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Recent Illinois Decisions

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CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—WHETHER STATE ENFORCEMENT OF RESTRICTIVE COVENANTS VIOLATES FOURTEENTH AMENDMENT—State enforcement of a restrictive covenant designed to exclude Negroes from occupying a specified area on the south side of Chicago was sought in the case of *Tovey* v. *Levy*.[1] Injunction was granted by the trial court on the ground that the restrictive agreement, voluntarily entered into between the several property owners, in no way violated state or federal constitutional provisions.[2] On direct appeal to the Illinois Supreme Court because of the constitutional issues concerned,[3] that court, deeming itself bound by the recent holding of the United States Supreme Court in *Shelley* v. *Kraemer*,[4] reversed on the ground that judicial enforcement of restrictive covenants amounts to prohibited state action under the Fourteenth Amendment. The court found no vice in restrictive agreements themselves, nor regarded them open to objection if voluntarily adhered to. The question still remains open, then, as to whether a suit for damages for violation of such an agreement may yet serve to provide some legally coercive backing for their recognition.

CORPORATIONS—DISSOLUTION—WHETHER INSTITUTION OF STATUTORY PROCEEDING TO HAVE VALUE OF SHARES FIXED PREVENTS DISSENTING SHAREHOLDERS FROM MAINTAINING ACTION IN EQUITY ON CLAIM OF FRAUD—The Appellate Court for the Third District recently had occasion, in the case of *Opelka* v. *Quincy Memorial Bridge Company*,[1] to deal with the possibility of an election of remedies in a proceeding by minority shareholders to obtain relief against the corporation for a fraudulent sale of its assets. In that case, the stock held by plaintiffs was preferred as to assets to the extent of its par value, and cumulatively preferred as to dividends, there being substantial accrued unpaid dividends. The assets of the defendant corporation were purchased by the City of Quincy, pursuant to a reservation of power to recapture the franchise, which had originally been given to the city, on condition that

* Editorial note: A new section has been added to the CHICAGO-KENT LAW REVIEW in which recent Illinois cases, not considered worthy of a more extended treatment, are noted for the particular benefit of the Illinois lawyer as these cases appear to possess some novelty or significance to the law of this state.

1 401 Ill. 393, 82 N. E. (2d) 441 (1948).

2 The validity of such a covenant had been tested in the earlier case of Burke v. Kleiman, 277 Ill. App. 519 (1934), and had there been upheld. That decision, not referred to in the instant case, must now be regarded as overruled.

3 Ill. Rev. Stat. 1947, Ch. 110, § 199.

4 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

1 335 Ill. App. 402, 82 N. E. (2d) 184 (1948).

the city apply the purchase money first to the retirement of the bonds, second to the preferred stock, and last to the common stock of the corporation. The plaintiffs claimed that the common stockholders were paid while they had been given nothing for their preferred. They alleged that there was a fund on deposit in the name of the corporation which could be used to pay their claims, but that the defendant corporation refused to do so. The question of election of remedies was brought about by the fact that plaintiffs, in order to prevent themselves from being legally presumed to have assented to the sale, had filed a statutory action under Section 73 of the Business Corporation Act,[2] although they much preferred the equitable relief sought in the present action.[3] The Appellate Court held that, in cases involving fraud and illegality,[4] the remedy provided by Section 73 was not exclusive. The decision, first of its kind in Illinois, not only recognizes the need for more flexible relief than that provided by the statute but also eliminates the difficulty which previously arose from a failure to file an appropriate statutory action in sufficient time to prevent the operation of the automatic presumption of approval of the sale,[5] at least in cases where fraud can be shown.

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—WHETHER INJUNCTION MAY BE OBTAINED TO PREVENT SUCCESSIVE BREACHES OF AN INSTALLMENT CONTRACT—The plaintiff in the case of *Serafin* v. *Reid*[1] filed a bill in equity to enjoin defendant from breaching a written

[2] Ill. Rev. Stat. 1947, Ch. 32, § 157.73. The material provisions of that statute indicate that in the event of a sale of all of the property or assets of a corporation, otherwise than in the usual and regular course of its business, "any shareholder who shall not have voted in favor thereof, may, within twenty days after the vote was taken, make written demand on the corporation for the payment to him of the fair value of his shares." The statute further directs that, in the event no agreement can be reached as to the worth of the shares, a suit is to be filed to determine the value thereof. That suit must be filed within a limited period of time or else, for failure to sue, the shareholder "shall be conclusively presumed to have approved and ratified the sale or exchange and shall be bound by the terms thereof." The motion to dismiss the instant case, granted by the trial court, urged that proceedings based on the statutory provision aforesaid had been providently instituted.

[3] Plaintiffs asked that the fund on deposit and all other funds and property of the corporation be impressed with a trust for their benefit.

[4] The case was not heard on the merits. As the ruling had been made on a motion to dismiss, plaintiff's allegations of fraud were regarded as true for the purpose of ruling on the motion to dismiss.

