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## Contracts - Survey of Illinois Law for the Year 1945-1946

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## II. CONTRACTS

The field of general contract law was barren of significant decisions, but some cases dealing with rather specialized branches of that subject are worthy of notice.

## INSURANCE

In *Olympia Fields Country Club v. Bankers Indemnity Insurance Company*,<sup>1</sup> a case of first impression in this state, the Appellate Court held that an insurance company could be liable for arbitrarily and unreasonably refusing to settle a case for an amount within the policy limits provided such refusal amounted to bad faith. The stock situation, such as was there presented, involves one wherein the insured is liable, where the plaintiff offers to settle within the policy coverage, wherein the carrier gambles on the chance of a judgment after trial for less than the offer of settlement, where the final judgment exceeds the policy coverage, and where the insured is personally obliged to pay that part of the judgment which exceeds the policy limits. Under the usual public liability policy, the insurer has the exclusive right to defend or to negotiate a settlement. The exclusive nature of the insurer's right raises a corresponding duty to act in good faith. Just what constitutes good faith or what facts show a breach of it, may be difficult to determine. Gross negligence on the part of the carrier may constitute bad faith, although a mistake in judgment is hardly sufficient. There are many cases in other jurisdictions on the subject,<sup>2</sup> so the broad principle seems hardly possible of contradiction, but as the instant case turned on an erroneously directed verdict it is necessary to await the final outcome to determine just what conduct will be treated as evidence of bad faith in this state.

The only other insurance case of significance is that of *In re Thompson's Estate*<sup>3</sup> where the Appellate Court held that a policy

<sup>1</sup> 325 Ill. App. 649, 60 N. E. (2d) 896 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 198, 13 U. of Chi. L. Rev. 105.

<sup>2</sup> See cases discussed and cataloged in 24 CHICAGO-KENT LAW REVIEW 198, particularly pp. 200-5.

<sup>3</sup> Sub nom. *Roberts v. Dempsey*, 328 Ill. App. 103, 65 N. E. (2d) 131 (1946), noted in 34 Ill. B. J. 536. Leave to appeal has been denied.

of life insurance on the life of the donor may be made the subject of a gift and, if there is actual delivery of the policy, no written assignment is necessary. As between donor, donee and donor's estate, there has been little question but that a policy of life insurance may be assigned by way of gift. The problem has usually been as to the method or the sufficiency of the assignment. It is almost uniformly concluded that no writing is necessary in order to vest at least an equitable interest<sup>4</sup> although, if there is a statute requiring a writing, the statute would control. While there is no such statute applicable in Illinois, an earlier Illinois Supreme Court decision had contained dicta from which it might be inferred that a writing would be necessary.<sup>5</sup> The instant case indicates that delivery together with proper accompanying words will be sufficient to sustain a gift *causa mortis*.

#### NEGOTIABLE INSTRUMENTS

While no significant Illinois cases involving negotiable instruments reached the reviewing courts of the state during the period of this survey, the Indiana case of *W. H. Barber Company v. Hughes*<sup>6</sup> will interest Illinois lawyers because of the constant commercial relationships with our sister state. It will be recalled that the Indiana Supreme Court, in *Egley v. T. B. Bennett & Company*,<sup>7</sup> ruled that a negotiable instrument containing a confession of judgment clause was not ordinarily enforceable in Indiana because contrary to its public policy, although it held that it was obliged, under the full faith and credit clause, to give recognition to a judgment obtained in Illinois on a cognovit note where such note was payable in Illinois even though it was executed in Indiana.

Since that decision, the Indiana legislature has adopted a statute declaring unlawful all contracts and stipulations for confession of judgment under powers of attorney granted prior to the accrual of a cause of action to enforce payment of money, which

<sup>4</sup> 24 Am. Jur., Gifts, § 70; 38 C. J. S., Gifts, § 98.

<sup>5</sup> *Weaver v. Weaver*, 182 Ill. 287, 55 N. E. 338 (1899). In that case, however, there had been no delivery of the policy.

<sup>6</sup> — Ind. —, 63 N. E. (2d) 417 (1945), noted in 21 Notre Dame Lawyer 187.

