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ILLINOIS DEVELOPMENTS IN CONTRACTS-SALES

Edward J. Benett*

In his third survey of Illinois contracts and sales law, Professor Benett discusses recent common law developments concerning the Statute of Frauds, quasi-contracts, silence as acceptance, impossibility of performance, consideration and promissory estoppel, option contracts, restrictive covenants, violation of city ordinances, and self-help leases. Professor Benett also analyzes several cases interpreting the sales article of the Uniform Commercial Code, including discussions of section 2-725(1) on the statute of limitations; section 2-318 on privity of contract concerning products liability; section 2-608 concerning revocation of acceptance of consumer goods; section 2-201 concerning the Statute of Frauds and the exception for merchants; and section 2-104(1) defining a merchant.

INTRODUCTION

IN this third survey of contracts and sales law,¹ certain trends appear to be developing among Illinois appellate and supreme court justices. There is a tendency, for example, for them to be unreceptive to the technical defenses of the Statute of Frauds² and the statute of limitations.³ At the same time, the judiciary seem to be increasingly receptive to the defense of illegality.⁴ Since

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1. The 17 principal cases for this survey were selected from Volumes 11-20 of the ILLINOIS APPELLATE REPORTS (Third Series), Volumes 56-57 of the ILLINOIS SUPREME COURT REPORTER (Second Series) and from Volumes 298-313 of the NORTH EASTERN REPORTER (Second Series).

2. See *George F. Mueller & Sons v. Northern Illinois Gas Co.*, 12 Ill. App. 3d 362, 299 N.E.2d 601 (1st Dist. 1973) (This case is discussed at pp. 343-45 *infra*); *Lee v. Central Nat'l Bank & Trust Co.*, 11 Ill. App. 3d 60, 296 N.E.2d 81 (2d Dist. 1973) (This case is discussed at pp. 345-46 *infra*); *Grundy County Nat'l Bank v. Westfall*, 13 Ill.App.3d 839, 301 N.E.2d 28 (3d Dist. 1973) (This case is discussed at pp. 347-48 *infra*); *Campbell v. Yokel*, 20 Ill. App. 3d 702, 313 N.E.2d 628 (5th Dist. 1974) (This case is discussed at pp. 372-75 *infra*).

3. See *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (This case is discussed at pp. 365-70 *infra*). See also *Wood Acceptance Co. v. King*, 18 Ill. App. 3d 149, 309 N.E.2d 403 (1st Dist. 1974).

4. Illegality is used herein in a broad sense and covers any attempt to prove a contract (or a part thereof) unenforceable because of a violation of law or because of a conflict with public policy.

the last survey, the Illinois courts have found covenants in employment contracts sufficiently restrictive of trade so as to make them unenforceable,⁵ recognized the violation of a city zoning ordinance as an adequate reason for voiding a contract,⁶ and held a self-help provision in a lease to be void as against public policy.⁷

Illinois justices seem willing to apply a quasi-contractual theory to allow recovery in cases where no actual contract exists,⁸ while at the same time, continuing their long-held hostility to recovery based on the doctrine of promissory estoppel.⁹ In another paradoxical stance, they show a reluctance to be guided by either *Restatement I or II of Contracts*,¹⁰ while demonstrating a willingness to be guided by case law from other jurisdictions.¹¹

Perhaps the most significant case discussed is *Berry v. G. D. Searle & Co.*,¹² where the Illinois Supreme Court adopted a broad construction of the Uniform Commercial Code's warranty of fitness provision by allowing a woman to sue for injuries sustained from taking birth-control pills. The suit was ordered to trial although the

5. See *Johnson v. Country Life Ins. Co.*, 12 Ill. App. 3d 158, 300 N.E.2d 11 (4th Dist. 1973) (This case is discussed at pp. 358-60 *infra*); *Nationwide Advertising Serv., Inc. v. Kolar*, 14 Ill. App. 3d 522, 302 N.E.2d 734 (1st Dist. 1973) (This case is discussed at pp. 360-62 *infra*).

6. See *Excellent Builders, Inc. v. Pioneer Trust & Sav. Bank*, 15 Ill. App. 3d 832, 305 N.E.2d 273 (1st Dist. 1973) (This case is discussed at pp. 362-63 *infra*).

7. See *Brooks v. LaSalle Nat'l Bank*, 11 Ill. App. 3d 791, 298 N.E.2d 262 (1st Dist. 1973) (This case is discussed at pp. 363-65 *infra*).

8. See *Dickerson Realtors, Inc. v. Frewert*, 16 Ill. App. 3d 1060, 307 N.E.2d 445 (2d Dist. 1974) (This case is discussed at pp. 348-49 *infra*); *Town of Montebello v. Lehr*, 17 Ill. App. 3d 1017, 309 N.E.2d 231 (3d Dist. 1974) (This case is discussed at pp. 348-49 *infra*).

9. See *Bank of Marion v. Robert "Chick" Fritz, Inc.*, 57 Ill. 2d 120, 311 N.E.2d 138 (1974) (This case is discussed at pp. 352-55 *infra*).

10. See, e.g., *Joseph W. O'Brien Co. v. Highland Lake Constr. Co.*, 17 Ill. App. 3d 237, 207 N.E.2d 761 (1st Dist. 1974) (This case is discussed at pp. 351-52 *infra*).

11. See *Roberts v. Buske*, 12 Ill. App. 3d 630, 298 N.E.2d 795 (5th Dist. 1973) (This case is discussed at pp. 349-51 *infra*); *Johnson v. Country Life Ins. Co.*, 12 Ill. App. 3d 158, 300 N.E.2d 11 (4th Dist. 1973) (This case is discussed at pp. 358-60 *infra*); *Brooks v. LaSalle Nat'l Bank*, 11 Ill. App. 3d 791, 298 N.E.2d 262 (1st Dist. 1973) (This case is discussed at pp. 363-65 *infra*); *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (This case is discussed at pp. 365-70 *infra*).

12. 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (This case is discussed at pp. 365-70 *infra*).

woman was not in privity of contract with the pill manufacturer and regardless of the fact that her tort claim based on strict liability was barred by a two-year statute of limitations. The court's willingness to allow the case to proceed exclusively on a contract basis—combined with its conservative attitude toward a tort theory in another case this year¹³—indicates that the supreme court may be shifting the resolution of product-injury cases from a tort to a contract basis.

STATUTE OF FRAUDS

One Year Provision

The Illinois appellate court virtually construed the one-year provision in Illinois' Statute of Frauds¹⁴ out of existence this year in *George F. Mueller & Sons, Inc. v. Northern Illinois Gas Co.*¹⁵ The court, in an opinion by Justice Lorenz of the First District, Fifth Division, equated the possibility of terminating a contract with the possibility of performing it in order to conclude that the Statute of Frauds did not apply to this particular contract. Plaintiff was a vending machine operator who contracted for the installation and maintenance of machines on defendant's premises. The contract was reduced to writing but was not signed by an authorized agent of the corporation. The writing expressly provided for a three-year period of performance, while giving the vending company the right to terminate at any time sales fell below a stated quantity. Fifteen months after the machines were installed, the defendant-

13. *Winnett v. Winnett*, 57 Ill. 2d 7, 310 N.E.2d 1 (1974), discussed elsewhere in this volume: Turkington, *Foreseeability and Duty Issues in Illinois Torts; Constitutional Limitations to Defamation Suits under Gertz, 1973-1974 Survey of Illinois Law*, 24 DEPAUL L. REV. 243 (1975). For two recent cases discussing the overlap between tort and contract theories of recovery, see *Pioneer Hi-Bred Corn Co. v. Northern Ill. Gas Co.*, 16 Ill. App. 3d 638, 642-45, 306 N.E.2d 337, 341-42 (3d Dist. 1973); *Sheldon Livestock Co., Inc. v. Western Engine Co.*, 13 Ill. App. 3d 993, 998, 301 N.E.2d 485, 489 (2d Dist. 1973).

14. Illinois Revised Statutes ch. 59, § 1 (1973), which reads in part:

No action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

15. 12 Ill. App. 3d 362, 299 N.E.2d 601 (1st Dist. 1973).

gas company became dissatisfied with the service of the machines and asked that they be removed from its premises. After several unsuccessful attempts to resolve the dispute amicably, the vendor sued for breach of contract. A defense raised was that the contract by its terms could not have been performed in less than three years and, as such, could not be proven without a writing signed by the defendant or an authorized agent.¹⁶ The court rejected the argument on the theory that if the plaintiff-vendor had exercised his right to terminate the contract within a year after its formation, the contract *would have been* fully performed and such a *possibility of performance* within a year was all that was necessary to satisfy the statute.

A liberal interpretation of the one-year rule—based on whether the contract was performable rather than whether it was actually performed within a year—is not unusual. The same court last year found that an oral employment contract which actually had been carried out for much longer than a year was provable without a writing because it *could have been completed* within one year.¹⁷ The contract in that case however, did not have a specified time term as in *Mueller*. Furthermore, the court in *Stein v. Malden Mills, Inc.* did not suggest that a termination of the contract within a year would have amounted to full performance.

A majority of courts have found a possibility of termination *not* to be the same as a possibility of full performance. In *Deevy v. Porter*,¹⁸ the leading case representing the majority view, a New Jersey court held that a more-than-one-year employment contract which contained a clause allowing the employee to terminate at will meant only that the employee would be discharged from liability for non-performance and not that the employee, by exercising his option to terminate, would be fully performing his contract.¹⁹

16. See note 14 *supra*.

17. *Stein v. Malden Mills, Inc.*, 9 Ill. App. 3d 266, 292 N.E.2d 52 (1st Dist. 1972). See Benett, *Contracts-Sales, 1972-1973 Survey of Illinois Law*, 23 DEPAUL L. REV. 179, 195-96 (1973).

18. 11 N.J. 594, 95 A.2d 596 (1953).

19. *Accord*, 2 WILLISTON ON CONTRACTS § 498 (Rev. Ed. 1936):

The distinction between an excuse for not performing and completion of performance . . . is taken in contracts requiring for their performance a period exceeding a year but which are subject to a right of defeasance, not

The minority view, represented by the California case of *Hopper v. Lennen & Mitchell, Inc.*,²⁰ regards an option to terminate as a term of the contract, and any effective action under that term as performance.²¹ A possible explanation for the California court's willingness to interpret "performance" so broadly in *Hopper* may be that the defendant was both the party requesting the protection of the Statute of Frauds and the party who had the option to terminate at any time.²² Therefore, there was no need to protect such a person from being bound to long-term oral contracts. *Mueller* has extended *Hopper* because the defendant-gas company was *not* the party with a right to terminate. plaintiff-vending company was the only party with such a right. The court may have felt justified in making this extension because of certain facts in the case. The fact that plaintiff had installed, supplied, and serviced the machines for fifteen months was evidence that plaintiff was not "fictionalizing" a contract. There was also evidence that what initially was an unauthorized signature on the writing was later ratified by the defendant-corporation.²³

In Consideration of Marriage

The Statute of Frauds fared no better as a technical defense to a contract action in *Lee v. Central National Bank & Trust Co.*²⁴

by operation of law but by the express terms of the contract, within the period of a year, as a contract for several years' service containing a provision permitting termination by either party on a week's or a month's notice. Such contracts are generally held within the Statute

20. 146 F.2d 364 (9th Cir. 1944) (a diversity case applying California law).

