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DAMAGES, EQUITY, AND RESTITUTION—ILLINOIS REMEDIAL OPTIONS

Terrence F. Kiely*

In this Article, Professor Kiely presents a unified Remedies approach to the legal concepts of Damages, Equity, and Restitution. He surveys Illinois decisions in the Damages area including personal injury and death, interest on judgments, and injuries to personality and realty. In the Equity field, he discusses the concepts of restitution, injunctions, and the equitable defenses available to defendants. The author concludes his Article with an analysis of Illinois' confusing election of remedies doctrine.

I. INTRODUCTION

The past decade has witnessed an ever increasing focus upon problems relating to constitutional law, criminal procedure, and the rights of the economically disadvantaged. As a result, the more traditional areas of damages, equity, and restitution have been de-emphasized in both law school curriculums and legal journals. In response to concerns felt by the bar and legal educators alike, these topics have been revived in the form of a broader analytical concept labeled “remedies.” By combining these topics as one course and stressing the remedial aspects of the subject matters, the twin goals of resurrecting interest in these areas and maximizing their utility to the practicing bar have hopefully been achieved.1

This current model for law school study reinforces the necessity for the practicing lawyer to approach a legal problem from the standpoint of “options.” Having arrived at the substantive grounds for relief, the lawyer should take a close look at the advantages, disadvantages, and dangers involved in choosing among several available remedies or “options.” This provides a safe, sound basis for further proceedings.

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1. Until relatively recent times, separate courses in Equity, Restitution, or Damages were offered with varying degrees of frequency. In addition, topics included within those subjects were and continue to be touched on in the context of other substantive courses such as Contracts, Torts, etc.
Another advantage of the unified format of the current model is that it gives the students the opportunity to engage in continual problem solving involving numerous areas of concentration. This develops analytical skills that will serve them well in the future.

Finally, the current analytical approach has the merit of bringing home to the practitioner, in a much more realistic and practical manner, the relationship between “law” and the “principles” of equity jurisprudence.\(^2\)

This Article, although limited to a discussion of the decisions rendered in the past year by Illinois courts,\(^3\) will adhere to this basic approach. Because treatment of the damage rule structure and remedial option base for cases involving the sale of goods is more appropriate in a study of the Uniform Commercial Code,\(^4\) these topics will not be included in this Article.

Consequently, this Article will deal with three basic topics: damages, equity, and election of remedies. The section on damages is a compendium of the recent decisions involving personal injury and death, interest on judgments, injuries to interests in personal property, and injuries to interests in realty. The discussion of equity will survey cases focusing on restitution, the devices of equity utilized to effectuate restitution (the constructive trust, accounting, and receivership), the injunction, and the limits of equitable relief (laches, equitable estoppel, and the “clean hands” doctrine). The concluding section will deal with aspects of the confusing and often misunderstood doctrine of election of remedies.

II. DAMAGES

Personal Injury and Death

In two recent appellate court decisions, Bireline v. Espenscheid\(^5\)
and *Cargnino v. Smith*, the collateral source rule, a major point of contention among defense counsel, received further judicial support. Simply stated, the collateral source rule provides that the benefits received by a plaintiff from a source wholly independent and "collateral" to the tortfeasor will not diminish the amount of damages otherwise recoverable.

The main focus of this concept has been directed to the receipt of insurance proceeds by the plaintiff, since the rule provides that the defendant may neither raise in the course of trial nor deduct from any award any hospitalization, medical, or other compensatory payments inuring to the plaintiff. The rule, while not limited to the receipt of insurance proceeds or other collateral sources for which the plaintiff has paid some consideration, has been used as the conceptual basis for preventing the plaintiff from raising the fact that he has no collateral source to rely upon. As will be seen, the proper application of the concept has often been blurred by its use in instances which could have been more appropriately decided on the basis of the substantial prejudice or irrelevancy of the evidence presented, even though those two factors lie at the heart of the rule itself.

