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## Contracts - Survey of Illinois Law for the Year 1950-1951

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pensation Act<sup>70</sup> and the Occupational Diseases Act,<sup>71</sup> each has been re-written and re-enacted. The most important change is one which provides for an increase in regard to the amount recoverable for specific losses covered by these two statutes as well as an overall increase of 13½% in the maximum weekly benefits.

## II. CONTRACTS

Although issues concerning the right of a person doing business under an assumed name<sup>1</sup> to sue for breach of contract have been before the Illinois Appellate Court on two prior occasions,<sup>2</sup> it was not until the Illinois Supreme Court took jurisdiction of the case of *Grody v. Scalone*,<sup>3</sup> on a claim that the so-called "assumed name" statute was unconstitutional, that the law on the subject was clarified. The plaintiff there had sold and installed a furnace for which the defendant had failed to pay. When sued, the defendant relied on the plaintiff's non-compliance with the statute to support a claim that the contract was against public policy, hence unenforceable. The Supreme Court, recognizing that the penal provisions of the statute were sanctions intended to aid in its enforcement, indicated that, as the legislature had expressed the penalty for violation, no room was left for further implementation. The requirement of registration by one doing business under an assumed name, it said, was planned for the benefit of those who might deal with such a person, particularly for the purpose of supplying information relating to credit and the like. As the statute did not declare the contracts made by such a person to be illegal, the court refused to achieve that result but it

<sup>70</sup> Laws 1951, p. 1060, H.B. 1253; Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.1 et seq.

<sup>71</sup> Laws 1951, p. 1095, H.B. 1254; Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 172.36 et seq.

<sup>1</sup> Ill. Rev. Stat. 1951, Vol. 2, Ch. 96, § 4 et seq., requires a person doing business under an assumed name to file a certificate to that effect with the County Clerk of the county.

<sup>2</sup> See *Mickelson v. Kolb*, 337 Ill. App. 493, 86 N. E. (2d) 152 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 327, and *Franks v. Coront*, 341 Ill. App. 137, 93 N. E. (2d) 157 (1950).

<sup>3</sup> 405 Ill. 61, 96 N. E. (2d) 97 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 282 and 39 Ill. B. J. 308. See also *Cohen v. Lerhman*, 408 Ill. 155, 96 N. E. (2d) 528 (1951).

did distinguish the case from situations wherein unlicensed real estate brokers have sued for fees or commissions.

Alleged and also valid agreements to bequeath or devise have often been before the Illinois courts. In every instance, the plaintiff has been required to make proof of the contract by clear and certain evidence and, in case the alleged promise affected real estate, to meet the additional requisite of a "writing" or a sufficient performance to take the case out of the operation of the Statute of Frauds.<sup>4</sup> In *Wilger v. Wilger*,<sup>5</sup> the testimony of a large number of disinterested persons together with admissions by the decedent made the case a close one, especially since the claimant had made substantial improvements to the premises. The Supreme Court, however, consistent with many prior decisions, held that the evidence fell short of establishing the terms and conditions of the agreement with sufficient definiteness to warrant a decree for specific performance, thereby adding further strength to the idea of the desirability of "getting it in writing." Other contract cases are discussed under appropriate sub-headings.

#### INSURANCE

Three significant cases involving problems in insurance law found their way to courts of review during this survey period. In the first, that of *Canadian Radium & Uranium Corporation v. Indemnity Insurance Company of North America*,<sup>6</sup> the plaintiff sought reimbursement from the insurer, under a comprehensive general liability policy, for money paid out in settlement of a suit brought against it by an employee of Radium Industries, Inc., a licensee of plaintiff engaged in manufacturing a certain ointment for it. The employee had alleged that she had become poisoned by exposure to radio-active vapor and other materials, used in the preparation of the ointment, because of a failure on the part of the Illinois agent to provide proper safeguards or to warn her of the risks involved. The insurer, although properly

<sup>4</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 59, § 2.

<sup>5</sup> 409 Ill. 58, 98 N. E. (2d) 716 (1951).

