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## NOTES

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### SOME ASPECTS OF THE LAW OF MISTAKE IN ILLINOIS\*

Although the law of mistake is thoroughly permeated with uncertainty, it is the intention of this note to confine the discussion—with the emphasis on Illinois law—to those problems presented by the distinction between mistake of law and mistake of fact; unilateral mistake as distinguished from mutual mistake; relief when there has been a change of position by the parties to the transaction; and the distinction of misunderstanding.

#### I

The differentiation between mistake of law and mistake of fact and the denial of relief in the former cases has long caused a great deal of controversy. But in recent years, the writers appear to be in harmony in stating that relief

\* This and the following two notes are part of a single project—the examination of various aspects of the law of contracts, with an emphasis on Illinois law. The reader is referred to: *Contracts without Consideration*; *The Seal and the Uniform Written Obligations Act*, 3 *Univ. Chi. L. Rev.* 312 (1936); *Some Aspects of Delivery: Specialties and the Uniform Written Obligations Act*, 3 *Univ. Chi. L. Rev.* 488 (1936); *Suretyship Releases in the Law of Mortgages*, 4 *Univ. Chi. L. Rev.* 469 (1937); other notes completing the pattern will appear in subsequent issues of the *Review*.

for mistake of law should be given as readily as that for mistake of fact.<sup>1</sup> A few courts have come to the same conclusion.<sup>2</sup>

The doctrine that there will be no relief for an error of law is apparently no more than a historical continuation of the statement of Lord Ellenborough in *Bilbie v. Lumley*<sup>3</sup> that "every man must be taken to be cognizant of the law." Prior to the nineteenth century no distinction had been made between mistakes of fact and mistakes of law.<sup>4</sup> Nor does the civil law make any such general distinction.<sup>5</sup>

The applicability of a maxim generally applied in criminal law to contract law is questionable. There can be no doubt that to the layman questions of law are often much too difficult for his comprehension, and he may be just as ignorant of a particular legal situation, in relation to which he contracts, as of the existence of any specific fact.<sup>6</sup>

Although this particular question rapidly may be becoming less troublesome, the difficulty concerning relief for unilateral mistake is as puzzling and as remote from solution as ever. The underlying reasons for relief for mistake in the formation of contracts, where a contract exists despite the mistake, as distinguished from cases commonly denoted as misunderstanding, where relief is given because it is said that no contract exists, have generally been considered to be unjust enrichment, failure of consideration, and impossibility of performance.<sup>7</sup>

Whether and to what extent a court should intervene in a particular case of unilateral mistake may be approached from several possible viewpoints. The most widely adhered to, supported by Professor Williston, is that based upon the objective theory of contracts. Although recognizing that courts extensively give relief for unilateral mistake when the contract is executory,<sup>8</sup>

<sup>1</sup> 5 Williston, *Contracts* § 1581 (rev. ed. 1937); Clark, *Equity* § 345 (1919); Woodward, *Quasi-Contracts* § 36 (1913); Keener, *Quasi-Contracts* 85 (1893); Rest., *Restitution*, 179 (1937).

<sup>2</sup> *Peterson v. First National Bank of Ceylon*, 162 Minn. 369, 203 N.W. 53 (1925); *Reggio v. Warren*, 207 Mass. 525, 93 N.E. 805 (1911); *Renard v. Clink*, 91 Mich. 1, 51 N.W. 692 (1892).

<sup>3</sup> 2 East 469 (1802).

<sup>4</sup> 5 Williston, *loc. cit. supra* note 1; Rest., *Restitution*, 179 (1937); Clark, *loc. cit. supra* note 1.

<sup>5</sup> See the discussion of the interpretation of the German Civil Code in 5 Williston, *op. cit. supra* note 1, at 4478.

<sup>6</sup> Foulke, *Mistake in the Formation and Performance of a Contract*, 11 Col. L. Rev. 197, 201 (1911).

<sup>7</sup> Thayer, *Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions*, Harv. Legal Essays 467 (1934); 5 Williston, *op. cit. supra* note 1, at 4335; Foulke, *op. cit. supra* note 6, at 221, suggests that impossibility of performance and failure of consideration are not to be considered proper reasons for granting relief in mistake cases.