21. *Contra*, RESTATEMENT OF CONTRACTS, Explanatory Notes § 198, comment c at 262-63 (1932): A distinction must be taken between promises which can be "fully performed" within a year and promises which, though they cannot be "fully performed" within that time, may be excused within it by the happening of some event. The former class is not within [the statute]; the latter class is. *But cf.* RESTATEMENT (SECOND) OF CONTRACTS, Explanatory Notes § 198, comment b at 190-91 (Tent. Draft No. 4, 1968).

22. Actress Hedda Hopper entered a verbal agreement with defendant advertising agency under which she was to advertise Jergens Lotion on the radio for a period not to exceed five years. The agency was to have the right to cancel at the end of any 26-week period during those five years. Ms. Hopper sued for the agency's breach of the agreement, and the agency argued that the Statute of Frauds prevented her from proving the existence of the contract.

23. 12 Ill. App. 3d at 364-65, 292 N.E.2d at 603.

24. 56 Ill. 2d 394, 308 N.E.2d 605 (1974).

Last year, the Second District Appellate Court accepted this defense²⁵ based on the statute's "consideration of marriage" provision.²⁶ A properly signed writing of an antenuptial agreement did exist in the case, but it came into existence *after* the marriage. The appellate court, in effect, construed the statute as requiring the writing to be made *prior* to marriage. This year, the Supreme Court of Illinois found no such requirement in the statute and reversed in favor of the party trying to prove the contract.²⁷

A Private Statute of Frauds

A "private" Statute of Frauds—where parties agree that all modifications to a contract must be in writing—failed to enable defendant-contractor to avoid costs for extra work in *Atlee Electric Co. v. Johnson Construction Co.*²⁸ The First District, First Division of the Appellate Court found facts showing defendant had made an oral waiver of the writing requirement. He orally gave permission for the extra work to be done and threatened non-payment if it were not performed.²⁹ Under these circumstances the court found it unfair to allow the defendant to avoid liability merely because of the absence of a written modification.

As an alternative to the waiver analysis used in *Atlee*, courts have also employed an estoppel theory to prevent a defendant from denying an obligation to pay for extra work.³⁰ With either alternative, the plaintiff must prove by clear and convincing evidence that the defendant led him to believe that no subsequent writing was necessary; or that the defendant had accepted the benefits of additional work before making an objection; or that he had stood idly

25. See *Lee v. Central Nat'l Bank & Trust Co.*, 11 Ill. App. 3d 60, 296 N.E.2d 81 (2d Dist. 1973).

26. Illinois Revised Statutes ch. 59, § 1 (1973) which reads, in part:

No action shall be brought . . . to charge any person upon any agreement made upon consideration of marriage . . . unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

27. 56 Ill. 2d at 404, 308 N.E.2d at 610. *Accord*, Benett, *supra* note 17, at 197.

28. 14 Ill. App. 3d 716, 303 N.E.2d 192 (1st Dist. 1973).

29. *Id.* at 722-23, 303 N.E.2d at 197.

30. See, e.g., *Capital Plumbing & Heating Supply Co. v. Snyder*, 2 Ill. App. 3d 660, 275 N.E.2d 663 (4th Dist. 1971).

by while the extra work was being done.³¹ By disallowing the "no writing" defense in *Atlee* and the two previously reported cases, the Illinois courts demonstrated their reluctance to allow technical deficiencies, based on traditional rules of contract, to interfere with just and equitable results.

Answering for Debt of Another

This same reluctance was evidenced by Justice Scott of the Third District Appellate Court in *Grundy County National Bank v. Westfall*,³² another Statute of Frauds case:

It is well established in our state that the courts will not permit the Statute of Frauds, the only purpose of which is to prevent fraud, to be used where the effect will be to accomplish a fraud and if the facts are such that it would be a virtual fraud to permit the defendant to interpose the statute, a court will not listen to that defense.³³

The issue in this case dealt with the application of the statute where one has agreed to "answer for the debts of another."³⁴ Defendant Mrs. Beth Westfall, signed a form agreement in 1963 guaranteeing payment on a note by her husband. She claimed that at the time of signing, the form had been blank with respect to the date, debtor's name, name of the lending bank and limitation of her own liability, and that these blanks were not filled in until four years later by the plaintiff-bank. The court held for the bank, reasoning that Mrs. Westfall, by executing the form instrument with empty blanks, impliedly authorized the holder-bank to fill in the blanks according to the terms of the underlying agreement.³⁵ Further, when the bank proceeded to loan the money to Mr. Westfall on his wife's guarantee, there had been substantial performance on its part

31. See Benett, *Contracts-Sales, 1971-1972 Survey of Illinois Law*, 22 DEPAUL L. REV. 156, 166-68 (1972).

32. 13 Ill. App. 3d 839, 301 N.E.2d 28 (3d Dist. 1973).

33. *Id.* at 845, 301 N.E.2d at 32.

34. Illinois Revised Statutes ch. 59, § 1 (1973), which reads in part:

No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

35. 13 Ill. App. 3d at 843-44, 301 N.E.2d at 31.

to remove the contract from the Statute of Frauds.³⁶ Reinforcing its decision, the court emphasized that Mrs. Westfall graduated from Stanford University with business experience, and thus should have known better than to sign a blank form.³⁷

QUASI-CONTRACTS

In two cases this year Illinois courts for the Second and Third Districts applied equitable principles to create contracts where none in fact existed. In *Dickerson Realtors, Inc. v. Frewert*,³⁸ a \$2,905 commission for the sale of real estate was awarded to plaintiff-brokerage company even though the company had never entered into a contract with defendant-sellers. Evidence showed that a saleswoman, employed by plaintiff, presented defendants with a prospective buyer for their home and discussed the possibility of payment of a customary seven percent broker's fee. The defendants accepted the services of the saleswoman in procuring an offer which they eventually accepted, but they refused to pay the fee. The court held that even though the services were not requested by defendants, nor the subject of a specific listing agreement, defendants were liable for the value of plaintiff's services.³⁹ Both elements necessary for quasi-contractual relief—an economic benefit to the defendant and an expectation of a remuneration by the plaintiff—were present in the case, although there was a question of fact as to whether the plaintiff could have reasonably expected remuneration *from the defendants*. A more forceful argument for the defendant-sellers would have asserted that since the buyers approached the plaintiff-broker with their interest to buy, it was more logical to look to them, rather than the sellers, for the payment of the commission.⁴⁰

In *Town of Montebello v. Lehr*,⁴¹ the Third District Appellate

36. *Id.* at 845, 301 N.E.2d at 32.

37. *Id.* at 843, 301 N.E.2d at 30-31.

38. 16 Ill. App. 3d 1060, 307 N.E.2d 445 (2d Dist. 1974).

39. *Id.* at 1063-64, 307 N.E.2d at 447-48.

40. *See Callano v. Oakwood Park Homes Corp.*, 91 N.J. Super. 105, 219 A.2d 332 (1966).

One reason why defendant-sellers did not emphasize this approach may have been that they had agreed in their contract with the buyers to hold them harmless from any real estate commission liability.

16 Ill. App. 3d at 1063, 307 N.E.2d at 448.

41. 17 Ill. App. 3d 1017, 309 N.E.2d 231 (3d Dist. 1974).

Court affirmed a judgment for a county, and its assessor, for the reasonable value of assessment services provided to a township in 1971. The township did not request the service, and the service ultimately generated no income for the township since the law under which it was conducted was later declared unconstitutional.⁴² Nevertheless, the court found that during the time the law was not in force, the township had the primary duty for conducting the assessment. By allowing the county to perform that duty, the township received a benefit for which it would have to pay.⁴³

While both of the above cases reflect a new receptiveness on the part of Illinois courts to the doctrine of quasi-contractual relief, it should be cautioned that the courts also have indicated a demand that the doctrine be properly pleaded in the lower courts. In two cases, the First District, Third Division Appellate Court refused to entertain the theory of implied contract when it was first raised on appeal.⁴⁴

SILENCE AS ACCEPTANCE

In *Roberts v. Buske*,⁴⁵ the Illinois Appellate Court for the Fifth District considered whether the silence of an offeree can constitute an acceptance of an offer. An insurance agent sent an unsolicited renewal policy with notice that if the insured did not wish to accept the policy, he was to return it or be liable for the premiums. The agent argued that the failure to respond amounted to an acceptance, reasoning that on a prior renewal the insured had accepted in that same non-responsive manner. Relying on a Connecticut de-

42. The law was the Illinois personal property tax provision in the amendment to the Revenue Article of the 1870 Illinois Constitution, ILL. CONST. art. IX-A (1971). The amendment was found unconstitutional by the Illinois Supreme Court in *Lake Shore Auto Parts Co. v. Korzen*, 49 Ill. 2d 137, 273 N.E.2d 593 (1971). This finding was later reversed by the United States Supreme Court in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), where Justice Douglas, speaking for a unanimous court, found no violation of the equal protection clause of the fourteenth amendment of the United States Constitution. See generally Note, *Personal Property Taxes—Lehnhausen v. Lake Shore Auto Parts Co.*, 22 DEPAUL L. REV. 630 (1973).

43. 17 Ill. App. 3d at 1021-22, 309 N.E.2d at 234-35.

44. *Oddo v. Western Sav. & Loan Ass'n*, 17 Ill. App. 3d 276, 307 N.E.2d 609 (1st Dist. 1974); *O'Hare Int'l Bank v. Feddler*, 16 Ill. App. 3d 35, 305 N.E.2d 325 (1st Dist. 1973).