<sup>6</sup> 342 Ill. App. 456, 97 N. E. (2d) 132 (1951), noted in 1951 Ill. L. Forum 331.

notified, had refused to defend against the employee's suit on the ground that the policy provided coverage only against accidental injury.<sup>7</sup> It urged the same defense in the instant case and succeeded thereon, both in the trial court and in the Appellate Court for the First District.

Plaintiff had contended that the word "accident," as used in the policy, should be defined not only to embrace injuries "traceable to a definite time and place of origin" but also to cover "occupational diseases gradually contracted over a period of time" since the affliction, that is the ultimate result of an exposure to harmful occupational conditions, was entirely unforeseen and unexpected. While the court agreed that some of the cases cited lent support to such a definition of the word "accident," it held that prior Illinois decisions, some invoking a construction of the Workmen's Compensation Act<sup>8</sup> and others centering around the interpretation of the word "accident" as used in accident insurance policies,<sup>9</sup> had established that "in order that the disability be by reason of an accidental injury or the result of an accident, it must be traceable to a definite time and place of origin."<sup>10</sup> Dictionary definitions given to the word "accident" have also stressed the necessity of the happening of a definite event rather than the gradual decline of bodily resistance caused by daily exposure to deleterious materials resulting in disease or death.<sup>11</sup>

The second case, that of *Hannig v. Hartford Accident & In-*

<sup>7</sup> Under the policy provisions, the insurer agreed to pay all sums for which the insured might become obligated by reason of "bodily injury, sickness or disease . . . sustained by any person . . . caused by accident," as well as to defend any suit seeking damages therefor, "even if such suit is groundless, false or fraudulent." See 342 Ill. App. 456 at 459, 97 N. E. (2d) 132 at 134.

<sup>8</sup> *Peru Plow & Wheel Co. v. Industrial Commission*, 311 Ill. 216, 142 N. E. 546 (1924); *Labanowski v. Hoyt Metal Co.*, 292 Ill. 218, 126 N. E. 548 (1920).

<sup>9</sup> *Brodek v. Indemnity Ins. Co.*, 292 Ill. App. 363, 11 N. E. (2d) 228 (1937); *Belleville Enameling Co. v. United States Casualty Co.*, 266 Ill. App. 586 (1932).

<sup>10</sup> 342 Ill. App. 456 at 468, 97 N. E. (2d) 132 at 138.

<sup>11</sup> See *Black, Law Dict.*, 3rd Ed., and *Webster, New International Dict.*, 2 Ed. An attempt to avoid the effect of the prior Illinois decisions, on the basis that the policy sued on was a New York contract, was unsuccessful because New York law on the point was precisely the same as that of Illinois: *Jackson v. Employers' Liab. Assurance Corp.*, 259 N. Y. 559, 182 N. E. 180 (1932); *Lerner v. Rump Bros.*, 241 N. Y. 153, 149 N. E. 334, 41 A. L. R. 1122 (1925); *Jeffreyes v. Charles H. Sager Co.*, 233 N. Y. 535, 135 N. E. 907 (1922); *Rosenthal v. National Aniline & Chemical Co.*, 216 App. Div. 588, 215 N. Y. S. 621 (1921). See also *United States Radium Corp. v. Globe Indemnity Co.*, 116 N. J. L. 90, 182 A. 626 (1936).

*demnity Company*,<sup>12</sup> concerned the application of a provision of the Illinois Insurance Code, one which requires that no liability policy shall be issued unless it contains a provision that the insolvency or bankruptcy of an insured should not serve to release the insurer in case execution against the insured be returned unsatisfied, and which permits action by the judgment creditor against the insurer in such a case.<sup>13</sup> The insurer there contended that the plaintiff, after recovery of a judgment against the insured, could not maintain an action against it without allegation and proof of due issuance and return of an execution marked unsatisfied, said to be an absolute condition precedent to any liability on the part of the insurer. The law of New York<sup>14</sup> and of New Jersey,<sup>15</sup> where the statutory provision is the same as that of Illinois, would seem to so hold, but because of other language contained in the policy in question,<sup>16</sup> the court found itself freed from the duty of interpreting the Illinois provision.<sup>17</sup> "If," said the court, "the policy gives a greater benefit to the injured party and eliminates one of the steps required by the statute before suit can be brought directly against the insurance carrier, then the terms of the policy govern."<sup>18</sup> In that regard, the case conforms to decisions in other jurisdictions.<sup>19</sup>