<sup>8</sup> 5 Williston, *op. cit. supra* note 1, at § 1578.

he would narrow the scope of relief to those cases where: (1) the mistake was known to the other party to the transaction, or (2) the person against whom relief is sought is in the position of a donee or volunteer.<sup>9</sup> The Williston objection to a broader doctrine of relief for unilateral mistake is that such redress is a contradiction of the objective theory of contracts. To allow release from obligations when only one party is mistaken would destroy the stability and definiteness secured by the objective theory.<sup>10</sup> Furthermore, a person would seem deserving of the benefit of a bargain made by him without fraud or duress.<sup>11</sup> If he gives such consideration as would support a simple contract it should be binding, and the other party should not be entitled to the return of what he gives merely because he is mistaken as to any facts<sup>12</sup> causing him to enter into the transaction.<sup>13</sup>

A second possible approach is based upon the suggestion that the reasonable interpretation of contracts is nothing but the reasonable man of torts appearing in another form. It is urged that relief for mistake should be dependent not upon whether the mistake was mutual, but should turn upon a useful tort doctrine, that of assumption of risk.<sup>14</sup> Thus, parties to a contract might well be presumed to undertake the risk that the facts upon which the contract was entered into might, within a certain margin, prove different in fact. Upon such analysis, it is contended, one who is faultlessly or even negligently mistaken should not, in the absence of a deliberate assumption of risk, be held liable for more than the actual expenses occasioned by his conduct.<sup>15</sup> Such expenses would not include any compensation for the other party's loss of the benefit of his bargain. Such reasoning does not entail a denial of the objective theory of contracts, for assumption of risk may be treated as objectively as any other phase of contract or, for that matter, as any other tort question. Nor does the objective theory of contracts, *per se*, require a denial of relief for unilateral mistake, unless one is also unwilling to deny that relief for mutual

<sup>9</sup> *Id.*, at § 1573.

<sup>10</sup> *Id.*, at § 1579.

<sup>11</sup> Cases of fraud undoubtedly would fall within Professor Williston's first category.

<sup>12</sup> The term "facts" is used in a broad sense to include also mistake of law.

<sup>13</sup> 5 Williston, *op. cit. supra* note 1, at § 1579; Rest., Restitution § 12 (1937).

<sup>14</sup> For a fuller development of this thesis see M. P. Sharp, Notes on Contract Problems and Comparative Law, 3 Univ. Chi. L. Rev. 277 (1936), and M. P. Sharp, Williston on Contracts, 4 Univ. Chi. L. Rev. 30 (1936). For an interesting and pertinent discussion of the moral-ethical aspect of mistake see F. C. Sharp, The Ethics of Breach of Contract, 45 Int. J. Ethics 27 (1934).

<sup>15</sup> "If a man states a thing reasonably, believing that he is speaking from knowledge, it is contrary to the analogies of the law to throw the peril of the truth upon him unless he agrees to assume that peril . . ." Holmes, The Common Law 323 (1881); see also Whittier, The Restatement of Contracts and Mutual Assent, 17 Calif. L. Rev. 441, 442 (1929).

It is upon this basis that relief for mistake is given under the German Civil Code § 122, 5 Williston, *op. cit. supra* note 1, at § 1600 C; see also Thayer, note 6 *supra*, for an extensive comparison of civil and common law rules of mistake.

error is inconsistent with such theory. The same outward elements which are relied upon to indicate the existence of a contract are present in either case. And there can be no question but that in cases of unilateral mistake one party may receive a windfall to which he is not entitled.<sup>16</sup>

A third method of attack upon the problem might be denominated as the "economic approach."<sup>17</sup> This recognizes that the commercial world is properly guided in investing and contracting when those who bargain at the market are fully informed as to all vital facts concerning any particular transaction. Consequently, a contract established upon such misinformation or mistake as would have deterred the parties from entering into the transaction had they known the true situation, should be set aside. This would obviate unjust enrichment resulting from an unfair price caused by mistake. Here, too, relief would be given in cases of unilateral mistake, and compensation would not be given for loss of bargain but the party seeking relief would be liable only for expenses caused to the other party.

Practically, the Williston view has in its favor simplicity of operation in limiting relief to two categories whose applicability to a particular fact situation normally would be easy to ascertain. On the other hand, cases may occur in which there would be unjust enrichment but no relief given because they do not come within either category. The other two approaches, on the contrary, are possibly too liberal in giving relief to the mistaken party. It would seem unfair that the party not mistaken, assuming he knew nothing of the mistake of the other, but relied on their contract relation, should lose the benefit of other bargains which *at the time* he may have been able to make with anyone else in the market, but which he *no longer* can secure. A possible mean might be achieved by a proper placing of the burden of proof. Relief for unilateral mistake should be granted whenever there is the absence of any element akin to assumption of risk on the part of the party who makes the mistake, so long as the party resisting relief can be equitably compensated for any expenses and for possible loss of other bargains.<sup>18</sup>

<sup>16</sup> See the opinion of Lord Sumner in *Jones v. Waring*, [1926] A.C. 670.