45. 12 Ill. App. 3d 630, 298 N.E.2d 795 (5th Dist. 1973).

cision,⁴⁶ the court found that a single transaction was not enough to establish a course of conduct or a course of dealing upon which an offeror could find an implied acceptance. Had the court referred to the *Restatement of Contracts*,⁴⁷ instead of the Connecticut precedent, it may have had less difficulty in finding a contract. The *Restatement* in treating silence as acceptance requires only "previous dealings" between the parties and not a *course of conduct* or *course of dealing*. Arguably, the silent acceptance of the first renewal policy could have met the "previous dealings" requirement.⁴⁸ By using the stricter test, the court had no choice but to apply the general rule that silence or inaction by an offeree cannot be relied upon to constitute an acceptance.⁴⁹ It should be noted, however, that if the *insured* had attempted to establish a contract under a "silence as acceptance" theory, the result would probably have been different. The *Restatement of Contracts* states there will be an acceptance,

[w]here the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive *intends to accept the offer*.⁵⁰

The agent's letter indicated that silence could manifest assent. The insured would then have alleged that he intended his silence to manifest acceptance. The offeree receives the best of both worlds under this section—a contract if he wants one and no contract if

46. *Phelan v. Everlith*, 22 Conn. Supp. 377, 1 Conn. Cir. 43, 173 A.2d 601 (1961).

47. RESTATEMENT OF CONTRACTS § 72(1)(c) (1932) states:

Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:

(c) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand.

See also RESTATEMENT (SECOND) OF CONTRACTS § 72(1)(c) (Tent. Draft No. 1, 1964):

Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

48. However, the *Restatement*, while not using the words "course of dealing," still indicates that more than one prior dealing between the parties is necessary because of the use of the plural word "dealings." See note 47 *supra*.

49. 12 Ill. App. 3d at 632-33, 298 N.E.2d at 797.

50. RESTATEMENT OF CONTRACTS § 72(1)(b) (1932) (emphasis added). There is no change in RESTATEMENT (SECOND) OF CONTRACTS (Tent. Draft No. 1, 1964).

he does not. This apparent unfairness is tolerated because of the inherent ambiguity in the offeree's silence, an ambiguity created by the terms of the offer. A court cannot determine whether the offeree remained silent because he intended to ignore the offer (which he had a right to do), or because he intended to accept; thus a court must accept the offeree's explanation.

IMPOSSIBILITY STRICTLY DEFINED

The Illinois Appellate Court for the First District, Fourth Division adopted a very strict view of the contractual defense of impossibility in *Joseph W. O'Brien Co. v. Highland Lake Construction Co.*⁵¹ The court rejected the *Restatement's* definition of the defense of impossibility⁵² and said instead that unless there is a provision for contingencies in the contract itself, a promisor will not be relieved from performing his duties.⁵³ The strictness of the definition may have been dictated by the peculiar facts of the case. The plaintiffs, two general contractors, were retained by the Cook County Department of Highways to install storm sewers in the west leg of the main drain of the Dan Ryan Expressway. They subcontracted with defendants to perform certain tunneling underneath the highway by a method known as "jacking." After commencing the "jacking," defendants encountered water and adverse soil conditions which forced them to discontinue their efforts. Plaintiffs subsequently did the "jacking" themselves and were able to tunnel about one-half the required distance when they too were forced to abandon the operation. The tunneling had to be completed by an entirely different method. The court was influenced by the fact that the plaintiffs had been able to perform some of the "jacking" themselves and that they had sued only for the cost incurred for their own "jacking."⁵⁴ Notwithstanding these factors, the

51. 17 Ill. App. 3d 237, 307 N.E.2d 761 (1st Dist. 1974).

52. RESTATEMENT OF CONTRACTS § 454 (1932) states:

In the Restatement of this Subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.

See 17 Ill. App. 3d at 241, 307 N.E.2d at 764.

53. 17 Ill. App. 3d at 241-42, 307 N.E.2d at 764-65, relying on *Leonard v. Auto-car Sales & Serv. Co.*, 392 Ill. 182, 64 N.E.2d 447 (1945), *cert. denied*, 327 U.S. 804 (1946).

54. 17 Ill. App. 3d at 240-41, 307 N.E.2d at 764.

court still seemed too hasty in rejecting the defense of impossibility. According to the *Restatement*⁵⁵ and law from other jurisdictions,⁵⁶ the doctrine of impossibility should apply where the following three requisites are met:

First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable.⁵⁷

Defendants were prepared to prove these three requisites by introducing into evidence a letter written by plaintiff-contractors to the Superintendent of Highways. The trial court, however, did not accept a broad definition of impossibility. It therefore excluded the letter from evidence and directed the verdict for the plaintiffs. The appellate court's affirmance can only be considered correct if the narrow definition of impossibility is accepted as the correct interpretation of the defense. Otherwise, the letter should have been accepted into evidence and the case given to the jury.⁵⁸

CONSIDERATION—PROMISSORY ESTOPPEL

In *Bank of Marion v. Robert "Chick" Fritz, Inc.*,⁵⁹ defendant, a beer distributor, entered into a contract for the construction of a new warehouse for which were to be made periodic payments. The contractor, Diversified Contractors, Inc., had difficulty obtaining financing to start the project. The plaintiff-bank advised Diversified that it could receive an advance only if the defendant would promise to make periodic work payments jointly to the contractor and to the bank. Diversified obtained such a promise from defendant's president, Robert Fritz, who signed a document read-

55. RESTATEMENT § 454, *supra* note 52.

56. See, e.g., *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916); *International Paper Co. v. Rockefeller*, 161 App. Div. 180, 146 N.Y.S. 371 (1914). See also *Fisher v. United States Fid. & Guar. Co.*, 313 Ill. App. 66, 39 N.E.2d 67 (1st Dist. 1942); UNIFORM COMMERCIAL CODE § 2-615(a).

57. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966). See also *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966).

58. It is interesting that in their letter to the highway department, the plaintiff-contractors seemed to be making a case for their own impossibility, claiming they were unable to do the work as agreed unless they received more money from the county. 17 Ill. App. 3d at 243-44, 307 N.E.2d at 765-66.

59. 57 Ill. 2d 120, 311 N.E.2d 138 (1974).

ing, in part: "The total amount plus any other extras and/or deletions will be made Jointly to the Bank of Marion and Diversified Contractors, Inc."⁶⁰ Diversified delivered the document to the bank, which then advanced the money. When Diversified defaulted on the loan payments, the bank sued defendant, who raised the defense of no consideration for its promise. Certainly, the defense would have been inapplicable if defendant had expressly stated in the document that "in exchange for the Bank's advancement of funds to Diversified, we promise to make our payments jointly to the Bank and Diversified." There would have been a contract between the defendant and the bank at the moment the bank agreed to give the advancement.⁶¹ Just because this statement did not appear in its entirety on the document does not mean it was not made. The first half of the statement imposing liability—"in exchange for the Bank's advancement to Diversified"—could be inferred from defendant's conduct.⁶² Why else would defendant's president have signed the promise to make joint payments? Parole evidence would be admissible to show that defendant knew or had reason to know the contractor's difficulty in getting financing and to show that defendant knew or had reason to know of the bank's request

60. *Id.* at 122, 311 N.E.2d at 139.

61. The contract would be one where the consideration moves from the promisee to someone other than the promisor, a type of contract specifically approved this year by the First District, Second Division of the Appellate Court in *Affiliated Realty & Mortgage Co. v. Jursich*, 17 Ill. App. 3d 146, 308 N.E.2d 118 (1st Dist. 1974). In that case, plaintiff-employer released defendant-employee from an employment contract in return for defendant's transfer of certain option rights to a third party. The court said it was "not necessary that consideration for a promise go to the promisor." *Id.* at 150, 308 N.E.2d at 122.

62. See RESTATEMENT OF CONTRACTS § 5 (1932) entitled "How a Promise May be Made":

[A] promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the promisee in understanding that the promisor intended to make a promise.

RESTATEMENT (SECOND) OF CONTRACTS § 5 (Tent. Draft No. 1, 1964) states:

A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.

RESTATEMENT OF CONTRACTS § 21 (1932) entitled "Acts as Manifestation of Assent" states:

ACTS AS MANIFESTATION OF ASSENT

The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct.

RESTATEMENT (SECOND) OF CONTRACTS § 21(1) (Tent. Draft No. 1, 1964) is materially the same as its predecessor section.

for joint payments.⁶³ Unfortunately the plaintiff-bank did not present sufficient evidence at the trial⁶⁴ and a jury returned a verdict for defendant. This year the supreme court affirmed the verdict for the defendant.⁶⁵ The court, in an opinion by Justice Ryan, did not consider whether the possibility of an implied promise is provable by parol evidence; instead it looked only to the four corners of the instrument signed by defendant's president and found there was no bargained-for exchange evident from that writing.⁶⁶

The plaintiff also tried to recover on a promissory estoppel theory, claiming that it justifiably relied to its detriment on defendant's promise to make joint payments.⁶⁷ The court rejected the argument, accepting the testimony of defendant's president that he had not read the document before signing it. The court's receptiveness to such testimony is startling in light of the fact that it has held consumers, some uneducated and unfamiliar with the English language, responsible for knowing what they have signed.⁶⁸ A bet-

63. This point was made by the Fifth District Appellate Court in the first appeal of this case, 9 Ill. App. 3d 102, 291 N.E.2d 836 (5th Dist. 1973). The court explained:

A contract partly written and partly verbal is one in parol. Accordingly, since, in such case, there is only a "partial integration" of the entire contract, the rule is that parol evidence to prove the part not reduced to writing is admissible, although it is generally inadmissible as to the part reduced to writing. In most cases, the admixture of parol and written evidence on the question of the making of a contract which is partly oral takes the question to the jury.

Id. at 107-08, 291 N.E.2d at 840, quoting 17 AM. JUR. 2d *Contracts* § 68 (1964).

64. The evidence in the case at bar does not prove that Fritz signed the paper in question with the intention or purpose that it was to induce the bank to make any loan to Diversified.

Id. at 109, 291 N.E.2d at 841.

65. The trial judge had granted plaintiff-bank's motion for judgment notwithstanding the verdict, but the appellate court reversed and reinstated the jury's verdict in favor of defendant-Fritz, Inc. The supreme court affirmed the reversal and reinstatement of verdict. 57 Ill. 2d 120, 311 N.E.2d 138 (1974).

66. "A reading of this instrument, however, clearly shows that standing alone it does not constitute a contract." 57 Ill. 2d at 123, 311 N.E.2d at 139.