The third case worthy of discussion, that of *Cross v. Zurich General Accident Liability Insurance Company*,<sup>20</sup> was one in which the insured sought a declaratory judgment that the carrier would be liable, on the facts presented, under a public liability policy requiring it to pay all sums which the insured should be-

<sup>12</sup> 342 Ill. App. 539, 97 N. E. (2d) 476 (1951).

<sup>13</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, § 1000.

<sup>14</sup> *Jacobs v. Maryland Casualty Co.*, 198 App. Div. 470, 191 N. Y. S. 692 (1921), affirmed in 234 N. Y. 622, 138 N. E. 472 (1922).

<sup>15</sup> *Universal Indemnity Ins. Co. v. Caltagirone*, 119 N. J. Eq. 491, 182 A. 862 (1936).

<sup>16</sup> The provision read: "It is understood and agreed that upon failure of the company to pay any such final judgment recovered against the insured, the judgment creditor may maintain an action . . . against the company to compel such payment. The bankruptcy or insolvency of the insured shall not relieve the company of any of its obligations hereunder. . . ." 342 Ill. App. 539 at 546, 97 N. E. (2d) 476 at 478.

<sup>17</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, § 1000.

<sup>18</sup> 342 Ill. App. 539 at 549, 97 N. E. (2d) 476 at 480.

<sup>19</sup> See *Bass v. Standard Accident Ins. Co. of Detroit*, 70 F. (2d) 86 (1934); *Kindervater v. Motorists Casualty Ins. Co.*, 117 N. J. L. 131, 187 A. 362 (1936).

<sup>20</sup> 184 F. (2d) 609 (1950), noted in 1951 Ill. L. Forum 333.

come obligated to pay by reason of any liability imposed upon him by law for damages because of injury to property "caused by accident." The plaintiff was engaged in the business of cleaning building exteriors. Finding that the chemicals generally used were ineffective for a particular job, plaintiff caused a minute percentage of hydrofluoric acid to be added to the normal chemical solution and adopted customary protective methods to avoid injury to window glass from the presence of the hydrofluoric acid. Despite this, some window glass was damaged and a number of claims were filed with plaintiff. The insurer disclaimed liability on the ground that the damage was not caused by accident and the trial court agreed, on the basis that the planned use of a chemical known to be harmful to glass prevented the injury from being unforeseen, unexpected, or unusual.

On appeal, the Court of Appeals for the Seventh Circuit reversed, holding that the test for negligence which the trial court had applied was inapplicable in determining what should constitute an accident under the terms of the public liability policy before it. Illinois precedent, limited though it be, seems to point to the conclusion that a question as to whether or not an injury is accidental should be determined from the standpoint of the person injured.<sup>21</sup> The problem then would simply be one as to whether or not the plaintiff intended to do damage to the glass. A negative answer would seem dictated in view of the protective measures taken to eliminate the known risk, albeit such measures proved ineffective. Absent wilful action on the plaintiff's part, the resulting damage was accidental even though caused by negligence. The lower court, instead of applying the test for negligence, had had recourse to the test followed by Illinois courts in the "accidental means" cases.<sup>22</sup> It would seem as if such a test is not to be applied where the policy protects against liability for injury "caused by accident."<sup>23</sup>

<sup>21</sup> *E. J. Albrecht Co. v. Fidelity & Casualty Co. of New York*, 289 Ill. App. 508, 7 N. E. (2d) 626 (1937).