<sup>17</sup> Sharp, *Williston on Contracts*, 4 Univ. Chi. L. Rev. 30, 38 (1936).

<sup>18</sup> It is desirable at this time to be quite general, allowing the courts to adopt workable rules consistent with the general principles advocated. However, it might not be too bold to suggest a possible line of demarcation in ascertaining when a party would be entitled to the benefit of his bargain by a refusal to set the contract aside or by monetary compensation.

It should be shown that the bid or offer which was made by virtue of a mistake of the offeror was within the limits of possible fluctuation for such offers if made without mistake and in light of market conditions at that time. This might be called the "range of the competitive market." Furthermore, it should appear that, because of an adverse change in the market, the offeree no longer can obtain any bid whatsoever within the "range of the competitive market" as it existed at the time of the original offer. If offers are still available within this range it would not be too great a hardship to compel the offeree to go elsewhere as compared with the hardship upon the offeror in compelling him to perform the contract at the low figure caused by his mistake. In certain situations this test would be stricter than that applied in other portions of

The treatment of the situations where there has been a change of position by one of the original parties subsequent to the transaction in which there has been either mutual or unilateral error has been quite orthodox. It is ordinarily said that any slight change of position bars recovery for mistake, even though the mistake was mutual.<sup>19</sup> It would seem, however, that the problems presented here are analogous to those arising in cases of unilateral mistake. When one gets a windfall because of a mistake he should not be entitled to keep it despite a partial change in position, but relief should be given, conditioned, of course, upon compensation for any actual damages suffered.<sup>20</sup> It might be noted that the Restatement on Restitution says that the right to restitution is terminated or *diminished* if circumstances have so changed that it would be inequitable to require the other party to make full restitution.<sup>21</sup>

A case might well be imagined in which *A* and *B* enter into a contract for the sale of 500 gallons of wine at a price of \$300 based upon a mutual error as to the year of the vintage. The wine, however, is actually older than both parties supposed and is really worth \$500. Subsequently, *B*, not yet having discovered the mistake, enters into a contract for resale to *C* at a price of \$400. It would seem only proper that *A*, prior to the actual consummation of the sale between *B* and *C*, should be able to rescind the contract upon the payment of the actual damages *B* will suffer, which in this case will be, if anything, \$100 that *C* will recover from *B* for his failure to perform his contract. Because of his mere change of position by a contract for resale, *B* should not be entitled to keep the wine worth \$200 more than he paid. On analogy to tort, it would seem improper to make one suffer, because of a careless use of language or language used in ignorance of a true state of affairs arising either with or without fault, for an amount greater than the damage actually caused the other party who has acted or changed his position in reliance thereon.

The various approaches suggested in relation to unilateral mistake are applicable also to those cases of error commonly referred to by the term "misunderstanding." A typical case of such misunderstanding would be a Chicago concern quoting to a customer prices which include delivery to Washington, the concern quoting with reference to Washington, D.C., but the customer

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contract law, *i.e.*, the mere showing that the next highest bid is unavailable. If the bid is not within the "range of the competitive market" it might well be found that the offeree should have known that the low bid was induced by mistake, and should not be allowed to take advantage of such a situation.

In addition, the burden of proof should be placed upon the person who is seeking to hold the mistaken party to his bargain. In the event that he can not satisfy the court with the proper quantum of evidence as to the existence of the above elements relief should be given for the mistake conditioned only upon compensation for actual expenses.

<sup>19</sup> 5 Williston, *op. cit. supra* note 1, at §§ 1594, 1595; Clark, Equity § 379 (1919).

<sup>20</sup> This argument does not apply to those cases in which the change of position has been such that reformation or rescission would be substantially impossible.