67. *Id.* at 124-25, 311 N.E.2d at 140. See RESTATEMENT OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

68. See, e.g., *Hurley v. Frontier Ford Motors, Inc.*, 12 Ill. App. 3d 905, 299 N.E. 2d 387 (2d Dist. 1973), where the Second District Appellate Court, in holding a used car buyer responsible for knowing what he had signed, stated: "One is ordinarily not justified in relying on a misrepresentation as to the terms of a contract he signs when he has been afforded the opportunity to read it but through his neglect fails to do so." *Id.* at 911, 299 N.E.2d at 392.

ter reason for not applying promissory estoppel would have been that the document, entitled "Certification of Contract," did not indicate that a promise was being made *to the bank* since it was prepared and presented by the contractor and not the bank. The court's strained reasoning reflects a continuing reluctance by Illinois courts to apply promissory estoppel outside the areas of charitable subscriptions and gift promises.⁶⁹

OPTION CONTRACTS

The First District, First Division of the Appellate Court had occasion to review the law of options in the case of *In re Estate of Girga*.⁷⁰ John Girga gave two options to purchase the same parcel of land to two different people, both of whom tried to exercise their options. In August, 1967, John gave his son Robert a three-and-a-half-year option to purchase certain land for \$55,000; a month later, he gave Walter Brucher a sixty-day option to purchase the same land for \$60,000. He received \$75 for the option to his son and \$500 for the option to Brucher. Girga died in October, 1967, before either option was exercised. Within a few days of his death, optionee-Brucher recorded an "exercise of option" with the DuPage County Recorder of Deeds. More than three years later, Robert Girga, recorded his own "exercise of option" with the same Recorder of Deeds. No issue was made of the fact that the son's option was recorded so much later than Brucher's. Apparently, neither possession of the property nor a deed was turned over to Brucher, and neither Brucher nor his assignee⁷¹ had tendered the purchase price during the three-year interim.⁷² In the absence of such factors, the court favored the son's option because it was created first, although not exercised first. Neither was an issue made of the fact

69. Compare *Brook v. Oberlander*, 49 Ill. App. 2d 312, 199 N.E.2d 613 (1st Dist. 1964) with *Estate of Beatty v. Western College*, 177 Ill. 280, 292-93, 52 N.E. 432, 436 (1898). See also *Dewein v. Dewein*, 30 Ill. App. 2d 446, 174 N.E.2d 875 (4th Dist. 1973).

70. 15 Ill. App. 3d 916, 305 N.E.2d 565 (1st Dist. 1973).

71. Brucher assigned his rights under the option to Anthony A. Antoniou, who on December 15, 1970, filed his petition under the Illinois Probate Act to require the administrator of the estate of John Girga to convey the property to him. *Id.* at 920, 305 N.E.2d at 567.

72. *Id.* at 923, 305 N.E.2d at 570.

that the optionor had died before either option was exercised. Apparently, both parties and the court were willing to concede that an option, unlike a bare offer, lives on after the optionor's death.⁷³

Brucher's claim to the property was based primarily on the argument that what the son had was not an option, but only an offer to sell.⁷⁴ If the evidence had supported such an argument, Brucher would have won because the father's death would have constituted an implied revocation of the offer.⁷⁵ However, the evidence pointed to an opposite conclusion. The document signed by the father was titled "Option to Purchase;" it mentioned the word "option" twice in the text, it was specific as to price and description of the land, and most importantly, it recited a \$75 consideration from the son. Only if the \$75 was to be returned to the son in the event he did not purchase the property, could the money not be regarded as consideration.⁷⁶ The instrument foreclosed this possibility by stating that the \$75 would be "forfeited" if the son decided not to buy the land.⁷⁷

As an alternative argument, Brucher claimed that there was no actual exercise of the option by the son, but only a counter-offer by him. The legal description of the land appearing on the option document differed from the description of the land on the son's "ex-

73. This is the position taken by RESTATEMENT (SECOND) OF CONTRACTS § 35A (Tent. Draft No. 1, 1964):

[T]he power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.

It is a position also supported by logic since an option itself is a contract (a collateral contract whereby the optionor receives consideration to hold the primary offer open for a certain period of time) and contractual obligations—at least those not requiring personal performances—survive one's death.

74. Although the opinion quotes optionee-Brucher as using different language than "mere offer to sell," it is apparent that this is what he was attempting to show in order to establish the father's promise as revocable. 15 Ill. App. 3d at 921, 305 N.E.2d at 568.

75. See, e.g., *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. R. 305 (1877). See also RESTATEMENT OF CONTRACTS § 35(f) (1932); RESTATEMENT (SECOND) OF CONTRACTS § 35(d) (Tent. Draft No. 1, 1964).

76. See *Country Club Oil Co. v. Lee*, 239 Minn. 148, 58 N.W.2d 247 (1953). Even in this situation, it might be argued that the optioner's use of the option money during the term of the option constituted the requisite consideration.

77. See instrument reprinted at 15 Ill. App. 3d at 918-19, 305 N.E.2d at 566.

ercise of option." The court admitted that the wording of the two documents was slightly different and that the law requires an optionee to comply exactly to the terms of the option;⁷⁸ but it also noted that the reason for enforcing such a strict rule was to prevent an optionee from introducing new terms which would alter the contract envisioned by the optionor. This protection was unnecessary here because it was clear that the son was not attempting to alter any terms of the option but merely giving a more detailed description of the land. It was obvious that the son was referring to exactly the same parcel of land as his father had in mind when creating the option.

Another argument advanced by Brucher was that since the payment term was omitted from the option document given to the son, the father-optionor intended acceptance of the primary offer to be full payment of the \$55,000. Since the son had never tendered the purchase price to his father or his father's estate, he had never exercised the option. The court, while noting there are cases in which options require specific acts for exercise,⁷⁹ did not believe that this was such a case. The son effectively exercised his option to purchase by *promising* to pay the purchase price, thereby creating an executory bilateral contract. "To conclude that payment was necessary to exercise the option," the court stated, "would leave nothing for Robert to do in performance of the contract of sale."⁸⁰

As if it were not enough to reject the three arguments made by the appellant in opposition to the son's option, the court volunteered an argument⁸¹ invalidating Brucher's own option. His option had stated that John Girga would sell for a price of \$60,000 "*or any less sum which I [John Girga] shall agree to accept.*"⁸² The court noted that this uncertain language made it "at least debatable whether the Brucher option price was fixed,"⁸³ and in Illinois a fixed

78. See *Dept. of Public Works & Bldgs. v. Halls*, 35 Ill. 2d 283, 220 N.E.2d 167 (1966); *Macy v. Brown*, 326 Ill. 556, 158 N.E. 216 (1927), cited by the court at 15 Ill. App. 3d at 923, 305 N.E.2d at 569.

79. See *Epton v. CBC Corp.*, 48 Ill. App. 2d 274, 197 N.E.2d 727 (1st Dist. 1964), cited by the court at 15 Ill. App. 3d at 921, 305 N.E.2d at 568.

80. 15 Ill. App. 3d at 921, 305 N.E.2d at 568.

81. The argument was not briefed by the parties. *Id.* at 923, 305 N.E.2d at 570.

82. *Id.* at 919, 305 N.E.2d at 567 (emphasis added).

83. *Id.* at 923, 305 N.E.2d at 570.

price for the primary contract is an essential element for a valid collateral (or option) contract.⁸⁴

ILLEGALITY

Restrictive Covenants Held in Restraint of Trade

In two appellate court decisions last year, restrictive covenants in employment contracts were found to be illegal as excessive restraints of trade. The first case is significant because it involves a type of covenant unseen before in Illinois courts; the second is significant because it illustrates the elements that Illinois courts will use in testing the "reasonableness" of restrictive covenants.

In the typical restrictive employment covenant, the employee promises not to compete with his employer for a certain period of time following his departure from his job. If the employee breaches this covenant, the employer can obtain an injunction or, in some cases, liquidated damages,⁸⁵ provided he can show that the restriction on the employee was "reasonable."⁸⁶

In *Johnson v. Country Life Insurance Co.*,⁸⁷ a different kind of sanction was available to the employer. In his employment contract, the employee, an insurance agent, promised to give up the right to renewal commissions he otherwise could receive if he joined

84. See *Whitelaw v. Brady*, 3 Ill. 2d 583, 121 N.E.2d 785 (1954), cited by the court at 15 Ill. App. 3d at 923, 305 N.E.2d at 570.

85. See, e.g., *Karpinski v. Ingrasci*, 28 N.Y.2d 45, 268 N.E.2d 751 (1971). See also 5 A. CORBIN, CONTRACTS § 1071 (1964).

86. RESTATEMENT OF CONTRACTS § 514 (1932) states: "A bargain in restraint of trade is illegal if the restraint is unreasonable." RESTATEMENT OF CONTRACTS § 515 (1932) states:

A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it

- (a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or
- (b) imposes undue hardship upon the person restricted, or
- (c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially, or
- (d) unreasonably restricts the alienation or use of anything that is a subject of property, or
- (e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment.

87. 12 Ill. App. 3d 158, 300 N.E.2d 11 (4th Dist. 1973).

a competing company any time after leaving Country Life. The contract defined renewal commissions as percentages of annual premiums paid by insureds to keep their life insurance policies in force. Employee-Johnson was entitled to retain the commissions on policies he previously sold, even after leaving Country Life's employ, so long as he refrained from working in any capacity for a competing insurance company in the eleven states where Country Life was authorized to do business. Upon learning that his policy renewals were being terminated pursuant to the clause, Johnson brought suit for a declaratory judgment, claiming that he stood to lose over \$63,000 in "renewals." He argued that the covenant was void as against public policy because it forced him to choose between losing his livelihood as an insurance agent (in the event he honored the clause) or losing his "vested renewals" (in the event he did not honor the clause). The Fourth District Appellate Court had no Illinois precedent to follow for the type of covenant involved,⁸⁸ and found that most other jurisdictions did not find an "unreasonable" restraint of trade in similar cases.⁸⁹ The strongest argument for enforcement was that, unlike most restrictive covenants, the one in *Johnson* did not preclude the employee from accepting like work with a competitor at any time after leaving his job; it is difficult to see how under this circumstance the clause could act to unduly restrict competition. Nevertheless, the court looked at "practical reality"⁹⁰ and concluded that the covenant was overly restrictive:

88. As demonstrated by *House of Vision v. Hiyane*, 37 Ill. 2d 32, 225 N.E.2d 21 (1967); *Canfield v. Spear*, 44 Ill. 2d 49, 254 N.E.2d 433 (1969), for example, cases involving restraint of trade have most commonly arisen in the context of a contract which completely prohibits the employee from engaging in competition with his former employer within a designated area for a specified period of time. We are unaware of any case in this State which has involved the covenant here in question.

Id. at 161, 300 N.E.2d at 13.

89. Cases supporting enforcement of the covenant: *Masden v. Travelers' Ins. Co.*, 52 F.2d 75 (8th Cir. 1931); *Himes v. Masonic Mutual Life Ass'n*, 215 Ala. 183, 110 So. 133 (1926); *Barr v. Son Life Assur. Co.*, 146 Fla. 55, 200 So. 240 (1941); *Chase v. New York Life Ins. Co.*, 188 Mass. 271, 74 N.E. 325 (1905); *Bohrstedt v. Travelers' Ins. Co.*, 123 Ore. 539, 262 P. 938 (1928); *Stancliff v. Southland Life Ins. Co.*, 175 S.W.2d 521 (Tex. Civ. App. 1943). Case supporting non-enforcement of the covenant: *Carson v. Sun Life Assur. Co.*, 56 Ga. App. 164, 192 S.E.2d 241 (1937). See generally Annot., 36 A.L.R.3d 958 at 1024 (1971).