<sup>22</sup> *Higgins v. Maryland Casualty Co.*, 281 Ill. 431, 118 N. E. 11 (1917); *Paoli v. Loyal Protection Ins. Co.*, 289 Ill. App. 87, 6 N. E. (2d) 909 (1937); *Wayne v. The Travelers Ins. Co.*, 220 Ill. App. 493 (1921).

<sup>23</sup> *Hill v. Standard Mutual Cas. Co.*, 110 F. (2d) 1001 (1940); *E. J. Albrecht Co. v. Fidelity & Casualty Co. of New York*, 289 Ill. App. 508, 7 N. E. (2d) 626 (1937).

Legislative enactments in 1951 affecting insurance law pertained principally to company matters. Among such changes were an increase in the amount of the deposit required from title guaranty companies;<sup>24</sup> a change in the minimum surplus requirement relating to domestic mutuals hereafter organized;<sup>25</sup> still others affecting the organization of reciprocals<sup>26</sup> and the kinds of business in which they may engage;<sup>27</sup> and a further broadening of the field for investment of funds of domestic companies.<sup>28</sup> The legislature has also prescribed new policy forms to be used, after January 1, 1952, in the case of accident and health insurance.<sup>29</sup>

#### NEGOTIABLE INSTRUMENTS

While only one case involving negotiable instruments law is worthy of attention, that case presented a complicated factual as well as an unusual legal problem. In *Schmelzle v. Transportation Investment Corporation*,<sup>30</sup> the defendant-drawer had delivered a check to an officer of the payee. It was then endorsed by the plaintiff, as an accommodation for the payee, and thereafter delivered to a third person who, in turn, cashed the check at a distant bank. On presentation to the drawee bank, the check was dishonored. Plaintiff, on demand of the endorsee bank, paid to it the amount represented by the check and then sued the drawer on the instrument. The latter contended that the check in question had been given to the payee, in exchange for two other checks totalling the same amount drawn by the payee, on the understanding that defendant's check would not be deposited until the two received in exchange had cleared. After alleging that these checks had never

<sup>24</sup> Laws 1951, p. 1575, H.B. 1086; Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, §§ 479-80.

<sup>25</sup> Laws 1951, p. 1565, H.B. 674; Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, §§ 655, 657, 662 and 663.

<sup>26</sup> Laws 1951, p. 605, H.B. 481; Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, § 677.

<sup>27</sup> Laws 1951, p. 605, H.B. 481; Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, § 678.

<sup>28</sup> Laws 1951, p. 1567, H.B. 819; Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, § 737, particularly clause 1(o). The new law permits, with certain restrictions, investments in bonds or other obligations, payable from revenue specifically pledged to that end, by a state, municipality or any civil division thereof.

<sup>29</sup> Laws 1951, p. 611, H.B. 185; Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, § 968a to § 974a, inclusive.

<sup>30</sup> 341 Ill. App. 639, 94 N. E. (2d) 682 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 184 and 39 Ill. B. J. 300.

been paid, defendant claimed the resulting failure of consideration constituted a good defense. The trial court dismissed this special defense and granted plaintiff's motion for summary judgment. The Appellate Court for the Second District, on appeal, affirmed the ruling below.

Although the issue involved might be simply stated to be one as to whether or not an accommodation endorser for a payee, compelled to take up the instrument, is subject to personal defenses which the drawer may have against the payee, the point would seem to be one not previously decided in Illinois.<sup>31</sup> The court noted that, by statute, a failure of consideration would be a valid defense against a payee<sup>32</sup> although it would be of no avail against a holder in due course.<sup>33</sup> The plaintiff, however, was not a holder in due course,<sup>34</sup> even though it could not be said that he was in the position of one endorsing with knowledge of defects, for no claim was asserted that he knew at the time he lent his name to the paper that the consideration had failed. Furthermore, he could not be considered as a mere donee, for value had been given by him for the paper, although not until after it had been dishonored.