<sup>21</sup> Rest., Restitution § 69 (1937).

seeking to contract with respect to delivery to the State of Washington. It has been urged in such cases that a party is not bound by ambiguous language since there can be no certain, manifested mutual assent which would create a binding contract.<sup>22</sup> Another possible approach is to treat any transaction of this type as a nullity on the theory that in such cases there is an entire absence of sufficient elements to constitute a valid promise.<sup>23</sup> Here, too, an inquiry as to the assumption of risk or even the fault of either of the parties might be pertinent prior to allowing the transaction to be set aside, and any relief given might be conditioned upon the payment of compensation for damages actually suffered by the party being sued for relief. In *Falck v. Williams*<sup>24</sup> the appropriate inquiry might have been whether or not the party seeking relief had been at fault or assumed the risk by failing to spend the extra shillings necessary to clarify the message. Such relief as splitting the loss between two parties equally at fault or equally innocent, rather than having one party bear the entire cost, might well be adopted.<sup>25</sup>

## II

After this theoretical inquiry, an examination of the Illinois cases in relation to these problems seems pertinent. As to the distinction between mistake of fact and mistake of law, in Illinois, the law appears to be quite settled. The earlier cases quite flatly state that there can be no relief for mistake when the mistake is one of law.<sup>26</sup> When the parties know what words are used equity will not grant relief for a mistake as to the legal effect of the language used.<sup>27</sup> However, a few cases, where the mistake was due to the ignorance of the scrivener, even though his mistake was one of law,<sup>28</sup> or where the party seeking relief was ignorant of the particular words used<sup>29</sup> relief has been given.

Apparently the doctrine of no relief for mistake of law did disturb some of the justices of the Illinois Supreme Court as indicated by the dissenting opin-

<sup>22</sup> 1 Williston, *op. cit. supra* note 1, at § 95; Foulke, *op. cit. supra* note 6, at 208; Raffles v. Wichelhaus, 2 H. & C. 906 (1864).

<sup>23</sup> Such an approach is indicated by Professor Sharp's treatment of these cases as a problem of the interpretation of promises: Sharp, *Cases on Contract and Quasi-Contract* (1937-8).

<sup>24</sup> [1900] A.C. 176 (the correspondence between the parties was by means of telegraphic code).

<sup>25</sup> For an application of such theory to the tort field, see Gregory, *Legislative Loss Distribution in Negligence Actions* (1936).

<sup>26</sup> *Shafer v. Davis*, 13 Ill. 396 (1851); *People v. Foster*, 133 Ill. 496, 23 N.E. 615 (1890); *Seymour v. Bowles*, 172 Ill. 521, 50 N.E. 122 (1898).

<sup>27</sup> *Gordere v. Downing*, 18 Ill. 492 (1857); *Wood v. Price*, 46 Ill. 439 (1868); *Fowler v. Black*, 136 Ill. 363, 26 N.E. 596 (1891); *Holbrook v. Tomlinson*, 304 Ill. 579, 136 N.E. 745 (1922).

<sup>28</sup> *Keith v. Globe Ins. Co.*, 52 Ill. 518 (1869); *Kyner v. Ball*, 182 Ill. 171, 54 N.E. 925 (1899).

<sup>29</sup> *Dinwiddie v. Self*, 145 Ill. 290, 33 N.E. 892 (1893); see also *Englebrecht v. Englebrecht*, 323 Ill. 208, 153 N.E. 827 (1926) (relief given for mistake of law because of disparity in the position of the parties).

ions in *Atherton v. Roche*<sup>30</sup> and *Tilton v. Fairmount Lodge*.<sup>31</sup> In the former case, the dissent attempted to limit the doctrine to cases of mistake of the legal principle involved as distinguished from mistake as to the particular individual's legal rights. In two subsequent cases in which the court gave relief for mistake, the question of whether or not the mistake was one of law was not discussed, but on closer examination it seems that this was the error of the parties.<sup>32</sup> In the case of *Peter v. Peter*,<sup>33</sup> the court expressly refusing to follow the time worn dogma and stating that there are some cases in which equity will intervene if such is the dictate of justice, said:

Private legal rights, interests, duties or liabilities are always more or less complex, particularly to the layman. They depend upon conditions of fact as well as rules of law, and a concrete notion of a private legal right, interest or liability is not readily separated from the facts on which it depends. Such mistakes may therefore be, and frequently are, properly considered as mistakes of fact.<sup>34</sup>

This same attitude was recently reflected in *Darst v. Lang*.<sup>35</sup> It should be noted that the holding of the court is not a denial of the usual rule in such cases where the mistake is as to the general legal principles involved. In this situation there is no indication in the cases that the rule denying relief has been abrogated.