[5] In Morris v. Columbia Apartments Corporation, 323 Ill. App. 292, 55 N. E. (2d) 401 (1944), the plaintiff did not proceed under Section 73 of the Business Corporation Act within the time specified but elected to maintain an action independent thereof. The court held that the statute created a conclusive presumption of approval of the sale which operated to preclude plaintiff in the action he did bring. It is difficult to see how, in a case in which only equitable relief would be adequate, a plaintiff shareholder could obtain that relief in the absence of a ruling such as the one in the instant case.

[1] 335 Ill. App. 512, 82 N. E. (2d) 381 (1948).

agreement executed by the parties therein under the terms of which the defendant, in consideration of plaintiff's forbearance to institute bastardy proceedings, agreed to pay plaintiff a weekly sum for the support and maintenance of their minor child. Equitable jurisdiction was invoked on the ground that successive suits at law would be necessary to enforce plaintiff's rights under the contract and would thereby give rise to an undesirable multiplicity of suits. After issues were joined on defendant's claim that the agreement had been obtained by duress, the trial court entered a decree finding not only that a specific sum was due to plaintiff but also enjoining the defendant from breaching the contract. On appeal, the Appellate Court for the First District reversed the decree saying that an adequate remedy at law could be had since the issues were simple, a determination of the suit would be res judicata, and there was no showing that the defendant was insolvent or that he would persist in refusing to meet his obligations under the contract. That court preferred that the issue as to validity of the contract be determined according to law, and by jury trial if requested, rather than under equitable principles. The question as to whether equity should take jurisdiction, in cases where a periodic sum is due under a contract and a refusal by the defendant to make payments might lead to a number of suits at law, has been the subject of controversy.[2] In ordinary commercial transactions, the rule might well be one remitting the parties to available legal remedies. In the instant case, however, the question was more nearly one of child support. The court has acknowledged jurisdiction to order support in divorce and separate maintenance cases.[3] Is there not, then, some propriety in assuming jurisdiction where paternity of a child born out of wedlock is admitted and the obligation to support is contractually acknowledged rather than judicially determined? The difference in the status of the parents should not be controlling.

INTOXICATING LIQUORS—LICENSES AND TAXES—WHETHER DEGREE OF PROXIMITY OF LICENSED PREMISES TO PUBLIC BUILDINGS IS TO BE MEASURED FROM STRUCTURE OR BOUNDARY OF LAND—In the case of *Smith* v. *Ballas*,[1] arising in the Appellate Court for the Third District, the court was obliged to construe a provision of the Liquor Control Act which declares that no license "shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any

[2] See, for example, Weininger v. Metropolitan Fire Insurance Co., 359 Ill. 584, 195 N. E. 420 (1935).

[3] Ill. Rev. Stat. 1947, Ch. 40, § 14, and Ch. 68, § 26.

[1] 335 Ill. App. 418, 82 N. E. (2d) 181 (1948).

military or naval station."[2] The petitioner-appellant had applied for a liquor license to conduct a business in petitioner's building located 101 feet and 1 inch from a high school building proper but only 87 feet 8 inches from the nearest point of the real estate upon which the school building was located. The local commissioner denied a license, but the state commission, on review, ordered that a license be granted. The circuit court directed reinstatement of the decision of the local commissioner and, on further appeal, the Appellate Court affirmed the holding denying a license. The point specifically in issue called for construction of the phrase "within 100 feet of any church, school, hospital" or the like. A narrow construction would have limited the application of the statute to cases based on measurements drawn from actual structures standing on the land. The court preferred to find that the legislative purpose was to protect children, among others, while within the confines of the premises where they would be apt to gather and that this could be accomplished only by keeping taverns beyond a reasonable area to be measured from the boundary line of the property. An early English case on statutory interpretation furnishes the best guide to be followed in similar situations. The court there said that "the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*"[3]

LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATION—WHETHER TIME RUNS FROM LOSS IN GAMBLING TRANSACTIONS OR FROM TIME OF PAYMENT OF BET—Actions to recover money lost by gambling are not often filed. For that reason, there is unusual significance in the case of *Holmes* v. *Brickey*[1] wherein the person who lost money gambling in a dice game filed a suit based on a statutory provision which permits the loser to sue within six months with a secondary *qui tam* action thereafter by any other person.[2] The gambling transaction in question occurred on January 4th but actual payment of the money lost did not take place until two days later. Suit was instituted by the loser on July 5th next thereafter, being one day over the six-month period following the gambling transaction but one day before the end thereof with respect to the pay-

2 Ill. Rev. Stat. 1947, Ch. 43, § 127.

3 Heydon's Case, 3 Co. 7a at 7b, 76 Eng. Rep. 637 at 638 (1584).

1 335 Ill. App. 390, 82 N. E. (2d) 200 (1948).

