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## Contracts - Survey of Illinois Law for the Year 1949-1950

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## II. CONTRACTS

In the field of general contract law, the Supreme Court, through the medium of the case of *Hanlon v. Hayes*,<sup>1</sup> issued a pronouncement which gives definiteness to Section 2 of the Statute of Frauds.<sup>2</sup> In substance, the court held that if a written memorandum of an oral contract for the sale of lands does not contain a statement as to the price or consideration to be paid, the contract purported to be evidenced thereby cannot be enforced. It further indicated that Section 3 of the Statute, one which states that the "consideration" need not be set forth in writing, applies only to those promises or agreements mentioned in Section 1 thereof, hence does not aid contracts for the sale of land, for the latter are referred to in a separate section. It is interesting to note that the Supreme Court could find no Illinois precedent on which to base its decision<sup>3</sup> and that it arrived at its conclusion entirely by way of a construction of statutory language, by logic, and by reference to the decisions of sister states. The decision is particularly precise and technical, for the facts in the case show that, in addition to the memorandum signed by both parties, the adversary admitted that the price or consideration had been orally agreed upon. In spite of this admission, the court upheld the defendant's contention that, as the price did not appear in the written memorandum, there was no enforceable contract. A statement of price in real estate contracts now becomes an essential element to every efficient memorandum.

## INSURANCE

Differences as to the construction to be given to insurance policy clauses, particularly those respecting coverage, still remain a source for litigation although the existence of such clauses lacks any novelty. Such was the situation in the case of *Freeport Motor Casualty Company v. Tharp*,<sup>4</sup> wherein the insurer

<sup>1</sup> 404 Ill. 362, 89 N. E. (2d) 51 (1949).

<sup>2</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 59, § 1 et seq.

<sup>3</sup> See comment on the instant case in 1950 Ill. L. Forum 309.

<sup>4</sup> 338 Ill. App. 593, 88 N. E. (2d) 499 (1949). In an opinion which lies outside the period of this survey, the decision was affirmed: 406 Ill. 295, 94 N. E. (2d) 139 (1950). Fulton, J., dissented.

had issued an automobile liability policy to one Wright containing a coverage clause favoring the named insured, provided he was the owner of the described automobile, with "respect to the use of any other automobile by or in behalf of such named insured." That clause was followed by another which made the coverage applicable to another automobile "used but not owned by the insured" when the use thereof was required by reason of a breakdown, repair, servicing, loss or destruction of the described car. The insured subsequently sold his car for junk and, within the policy period, became involved in an accident with one Tharp while driving the car of another. Suit by Tharp was followed by the instant case, one seeking a declaratory judgment to the effect that Wright's sale of the insured automobile had operated to terminate the policy coverage.

At the trial thereof, the insurer demonstrated that (1) it and other automobile liability carriers issued policies of two general types, one designed to cover automobile owners, the other providing liability coverage for non-owners; and (2) that the premium rate for non-owner coverage was substantially higher than in ownership cases. Such custom or usage among carriers, the insurer contended, disclosed an intention on the part of the companies that the coverage afforded under the first type of policy should terminate with the disposal of the described automobile, so long as replacement was not contemplated. The court, however, without citing any case in point, ruled the coverage was still applicable because of the absence of any express language in the policy providing for its termination.<sup>5</sup>

Another case falling within the same category is that of *Mid-States Insurance Company v. Brandon*<sup>6</sup> wherein the insurer, alleging misrepresentation, also sought a declaratory judgment to nullify an automobile liability policy from the inception date. The

<sup>5</sup> Two well-known and universally accepted rules were invoked. The first requires that ambiguities in insurance policies be construed strictly against the insurance company: *Lenkutus v. New York Life Ins. Co.*, 374 Ill. 136, 28 N. E. (2d) 86 (1940). The second declares that insurance forfeitures are disfavored and will not be allowed unless the right to such forfeiture is clearly demonstrated: *Scott v. Inter-Insurance Exchange*, 352 Ill. 572, 186 N. E. 176 (1937).

