removal could have been readily accomplished by following defendant's ordinary cleaning processes. After plaintiff had paid for the damage suffered by its customer, it sued the defendant for an

²³ Cases involving service on foreign corporations other than insurers, decided prior to the adoption of the present Insurance Code, may be found in *National Can Co. v. Weirton Steel Co.*, 314 Ill. 280, 145 N. E. 389 (1924), and in *Simpson Fruit Co. v. Railway Co.*, 245 Ill. 596, 92 N. E. 524 (1910). Any argument that the venue of the suit was improper was nullified by the decision in *Furst v. Brady*, 375 Ill. 425, 31 N. E. (2d) 606, 133 A. L. R. 558 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 293, which had indicated that the venue provisions of the Civil Practice Act had no application to non-resident plaintiffs suing insurance companies in this state.

²⁴ 333 Ill. App. 338, 77 N. E. (2d) 526 (1948).

alleged breach of express warranty to the effect that the barrels were thoroughly cleaned. Judgment for the plaintiff in the trial court was affirmed.

The defendant had denied the existence of an express warranty, had argued that the wording of the purchase order was of such a nature as to preclude plaintiff from a recovery of damages, had insisted that plaintiff should have inspected the barrels upon delivery, and that anyway the proximate cause of the injury was not the failure to clean the barrels but rather was the independent act of the customer's son in lighting the match. In contrast, the court found that the defendant's delivery of barrels under plaintiff's written order constituted an acceptance of that order with all its terms and conditions; that defendant thereby represented that all barrels would be thoroughly cleaned before delivery, without which representation plaintiff would not have entered into the contract; that such representation constituted an express warranty and, there being an express warranty, plaintiff was not required to inspect the barrels.²⁵

The court likewise held that the right to return so much of the merchandise for credit as was not entirely satisfactory did not serve to limit the measure of plaintiff's recovery. The right of the parties to contract as to the remedy in case of breach of their agreement, recognized at common law as well as under Sections 49 and 71 of the Uniform Sales Act,²⁶ was held not to limit the recovery but merely to provide a cumulative remedy which plaintiff could exercise at its election if it wished, in preference to suing for breach of warranty.

On the subject of causation, the court declared that the intervention of independent concurring or intervening forces will not serve to break causal connection if the intervention of such forces was itself probable or foreseeable. The evidence indicated that defendant had purchased the barrels originally from a supplier with intent to recondition and resell the same and had been warned

²⁵ *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598 (1890); *Cook v. Perfection Piano Bench Mfg. Co.*, 236 Ill. App. 472 (1925).

²⁶ Ill. Rev. Stat. 1947, Ch. 121½, §§ 49 and 71.

by that supplier that many of the barrels had been used to ship inflammable materials with the result that dangerous fumes would be apt to remain in the drums after they had been emptied. The likelihood of an explosion from contact between these fumes and an open flame, with resultant injury to persons or property, was reasonably probable and foreseeable unless the barrels were adequately cleaned or due warning given. Omission in either respect was sufficient to charge defendant with responsibility.

QUASI-CONTRACT

The victim of a tort may, at times, have an election to pursue some form of delictual remedy or, choosing to waive the tort, may sue instead as on an implied in law contract. Should he see fit to select the latter, his recovery is, of course, limited to the worth of the benefit conferred. If, for example, he has been induced through fraud to part with money, he may sue as in trespass on the case to collect whatever damage he may have suffered or he may, upon offer to restore the status quo, recoup the amount paid out in an action sounding in general assumpsit. In case he has been induced to part with real property rather than money, his proceeding speaks in equity rather than at law unless the wrongdoer has resold the property and the victim would prefer to hold him for the financial gain arising from the resale. These principles were given application in the only significant case on restitution, that of *In re Thomas' Estate*,²⁷ when the court held it was proper to dismiss a claim, filed in county court proceedings for the probate of an estate, predicated on the decedent's fraud in obtaining a conveyance of real property for an inadequate consideration because of his misrepresentations as to the character and worth of the land. Since the claimant had failed to allege a resale of the property at a profit, thereby postulating a claim on an implied in law contract, it was held that the gravamen of the transaction was in tort, hence beyond the jurisdiction of a court having limited authority in probate matters.²⁸

²⁷ 333 Ill. App. 238, 77 N. E. (2d) 426 (1948).

²⁸ Ill. Rev. Stat. 1947, Ch. 3, § 354.

III. CIVIL PRACTICE AND PROCEDURE

AVAILABILITY OF REMEDIES.

Attention paid to jurisdictional requirements at the outset of litigation may save hours of effort which might otherwise be spent fruitlessly in the conduct of suits incapable of achieving anything of value if those requirements be neglected. There is no evidence, in the recent decisions, that any debatable questions have arisen concerning the power of the Illinois courts to exercise their jurisdiction as that term relates to their ability to hear and determine particular categories of proceedings. Some cases involving aspects of jurisdiction in terms of control over the parties are noteworthy, however.

The provision of the Civil Practice Act which permits the use of substituted service of summons in actions *in personam*¹ has, in the main, produced little dispute, and that only of the factual variety, for the legislative language is clear and accords with all requirements of due process. The case of *Mahler v. Segel*² is entitled to notice because it grew out of the fairly standard and common practice for persons, former residents of the state, to leave a mailing address or a telephone listing with some relative through whom communication with the non-resident might be established. If, in fact, permanent residence has been established elsewhere, the retention of these symbols of residence within the state will not, according to the holding therein, be enough to support substituted service upon the relative as a "person of the family," nor can the premises so listed be regarded as a "usual place of abode." In that respect, the abstract decision in *Conley v. McNamara*³ may prove interesting for the headnote thereto would indicate that service on a step-daughter who maintained her separate apartment on the second floor of a building owned by defendant, whose separate living quarters were on the first floor,

¹ Ill. Rev. Stat. 1947, Ch. 110, § 137.

² 333 Ill. App. 138, 76 N. E. (2d) 795 (1948).

³ 334 Ill. App. 396, 79 N. E. (2d) 645 (1948).