As a consequence, plaintiff fell into a category not fully nor clearly covered by either the Illinois statute or the Uniform Negotiable Instruments Act. This is true because the only provision of either statute bearing upon the rights of one secondarily liable, who has satisfied his liability when properly called upon, would seem to leave such a person without remedy. That provision, noting that the instrument is not discharged, states that the party so paying is "remitted to his former rights as regards all prior parties."<sup>35</sup> The accommodation endorser, however, being unconnected with the title of the instrument, has no former rights to which it would be possible to remit him. The phrase in question, then, creates an ambiguity when applied to an accommodation en-

<sup>31</sup> The only prior decision which might cover the problem is *Graves v. Neeves*, 183 Ill. App. 235 (1931). Headnotes to an abstract opinion therein would indicate that the court reached a comparable result.

<sup>32</sup> Ill. Rev. Stat. 1951, Vol. 2, Ch. 98, § 48.

<sup>33</sup> *Ibid.*, § 78.

<sup>34</sup> *Ibid.*, § 72.

<sup>35</sup> Unif. Laws Anno., Vol. 5, § 121; Ill. Rev. Stat. 1951, Vol. 2, Ch. 98, § 142.

dorser for a payee, unless it could be argued that it was the legislative intention to allow one in the plaintiff's position to go without a remedy.<sup>36</sup>

Finding that the Negotiable Instruments Act provided no answer,<sup>37</sup> the court then had resort to a common-law doctrine which holds that an accommodation endorser for a payee who takes up an instrument is to be treated as a purchaser, and entitled to recover against the drawer, provided he lacked notice of any defense at the time he placed his signature upon the paper.<sup>38</sup> While such a person could not properly be called a holder in due course, he would, on the theory of subrogation, be entitled to comparable rights. The decision squares with cases from other jurisdictions where the problem has arisen.<sup>39</sup>

#### QUASI-CONTRACTS

It has been the view in some states that, upon rescission of an express contract for the sale of land, an implied contract arises between the parties entitling the vendee to recover the amount of all payments made under the express contract less a reasonable sum for use and occupation made of the vendor's premises.<sup>40</sup> This view proceeds on the theory that to hold otherwise might work an unconscionable forfeiture. Other states, including Illinois, deny a recovery, provided the contract contains an express provision covering the consequence of a default, provided the vendor is ready, willing and able to perform, and provided there is no mutual agreement to rescind the sale.<sup>41</sup> The issue in *Tucker v.*

<sup>36</sup> For a recognition, and discussion, of this ambiguity, see Chafee, "The Reacquisition of a Negotiable Instrument by a Prior Party," 21 Col. L. Rev. 538 (1921), and note in 28 Harv. L. Rev. 102. See also Beutell's Brannan, *Negotiable Instrument Law* (W. H. Anderson Co., Cincinnati, 1948), 7th Ed., p. 1167.

<sup>37</sup> But see Ill. Rev. Stat. 1951, Vol. 2, Ch. 98, § 218.

<sup>38</sup> *Andrews v. Meadow*, 133 Ala. 442, 31 So. 971 (1901); *Breckenridge v. Lewis*, 84 Me. 349, 24 A. 864 (1892); *Reinhart v. Schall*, 69 Md. 352, 16 A. 126 (1888); *Barber v. Parker*, 76 Mass. (10 Gray) 339 (1858).

<sup>39</sup> *Williams v. Walker*, 66 Cal. App. 672, 226 P. 939 (1924); *Lill v. Gleason*, 92 Kan. 754, 142 P. 287 (1914).

<sup>40</sup> *Dooley v. Stillson*, 46 R. I. 332, 128 A. 217, 52 A. L. R. 1505 (1925).

<sup>41</sup> See abst. opinions in *Forest Preserve Corp. v. Miller*, 307 Ill. App. 243, 30 N. E. (2d) 126 (1940), and in *Morrey v. Bartlett*, 288 Ill. App. 620, 6 N. E. (2d) 290 (1937).