90. True, the terminated employee cannot be restrained, i.e., enjoined, from pursuing his occupation nor is he obligated to refrain from so doing, but this is only half the problem. If he *does* elect to engage in his occupation

[T]o say that the prospective loss of those commissions does not operate to significantly restrict his right to engage in the pursuit of his occupation following termination of his relationship with the company, and by the same token reduce, if not eliminate competition is, in our view, to divorce the practical application and consequences of the covenant from the hard facts of economic reality.⁹¹

Severing the portion of the contract depriving plaintiff of his commissions,⁹² the court held that plaintiff could keep both his new insurance-selling job and the "renewals" from his old job. Without precluding the employer from the possibility of enforcing the covenant in other cases,⁹³ the court felt these particular facts did not warrant the degree of protection sought by the employer.⁹⁴

The First District, Third Division Appellate Court invalidated a restrictive covenant in *Nationwide Advertising Service, Inc. v. Kolar*.⁹⁵ The covenant involved was a typical one; the employee-Kolar promised not to compete with his employer for one year after the completion of his employment at plaintiff's advertising agency. Within a month after leaving the employ of the plaintiff, Kolar

what consequences follow as a result of the contractual provision? He forfeits his right to commissions which he would have received but for the contractual terms, and this after he has performed all of the services required of him during his relationship with the defendant.

12 Ill. App. 3d at 164, 300 N.E.2d at 15.

91. *Id.*

92. [W]e refuse to hold that plaintiff's right to renewal commission was conditioned solely on compliance with an illegal condition and that his right to the commissions falls with the condition.

12 Ill. App. 3d at 165, 300 N.E.2d at 16. On severance of illegal clauses in restraint of trade *see generally* RESTATEMENT OF CONTRACTS § 518 (1932); 6A A. CORBIN, CONTRACTS: §§ 1309, 1394, at 104 (1962); Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 674-75 (1960); Kreider, *Restrictive Employment Contracts*, 35 U. CIN. L. REV. 16, 26-30 (1966); Note, *An Employer's Competitive Restraints on Former Employees*, 17 DRAKE L. REV. 69, 71-72 (1967).

93. 12 Ill. App. 3d at 165, 300 N.E.2d at 16.

94. Here the plaintiff has worked only in the State of Illinois for the defendant in the pursuit of his occupation and his efforts have apparently been confined to Coles County since 1952. Under the restrictions of . . . the contract he is prohibited, except on forfeiture of his right to renewal commissions, from representing any other life insurance company *in any capacity* not only in Illinois but in the eleven State area in which it appears to be authorized to do business. He is then precluded, for example, from working in that area as an actuary, claims supervisor or in any other capacity for any other company. To state the restriction is to demonstrate its breadth.

Id. at 164, 300 N.E.2d at 15.

95. 14 Ill. App. 3d 522, 302 N.E.2d 734 (1st Dist. 1973).

breached the covenant by joining a competing agency and by soliciting a number of the same firms which he previously had serviced. His only method of avoiding an injunction was by demonstrating that the non-competing covenant was illegal and therefore unenforceable. To do this, Kolar presented witnesses who testified that in his particular business (recruitment advertising for personnel in private industry) the advertising agency's relationship to its customers is not permanent,⁹⁶ and its relationship with its own employees is not grounded on confidentiality.⁹⁷ All of the Illinois cases cited by the plaintiff in support of the covenant contained at least one of these two elements.⁹⁸ The court, distinguishing those cases,⁹⁹ held *Kolar* was analogous to *United Travel Service, Inc. v. Weber*,¹⁰⁰ where a court refused to enjoin a saleswoman in the travel agency business from soliciting clients of a former employer. Applying the tests of that case, the court in *Kolar* inquired first, whether salesmen like Kolar had such dominion over customers as to cause an automatic switch of patronage,¹⁰¹ and secondly, whether the identities of customers constituted confidential information which Kolar attempted to use to his own benefit.¹⁰² On the basis of

96. The witness who most impressed the trial court was a vice president of a firm directly competing with Kolar's present and past employers. He stated that in a normal year, about 20 to 25 percent of his business was not business he had had the preceding year. He attributed the new business to the fact that persons responsible for placing a company's recruitment advertising frequently go to other companies and continue using the same advertising agencies they used in the past. *Id.* at 525-26, 302 N.E.2d at 736.

97. It was shown that a list of customers for a particular advertising agency was not confidential information. Anyone in the recruitment advertising business easily could find out with whom a competitor was doing business. He could do this by calling a newspaper which carried recruitment ads and ask which advertising firm placed a particular ad; he could call the customers who ordered a particular ad and inquire who was doing their recruitment advertising, or he could examine the ad itself and tell from its peculiar style which ad agency was responsible for it. *Id.*

98. See *Cockerill v. Wilson*, 51 Ill. 2d 179, 281 N.E.2d 648 (1972); *Canfield v. Spear*, 44 Ill. 2d 49, 254 N.E.2d 433 (1969), both involving permanent relationships to clientele; *Smithereen Co. v. Renfro*, 325 Ill. App. 229, 59 N.E.2d 545 (1st Dist. 1945), involving confidential knowledge of employer's methods and processes. See also *House of Vision, Inc. v. Hiyane*, 37 Ill. 2d 32, 37-38, 225 N.E.2d 21, 24 (1967), where the court by *dictum* approved enforcement of a covenant "where specialized knowledge, such as secret processes or the like are involved."

99. 14 Ill. App. 3d at 526-28, 302 N.E.2d at 736-38.

100. 108 Ill. App. 2d 353, 247 N.E.2d 801 (4th Dist. 1969).

101. 14 Ill. App. 3d at 529, 302 N.E.2d at 738.

102. *Id.* at 526-27, 302 N.E.2d 737.

the record, the court was compelled to answer "no" to each question.

Violation of City Ordinance

In *Excellent Builders, Inc. v. Pioneer Trust & Savings Bank*,¹⁰³ the First District, Second Division Appellate Court recognized the violation of a Chicago zoning ordinance as an illegality sufficient to void a contract. At the same time, the court remanded the case to determine if the doctrine of *pari delicto* (balancing degrees of culpability) would permit the contract's enforcement. Plaintiff-contractor was attempting to establish and foreclose on a mechanic's lien for work performed on defendant's property. The Illinois Mechanic's Lien Act¹⁰⁴ requires proof of a contract as a necessary basis for a lien, and case law has construed that to mean proof of a *valid* contract.¹⁰⁵ Defendant-property owner claimed that the contract was illegal and void because its performance would violate Chicago's zoning ordinance. The zoning violation, dealing with improper side yard and setback allotments, caused the city's Department of Buildings to revoke a building permit shortly after construction began;¹⁰⁶ this permit revocation forced an end to the work on the building. Plaintiff tried to obtain a lien for the \$64,000 he claimed was due for materials and services he had furnished up to the time of the permit revocation. The lower court granted summary judgment for the bank, holding the contract illegal on its face and unenforceable. The appellate court held that evidence outside the contract should have been received to determine if defendant was more responsible for the zoning violation than the plaintiff. Plaintiff had alleged that it had no part in the drafting of the illegal architectural plans, that it had no actual knowledge of the illegality of the plans when it made its bid for the job, and that it made no misrepresentation to officials of the Department of Build-

103. 15 Ill. App. 3d 832, 305 N.E.2d 273 (1st Dist. 1973).

104. ILL. REV. STAT., ch. 82, § 1 (1973).

105. See *Paddock, Inc. v. Glennon*, 32 Ill. 2d 51, 203 N.E.2d 421 (1964); *Rittenhouse & Embree Co. v. Warren Const. Co.*, 264 Ill. 619, 106 N.E. 466 (1914).

106. Plaintiff-contractor paid for and procured the building permit, but the plans and specifications on which it was based were prepared by defendant's architect. Furthermore, plaintiff alleged that the permit initially was issued because of active wrongdoing on the part of defendant's representatives. 15 Ill. App. 3d at 834, 305 N.E.2d at 275.

ings to secure the building permit.¹⁰⁷ If the plaintiff could substantiate these allegations, the court was prepared to make an exception to the equitable doctrine of leaving co-wrongdoers in the position they are found. The court stated:

It is our opinion that the allegations of fact, if true, would invoke the doctrine of imbalance of culpability as between the parties and, therefore, raised an issue of fact which made summary judgment unavailable.¹⁰⁸

Excellent Builders involved the very specialized situation of a contractor trying to establish a mechanic's lien. The case may, however, be used as a precedent for other kinds of contract cases in the future. For example, a tenant wishing to avoid an obligation to pay rent under a lease can use *Excellent Builders* to buttress a 1970 First District, Fourth Division Appellate Court decision¹⁰⁹ which held a landlord's violations of the Chicago Housing Code¹¹⁰ prevented recovery of past due rents.

Self-Help Clause in Lease

A lease provision giving a landlord the right of re-entry without

107. Plaintiff's theory was that, even if the contract were illegal (which plaintiff did not concede), the parties were not in *pari delicto* because President Brooks had merely delivered the plans (which had been furnished him by defendants' architect) to the Building Department and had not participated in the alleged fraud which resulted in the issuance of the void and revocable permit. Therefore, plaintiff would not be barred from obtaining its lien.

Id. at 834-35, 305 N.E.2d at 275.

108. *Id.* at 838, 305 N.E.2d at 278. The court also stated that the doctrine should be extended to an action for recovery by lien

where the active misconduct of one party to the illegal contract has not only created the illegality with actual knowledge thereof but has then caused the improper issuance of the building permit, whereas the misconduct of the other party to the illegal contract has occurred without actual knowledge and consists of cooperation of a relatively passive and ministerial nature. Giving this limited, purely inter-party, validity to this contract would not be injurious to the public order. On the contrary, it would merely prevent the more culpable party from benefiting from his own wrongdoing, thereby contributing to the public order.

Id. at 837-38, 305 N.E.2d at 277-78.