The Illinois courts in their treatment of unilateral mistake have made a distinction bearing on the type of relief sought. If the mistaken party seeks rescission it has been said that such relief will be granted but if reformation is sought redress will be denied.<sup>36</sup> The reasoning of the courts in upholding rescission but denying reformation is that there is no meeting of the minds and therefore there was no agreement to which the writing could be made to conform. This talk of the courts, embodying subjective phraseology, is misleading. The necessary elements for the existence of a contract on the basis of the objective theory seem to be present and the cases are not true cases of misunderstanding. But denial of reformation is apparently sound. In cases of mutual error reformation is the changing of the written instrument to conform with the prior agreement and understanding of the parties. Whereas, to give reformation in cases of unilateral mistake would be tantamount to the foisting of a new contract upon the non-mistaken party.<sup>37</sup>

<sup>30</sup> 192 Ill. 252, 61 N.E. 357 (1901).

<sup>31</sup> 244 Ill. 617, 91 N.E. 644 (1910).

<sup>32</sup> *Highway Comm'rs. v. Bloomington*, 253 Ill. 164, 97 N.E. 280 (1912); *Moore v. Shook*, 276 Ill. 47, 114 N.E. 592 (1916).

<sup>33</sup> 343 Ill. 493, 175 N.E. 846 (1913).

<sup>34</sup> *Id.*, at 498.

<sup>35</sup> 367 Ill. 119, 10 N.E. (2d) 659 (1937).

<sup>36</sup> *Morgan v. Owens*, 228 Ill. 598, 81 N.E. 1135 (1907); *Bivins v. Kerr*, 268 Ill. 164, 108 N.E. 66 (1915); *Nelson v. Pedersen*, 305 Ill. 606, 137 N.E. 486 (1922); *Schaefer v. Henze*, 337 Ill. 41, 168 N.E. 625 (1929); but see *Harmony Way Bridge Co. v. Leathers*, 353 Ill. 378, 187 N.E. 432 (1933).

<sup>37</sup> *Patterson, Equitable Relief for Unilateral Mistake*, 28 Col. L. Rev. 859, 884 (1928). For a note in relation to this distinction see, 59 A.L.R. 807 (1929).

There are exceptions to the granting of rescissory relief. It is said such relief will be denied if the complainant has been negligent and failed to exercise due care.<sup>38</sup> Such was the holding of *Steinmeyer v. Schroepffel*,<sup>39</sup> although in *Devine v. Edwards*<sup>40</sup> it was said that negligence in not discovering the mistake would not be a bar to relief. The identical problem of the *Steinmeyer* case is found in *Bromagin v. City of Bloomington*,<sup>41</sup> in which a contractor made a miscalculation in his bid. The court decided that there was no such negligence as would bar relief because the contractor was pressed for time in preparing his bid. Denial of relief because of negligence is not an absolute rule. Thus, relationship of trust has been said to excuse a want of care in examining a deed.<sup>42</sup> Negligence, *per se*, should not be a bar to relief for mistake, but if the doctrine of negligence is to be incorporated into this field of contract law, logically the negligent party should be liable only for actual damages suffered, and relief should be conditioned upon such compensation.

It might be appropriate in order to have stability of contract in a commercial world to hold that a contractor in submitting a bid, has assumed the risks of making mistakes. This is said in the compromise and settlement cases.<sup>43</sup> But if, as in the *Bromagin* case, the bid actually submitted is so out of line with all possible prices as to put the buyer on notice that a mistake has been made it cannot be so argued.

Since relief for unilateral mistake is given in some instances in Illinois, perhaps a gradual extension of relief may be possible beyond its present narrow confines even to cases in which the complainant has been negligent, providing that the adoption of some such doctrine as the assumption of risk coupled with a proper placing of the burden of proof as to loss of bargain will provide adequate protection for commercial contracts.<sup>44</sup>

As to the situation in which there has been a change of position by either party to the transaction, the general rule in Illinois is that there can be no rescission of a contract unless the other party can be put in a *status quo*, and rescission must be *in toto*.<sup>45</sup> Moreover, those cases which say rescission will be

<sup>38</sup> *Bonney v. Stoughton*, 122 Ill. 536, 13 N.E. 833 (1887); *Tosier v. Mayer*, 315 Ill. 362, 146 N.E. 465 (1925).

<sup>39</sup> 226 Ill. 9, 80 N.E. 564 (1907) (the seller made an error in his bid by wrongly adding a column of figures, one of the figures having been displaced in the column); see 2 Ill. L. Rev. 267 (1907).