In *Espenscheid*, an action for injuries brought under the Dram Shop Act, the defendants sought to introduce evidence of medical payments made to the plaintiff by his health insurance carrier, arguing (1) that the Dram Shop Act, when discussing "injury to property," intended to limit recovery to those items set out in the Family Expense Statute and (2) that that statute only provided for recovery of obligations in fact owed or personally paid by the plain-

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8. 15 Ill. App. 3d at 370, 304 N.E.2d at 510.
9. Id.
10. See, e.g., Goldstein v. Gontarz, 309 N.E.2d 196 (1974) (plaintiff's statement to the jury that he had elected not to seek Workmen's Compensation payments held violative of the rule).
tiff. In rejecting the defendant's theory that the collateral source rule was inapplicable in this statutory cause of action, the court held that the mere fact that the elements of special damage fell within the scope of obligations covered by the Family Expense Statute did not alter the clear applicability of the collateral source rule.\(^\text{14}\)

In the more unique decision of *Cargnino v. Smith*,\(^\text{15}\) the fifth appellate district discussed, in the context of the collateral source rule, the weight to be given the plaintiff's claim for lost wages in light of his receipt of total disability payments from the United States government for emphysema and black lung disease. The plaintiff was hit by the defendant's automobile as he walked along a roadway. Medical testimony was introduced establishing that the plaintiff would be unable to work for a year because of the injuries received in the accident.

The plaintiff, a coal miner, was classified as totally disabled under government standards and was receiving monthly disability payments. The defendant, over objection, introduced evidence of the plaintiff's payments to establish the fact that there could be no lost wages for the ensuing year due to the plaintiff's total disability. Medical testimony was offered by the plaintiff to further establish the fact that emphysema and black lung were progressively disabling diseases and that he was capable of working even though his disorders had progressed sufficiently to meet the government standards for receipt of total disability payments.

The court, on the basis of the collateral source rule, reversed a verdict in defendant's favor, stating:

> The uncontroverted testimony was that plaintiff was disabled from working for at least a year solely because of injuries received in the accident, totally distinct from his emphysema and black lung conditions. Thus, testimony of black lung and social security benefits was improper under the collateral source rule.\(^\text{16}\)

As to the ability of defendant to utilize the fact of plaintiff's government classification, the court held that the manner in which total disability was determined for purposes of the receipt of benefits was irrelevant to the issue of plaintiff's *actual* ability to work:

\(^\text{14}\) 15 Ill. App. 3d at 370, 304 N.E.2d at 510.
\(^\text{15}\) 17 Ill. App. 3d 831, 308 N.E.2d 853 (5th Dist. 1974).
\(^\text{16}\) Id. at 834, 308 N.E.2d at 856.
We do not mean to suggest that evidence of plaintiff's prior physical condition, including black lung disease and emphysema, is to be excluded. However, plaintiff's prior physical condition can be established without any reference to governmental agencies' standards for disabilities from unrelated causes or any reference to benefits which such agencies disburse.\footnote{Id.}

The \textit{Espenscheid} and \textit{Smith} cases thus lend further support to the principle that a tortfeasor should not benefit from the fact that the injured party receives compensation from a collateral source. While the rule appears anomalous in light of the fact that compensatory damages are presumed to be economic in nature and serve to make the plaintiff "whole," the punitive aspect of the plaintiff's double recovery has received little or no discussion in the case law. The effect of the collateral source rule and the open-ended concept of "pain and suffering" on the alleged economic base of personal injury awards will be discussed further in this Article after the subjects of punitive damages and wrongful death are analyzed.

In the area of wrongful death and the relationship between that statutory cause of action\footnote{ILL. REV. STAT. ch. 70, §§ 1-2 (1973).} and actions for personal injuries that survive under the Survival Act,\footnote{ILL. REV. STAT. ch. 3, § 339 (1973).} The Supreme Court of Illinois, in the case of \textit{Murphy v. Martin Oil Co.},\footnote{56 Ill. 2d 423, 308 N.E.2d 583 (1974).} has eliminated the unitary death concept and joined the vast majority of jurisdictions throughout the nation.

Based upon the nearly century old authority of \textit{Holton v. Daly},\footnote{106 Ill. 131 (1882).} Illinois courts, with certain important exceptions,\footnote{See generally Note, \textit{Death of the Abatement Doctrine—Murphy v. Martin Oil Co.}, 1973-1974 Survey of Illinois Law, 24 DEPAUL L. REV. 608 (1975).} have consistently held that if a decedent's death was the direct result of injuries upon which an action for injuries was based, such action abated. Thereafter, the only vehicle for recovery was an action for pecuniary loss to the widow and next-of-kin under the Wrongful Death Act. The only times the action for injuries survived under the statute were in instances where the death resulted from causes unrelated to the conduct of defendant.
In *Martin Oil*, the plaintiff administratrix brought an action for the wrongful death of her husband with a separate count for the personal injuries suffered by him during the nine-day period between the date of his injury and directly resulting death. At the trial level, plaintiff's second count was dismissed.