109. Longenecker v. Hardin, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1st Dist. 1970).

110. CHICAGO, ILL., MUNICIPAL CODE ch. 78, §§ 78-13.1 (water closet required); 78-13.6 (maintenance of sanitary facilities); 78-13.8 (heat); 78-13.11 (hot water); 78-17.1 (maintenance of floors); 78-17.3 (maintenance of windows, doors and hatchways); 78-17.5 (maintenance of stairways and porches); 78-17.7 (maintenance of facilities, equipment and chimneys).

legal process was held invalid by the First District, Third Division Appellate Court in *Brooks v. LaSalle National Bank*.¹¹¹ The illegality of the clause was a collateral issue in a suit brought by the tenant to restore himself to possession of his apartment and his personal property within the apartment. Brooks had been locked out by his landlords when he had defaulted in rent payments. He sought a preliminary injunction, while defendants, in an effort to show his claim lacked the requisite probability of success, relied upon the clause as their defense. They argued that it gave them a right of self-help in gaining possession of an apartment upon a rent default. The court specifically rejected the sixty-seven year old Illinois case upholding such landlord self-help clauses.¹¹² Instead it chose to follow a 1961 California decision¹¹³ in which Justice Traynor said such self-help clauses were void because they clashed with the public policy behind California's forcible entry and detainer statutes.¹¹⁴ According to Traynor, "[r]egardless of who has the right to possession, orderly procedure and preservation of the peace require that the actual possession shall not be disturbed except by legal process."¹¹⁵ Justice McGloon, writing for the Illinois court, referred to this as "the modern trend on the subject."¹¹⁶

As for the withholding of the tenant's personal possessions, defendants unsuccessfully tried to justify their actions by relying on the Illinois Innkeepers' Lien Act¹¹⁷ and the common law right to distress.¹¹⁸ The court, however, analogized this case to *Fuentes v. Shevin*¹¹⁹ where the United States Supreme Court held Florida's pre-

111. 11 Ill. App. 3d 791, 298 N.E.2d 262 (1st Dist. 1973).

112. *Sherman House Hotel Co. v. Circle*, 136 Ill. App. 381 (2d Dist. 1907). *See generally* Annot., 6 A.L.R.3d 177 at 194-95 (1966).

113. *Jordan v. Talbot*, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961).

114. *See* 11 Ill. App. 3d at 797, 298 N.E.2d at 267.

115. 55 Cal. 2d at 605, 361 P.2d at 24, 12 Cal. Rptr. at 492.

116. 11 Ill. App. 3d at 797, 298 N.E.2d at 267.

117. Illinois Revised Statutes ch. 82, § 57 (1973) states:

Hotel, inn and boarding house keepers shall have a lien upon the baggage and other valuables of their guests or boarders, . . . for the proper charges due from such guests or boarders for their accommodations, board and lodgings and such extras as are furnished at their request.

118. *See* 11 Ill. App. 3d at 797, 298 N.E.2d at 267.

119. 407 U.S. 67 (1972). For a detailed discussion of this opinion *see* Spak, *Constitutional Attacks on Creditors' Self-Help Repossession Rights Under U.C.C. Section 9-503—Developments in Illinois Secured Transactions, 1973-1974 Survey of Illinois Law*, 24 DEPAUL L. REV. 378 (1975).

judgment replevin statute violative of the Due Process Clause of the fourteenth amendment. The court in *Brooks* held that Brooks' lessors must resort to judicial proceedings—with proper due process notice and hearing—before they could distrain his property for unpaid rent.¹²⁰

SALES—UNIFORM COMMERCIAL CODE

Statute of Limitations, Privity, and Warranty of Fitness

In *Berry v. G. D. Searle & Co.*¹²¹ the Supreme Court of Illinois indicated that a suit for personal injuries resulting from a product might be more advantageously brought in *assumpsit*—for breach of warranty under the Uniform Commercial Code—than in tort for strict liability. The warranty approach has all the benefits of the tort approach with the additional advantage of a longer statute of limitations.¹²²

Plaintiff Martha Berry obtained a prescription for birth-control pills from the Planned Parenthood Association of Chicago. The prescription was filled with Enovid, pills manufactured by G. D. Searle & Co. After using the pills as directed, she suffered a cerebral vascular attack (a stroke) which paralyzed portions of her body. Four years later, she filed a lawsuit against both the Planned Parenthood Association and the drug company, contending that they had failed to warn her of the dangers of the drug. In two counts her complaint alleged that the drug company breached its implied warranty that the drug was fit for its particular purpose,¹²³ and, that defendants were strictly liable for injuries from the unreasonably dangerous propensities of the drug. Defendants attempted to defeat both counts by asserting the two-

120. 11 Ill. App. 3d at 797, 298 N.E.2d at 267. See also *Faubel v. Michigan Blvd. Bldg. Co.*, 278 Ill. App. 159 (1934). This is similar to the position taken by the federal district court for Northern Illinois in 1972. See *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972).

121. 56 Ill. 2d 548, 309 N.E.2d 550 (1974).

122. UNIFORM COMMERCIAL CODE § 2-725(1) states:

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

123. UNIFORM COMMERCIAL CODE § 2-315. See note 147 *infra* for the text of this section.

year statute of limitations for tort liabilities. The supreme court accepted the defense with respect to the strict liability count,¹²⁴ but not with respect to the warranty count. In an opinion by Justice Kluczynski, the court admitted that prior to the adoption of the U.C.C. in Illinois, the general two-year statute of limitations¹²⁵ was applied in all cases for personal injuries whether the form of action was premised in tort or contract.¹²⁶ The court also admitted that even though the U.C.C. now establishes a four-year statute of limitations, it is still the policy in some states to apply a shorter time period for personal injury cases, apparently because of a desire for uniformity of treatment between cases brought under the Code and those under strict liability.¹²⁷ Nevertheless, the court concluded that the clear intention of the Illinois legislature in adopting section 2-725(1)¹²⁸ was to provide a four-year statute of limitations period for the breach of *any* sales contract, and not *only* those involving purely economic losses.¹²⁹ The decision appears to

124. 56 Ill. 2d at 558, 309 N.E.2d at 556. Mrs. Berry wanted the court to measure the two-year statute of limitations from the time she found out that the birth-control pills caused her paralysis. If the court had obliged her, the count based on strict liability would have been filed timely. However, the court chose to follow its decision in *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 432, 261 N.E.2d 305, 313 (1970), where it was held that "an action to recover for personal injuries resulting from a sudden traumatic event accrues when plaintiff first knew of his right to sue, *i.e. at the time when the injury occurred.*" (emphasis added). Since Mrs. Berry admitted in her pleadings that she knew she was ill shortly after taking the pills, and since her knowledge of her injury occurred more than two years before her complaint was filed, the court held that the strict liability count was barred.

125. ILL. REV. STAT. ch. 83, § 15 (1973): "Actions for damages for an injury to the person, . . . shall be commenced within two years next after the cause of action accrued."

126. See *Seymour v. Union News Co.*, 349 Ill. App. 197, 110 N.E.2d 475 (1st Dist. 1953); *Handtoffski v. Chicago Consol. Traction Co.*, 274 Ill. 282, 113 N.E. 620 (1916).

127. See, *e.g.*, *Tyler v. R.R. Street & Co.*, 332 F. Supp. 541 (E.D. Va. 1971); *Heavner v. Uniroyal, Inc.*, 118 N.J. Super. 116, 286 A.2d 718 (1972). *Contra*, *Sinka v. Northern Comm. Co.*, 491 P.2d 116 (Alaska 1971); *Redfield v. Mead, Johnson & Co.*, 512 P.2d 776 (Ore. 1973); *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964); *Laymon v. Keller Ladders, Inc.*, 224 Tenn. 396, 455 S.W.2d 594 (1970).

128. ILL. REV. STAT. ch. 26, § 2-725(1) (1973). See note 122 *supra* for the text of this section.

129. 56 Ill. 2d at 554, 309 N.E.2d at 554.

There was also an issue made over how the four-year period should be computed, since the complaint alleged that the breach of warranty occurred on May 29, 1965, and the complaint was filed on May 28, 1969. The court resorted to the Construction of Statutes Act, ILL. REV. STAT. ch. 131, § 1.11 (1973), which states: "The time within which any act provided by law is to be done shall be computed by exclud-

overrule *Hundt v. Burhans*,¹³⁰ a decision rendered seven months earlier by the Third District Appellate Court. *Hundt* embraced a 1916 supreme court decision¹³¹ which held that the applicability of the statute of limitations is determined by the resulting injury and not the particular form of action brought.¹³² *Hundt* and *Berry* can be distinguished because the general statute of limitations for personal injuries in *Hundt*¹³³ was not in direct conflict with the U.C.C. The Code did not apply to the contract in *Hundt*.

Defendants in *Berry* advanced four other arguments: First, that there was no privity of contract between Ms. Berry and defendant-drug company; second, that there was no requisite sale of goods, only a service contract, between plaintiff and defendant-Planned Parenthood Association; third, that there was no breach of warranty since the drug effectively prevented pregnancy; and fourth, that plaintiff had not notified defendants of the defect within a reasonable time after she had detected the alleged breach of warranty.

As to the privity argument, the court recognized that there is a gap deliberately left in the language of section 2-318¹³⁴ and that the Official Comments to the section leave the area open to developing case law.¹³⁵ The court also recognized that case law in other states has filled the gap by requiring privity of contract between a purchaser of goods and a remote seller or manufacturer of

ing the first day and including the last . . ." and thus concluded that Mrs. Berry's complaint was filed timely. 56 Ill. 2d at 557, 309 N.E.2d at 555.

130. 13 Ill. App. 3d 415, 300 N.E.2d 318 (3d Dist. 1973).

131. *Handtoffski v. Chicago Consol. Traction Co.*, 274 Ill. 282, 113 N.E. 620 (1916), cited by 13 Ill. App. 3d at 418, 300 N.E.2d at 320.

132. *Handtoffski*, note 131 *supra*, also was cited, though not followed, by the supreme court in *Berry*, 56 Ill. 2d at 553, 309 N.E.2d at 553. See also note 126 *supra*.

133. ILL. REV. STAT. ch. 83, § 15 (1973). See note 125 *supra*.

134. UNIFORM COMMERCIAL CODE § 2-318, Alternative A reads:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this Section.

135. UNIFORM COMMERCIAL CODE § 2-318, Comment 3 states:

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

those goods.¹³⁶ Nevertheless, the court borrowed the reasoning from two Illinois tort cases, *Suvada v. White Motor Co.*¹³⁷ and *Rozny v. Marnul*,¹³⁸ in concluding that

privity is of no consequence when a buyer who purportedly has sustained personal injuries predicates recovery against a remote manufacturer for breach of an implied warranty under the Code.¹³⁹

It is interesting that the court found enough similarity between strict product liability cases and breach of warranty cases to adopt a uniform position on privity, but did not find a sufficient similarity to adopt a uniform position on the statute of limitations.¹⁴⁰

While the court's elimination of the need for privity in *Berry* is encouraging for plaintiff-oriented attorneys wishing to pursue a contract theory of recovery, this elimination still leaves unresolved two other important questions. First: Will the need for privity be eliminated in a case where there is no personal injury to a plaintiff, but only economic loss? Second: Will the need for privity be eliminated in a case where a remote user of goods—someone other than the buyer, a family or household member or a guest in the buyer's home¹⁴¹—sustains personal injuries as a result of a seller's breach of warranty? These questions must be decided by future cases.¹⁴²

136. See *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973); *United States Fid. & Guar. Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970); *International Union of Operating Eng'rs Local 57 v. Chrysler Motors Corp.*, 106 R.I. 248, 258 A.2d 271 (1969). *Contra*, *Kassab v. Cent. Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

What the court was dealing with in *Berry* is known as "vertical privity," that is a direct contractual relation between a purchaser and some seller along the distributive ladder leading back to the manufacturer. It is distinguishable from "horizontal privity," where the injured party is someone who used or was affected by the goods after the time they were purchased by the buyer. While section 2-318 is "neutral" on "vertical privity," it does take a limited stand on "horizontal privity," stating that it is eliminated as between a seller and an injured user of the goods if the user is a member of the buyer's family or household or is his house guest. See note 135 *supra*.