<sup>6</sup> 340 Ill. App. 470, 92 N. E. (2d) 540 (1950). Leave to appeal has been denied.

policy had been issued to one Brandon, an adult person, as the named insured. His minor son, while driving the described automobile, became involved in a collision with a third person. After the accident, the insurer learned that the named insured held only a mere naked legal title to the described automobile, the beneficial interest being at all times in his minor son. The policy at bar was in standard form, named the father as the sole owner, and defined the "insured" in the usual manner, thereby making the coverage applicable not only to the owner of the vehicle but also to "any person or organization legally responsible for the use thereof, provided the actual use of the automobile" was with the permission of the named insured.<sup>7</sup> There were no restrictions on the right of the named insured to permit the use of the automobile by any one whom he pleased. In view of the decision in the case of *Hamberg v. Mutual Life Insurance Company of New York*,<sup>8</sup> which had construed Section 766 of the Illinois Insurance Code,<sup>9</sup> the problem came to become one as to whether or not, admitting there was a misrepresentation as to sole ownership, such misrepresentation materially affected the risk assumed. The Appellate Court for the First District, affirming a judgment for the defendant, found the precise question hitherto undetermined in Illinois but was able to cite ample persuasive authority<sup>10</sup> for the holding that a misrepresentation as to sole ownership was not material to the risk with respect to liability to third persons.<sup>11</sup>

<sup>7</sup> 340 Ill. App. 470 at 472, 92 N. E. (2d) 540 at 541.

<sup>8</sup> 322 Ill. App. 138, 54 N. E. (2d) 227 (1944).

<sup>9</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 73, § 766. In the case last cited, the court held that the disjunctive "or," when used in the statute immediately following the word "deceive," was to be construed to mean "and."

<sup>10</sup> *Ocean Accident & Guarantee Corp. v. Bear*, 220 Ala. 491, 125 So. 676 (1929); *Sly v. American Indemnity Co.*, 127 Cal. App. 202, 15 P. (2d) 522 (1932); *Commonwealth Casualty Co. v. Arrigo*, 160 Md. 595, 154 A. 136, 77 A. L. R. 1250 (1931); *Pauli v. St. Paul Mercury Indemnity Co.*, 255 App. Div. 935, 8 N. Y. S. (2d) 691 (1939), appeal den. 280 N. Y. 853, 19 N. E. (2d) 685 (1939); *Hunt v. Century Indemnity Co.*, 58 R. I. 336, 192 A. 799, 112 A. L. R. 902 (1937); *Kuntz v. Spence*, 48 S. W. (2d) 413 (Tex. Civ. App., 1931); *Pontious v. American Motorists' Ins. Co.*, 158 Wash. 264, 290 P. 850 (1930).

<sup>11</sup> The law involved has been set forth, by one text writer, to be as follows: "The rule requiring possession by the insured of an insurable interest in the property forming the subject matter of the insurance which prevails generally in casualty insurance, is not applicable to liability indemnity policies . . . in the case of liability insurance the risk and hazard insured against is not the injury or loss

An interesting point turned up in *Oller v. New York Fire Insurance Company*.<sup>12</sup> The insured, who there held a fire insurance policy issued by the defendant, brought suit to recover the full face amount of the policy on account of a fire loss of greater amount without reduction therefrom for an amount previously paid to him because of a windstorm loss. Payment for the last mentioned loss had been made under an endorsement to the policy providing for extended coverage.<sup>13</sup> The court, upholding the insurer's contention that its liability to plaintiff was only the difference between the face amount of the policy and the sum already paid for the windstorm loss, ruled that the fire policy and the extended coverage endorsement constituted but one contract and that a clause expressly providing that the endorsement should not operate to increase the amount of the policy was not ambiguous even when followed by another clause providing that "wherever the word 'fire' appears, there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires."<sup>14</sup> No authority was cited as a basis for the opinion and there would seem to be none covering the precise issue.<sup>15</sup>

Issues concerning Illinois law, not yet settled by any appellate tribunal within the state, appear to have been settled, at least for the time being,<sup>16</sup> by the federal court holding in *Lumbermen's Mutual Insurance Company v. Slide Rule and Scale*

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of the property named in the policy, but against loss and injury caused by the use of property therein named, for which the insured might be liable, and the right of the insured to recover does not depend upon his being the holder, in fact, of either a legal or equitable title or interest in the property, but whether he is primarily charged at law or in equity with an obligation for which he is liable." See *Blashfield, Cyc. of Auto. Law and Practice, Perm. Ed., Vol. 6, § 3873, p. 537.*

<sup>12</sup> 339 Ill. App. 461, 90 N. E. (2d) 241 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 378.