The supreme court, speaking through Justice Ward, after an examination of opposing case law in most of the other jurisdictions and a series of Illinois decisions that had eroded the unitary death concept, reversed *Holton v. Daly* and its progeny. The court declared that, henceforth, if death were not instantaneous, an action for personal injuries shall not abate even if death results directly from the injuries received, and that the action may be maintained contemporaneously with an action for pecuniary loss under the Wrongful Death Act.

The basis for the ruling, stated Justice Ward, was the basic unfairness of the prior conceptual posture:

To say that there can be recovery only for his wrongful death is to provide an obviously inadequate justice. Too, the result in such a case is that the wrongdoer will have to answer for only a portion of the damages he caused. Incongruously, if the injury is so severe that death results, the wrongdoer's liability for the damages before death will be extinguished. It is obvious that in order to have a full liability and a full recovery there must be an action allowed for damages up to the time of death, as well as thereafter.24

This decision, long overdue, rectifies an unjust response to the legitimate claims of scores of families who have suffered through the injury and eventual death of a loved one. The ruling, allowing for the maintenance of both actions, is, however, bound to raise several crucial issues due to the separate conceptual bases for damage valuation in the two actions.

The Wrongful Death Act limits recovery to loss of support or "pecuniary loss" and formally excludes recovery on items such as medical bills, lost wages, and other items of special damages as well as general damages for pain and suffering. The traditional common law action for injuries, on the other hand, includes all those items

23. *Id.*
24. 56 Ill. 2d at 431, 308 N.E.2d at 587. *See also* Wonaitis v. Kustak, 18 Ill. App. 3d 17, 309 N.E.2d 300 (1st Dist. 1974).
as well as punitive damages in appropriate instances. While a dis-
cussion of the nature of pecuniary loss under the Wrongful Death
and Dram Shop Acts will follow shortly, it is important at this point
to note a decision rendered after Murphy v. Martin Oil Co., holding
punitive damages unavailable under the survival statute.

In Mattyasovsky v. West Towns Bus Co., a wrongful death ac-
tion was brought against the defendant for the death of the plain-
tiff's twelve year old son, who died shortly after the injury. The
plaintiff in his complaint for wrongful death sought both pecuniary
loss and punitive damages. The jury awarded the plaintiff pecuniary
loss damages in the amount of $75,000 and $50,000 in punitive
damages. Three months after trial, the plaintiff was allowed to
amend the original complaint to include a count for the decedent's
personal injuries, pursuant to the Survival Act.

The defendant, on appeal, argued that punitive damages are not
recoverable either under the Wrongful Death Act or the Survival
Act, and that since wrongful death was the only theory utilized at
trial, the punitive damage award must fall. The plaintiff agreed with
respect to the Wrongful Death Act issue, but argued that the Survival
Act simply allows for the continuation, by the estate, of the complete
personal injury action and that punitive damages, where appropriate,
are always available in a common law action for injuries. Since his
later amendment cured any conceptual defects regarding the nature
of his claims, the plaintiff sought affirmance of the award under the
reasoning in Murphy v. Martin Oil Co.

While noting recent decisions in other jurisdictions allowing puni-
tive damage awards in action for injuries brought pursuant to comp-
parable survival statutes, the court, speaking through Justice Moran,

27. The award was reduced to $30,000, the statutory limit in effect at the times
relevant to the case.
28. The court distinguished Martin Oil on the basis that it did not state that puni-
tive damages were recoverable under the combined theory, but simply eliminated the
unitary death concept in Illinois.
1967), aff'd, 400 F.2d 857 (3d Cir. 1968), cert. denied, 395 U.S. 904 (1969); Reyn-
olds v. Willis, 58 Del. 368, 209 A.2d 760 (1965). See also RESTATEMENT OF TORTS,
§ 908, comment (a) (1939).
nevertheless felt compelled to reject the admitted logic of the cases and plaintiff's position:

Despite our highest desires, however, law is not always based upon logical rationale. The survival action for damages for injury to the person is a creature of statute and the intent of the legislature, as expressed in the statute, is controlling. The words "damages for injury to the person" clearly and unequivocally mean damages of a physical character. . . . Punitive damages are not damages of a physical character. They are those assessed in the interests of society to punish the defendant and to warn him and others that such acts are offenses against society. 30

Maintaining that the words of a statute must be construed to take their "ordinary, popularly accepted meaning," the court held punitive damage awards unavailable under the Survival Act and vacated the jury award.