137. 32 Ill. 2d 612, 618-19, 210 N.E.2d 182, 185-86 (1965).

138. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

139. 56 Ill. 2d at 558, 309 N.E.2d at 556.

140. See discussion accompanying notes 124-133 *supra*.

141. See notes 134 and 136 *supra*.

142. A 1973 appellate court decision, *Weiss v. Rockwell Mfg. Co.*, 9 Ill. App. 3d 906, 293 N.E.2d 375 (1st Dist. 1973), indicated that horizontal privity *may* be unnecessary when an employee of a buyer sues the buyer's seller for breach of war-

To debunk the defendant's argument that the U.C.C. did not apply in *Berry* because the party dispensing the drug was primarily a service organization, the court analogized the case to *Cunningham v. MacNeal Memorial Hospital*,¹⁴³ where the supreme court held that it was "unrealistic" to assert that the transfusion of blood by a hospital into a patient did not give rise to a "sale."¹⁴⁴ The same court in *Berry* held that it would be inappropriate to conclude there was no sale of goods simply because the dispensing of birth-control pills was ancillary to the main purpose of a service organization such as the Planned Parenthood Association.¹⁴⁵ The response to the court's decision in *Cunningham* was the passage of an act by the Illinois legislature in 1971 declaring as a matter of public policy that the furnishing of blood for transfusions was indeed a service and not a sale, thereby avoiding the effects of *Cunningham*.¹⁴⁶ It will be interesting to see if similar legislation, exempting manufacturers and dispensers of birth-control pills from the coverage of the U.C.C., will be introduced in response to the court's decision in *Berry*.

The court quickly dismissed the argument that because the birth-control drug did prevent conception (although precipitating a stroke) there could be no breach of the warranty of fitness for a particular purpose.¹⁴⁷ The court said that to accept such a proposition would be "palpably contrary to the intent of the Code."¹⁴⁸ If it were the intent of the Code to prevent a seller's deceptions

ranty. Neither party nor the court raised the privity question in that case, and instead went on to discuss whether a warranty was made and breached by the seller. See report of case in Benett, *supra* note 17, at 191-93.

143. 47 Ill. 2d 443, 266 N.E.2d 897 (1970). In this case a hospital supplied contaminated blood to a patient as part of the hospital's services.

144. *Id.* at 450, 266 N.E.2d at 901.

145. 56 Ill. 2d at 554-55, 309 N.E.2d at 554.

146. See ILL. REV. STAT. ch. 91, §§ 181-183 (1971). See also *Evans v. Northern Ill. Blood Bank, Inc.*, 13 Ill. App. 3d 19, 298 N.E.2d 732 (2d Dist. 1973), where the statute was not applied because the facts of the case occurred prior to the Act's passage.

147. UNIFORM COMMERCIAL CODE § 2-315 states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

148. 56 Ill. 2d at 556, 309 N.E.2d at 555.

about his product, then the court's statement was correct. By not disclosing the inherent dangers of the contraceptive drug, the defendants deceived Ms. Berry.¹⁴⁹

The defendants' final argument—based on lack of timely notice of the alleged breach of warranty¹⁵⁰—was the one the court seemed most likely to accept. The defendants, however, failed to raise it in the lower court, and therefore were precluded from raising it on appeal.¹⁵¹ Nevertheless, the court took occasion to explain the particular importance of the Code's notification requirement to a case such as *Berry*, where personal injuries are involved. The state's general law for personal injuries provides for a two-year statute of limitations¹⁵² because of the realization that after that period of time, it may become too difficult for a defendant to marshal evidence for his defense to an action. If the general law is to be pre-empted by the Code's longer statute of limitations, as the court already said it would be,¹⁵³ then there must be some assurance that the feared unfairness to defendants does not materialize. Thus, to protect defendants, the Code requires that notification be given to the seller of an allegedly defective product within a reasonable time after the buyer discovers or should have discovered any breach of product merchantability.

Revocation of Acceptance (2-608)

An important case reported in last year's survey article of Illinois contracts and sales law¹⁵⁴ was *Overland Bond & Investment Corp.*

149. See UNIFORM COMMERCIAL CODE § 2-315, Comment 3, where the authors refer to "usage of trade" as one factor in determining "the allocation or division of risks." In the medical profession, it is the normal practice to warn patients of possible side effects. See also UNIFORM COMMERCIAL CODE § 2-314(2)(f), which states that for goods to be merchantable, they must "conform to the promises or affirmations of fact made on the container or label if any." Again, when drugs are sold, the labels must contain warnings of possible side effects.

150. UNIFORM COMMERCIAL CODE § 2-607(3)(a) states:

Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy

151. See 56 Ill. 2d at 556; 309 N.E.2d at 555, where the court said the proper way to raise such objection is by a motion pursuant to section 45(1) of the Illinois Civil Practice Act, ILL. REV. STAT. ch. 110, § 45 (1973).

152. See note 126 *supra* and accompanying text.

153. See discussion accompanying notes 128 and 129 *supra*.

154. See Bennett, *supra* note 17, at 185-89.

v. *Howard*,¹⁵⁵ where the First District, Fifth Division Appellate Court held that a consumer had properly revoked his acceptance of a defective used car bought from the plaintiff's assignor.¹⁵⁶ By allowing the defendant-consumer to assert section 2-608 of the U.C.C.,¹⁵⁷ the court enabled him to avoid liability for a failure to pay the balance due on the defective vehicle. This year section 2-608 was asserted offensively, rather than defensively, in *Boysen v. Antioch Sheet Metal, Inc.*¹⁵⁸ when a consumer wished to recover \$925 for the alleged "defective installation of an inadequate furnace." The purchaser contended that she gave repeated and continuing notices of defects, and when they were ignored, she removed the furnace and put it in storage.¹⁵⁹ The trial court held against her.¹⁶⁰ The appellate court for the second district appeared ready to accept her theory and, in fact, referred approvingly to the *Overland* decision on three occasions in its opinion.¹⁶¹ Unfortunately, the appellate court was compelled to affirm the trial court because there was no lower court record from which to conclude several necessary factual inquiries in her favor.¹⁶² The appellate court

155. 9 Ill. App. 3d 348, 292 N.E.2d 168 (1st Dist. 1972).

156. This was one of several bases for the court's decision. 9 Ill. App. 3d at 360, 292 N.E.2d at 177.

157. UNIFORM COMMERCIAL CODE § 2-608 states:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

158. 16 Ill. App. 3d 331, 306 N.E.2d 69 (2d Dist. 1974).

159. *Id.* at 332, 306 N.E.2d at 70.

160. *Id.* The trial occurred in a small claims court.

161. *Id.* at 332, 306 N.E.2d at 71.

162. *Id.*

Application of these legal principles to the instant case . . . is frustrated because the record before us contains no transcript of the trial proceedings.

wanted to know whether the defect complained of substantially impaired the value of the goods so as to justify her revocation, and whether sufficient notice of the defect was given within a reasonable time.¹⁶³ Since an unfamiliarity, if not hostility, to consumer-oriented law is commonly found among lower court judges, attorneys representing consumers should learn from *Boysen* the importance of preserving a lower court record when requesting relief from appellate courts.

Statute of Frauds: Definition of Merchant

In *Campbell v. Yokel*,¹⁶⁴ the Appellate Court for the Fifth District contradicted a one-year old decision of a sister court,¹⁶⁵ and in so doing, took the Statute of Frauds defense away from two defendant-farmers. The farmers, Frank and Robert Yokel, were alleged to have entered an oral agreement with plaintiff-owners of a grain and seed company for the sale of yellow soybeans at a price of about \$36,000. Plaintiffs signed and mailed to defendants a written confirmation of the alleged contract. Defendants received the writing, but did not sign it or give any notice of objection to its contents. Upon failing to deliver the soybeans, the Yokels were sued for breach of contract and asserted the Statute of Frauds as their defense.¹⁶⁶ Ordinarily, to be enforceable, a contract for the sale of goods with a price of over \$500 must be evidenced by a writing signed by the party *against whom enforcement is sought*.¹⁶⁷

Nor have the parties prepared a proposed report of proceedings from the best available sources, or agreed on a statement of facts, in accordance with Supreme Court Rule 323 [ILL. REV. STAT. ch. 110A, § 323(c), (d) (1973).] Instead, we are directed to the transcript of the arguments on the motion for a new trial in which the court and counsel in colloquy made partial references to their recollection of trial proceedings.

Id. at 332-33, 306 N.E.2d at 71.

163. See note 158 *supra*. In a memorandum opinion filed by the trial court—the only record of the trial proceedings available—the court indicated that the evidence supported answers to these questions in favor of defendant-seller, especially the second one dealing with sufficiency of notice. The lower court found that the notice did not comply with the requirement of particularization pursuant to section 2-605 of the Code. 16 Ill. App. 3d at 333, 306 N.E.2d at 71.

164. 20 Ill. App. 3d 702, 313 N.E.2d 628 (5th Dist. 1974).

165. *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (3d Dist. 1973).

166. ILL. REV. STAT. ch. 26, § 2-201 (1973). See notes 167 and 168 *infra*.

167. UNIFORM COMMERCIAL CODE § 2-201(1) states:

(1) Except as otherwise provided in this section a contract for the sale of

However, an exception is made in those cases between merchants where a written confirmation of the contract is sent a reasonable time after the making of the contract. The exception states that a contract may then be valid if the party seeking enforcement has signed the confirmation, and the party receiving the confirmation has reason to know of its contents and fails to object within ten days after he receives the confirmation.¹⁶⁸ Relying on the year-old case from Illinois' Third District Appellate Court, *Oloffson v. Coomer*,¹⁶⁹ and a nine-year old case from the Arkansas Supreme court for precedent,¹⁷⁰ the Yokels contended they were not "merchants," as defined by the Code.¹⁷¹ The Illinois case, while stating that a corn farmer was not a "merchant,"¹⁷² involved problems other than

goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and *signed by the party against whom enforcement is sought* or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing. (emphasis added.)