<sup>13</sup> That endorsement, made after the effective date of the fire policy, read as follows: "In consideration of . . . premium, and subject to provisions and stipulations . . . herein and in the policy to which this endorsement is attached, coverage of the policy is extended to include direct loss by windstorm. . . . This endorsement does not increase the amount or amounts of insurance provided in the policy to which it is attached." 339 Ill. App. 461 at 462, 90 N. E. (2d) 241.

<sup>14</sup> 339 Ill. App. 461 at 462, 90 N. E. (2d) 241.

<sup>15</sup> But see *Hansen & Rowland, Inc. v. Fidelity & Deposit Co. of Maryland*, 72 F. (2d) 151 (1934).

<sup>16</sup> The point must be regarded as settled until such time as a reviewing court of the State of Illinois rules otherwise: *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

*Engineering Company*.<sup>17</sup> It appeared therein that an agent for several insurance companies had entered into a parol binder with an insured under which he agreed to issue insurance contracts when all information was available, such contracts to be effective from the date of the parol agreement. After having allotted a portion of the total coverage desired to Lumbermen's Mutual, he was notified by that company that it rejected the coverage. He thereupon substituted the Citizens and the Firemen's Fund companies as insurers for the amount originally placed with Lumbermen's Mutual. Following a suit by the insured for recovery because of a fire loss, the Citizens and the Firemen's Fund companies contended, *inter alia*, that if they were to be held liable, Lumbermen's Mutual should be held primarily liable, arguing that the agent lacked power, on rejection of a risk by one company, to substitute another in its stead so that the company originally selected remained liable.<sup>18</sup> The court, upholding the view below that the substitution had been validly made with binding effect on the companies so substituted, pointed out that while this question was presently unanswered in Illinois, nevertheless, where the point had arisen, support could be found for the district court's conclusion.<sup>19</sup>

Some years ago, in *Moscov v. Mutual Life Insurance Company of New York*,<sup>20</sup> the Illinois Supreme Court decided that where, according to the terms of disability benefit clauses contained in an insured's life policy, it was necessary for the insured to furnish due proof of permanent disability prior to reaching

<sup>17</sup> 177 F. (2d) 305 (1949), in part affirming 79 F. Supp. 394 (1948).

<sup>18</sup> The district court had found that the substitution had been made by an authorized agent: 79 F. Supp. 394 (1948).

<sup>19</sup> The court, in *Rose Inn Corp. v. Nat'l Union Fire Ins. Co.*, 258 N. Y. 51 at 54, 179 N. E. 256 at 256, 83 A. L. R. 293 (1932), stated: "It is a principle of almost universal acceptance that where an assured has applied for insurance to an agent, having authority to write policies for many companies, with instructions to maintain the insurance in an amount stated, and the agent has undertaken to so act, the agent, upon notice from his companies to cancel, has power to waive for the assured the five-day period of cancellation, to cancel the policies at once, and immediately write new policies in other companies for the assured, so that the new policies become at once effective." See also *May v. Hartford Fire Ins. Co.*, 297 F. 997 (1923); *Sterling Fire Ins. Co. v. Comision Reguladora*, 195 Ind. 29, 143 N. E. 2 (1924); *Federal Ins. Co. v. Sydeman*, 82 N. H. 482, 136 A. 136 (1927); *N. Pelaggi & Co. v. Orient Ins. Co.*, 102 Vt. 384, 148 A. 869 (1930); *Schauer v. Queen Ins. Co.*, 88 Wis. 561, 60 N. W. 994 (1894).