It is submitted that the court gave an unduly restrictive interpretation to the relevant position of the Survival Act, treating it, in effect, as a separate statutory cause of action, providing for recovery where none was allowed under any circumstances at common law. The Wrongful Death and Dram Shop Acts are clear examples of the latter type. The Survival Act, on the contrary, does not create a cause of action where none existed before, but simply prevents a common law action for injuries, in its full scope, from abating upon death. By treating such actions as being limited by the statute, the court is reverting to the posture of unfairness noted by the supreme court in Murphy v. Martin Oil Co. as the basis for abandoning the unitary death concept.

Wrongful Death

Under Illinois law, damages resulting from the death of a family member are allowed only by virtue of statute because there is no common law action for death. In the case of an action for the death of a lineal descendant, brought under the Wrongful Death Act, 31 Illinois law provides for the presumption of substantial pecuniary loss. 32 Three recent decisions, Goldstein v. Hertz Corp., 33 Prather

30. 21 Ill. App. 3d at 54, 313 N.E.2d at 502.
32. Illinois Pattern Jury Instructions 2d, § 31.01 (1971) [hereinafter cited as IPI 2d].
33. 16 Ill. App. 3d 89, 305 N.E.2d 617 (1st Dist. 1973).
v. Lockwood and Mattyasovszky v. West Towns Bus Co., are concerned with the strength of the presumption of substantial pecuniary loss with respect to the death of minor lineal descendants.

While the mechanics of proof of pecuniary loss in cases of adult breadwinners—i.e., the computation, over decedent's working life, of his annual gross income, fixed benefits, contributions to home upkeep, and contributions to the religious and moral training of the children, minus the amount taken for his personal use—bring into sharper focus the realities of the presumed loss, the presumption in cases of minor decedents, unless rebutted in some special cases, is obviously rank with speculation. In these instances, as will be seen, the alleged economic base for pecuniary loss recovery is subject to the same criticisms that are directed toward open-ended awards for pain and suffering in personal injury cases and toward cases invoking the collateral source rule.

In Goldstein v. Hertz Corp., the decedent, the plaintiff's daughter, was twenty years old at the time of her death in an automobile collision. The jury found for the plaintiff, awarding loss of support damages in the amount of $80,000. The award was reduced to the statutory limit of $30,000 then in effect. The defendant argued that the award was excessive in light of the meager evidence presented by the plaintiff to support the rebuttable presumption of substantial pecuniary loss. The plaintiff's evidence consisted of the fact that the decedent was an excellent student of the University of Illinois, had worked part-time earning seventy dollars per week, was helpful around the house and had a close relationship with the other family members. The court, without raising questions about the reality of the alleged loss of pecuniary support, noted the existence of the presumption and held the award not excessive on the evidence presented.

Prather v. Lockwood, on the other hand, concerned the ade-
quacy of an award of $2,000 to the mother of an eighteen year old mentally handicapped son also killed as the result of an automobile collision. Testimony was presented that established the decedent's good physical condition, that while he never finished high school, he was enrolled in the Educable Mental Health program at Illinois State University, and that he earned seventy dollars a week, twenty of which went to his mother. The record was silent as to the extent of his retardation, his progress at the school, or his life expectancy.