<sup>7</sup> 196 Ind. 50, 145 N. E. 830, 40 A. L. R. 436 (1924).

statute carries a penalty for entering into such agreements.<sup>8</sup> It was assumed that this law effectively voided cognovit notes in that state. However, in the instant case, the defendants unsuccessfully sought to apply this statute to prevent the enforcement in Indiana of an Illinois judgment obtained on a cognovit note which, though payable in Illinois, had been signed in Indiana. Refusing to hold the statute applicable, the court ruled that though the instrument was signed in Indiana it could not be said to have been finally executed until the plaintiff accepted it in Illinois and gave value for it by crediting it against back items due on defendant's open account. It was, consequently, a case where the Illinois law should rule. The court reached its conclusion by resorting to the so-called "points of contact" method recommended by modern authorities on the subject of the Conflict of Laws. That rule, which may prove serviceable in other similar cases, contemplates that the court should consider all acts of the parties touching the transaction in relation to the several states involved but should apply, as the law governing the transaction, the law of that state with which the facts are in most intimate contact.<sup>9</sup>

#### QUASI-CONTRACTS

Successful maintenance of a quasi-contractual action against a municipal government for the reasonable value of services rendered has been made difficult in the past by reason of two lines of conflicting authority. If the claim is based upon a contract for which no prior appropriation has been made, recovery has been denied, particularly so where, to impose liability, debts would be created in excess of constitutional limitations.<sup>10</sup> On the other hand, if the service is rendered on a public improvement payable from a special assessment fund, no prior appropriation is necessary and the constitutional limitation is then inapplicable, so quasi-contractual recovery might be possible.<sup>11</sup> An extension to the latter

<sup>8</sup> Burns Ind. Stat. Ann. 1927, §§ 2-2904 to 2-2906.

<sup>9</sup> See the discussion of this proposition in — Ind. — at —, 63 N. E. (2d) 417 at 423.

<sup>10</sup> Hancock v. Village of Hazel Crest, 318 Ill. App. 170, 47 N. E. (2d) 557 (1943).

<sup>11</sup> Gray v. City of Joliet, 287 Ill. 280, 122 N. E. 550 (1919); Markman v. Calumet City, 297 Ill. App. 531, 18 N. E. (2d) 75 (1938).

doctrine has been given in the case of *DeLeww, Cather & Company v. City of Joliet*<sup>12</sup> where it was held that recovery on *quantum meruit* was proper, even though no valid contract existed, because compensation was to be derived from funds furnished by a federal loan and grant for a municipal water works system, hence would require no prior appropriation nor would create any addition to the municipal general indebtedness.

The Restatement of the Law of Restitution intimates that if one officiously purports to act as agent for another he may be entitled to receive compensation for his services in so acting if the other accepts the benefits thus produced.<sup>13</sup> A complaint framed on that theory, however, was held insufficient in the case of *Straus v. Spiegel, Inc.*,<sup>14</sup> to support recovery upon the ground that the plaintiff was either conferring his services gratuitously<sup>15</sup> or else was the agent for the other party, so could not be defendant's agent. It appeared that plaintiff, a real estate broker, was asked by representatives of the U. S. Army to provide a list of available properties and to arrange interviews with their owners. Plaintiff, with defendant's full knowledge of plaintiff's occupation, arranged an interview between the army representatives and defendant which culminated in a favorable lease of defendant's property. Plaintiff's attempt to recover in *quantum meruit* for services rendered was rejected for the reasons aforementioned. There is occasion to believe, however, that liability might have arisen had defendant permitted the broker to negotiate the lease, especially in view of the broker's expectation of payment for his services.<sup>16</sup>

#### SALES

The law regarding the liability of sellers to persons injured by defective or dangerous instruments seems to have been extended, at least to the extent that it was applied to a new factual situation such as was found in *Lindroth v. Walgreen Company*.<sup>17</sup>

<sup>12</sup> 327 Ill. App. 453, 64 N. E. (2d) 779 (1946). Leave to appeal has been denied.

<sup>13</sup> See comment, Restatement, Restitution, § 112, at p. 463.

<sup>14</sup> 153 F. (2d) 268 (1946).

<sup>15</sup> See *Evans v. Henry*, 66 Ill. App. 144 (1896).