<sup>20</sup> 387 Ill. 378, 56 N. E. (2d) 399 (1944).

the age of sixty years, an insured who had not so done had to be denied a right of recovery. Much the same question arose in the recent case of *Mosby v. Mutual Life Insurance Company of New York*,<sup>21</sup> but the Supreme Court there reversed a judgment favoring the insurer. It pointed out that the basis for its decision in the former case should not be understood to be a reflection of its view on the law involved but rather represented the Pennsylvania view, there applicable because the insurance contract then under consideration had been made in that state and was governed by its law.<sup>22</sup>

In the *Mosby* case, the insured, prior to reaching sixty, had suffered a cerebral hemorrhage which rendered him permanently disabled from performing any work for gain. He failed to file due proof of this disability until after his sixtieth birthday, claiming that he had refrained from such action because of hope of recovery. The company refused to honor his claim, asserting that the furnishing of due proof within the specified time was a condition precedent to its liability. Provisions in the contract there involved bore captions referring to benefits for "Total and Permanent Disability before Age 60." The text of such provisions, however, was to the effect that if "the insured . . . shall, before attaining the age of sixty years . . . furnish due proof" of permanent disability, the company on receipt and approval thereof would grant certain benefits.<sup>23</sup>

The court, upholding the insured's contention that the provisions of the policy were sufficiently variant from the captions thereof to create an ambiguity to be resolved in a manner most liberal to the insured, refused to be controlled by the prior decision. It declared the earlier decision to be inconclusive on the issue presented because it had resulted from an obligation placed on it to give judicial recognition to foreign law.<sup>24</sup> While

<sup>21</sup> 405 Ill. 599, 92 N. E. (2d) 103 (1950), reversing 337 Ill. App. 286, 85 N. E. (2d) 862 (1949), abst. opin. Wilson, J., dissented.

<sup>22</sup> The Pennsylvania view is reflected in *Farmer's Trust Co. v. Reliance Life Ins. Co.*, 140 Pa. Super. 115, 13 A. (2d) 111 (1940); *Jenkins v. Mutual Life Ins. Co. of New York*, 130 Pa. Super. 442, 193 A. 486 (1938).

<sup>23</sup> 405 Ill. 599 at 601, 92 N. E. (2d) 103 at 104.

<sup>24</sup> See the Uniform Judicial Notice of Foreign Law Act: Ill. Rev. Stat. 1949, Vol. 1, Ch. 51, § 48g et seq.

there is opinion to the contrary,<sup>25</sup> the view currently expressed, *i. e.*, that the furnishing of due proof is not a condition precedent to liability but only a condition precedent to the right of the insured to enforce benefit payments, the latter right being postponed until due proof is made, has found support elsewhere.<sup>26</sup> It certainly seems to coincide with the intention of the parties, as that intention existed at the inception of the contract, for it would seem self-evident that the paramount consideration of the parties was not so much a matter of *notice* as it was *insurance* against total and permanent disability occurring before the age of sixty years had been attained.<sup>27</sup>

The decision in *Dempsey v. National Life & Accident Insurance Company*<sup>28</sup> will probably cause attorneys for insurance companies, engaged in drafting war riders, to scrutinize even more carefully the language used in an effort to prevent that indefiniteness and ambiguity which nullifies attempts to limit or change the primary obligation. The life policy there concerned carried a war rider which required the insured, on becoming a member of the armed forces of any nation at war, to secure the company's consent in writing and to pay such extra premium as might be required by it for the period of the duration of such service.<sup>29</sup> The insured, a member of an Illinois National Guard unit at the time the policy had been issued, was ordered to the Philippine Islands with his unit as a part of the United States Army and was killed in action while so engaged. He had not sought company consent to such service nor had he made any offer to pay any extra premiums

<sup>25</sup> In addition to the cases cited in note 22, *ante*, see *Mutual Life Ins. Co. of New York v. Landry*, 148 F. (2d) 699 (1945); *Birnbaum v. Mutual Life Ins. Co. of New York*, 170 Misc. 83, 9 N. Y. S. (2d) 928 (1939).