The court, on appeal, while noting the presumption of substantial pecuniary loss in cases involving the death of lineal descendants, stressed the rebuttable nature of such presumption in light of the realities of pecuniary loss presented by the evidence:

It is not debatable but that a presumption arises of loss to a lineal descendant from wrongful death. That presumption is to be considered if there is no other evidence on the issue, or if there is evidence that presumption should be weighed by the jury with such other evidence.40

Noting the earlier decision of Flynn v. Vancil,41 which held the evidence warranted a jury finding of no damages in the case of the death of an incurable mentally defective infant, the court concluded:

We see no basis for holding that the jury subverted its duty under the evidence or failed to follow instructions. The proof of pecuniary loss is too anemic and speculative for us to say as a matter of law that the $2000 is inadequate to compensate for the reasonably expected pecuniary loss.42

Justice Craven, in a ringing dissent, while admitting the sparse nature of the evidence presented by plaintiff to substantiate the presumption, admonished the majority for failing to take judicial notice of decedent's life expectancy for purposes of computing a more realistic pecuniary loss amount:

The judgment in this case is inadequate not because of a rejection of the presumption, but because the affirmative evidence, even if not presented in model form, commands a higher verdict. The decedent's life expectancy was not established; however, the decedent was shown to be in good health, was employable, and this court can, as the defendant candidly conceded at oral argument, take note of a life expectancy that clearly shows this award to be inadequate as a matter of law.43

The decision was especially unfortunate, Justice Craven continued,
in light of the expanded scope of recovery afforded the family unit in *Murphy v. Martin Oil Co.*

The final decision noted above, *Mattyasovsky v. West Towns Bus Co.*, discussed the propriety of an award of $75,000 for the death of a twelve year old decedent, in light of defendant's claim that it was excessive as a matter of law. The evidence in support of the presumption of substantial pecuniary loss was that the decedent did all family outdoor maintenance chores, repaired watches and television sets, had a paper route, paid for his own clothes, planned to attend college, and after graduation, help finance the education of his younger brothers and sisters.

The court, again noting the presumption of substantial pecuniary loss, affirmed the award as being within the permissible range and, hence, not resulting from "passion and prejudice" of the jury, which is the conceptual basis for the reduction of jury verdict awards by an appellate court.

The rationale of the early common law in disallowing actions for death, that any attempt to put a price tag on a human life would be sheer speculation and reduce human beings to the status of property, was rejected by nineteenth century legislatures. By employing the economic concept of loss of support to the surviving family and by courts refining the mechanics of proof regarding it, the earlier fears of speculation were allayed. However, in jurisdictions such as Illinois, which allow for the presumption of substantial pecuniary loss in cases of the death of minor lineals, the bankruptcy of the pecuniary loss concept is demonstrated.

When the evidence of actual pecuniary loss is sparse indeed and the financial realities of the liability status of children and the minimal supportive assistance given parents by emancipated children is ignored as in most cases, the pecuniary loss concept must simply allow recovery for the stunning loss of a child to the family unit. The absence of an alternative conceptual basis for recognition of familial losses in this regard will necessitate the continuance of the current inconsistent and anomalous results in this area.

44. 56 Ill. 2d 423, 308 N.E.2d 583 (1974).
45. 21 Ill. App. 3d 46, 313 N.E.2d 496 (2d Dist. 1974).
46. Id. at 56, 313 N.E.2d at 503.
As mentioned above, awards for death are solely the result of statutory enactments. In actions against a tavern keeper, there is no recovery for death or personal injuries received at the hands of an intoxicant outside of a statute. The Illinois Dram Shop Act is the exclusive remedy, the common law having established early that the concepts of lack of duty or proximate cause insulated the dram shop keeper from liability for injury or death caused by the intoxicated customer. The Act, in section 135, delineates the parameters of the exclusive statutory remedy, which provides for three basic areas of recovery:

1. An action for personal injuries and/or property damage for a third party injured by the intoxicant.

2. An action for loss of or injury to the means of support by the family of a third party victim due to the death or injury of the family member.

3. An action for loss of or injury to means of support by the family of the intoxicant due to death, injury or incapacitation due to intoxication.

Five recent decisions merit attention at this point inasmuch as they shed light on the finer points of an action for injury or death initiated under the Dram Shop Act. Weiner v. Trasatti and Caruso v. Kazense discuss the nature of the concept “loss of means of support” and the liability of contributing dram shops under the Act. Wendt v. Richter and Harden v. Desideri analyze the extent of statutory responsibility of “owners,” who have the beneficial interest in a land trust that includes a dram shop. Finally, American National Bank v. Wisniewski considers the propriety of certain action taken to