*Beam*,<sup>42</sup> therefore, became one as to whether or not, on the vendee's default, the express contract had been properly terminated, entitling the vendor to retain the payments made, or had been rescinded by mutual agreement. The Appellate Court for the Fourth District, affirming a decision of the trial court in favor of the vendor, refused to enter into a discussion as to whether or not there was a semantic problem involved in the indiscriminate use of the words "rescission," "cancellation," and "termination," by concluding that the vendee had abandoned all rights under the contract, hence could not recover any excess in payment over a sum equal to a reasonable charge for use and occupation.

By way of contrast, there has been recognition in Illinois, since prior to statehood, of the equitable doctrine under which one who, while in possession, erroneously improves the land of another but who is subsequently ousted by paramount title is permitted to recover as on a quasi-contract for the value of the betterment made less any damage done to the property.<sup>43</sup> The present statute contemplates, however, that the claim for compensation should be advanced and decided in the suit for possession of the land,<sup>44</sup> on the theory that all issues could best be settled at one time. It was for this reason, in *Loehde v. Rudnick*,<sup>45</sup> that the Supreme Court held that the claim for reimbursement for betterments made came too late, when urged some twelve years later in a land registration proceeding, inasmuch as the ousted claimant had not advanced the question prior to that time.<sup>46</sup>

#### SALES

A frequent bone of contention, in cases on the law of sales, is one relating to the time point at which title passes from seller to buyer. It was the main issue in *Tupman Thurlow Company*,

<sup>42</sup> 343 Ill. App. 290, 98 N. E. (2d) 871 (1951).

<sup>43</sup> See Philbrick, *Laws of Illinois Territory 1809-1818*, Ill. Hist. Coll., Vol. 25, p. 41.

<sup>44</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 45, § 56 et seq.

<sup>45</sup> 409 Ill. 73, 98 N. E. (2d) 719 (1951).

<sup>46</sup> If not advanced in the ejectment proceeding, the claim would have to be brought within five years, as a suit in general assumpsit, according to Ill. Rev. Stat. 1951, Vol. 2, Ch. 83, § 16.

*Inc. v. Cook*,<sup>47</sup> under a c. i. f. Pacific Coast contract<sup>48</sup> covering goods to be shipped from New Zealand to Vancouver, B. C., and from there to Chicago. The seller had undertaken the obligation of paying duty on behalf of the purchaser at Vancouver and of arranging for rail transportation to, and delivery of the goods in, Chicago. It was held that title passed at the shipping port in New Zealand, not only because of the c. i. f. provisions but also because of certain additional contract terms specifying that war risk insurance should be purchased for the buyer's account and regarding payment of the duty on the buyer's behalf, said to be indicative of an intent that the buyer should acquire title to the goods as soon as they were delivered to the carrier at the original shipping point. The seller's obligation of seeing to it that the goods were transported from Vancouver to Chicago was said to have no effect upon the passage of title as the seller, in performing this obligation, was merely acting as the buyer's agent.

The case of *Williams v. Paducah Coca Cola Bottling Company*<sup>49</sup> would be no different than other warranty cases if it were not for the fact it contains some unfortunate statements which, it is to be hoped, will not be accepted by other courts. The plaintiff there had purchased a bottle of soft drink from a grocer and had consumed part of the contents when he discovered a match box cover in the bottle and became ill. At the ensuing trial, in an action against the bottling company based upon an implied warranty of wholesomeness, it was shown that the grocer kept the bottles in an ice container near the front door of the store where the bottles were accessible to anyone who desired to raise the lid, and that customers of the grocer frequently served themselves therefrom. On the basis of this proof, the Appellate Court for the Fourth District reversed a lower court judgment in favor of the plaintiff. While it recognized that a previous Appellate Court decision from another district had adopted the existence of an implied warranty of fitness for human consumption of

<sup>47</sup> 342 Ill. App. 344, 96 N. E. (2d) 666 (1950). Leave to appeal has been denied.

<sup>48</sup> A type of contract under which the purchaser pays a fixed price which covers the cost of the goods, the insurance, and the freight.