<sup>26</sup> *Kimel v. Missouri State Life Ins. Co.*, 71 F. (2d) 921 (1934); *Smith v. Mutual Life Ins. Co. of New York*, 188 Ark. 111, 69 S. W. (2d) 874 (1934); *Mutual Life Ins. Co. of New York v. Smith*, 257 Ky. 709, 79 S. W. (2d) 28 (1935).

<sup>27</sup> That, at least, was the rationale followed in *Smith v. Mutual Life Ins. Co. of New York*, 188 Ark. 111 at 115, 69 S. W. (2d) 874 at 876.

<sup>28</sup> 404 Ill. 423, 88 N. E. (2d) 874 (1949), reversing 338 Ill. App. 109, 86 N. E. (2d) 871 (1949).

<sup>29</sup> Failure to obtain consent or to pay the required extra premiums was to operate to limit the company's liability, in case of the insured's death in military service, to a return of the premiums paid. It appeared that the Director of Insurance had denied approval for the issuance of the rider but it had been attached anyway. The apparent violation of Ill. Rev. Stat. 1949, Vol. 1, Ch. 73, § 755, was not referred to as a basis for the court's decision.



which the company might then require. As a matter of fact, the company had not evolved any standard by which the insured could ascertain the amount of additional premiums which would be necessary to keep the policy in full force. Following notice of the insured's death, the company's tender of the premiums paid was refused and suit followed for the face amount of the policy. The lower court gave judgment for plaintiff despite the rider, but the Appellate Court for the First District reversed. On further appeal, the Supreme Court came to the conclusion that the language of the rider was too uncertain, too indefinite to supply that mutuality required for a contract between the parties, hence it ruled the rider to be ineffective to limit the primary obligation.

The principal uncertainty was said to rest in the fact that the rider neither prescribed the amount of extra premium to be paid nor provided any standard for the calculation thereof. While consent to military service might properly be made a necessary element to the continuance of full liability, the rider was so drafted as to imply that consent might be granted yet the insured still be left without knowledge as to the amount of additional premium obligation which might be imposed upon him. Although the case was one of first impression in Illinois, the court found support for the result attained in a Nebraska<sup>30</sup> and a Louisiana case.<sup>31</sup>

#### NEGOTIABLE INSTRUMENTS

Notice was taken, in the survey preceding this one of a change in Section 207a of the Negotiable Instruments Act,<sup>32</sup> one designed to give definition to the term "business day." The nature of the problem there sought to be obviated may be seen in the case of *Rock Finance Company v. Central National Bank of Sterling*.<sup>33</sup> Briefly, the facts were that the plaintiff forwarded two checks drawn on the defendant for collection, using regular

<sup>30</sup> *Arendt v. North American Life Ins. Co.*, 107 Neb. 716, 187 N. W. 65 (1922).

<sup>31</sup> *Edward v. Life & Casualty Ins. Co.*, 25 So. (2d) 552 (La. App., 1946), affirmed in 210 La. 1024, 29 So. (2d) 50 (1946).

<sup>32</sup> See Laws 1949, p. 1160, H. B. 828, and comment thereon in 28 CHICAGO-KENT LAW REVIEW 23-4.

<sup>33</sup> 339 Ill. App. 319, 89 N. E. (2d) 828 (1950).

channels. These checks, received on February 13th, were held by the drawee without payment until late afternoon on the following day, at which time it wired the forwarding agent that payment would not be made. The checks were then returned by mail. Plaintiff sued on the theory that the defendant, having failed to pay or to refuse payment prior to the hour at which the bank closed for the transaction of public business on February 14th, had thereby made an implied acceptance. Defendant's motion for summary judgment, based on the theory that the drawee bank had until midnight of the next business day in which to decide whether to honor or not, was sustained and the suit was dismissed.