168. UNIFORM COMMERCIAL CODE § 2-201(2) states:

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

The reason for the exception is that in commercial practice, confirmation letters are frequently used and it is not an undue burden to place on a merchant an obligation to object to the contents of such letters. It amounts to no more than an obligation to answer mail. See 20 Ill. App. 3d at 705, 313 N.E.2d at 630. Of course, subsection 2 only takes away the defense of the Statute of Frauds, it does not eliminate the need for the plaintiff to prove the existence and terms of the contract he is alleging. See UNIFORM COMMERCIAL CODE § 2-201, Comment 3; Smith-Hurd Ill. Ann. Stat. ch. 26, § 2-201, Illinois Code Comment, subsection (2) (1963). See also 20 Ill. App. 3d at 706, 313 N.E.2d at 631.

169. 11 Ill. App. 3d 918, 296 N.E.2d 8 (3d Dist. 1973). See also Benett, *supra* note 17, at 189 n.50.

170. *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555 (1965). *But cf. Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. 1972).

171. UNIFORM COMMERCIAL CODE § 2-104 states:

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge of skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

172. *Coomer* . . . was simply in the business of growing rather than merchandising grain. He, therefore, was not a "merchant" with respect to the

the Statute of Frauds and for that reason might be distinguished from *Campbell*.¹⁷³ The Arkansas case was factually on all fours with *Campbell*, to the extent that a soybean farmer was claiming he was not a "merchant" within section 2-201(2) of the Code.¹⁷⁴ Nevertheless, both cases were rejected by *Campbell*,¹⁷⁵ and a circuit court's summary judgment favoring the Yokels was reversed.¹⁷⁶ Not to find the Yokels merchants, reasoned the court, in light of the fact they had been selling soybeans and other grains to companies for several years,¹⁷⁷ would have been ignoring the intent of the Code's drafters as reflected in the Official Comments to section 2-104.¹⁷⁸ The court stated:

The defendants admittedly were not "casual or inexperienced" sellers. We believe that farmers who regularly market their crops are "professionals" in that business and are "merchants" when they are selling those crops.¹⁷⁹

merchandising of grain.

11 Ill. App. 3d at 920, 296 N.E.2d at 873.

173. The issues in *Coomer* were whether there was an anticipatory repudiation of the contract under section 2-610 of the Code and how damages were to be measured under sections 2-711, 2-712, and 2-713. See Benett, *supra* note 17, at 189-91.

The court's conclusion of *Coomer* as a "non-merchant" arguably was unnecessary to its opinion, and hence only *dictum*, since the result would have been the same if *Coomer* had been found to be a merchant. In accord with this analysis is the court's opinion in *Campbell*. 20 Ill. App. 3d at 704, 313 N.E.2d at 629.

174. In that case, the farmer, Fallis, allegedly made an oral contract with a wholesaler, Cook Grains, Inc., for 5,000 bushels of soybeans at a price of \$2.54 per bushel. The wholesaler mailed to the farmer a copy of the contract of sale, signed by the wholesaler. The farmer neither signed nor returned the instrument, and the court permitted him to retain the defense of the Statute of Frauds because he was not a "merchant." See note 170 *supra*.

175. 20 Ill. App. 3d at 704, 313 N.E.2d at 629.

176. The court also remanded the case to allow plaintiff-Campbell to meet its burden of persuading the trier of fact that an oral contract had in fact been made prior to the written confirmation. 20 Ill. App. 3d at 706, 313 N.E.2d at 631. See UNIFORM COMMERCIAL CODE § 2-201(2), note 168 *supra*.

177. They admitted this fact in discovery depositions. 20 Ill. App. 3d at 705, 313 N.E.2d at 630.

178. UNIFORM COMMERCIAL CODE § 2-104, Comments 1 and 2. Comment 2 reads, in part, as follows:

The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

179. 20 Ill. App. 3d at 705, 313 N.E.2d at 630.

The court's reasoning is sound, with respect to how the word "merchants" should be defined for purposes of section 2-201(2). If a farmer in the position of the Yokels were not regarded as a "merchant," he would have an unfair advantage over the grain buyers with whom he dealt. The farmer would be able to rely on a buyer's written confirmation of an oral contract if he wanted to enforce the contract, but he would also be able to ignore the written confirmation and claim the protection of the Statute of Frauds if he did not want the contract enforced. This would allow him to speculate on prices for his goods (something which may be very useful during the recent period of price instability), while at the same time, having a buyer "frozen" to the contract price. Such free-wheeling on the part of the farmer would probably perpetrate more fraud than the Statute of Frauds would prevent. For sections of the Code other than 2-201(2), however, or for farmers who are not so experienced as the Yokels, there should be enough flexibility left for courts to reach conclusions different from that reached in *Campbell*.¹⁸⁰ There may be situations where courts would want to exempt certain farmers from the harsh standards the Code sometimes places on merchants.¹⁸¹ To this extent, it may be wise for the supreme court to let the appellate court decisions in both *Campbell* and *Oloffson* stand, regardless of their contradictory conclusions.

EPILOGUE

The foregoing Illinois cases were selected by this author as the most significant in the contracts-sales area during the prior year. Additional developments of interest to attorneys practicing contract-sales law are noted below.

A series of cases applied and interpreted the Illinois Fair Trade

180. The court itself recognized that not all farmers should now be regarded as "merchants" when it stated, "a farmer may be considered a merchant *in some instances* . . ." 20 Ill. App. 3d at 705, 313 N.E.2d at 630 (emphasis added). The court also recognized that farmers in the same position as the Yokels may not necessarily be regarded as "merchants" in future cases if the burden involved is something other than the "small burden" of "answering mail" which 2-201 places on them. *Id.*

181. In addition to subsection 2-201(2), there are 12 instances in Article II of the Code where a higher standard is indicated for "merchants." They are: sections 2-205, 2-207, 2-209, 2-314, 2-402(2), 2-403(2), 2-103(1)(b), 2-327(1)(c), 2-603, 2-605, 2-509, and 2-609. See UNIFORM COMMERCIAL CODE § 2-104, Comment 2.

Act.¹⁸² Four appellate courts upheld the validity of contract clauses requiring liquor retailers to honor minimum resale prices set by distributors.¹⁸³ In another group of cases, Illinois courts manifested a willingness to scrutinize fee arrangements between attorneys and clients.¹⁸⁴ Various types of contractual mistakes which would justify the reformation of contracts were discussed in four separate decisions.¹⁸⁵ The enforceability of forfeiture clauses in real estate and employment contracts were discussed in two decisions.¹⁸⁶ Further, in a class action suit challenging the retail practice of including certain taxes in credit account balances, the court examined the definitional sections of the Retail Installment Sales Act¹⁸⁷ before deciding in favor of the defendant retailers.¹⁸⁸

In the insurance contract area, the supreme court permitted an accumulation of recoveries under uninsured motorist clauses found in three separate insurance policies.¹⁸⁹ The same court construed an incontestability clause narrowly, allowing an insurer to

182. ILL. REV. STAT. ch. 121½, §§ 188-191 (1973).

183. *Calvert Distillers Co. v. Vesolowski*, 14 Ill. App. 3d 634, 303 N.E.2d 170 (1st Dist. 1973); *Taylor Wine Co., Inc. v. Foremost Sales Promotions, Inc.*, 12 Ill. App. 3d 1042, 299 N.E.2d 556 (1st Dist. 1973); *Heublein, Inc. v. Foremost Sales Promotions, Inc.*, 14 Ill. App. 3d 114, 302 N.E.2d 233 (1st Dist. 1973); *Buckingham Corp. v. Modern Liquors, Inc.*, 15 Ill. App. 3d 845, 306 N.E.2d 650 (1st Dist. 1973).

184. *Kravis v. Smith Marine, Inc.*, 15 Ill. App. 3d 494, 304 N.E.2d 720 (1st Dist. 1973); *Johnson v. Long*, 15 Ill. App. 3d 506, 305 N.E.2d 30 (1st Dist. 1973); *Drake v. Becker*, 14 Ill. App. 3d 690, 303 N.E.2d 212 (1st Dist. 1973). *But see* *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1st Dist. 1974), where no malpractice was found on the part of an attorney who failed to register a securities sale as required by state law.

185. *Harden v. Desideri*, 20 Ill. App. 3d 590, 315 N.E.2d 235 (1st Dist., 1974) (*see* *Kiely, Damages, Equity, and Restitution—Illinois Remedial Options, 1973-1974 Survey of Illinois Law*, 24 DEPAUL L. REV. 274 (1975)); *319 South LaSalle Corp. v. Lopin*, 19 Ill. App. 3d 285, 311 N.E.2d 288 (1st Dist. 1974); *Korsgaard v. Elliott*, 17 Ill. App. 3d 1061, 309 N.E.2d 263 (3d Dist. 1974); *Kolkovich v. Tosolin*, 19 Ill. App. 3d 524, 311 N.E.2d 782 (4th Dist. 1974).

186. *Miles Homes, Inc. v. Mintjal*, 17 Ill. App. 3d 642, 307 N.E.2d 724 (4th Dist. 1974); *Anderson v. Equitable Life Assur. Soc'y*, 17 Ill. App. 3d 489, 308 N.E.2d 387 (1st Dist. 1974).

187. ILL. REV. STAT. ch. 121½, §§ 501-533 (1973).

188. *Rose v. Sears Roebuck & Co.*, 12 Ill. App. 3d 929, 299 N.E.2d 95 (1st Dist. 1973).

189. *Glidden v. Farmers Automobile Ins. Assn.*, 57 Ill. 2d 330, 312 N.E.2d 247 (1974) (with the qualification that total recovery under all the policies does not exceed the total damages sustained).

challenge the eligibility of the insured.¹⁹⁰ Finally, the appellate courts granted greater protection to insurance companies by holding that the mere completion of an application for insurance does not impose liability on the part of the company.¹⁹¹

190. *Crawford v. Equitable Life Assur. Soc'y*, 56 Ill. 2d 41, 305 N.E.2d 144 (1973) (with the qualification that the challenge to eligibility can be tied to a risk assumed by the insurer and not to the validity of the policy).

191. *Kleinman v. Commercial Ins. Co.*, 19 Ill. App. 3d 1004 at 1007, 313 N.E.2d 290 at 292 (1st Dist. 1974); *Wallace v. Prudential Ins. Co.*, 12 Ill. App. 3d 623 at 628-29, 299 N.E.2d 344 at 347-48 (5th Dist. 1973). *Contra*, *Fuller v. Standard Oil Co.*, 1 Ill. App. 3d 799, 274 N.E.2d 865 (3d Dist. 1971), discussed in *Benett*, *supra* note 17, at 156-58.