<sup>16</sup> *Linn v. Linderoth*, 40 Ill. App. 320 (1891).

<sup>17</sup> 329 Ill. App. 105, 67 N. E. (2d) 595 (1946).

The defendant company was there held liable for injuries resulting to an infant plaintiff from burns sustained when a vaporizer, without a thermal cut-out, set the child's bed on fire. Liability was predicated upon an express warranty, made by the sales person to the plaintiff's mother, that the vaporizer was safe if operated for periods not to exceed two hours. The court may have been unconsciously influenced by the fact that the vaporizer was sold under a label saying "Quick, safe, no-flame, electrical."

Ordinarily, the passage of title to goods takes place when the goods are delivered to a common carrier for shipment to the purchaser. In *Department of Revenue v. Jennison-Wright Corporation*,<sup>18</sup> there was an Illinois contract to sell timber for railroad ties and also another contract to creosote them. Inspection of the "green" ties by the ultimate consumer took place in Alabama. The consumer paid the freight charges to Illinois where the ties were to be stored for seasoning until ready for creosoting, which operation was not to be performed until the consumer so decided. After processing by defendant corporation, the seasoned ties were loaded aboard the consumer's cars and the agreed price was then paid. The issue being the taxability of the defendant corporation under the Illinois Retailers' Occupational Tax Act,<sup>19</sup> it was decided, over defendant's claim that the transaction was one of bailment rather than of sale, that there remained something to be done to the goods by the seller and therefore title to the timber did not pass in Alabama but only in Illinois after final inspection covering both seasoning and creosoting. There was, unfortunately, no mention of the risk of loss, an element which would also have been relevant on the point as to when title passed.

As there is no requirement for the recording of conditional sales agreements in Illinois, there is no specific limitation of time as to when a conditional seller should exercise his remedies in order not to be estopped as against a judgment creditor of the purchaser. Recognition of that fact had been accorded by the

<sup>18</sup> 393 Ill. 401, 66 N. E. (2d) 395 (1946).

<sup>19</sup> Ill. Rev. Stat. 1945, Ch. 120, § 440 et seq.

Appellate Court for the First District in an earlier case.<sup>20</sup> That case has now been followed by the Appellate Court for the Third District, in *Thomas v. State Bank of Saybrook*,<sup>21</sup> where it was held that the conditional seller's rights in a farm combine were not prejudiced by a period of inaction lasting four and one-half months after the indebtedness became due at least as against the asserted rights of a judgment creditor of the purchaser.

### III. CIVIL PRACTICE AND PROCEDURE

While issues of practice and procedure are presented in almost every case taken to the reviewing courts, many of the points presented are so well-settled as to be almost trite. Some cases do, however, involve unsettled questions of procedural law, although often of slight importance, so such cases are here summarized and arranged in substantially the same order as these questions would probably occur in the conduct of litigation.

#### AVAILABILITY OF REMEDIES

Without question, the practitioner should be concerned with the matter of jurisdiction, particularly in the sense of the power to hear and determine, for otherwise his efforts may come to naught. The existence of monetary limitations upon the jurisdiction of certain of the inferior courts of this state has produced problems as to whether or not the litigant may (1) state a case involving more but seek only the jurisdictional figure,<sup>1</sup> or (2) sue for more upon a case involving more but voluntarily remit that part of a verdict in excess of the jurisdictional limitation.<sup>2</sup> Another innovation has been introduced by the case of *Binger v. Baker*,<sup>3</sup> a suit originally brought before a justice of the peace upon a claim exceeding \$500 wherein verdict in excess of that

<sup>20</sup> *American Type Founders Co. v. Metropolitan Credit & Discount Corp.*, 271 Ill. App. 380 (1933), noted in 13 CHICAGO-KENT REVIEW 28.

<sup>21</sup> 328 Ill. App. 184, 65 N. E. (2d) 626 (1946).

<sup>1</sup> *Dahlgren v. Israel*, 204 Ill. App. 340 (1917), abst. opin.

<sup>2</sup> *G. B. Hemingway Co. v. Keagle*, 181 Ill. App. 5 (1913).

<sup>3</sup> 326 Ill. App. 639, 63 N. E. (2d) 256 (1945).