The Appellate Court for the Second District, affirming the summary judgment, found that, prior to the statutory amendment aforesaid, the phrase "business day" had not received either judicial or statutory definition but reached the construction contended for by defendant. It pointed out that the term "business day," as used alike by courts<sup>34</sup> and text-writers,<sup>35</sup> refers to a day on which business is done as distinguished from Sundays or holidays and is not limited to the hours during which business is actually conducted with the public. To accept plaintiff's theory, said the court, would be to defeat the purpose of the Negotiable Instruments Act, intended to set up a uniform procedure for the collection of negotiable paper. Restricting the meaning of "business day" to business hours would make the question of liability of any drawee bank one of fact rather than one of law, for the business hours of banking institutions vary not only throughout the state but even within the same locality.

A question, apparently not previously decided in Illinois, was presented in the case of *Greenberg v. A. & D. Motor Sales, Inc.*<sup>36</sup> The plaintiff there, operator of a currency exchange, sued as a holder in due course on a check cashed by plaintiff, which defendant had executed and made payable to one Gross. The check cleared but was later returned by the drawee bank accompanied

<sup>34</sup> *Industrial Bank of Chicago v. Bowes*, 165 Ill. 70, 46 N. E. 10, 56 Am. St. Rep. 228 (1897); *Village of Lombard v. Anderson*, 280 Ill. App. 283 (1935); *Hixenbaugh v. Union Cent. Life Ins. Co.*, 219 Ill. App. 534 (1920).

<sup>35</sup> 52 Am. Jur., Time, § 21.

<sup>36</sup> 341 Ill. App. 85, 93 N. E. (2d) 90 (1950).

with an affidavit that the payee's endorsement was a forgery.<sup>37</sup> The defendant argued that, under applicable law,<sup>38</sup> payee's endorsement being a forgery, the drawer was not liable. Plaintiff, admitting that the one for whom he cashed the check was, as facts later revealed, an imposter, nevertheless contended that, on the facts of the case, the statutory section ordinarily governing forged negotiable instruments was not applicable. The court found for the plaintiff, citing and approving the so-called "imposter" rule which declares that where a drawer or maker delivers a negotiable instrument to "an imposter as payee, supposing that he is the one he has falsely represented himself to be, the imposter's endorsement in the name by which the payee is described is regarded as a genuine endorsement as to subsequent holders in good faith."<sup>39</sup> Under the facts of the case, the court could hardly have reached any other result. The sound rule there adopted has achieved favor elsewhere.<sup>40</sup>

#### SALES

Some form of warranty problem was involved in the two sales cases worthy of mention. In the case of *Garofalo Company v. St. Mary's Packing Company*,<sup>41</sup> the buyer had purchased a

<sup>37</sup> It appeared that the defendant, believing the imposter to be the party entitled thereto, delivered the check to him. The imposter immediately took the check to plaintiff's currency exchange, located near defendant's office, and sought to cash the same. Plaintiff called defendant for verification as to the issuance of the instrument and was told that it was all right to cash the check. Nevertheless, plaintiff demanded identification and was shown various items all indicating that the person before him was the Wallace Gross named as payee. So satisfied, he cashed the check after the imposter endorsed the same with the name of the payee.

<sup>38</sup> Ill. Rev. Stat. 1949, Vol. 2, Ch. 98, § 43, reads: "Where a signature is forged or made without authority, it is wholly inoperative, and no right to retain the instrument or to give a discharge thereof, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

<sup>39</sup> See *Security-First Nat. Bank of Los Angeles v. United States*, 103 F. (2d) 188 at 190 (1939).

<sup>40</sup> *Boatsman v. Stockmen's Nat. Bank*, 56 Colo. 495, 139 P. 764, 50 L. R. A. (N. S.) 107 (1914); *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 11 P. 141, 57 Am. Rep. 171 (1886); *Russell v. Second Nat. Bank of Patterson*, 136 N. J. L. 270, 55 A. (2d) 211 (1947); *Montgomery Garage Co. v. Manufacturers' Liability Ins. Co.*, 94 N. J. L. 152, 109 A. 296, 22 A. L. R. 1224 (1920); *McHenry v. Old Citizens Nat. Bank*, 85 Ohio St. 203, 97 N. E. 395, 38 L. R. A. (N. S.) 1111 (1911); *Land-Title & Trust Co. v. Northwestern Nat. Bank*, 196 Pa. 230, 46 A. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717 (1900); *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 P. 165 (1906). See also 34 Harv. L. Rev. 76.