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47. ILL. REV. STAT. ch. 43, § 135 (1973).
48. See, e.g., Graham v. General Ulysses S. Grant Post No. 2665, V.F.W., 43 Ill. 2d 1, 248 N.E.2d 657 (1969), and cases cited therein.
49. 19 Ill. App. 3d 240, 311 N.E.2d 313 (1st Dist. 1974).
52. 20 Ill. App. 3d 590, 315 N.E.2d 235 (1st Dist. 1974).
53. 18 Ill. App. 3d 961, 310 N.E.2d 834 (1st Dist. 1974).
maximize recovery under the Act to avoid to some extent its damage limitation section. 54

In Trasatti, an action was brought by the decedent's husband for loss of means of support damages due to his wife's death in an auto collision involving an individual who allegedly became intoxicated on defendant's premises. After discussing the nature of intoxication under the Act55 and the fact that mere evidence of consumption of alcohol was insufficient to raise a jury question in that regard,56 the court addressed the damage issue.

Evidence was presented that the decedent was separately employed and contributed her time and income to the family business. Since there is no presumption of any loss of means of support under the Dram Shop Act, the court held it a jury question as to whether Mr. Weiner in fact lost "support" and set out the items includable within that concept:

Means of support include all those resources from which the necessities and comforts of living are or may be supplied. [citations omitted]. The capacity for providing means of support may be shown by proof of earnings and contribution of services or income.57

In cases of the loss of a wife, as in the case at bar, the court continued:

The services of a wife to which a husband is entitled include those rendered by the wife in performance of her household and domestic duties, as well as those rendered by her while assisting the husband in his business.58

Thus, while the Wrongful Death Act's presumption of loss is absent in the Dram Shop Act and the terminology differs, i.e., "injury to means of support" as opposed to "pecuniary loss," the nature of the

54. The act limits recovery for injury to the person or property to $15,000, and actions for loss of means of support to $20,000. Ill. Rev. Stat. ch. 43, § 135 (1973).
55. 19 Ill. App. 3d at 243-44, 311 N.E.2d at 317.
56. [P]roof of intoxication in a dram shop suit requires evidence which establishes that the person involved was in fact intoxicated. It is not enough that the evidence prove only that the alleged intoxicated person consumed alcohol, . . . However, evidence that the alleged intoxicated person consumed alcoholic liquor, together with evidence of unusual behavior or opinion evidence that he was drunk, would entitle a jury, under such circumstances, to conclude that the person was intoxicated.
Id. at 244, 311 N.E.2d at 317.
57. Id. at 246, 311 N.E.2d at 319.
58. Id.
loss and the mechanics of proof are essentially the same in both actions.

As to the liability of the dram shop operator, a 1971 amendment to the Act removed the words “in whole or part” so that currently, statutory liability is to be imposed only upon the person who caused the intoxication rather than those who merely contributed to the eventual intoxication. This language change supposedly eliminates as proper parties defendant dramshop keepers who have been referred to as “spree” defendants. The third appellate district, in the case of Caruso v. Kazense,60 analyzed the actual effect of the amendment in a setting where the intoxicant arrived at defendant’s premises in a clear state of intoxication.

The action was brought by the wife of the intoxicant for injury to her means of support. After drinking heavily for a twelve hour period in one tavern, the intoxicant arrived at the defendant’s establishment, where he consumed several additional drinks before leaving and receiving injuries as a result of losing control of his vehicle. The defendant, arguing that intoxication occurred prior to entry on his premises, received a jury verdict in his favor, which was appealed.

The court, after upholding the propriety of the trial court’s submission of the issue to the jury, indicated the questionable nature of the alleged aid given contributing tavern keepers by the 1971 amendment. It was apparent, the court stated, that the recent statutory change had limited the applicability of the act, since by its terms it only applied to those dram shops which “cause” the intoxication that results in injury or death. However, the court continued:

The phrase, “causes the intoxication” is not a technical legal term requiring definition. We note that IPI 150 et seq. (2d ed.) does not define the term. In the case at bar we believe that the question of whether the intoxication was the result of the serving of liquor by defendants was a question of fact for the jury.60

Thus, while on the facts of this case the contributing tavern keeper escaped liability, the court’s technical holding relative to the meaning of “cause,” gives little comfort to dram shop keepers who in fact, contribute to intoxication in “whole or in part.”