2 Ill. Rev. Stat. 1947, Ch. 38, § 330.

ment. The trial court dismissed the suit on motion,[3] but that holding was reversed on appeal when the Appellate Court held, seemingly for the first time, that no cause of action accrued until the money was paid.[4] As the statute refers to the "losing and paying" of money or "delivering" of any other valuable thing, the decision appears to be obviously correct.[5]

NEGLIGENCE—ACTIONS—WHETHER RES IPSA LOQUITUR DOCTRINE APPLIES WHEN INSTRUMENTALITY HAS PASSED FROM DEFENDANT'S CONTROL—The question as to whether or not a plaintiff may rely on the doctrine of res ipsa loquitur in cases in which the defendant has relinquished control of the agency causing the harm at the time of the injury was considered in the recent case of *Roper* v. *Dad's Root Beer Company*.[1] The plaintiff was injured by the explosion of a bottle containing root beer left standing on a shelf in a self-service market. The record showed merely that the defendant's truck driver placed such bottles either into the storeroom or into a display rack, from which they were taken by store employees to replenish stock removed by customers from the shelf. No evidence was presented as to when the bottle in question had been delivered or as to its subsequent handling. The Appellate Court for the First District held that res ipsa loquitur applied to carbonated beverages, even if the bottle was not under the control of the defendant at the time of injury, so long as the defendant had control at the time of the negligent act causing the injury. However, the court demanded, as a condition precedent to recovery, that the plaintiff show affirmatively the absence of intervening negligence in the handling of the bottle after it left the control of the defendant. As the plaintiff had wholly failed to comply with this condition, judgment for the defendant was affirmed. It would appear that this is the first time that an Illinois court has formulated such a requirement for previous applications of the doctrine of res ipsa loquitur to situations in which harmful foreign substances were found in bottles have been sustained even though defendants have objected that the injurious instrumentality had previously gone out of the control of their agents.[2] Since

[3] Ibid., Ch. 110, § 172(f), authorizes the use of such a motion when the cause of action "did not accrue within the time limited by law for the commencement of an action or suit thereon."

[4] The court referred to the holding in English v. Cannon, 17 Ill. App. 475 (1885), wherein it was decided that the delivery of a promissory note was not sufficient to give rise to a cause of action inasmuch as the maker was under no obligation to pay the same.

[5] Compare with Mrowiec v. Polish Army Veterans Ass'n of America, 73 N. Y. S. (2d) 361 (1947).

[1] 336 Ill. App. 91, 82 N. E. (2d) 815 (1948).

[2] Paolinelli v. Dainty Food Manufacturers, 322 Ill. App. 586, 54 N. E. (2d) 759 (1944), appeal den. 326 Ill. App. xiv, noted in 23 CHICAGO-KENT LAW REVIEW 69,

the courts have thus extended the doctrine of res ipsa loquitur, it seems only fair to require in return as a safeguard for the defendant that the plaintiff be required to show that the injury was not caused by intervening negligent or wilful acts.[3] Such a doctrine cannot be considered contrary to established principles in tort cases and may be regarded simply as an extension of the requirement that the plaintiff must prove that he was in the exercise of due care and caution.[4]

dealt with a bone in certain soup mix; Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N. E. (2d) 739 (1943), involved paint in a milk bottle; Rost v. Kee & Chapell Co., 216 Ill. App. 497 (1920), concerned glass particles in milk. The dissent objected to application of res ipsa loquitur since defendant did not have control at the time of the injury. In Duval v. Coca-Cola Bottling Co., 329 Ill. App. 290, 68 N. E. (2d) 479 (1946), a mouse-in-bottle case, the "defendant, for practical purposes, had exclusive control of the bottle."

[3] Similar requirements were made in Tingey v. E. F. Houghton & Co., 172 P. (2d) 715 (Cal. App., 1946), affirmed in 30 Cal. (2d) 97, 179 P. (2d) 807 (1947); Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. (2d) 453, 150 P. (2d) 436 (1944); Hughs v. Miami Coca Cola Bottling Co., 155 Fla. 299, 19 So. (2d) 862 (1944); Alagood v. Coca Cola Bottling Co., 135 S. W. (2d) 1056 (Tex. Civ. App., 1940). But see contra; Fick v. Pilsener Brewing Co., — Ohio Op. —, 86 N. E. (2d) 616 (1949).

[4] Hanson v. Trust Co. of Chicago, 380 Ill. 194, 43 N. E. (2d) 931 (1942); Dee v. City of Peru, 343 Ill. 36, 174 N. E. 901 (1931); Illinois Cent. R. Co. v. Oswald, 338 Ill. 270, 170 N. E. 247 (1930); West Chicago St. R. Co. v. Liderman, 187 Ill. 463, 58 N. E. 367, 52 L. R. A. 655, 79 Am. St. Rep. 226 (1900); Aurora Branch R. R. Co. v. Grimes, 13 Ill. 585 (1852).