<sup>49</sup> 343 Ill. App. 1, 98 N. E. (2d) 164 (1951).

food products sold in sealed containers or bottles, one running not only from the retailer but also from the manufacturer or bottler to the consumer despite lack of privity,<sup>50</sup> it was of the opinion that such a warranty did not go so far as to insure that no one would tamper with the product after it left the control of the manufacturer or bottler and before it reached the ultimate consumer. Under this circumstance, it would become necessary for the consumer, attempting to fix liability upon a manufacturer or bottler, to assume the burden of proving that the condition of the food product at the time of sale to him was the same as it was when it left the control of the manufacturer or bottler.

In the particular case, the bottles were not only accessible to members of the public but were sealed with removable crown caps of a type which would make it possible for a person so disposed to remove the cap, insert a foreign object, and reseal the bottle without this fact being readily detected. It can easily be surmised, however, that a general application of the rule of proof laid down would virtually nullify the possibility of recovery against a manufacturer, upon the basis of an implied warranty of fitness for consumption, in cases relating to food products sold in sealed containers.

One slight statutory amendment has been made in Section 1 of the Bulk Sales Act<sup>51</sup> so that it now provides that the purchaser shall, at least ten days before payment of the price, notify the seller's creditors of the impending sales transaction. The time period was previously set at five days.

#### SURETYSHIP

Although no cases have been decided dealing with the law of suretyship as that topic of the law is generally understood, one issue concerning a right to subrogation was developed in the case of *Weaver v. Hodge*.<sup>52</sup> A state employee had been negligently

<sup>50</sup> *Patargias v. Coca-Cola Bottling Co. of Chicago*, 332 Ill. App. 117, 74 N. E. (2d) 162 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 23-4.

<sup>51</sup> Laws 1951, p. 1200, S.B. 124; Ill. Rev. Stat. 1951, Vol. 2, Ch. 121½, § 78.

<sup>52</sup> 406 Ill. 537, 94 N. E. (2d) 297 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 284.

killed while on the job as a consequence of which claims were advanced against the State of Illinois, by the dependent widow, for workmen's compensation and also for pension benefits under the state retirement system.<sup>53</sup> The state honored both demands, but took credit, pursuant to law,<sup>54</sup> on the pension claim for the amount paid by way of workmen's compensation benefits. It thereafter intervened, in a wrongful death action brought by the administrator of the deceased employee against the negligent third person, to enforce a lien against the proceeds of that suit to secure reimbursement for the amount so paid out.<sup>55</sup> Both the trial court and the Supreme Court denied a right to a lien on the ground that the state had, by its election to reduce the primary obligation to pay pension benefits, lost the privilege of subrogation afforded by the Workmen's Compensation Act. To hold otherwise would have given the state duplicate credits against both its secondary and its primary liability.

### III. CIVIL PRACTICE AND PROCEDURE

#### AVAILABILITY OF REMEDIES

Two important decisions relating to the jurisdiction of inferior Illinois courts were produced by the Illinois Supreme Court during the survey period. In the first, that of *Turnbaugh v. Dunlop*,<sup>1</sup> the court placed a sharp limitation on, if not virtually reversing, the holding in *Werner v. Illinois Central Railroad Company*.<sup>2</sup> The last mentioned case had declared that an Illinois city court was without jurisdiction to entertain a transitory tort cause of action arising beyond the municipal limits for the reason that it was a court "in and for" the city. On the basis of certain amendments which had been made in the statute since that decision, the Supreme Court, through the medium of the *Turnbaugh*

<sup>53</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138 et seq., and Vol. 2, Ch. 127, § 215 et seq.

<sup>54</sup> *Ibid.*, Ch. 127, § 225.

<sup>55</sup> *Ibid.*, Ch. 48, § 166, provides a lien in favor of an employer who has paid a compensation award.

<sup>1</sup> 406 Ill. 573, 94 N. E. (2d) 438 (1950), noted in 39 Ill. B. J. 305.

<sup>2</sup> 379 Ill. 559, 42 N. E. (2d) 82 (1942). The decision interpreted Ill. Rev. Stat. 1941, Ch. 37, § 333.