60. Id. at 697, 313 N.E.2d at 691.
On the issue of who is a proper party defendant in a dram shop case, the first appellate district, in the case of Wendt v. Richter, has held that the beneficiary under a land trust is to be included within the statutory roll of "[a]ny person owning, renting, leasing or permitting the occupation of any building or premises with knowledge that alcoholic liquors are to be sold therein. . . ."62

The plaintiff, administratrix of her husband's estate, brought action against the dram shop operator and the trustee bank for injury to her means of support resulting from her husband's death from a fall down a flight of stairs while intoxicated. Upon motion, the trustee was dismissed as only holding bare legal title and the land trust beneficiary was added as a party defendant. The defendant beneficiary was successful, however, on her motion for summary judgment.

The defendant argued that because she contracted to sell the premises under articles of agreement for warranty deed, she retained no real control over the building other than the traditional security measures of prohibition against lien attachments, consent for all alterations, and retention of all title and interest until transfer of title upon full payment under the land contract. Accordingly, the purpose of the Act in making owners responsible because of their ability to control activities on the premises had no application to her situation.

The court, after an examination of the purposes of the Act, rejected defendant's argument, stating:

In Illinois there is no uniform meaning to the term "owner," and consideration must be given to the nature and purpose of the statute involved. . . . The defendant . . . did not divest herself of her equitable title by entering into the agreement. The defendant retained sufficient control of the premises in question to be held liable as an "owner" under the Dram Shop Act. Holding the defendant liable will provide "discipline of traffic in liquor" and will serve the purpose of the Dram Shop Act.63

In Harden v. Desideri, another case involving an "owner" who was the beneficiary of a land trust, the question of the availability

63. 17 Ill. App. 3d at 232, 307 N.E.2d at 758.
64. 20 Ill. App. 3d 590, 315 N.E.2d 235 (1st Dist. 1974).
of common law indemnity by such owner from the operator-lessee was discussed. The plaintiffs were successor beneficiaries of a land trust covering premises upon which the defendant lessee operated a tavern. A dram shop action which led to an eventual settlement paid by the plaintiffs was brought against both parties by a patron injured by another intoxicated patron. The plaintiffs brought the instant action against the lessee seeking indemnity.

In count I, the plaintiffs sought reformation of an indemnity agreement entered into by defendant stating that he would indemnify the "lessor" against all judgments paid pursuant to the Dram Shop Act. Reformation was sought because the trustee was mistakenly listed as the lessor. Count II sought common law indemnity on the basis that the defendant's actual sale of the liquor was "active" conduct, whereas plaintiffs' mere ownership was "passive" conduct. After a lengthy analysis of the law of reformation and holding the trial court's refusal to grant it to be error, the court addressed the common law indemnity issue.

There is a basic distinction, the court noted, between common law negligence actions and actions brought pursuant to the Act in that there is no common law action maintainable against either owner or operator. Since the sole basis for recovery in this area is statutory, the court held:

Under the statute, both the owner of the premises and the seller of intoxicating liquors thereon are jointly and severally liable, and the statute makes no qualitative distinction between the actions of owning and serving. If one's conduct falls within the provisions of the statute, he must be considered an active wrongdoer under that statute, regardless of the comparative passive nature of that conduct relative to the conduct of another statutory obligor.65

Since in the instant case both plaintiff and defendant were statutory tortfeasors, they were both "active" wrongdoers, thus eliminating the conceptual basis for common law indemnity.

Aside from the above considerations, the court also noted the recent Illinois Supreme Court decision in the case of Wessel v. Carmi Elks Home, Inc.,67 which held, on the same basic rationale, that an

65. Id. at 596-601, 315 N.E.2d at 240-43. This portion is suggested for reading for both law and fact.
66. Id. at 601, 315 N.E.2d at 243.
67. 54 Ill. 2d 127, 295 N.E.2d 718 (1973).
“owner” within the Act could not receive common law indemnity from the intoxicant. While noting the limited factual setting of *Carmi Elks Home*, the court could see no justification for not applying the same reasoning to the case of “owner” versus “operator.”

While the court did not discuss the propriety of the “owners” escaping ultimate financial responsibility by way of contractual indemnity, it appears to be only a matter of time before that liability shield is severely dented or pierced. The *Desideri* decision, along with the others discussed above, is a further indication of the tenacity with which Illinois courts resist argument of counsel who seek to minimize statutory responsibility under the Dram Shop Act.