<sup>40</sup> 87 Ill. 177 (1877).

<sup>41</sup> 234 Ill. 114, 84 N.E. 700 (1908).

<sup>42</sup> *Purvines v. Harrison*, 151 Ill. 219, 37 N.E. 705 (1894); *Morgan v. Owens*, 228 Ill. 598, 81 N.E. 1135 (1907); *McCall v. Middleton*, 304 Ill. 408, 136 N.E. 723 (1922).

<sup>43</sup> *Jones v. Wright*, 71 Ill. 61 (1873); *Frank v. Tolman*, 75 Ill. 648 (1874); *Kall v. Block Co.*, 319 Ill. 339, 150 N.E. 254 (1926); see also *Botsford v. Wilson*, 75 Ill. 132 (1874).

<sup>44</sup> Note 18 *supra*.

<sup>45</sup> *Buchenau v. Horney*, 12 Ill. 336 (1851); *Lovington v. Short*, 77 Ill. 587 (1875); *Bollnow v. Novacek*, 184 Ill. 463, 56 N.E. 801 (1900); *Fisher v. Burks*, 285 Ill. 290, 120 N.E. 768 (1919).

given for unilateral mistake do so only if no injustice will result to the other party and if rights of innocent third parties have not intervened.<sup>46</sup> Where relief for mistake has been sought against a bona-fide purchaser from a party to the original transaction, the court has said that no correction for mistake would be given if the purchaser was without notice of the mistake.<sup>47</sup> The purchaser need not have actual knowledge to be defeated, for if the situation was such at the time of his purchase that he should have been put on notice of the mistake, relief will be given against him.<sup>48</sup> The case of *Sickmon v. Wood*<sup>49</sup> denied relief to a mortgagee in a foreclosure proceeding against a later purchaser because of a mistaken description in the mortgage, of which mistake the purchaser was unaware. This seems obviously unjust as depriving the mortgagee of the security for his debt. In *Way v. Roth*,<sup>50</sup> a mortgage was reformed for a mistake in description even though subsequent grantees had purchased the premises without knowing of the mistake. Relief was proper since the grantees purchased the premises on the understanding that there was a mortgage thereon. It is highly probable that this was the understanding in the *Sickmon* case as well. *Way v. Roth* does not, however, appear to indicate any decided tendency in the Illinois courts, to depart from the accepted doctrine that a change of position by either party, complainant or defendant, will be a bar to relief.

The subject matter of misunderstanding reveals a scarcity of cases; few of them have been taken to the Supreme Court for decision. In *Rupley v. Daggert*,<sup>51</sup> a seller of a horse was allowed to recover the property in an action of replevin when it appeared that the parties had not understood each other as to the price. Another case of misunderstanding was that of *Shores, Dunham and Co. v. Barker*<sup>52</sup> in which a third party failed to communicate the offer as made by the offeror. In the latter case the court said the proper remedy would be rescission upon discovery of the mistake. More properly, it would seem there was no contract to rescind. Nor was anything said about splitting any costs or expenses although both parties were equally at fault.

At this time, it cannot be said that the Illinois courts have adhered strictly to the objective theory of contracts in handling the various problems of mistake. Nor on the other hand have they taken into consideration the possible tort and economic theories suggested.

<sup>46</sup> *Morgan v. Owens*, 228 Ill. 598, 81 N.E. 1135 (1907); *Bivins v. Kerr*, 268 Ill. 164, 108 N.E. 996 (1915); *Nelson v. Pedersen*, 305 Ill. 606, 137 N.E. 486 (1922); *Schaefer v. Henze*, 337 Ill. 41, 168 N.E. 625 (1929); see also *Dillard v. Jones*, 229 Ill. 119, 82 N.E. 206 (1907).

<sup>47</sup> *Sickmon v. Wood*, 69 Ill. 329 (1873); see also the dictum in *Boone v. Graham*, 215 Ill. 511, 74 N.E. 559 (1905).

<sup>48</sup> *Skelly v. Ersch*, 305 Ill. 126, 137 N.E. 106 (1922); *Pearce v. Osterman*, 343 Ill. 175, 175 N.E. 416 (1931).

<sup>49</sup> 69 Ill. 329 (1873).

<sup>50</sup> 159 Ill. 162, 42 N.E. 321 (1895).

<sup>51</sup> 74 Ill. 351 (1874).

<sup>52</sup> 88 Ill. 212 (1878).