<sup>41</sup> 339 Ill. App. 412, 90 N. E. (2d) 292 (1950).

large quantity of cans of tomato juice for resale. The sales memorandum referred to some 900 to 1,000 cases of "rusty" cans of tomato juice at \$2.00 per case, delivered "as is, no recourse." The buyer later complained that, after the delivery of the goods to it and its purported resale thereof, its vendees returned a portion of the merchandise as being unfit for human consumption because the rusty condition had penetrated the cans and caused a spoilation of the contents. It sought damages for an alleged breach of an implied warranty of fitness of the goods for human consumption. The Appellate Court, however, affirmed a judgment dismissing the complaint.

The buyer contended that the words "rusty" and "as is," used in the sales memorandum, referred only to the external condition of the cans, hence did not pertain to nor limit the warranty of fitness of the contents. The court declared that contention untenable on the ground that it was obvious that the buyer had not purchased cans, but cans of tomato juice. Use of the term "as is" implied that the buyer was to take delivery of goods which might, in some way, prove defective and take them upon express condition that he must trust to his own examination. The term "no recourse" manifested the intent not to look to the seller for any reimbursement in case of loss or damage. The significance of the terms being clear, resort to parol evidence to vary the clear import of the sales memorandum was not possible.

Slightly different, because it involved a buyer's choice of remedies, was the warranty problem found in the decision of the Court of Appeals for the Seventh Circuit in *Reno Sales Company, Inc. v. Pritchard Industries, Incorporated*.<sup>42</sup> The buyer there concerned had purchased a quantity of waste baskets, to be shipped in individual sealed cartons. Twelve shipments had been received and had been partly paid for when the buyer became aware of the fact that the merchandise was defective. The remainder of the price was not paid. When the seller sued for the unpaid balance, the buyer claimed a right of rescission and offered, in accordance with that defense, to return all of the baskets. Actually, no at-

<sup>42</sup> 178 F. (2d) 279 (1950).

tempt to return occurred and the buyer continued to sell the baskets up to the date of the trial. The Court of Appeals affirmed a judgment disallowing rescission. It emphasized the fact that the buyer had a choice of defenses under the Uniform Sales Act, which has been adopted in Illinois.<sup>43</sup> The buyer could have kept the baskets and set up the breach of warranty in diminution of the sales price; could have kept the baskets and sued the seller for damages for breach of warranty; or could have rescinded the contract and offered to return the baskets. But, said the court, "rescission implies renunciation of the sale and disclaimer of the ownership of the goods." As the buyer had continued to sell the baskets long after discovery of the defects in the merchandise, an affirmation of the contract had occurred, thereby nullifying the later attempt to rescind. No partial rescission was possible for the sales contract was entire, involving one sale of one type of waste basket at a uniform price. The fact that delivery was to be made in installments did not change the nature of the contract nor permit of any deviation from the principles governing rescission.

### III. CIVIL PRACTICE AND PROCEDURE

#### AVAILABILITY OF REMEDIES

Of prime importance to the attorney who is about to commence litigation is the fact that he must be certain that the tribunal to which he expects to present his case is one competent to grant the desired relief or, stated differently, is one possessed of jurisdiction both in terms of power to hear and determine the controversy and in ability to exercise control over the litigants. As to the first of these points, the unsettling influences growing out of the decision in *Werner v. Illinois Central Railroad Company*,<sup>1</sup> which spoke particularly with regard to the jurisdiction of city courts in Illinois, culminated during the year in the surprising decision of the

<sup>43</sup> Ill. Rev. Stat. 1949, Vol. 2, Ch. 121½, § 1 et seq. Section 69 in particular delineates the remedies of the buyer.

<sup>1</sup> 379 Ill. 559, 42 N. E. (2d) 82 (1942).