In a final unique dram shop decision, dealing with the statutory damage limitation,68 the first appellate district, in *American National Bank v. Wisniewski*,69 discussed the effect of a probate court’s allocation of funds received from the carrier of the intoxicant in a prior suit, on the maximization of damages under the Act. As the result of an auto collision, Kamil Brazda and his son Roy were killed and his two minor children, Larry and Marcia, received personal injuries. Subsequently, due to her grief over the loss, the mother, Florence Brazda, committed suicide. The plaintiff, as administrator of the estates of the parents and son, brought a diversity action in federal court against the intoxicated driver of the other vehicle for the wrongful deaths and for the injuries to the children. Judgment by stipulation was entered, with $31,875 going to the estate of the father, $20,000 to the estate of the mother, $8,000 to that of the son and $1,000 each to the minor children.

The intoxicant’s carrier paid in the sum of $21,875, the extent of its contractual obligation, in one lump sum. Counsel for plaintiff then successfully petitioned the probate court to allocate the funds so that only $1,875, representing property damage, went to the estate of the father. Hence, on the probate books of account, no funds representing pecuniary loss inured to the children from the estate of the father.

A successful dram shop action for loss of means of support of the children was brought against the tavern where the driver became

69.  18 Ill. App. 3d 961, 310 N.E.2d 834 (1st Dist. 1974).
intoxicated; the jury awarding the litigants the statutory maximum of $20,000. The defendant sought a nullification of the award by arguing that he should receive a credit for the total monies received in the earlier federal court action against the driver, arguing that otherwise, the plaintiffs would get double recovery.

On appeal, the court, while agreeing that defendants in dram shop cases are entitled to credit in the amount of any sums paid by co-wrongdoers in return for covenants not to sue, rejected the defendant’s double recovery argument. The defendant asserted that the court should adopt a “per beneficial” plaintiff approach as opposed to the “per cause of action” position urged by the plaintiff bank. In effect the court stated that the defendant was seeking a type of equitable apportionment, cutting across the lines of clearly separate causes of action. The defendant was not entitled to credit for funds allocated by the probate court to the estates of Florence and Roy, since no recovery was sought or received on their estate’s behalf in the instant action.

While noting plaintiff’s concession that the sole purpose of the probate court allocation was to maximize recovery in the dram shop action and the fact that defendants would have little opportunity to challenge it, the court held:

We see nothing improper on the state of this record with regard to the probate court’s allocation of the recovery from the suit in Federal court to the various estates in order to permit maximum recovery in this dram shop action. . . . No case on point as to the propriety of this allocation in respect of its impact on defendants has been cited to us, and our research has disclosed none. . . . The fact remains that plaintiffs have received no double recovery for any single cause of action.

While the propriety of the above action with respect to defendant’s position and the principle of one satisfaction for one injury both appear questionable, the case serves as further evidence of the strong position taken by Illinois courts towards the furtherance of the purpose of the Dram Shop Act.

70. ILL. REV. STAT. ch. 43, § 135 (1973).
71. A second tavern had been dismissed from the action after paying $2,500 for a covenant not to sue.
72. 18 Ill. App. 3d at 969, 310 N.E.2d at 840. The closest analogy the court could find was the right of a debtor, subject to the laws of bankruptcy, to prefer one creditor over others by payment in full, rendering him unable to pay the others. Id.
Only one case decided during this past year addresses itself to the issue of the proper valuation of loss model to be utilized in instances of damage to personal property. The first appellate district, in the case of *Kroch's & Brentano's, Inc. v. Barber-Colman Co.*, misapplied the relevant law by confusing the valuation of loss model appropriate to injury to improvements on realty with that relating to personal property damage per se.

In *Barber-Colman*, several retail businesses sued the defendant for water damage resulting from the alleged negligent installation of a central air-conditioning unit which had caused extensive property damage when it malfunctioned. At trial, one plaintiff called as an expert witness an experienced insurance adjustor, who attempted to testify only as to the reasonable cost of repairing the damaged items. The defendant objected to the proffered testimony on the basis that it did not seek to establish the reasonable market value of the items immediately prior to the injury. The objection was sustained and a directed verdict eventually was entered in defendant's favor.

On appeal by plaintiffs, the court, relying on the cases of *Behrens v. W. S. Bills & Sons, Inc.* and *Lucas v. Bowman Dairy Co.*, made a distinction between repairable or non-repairable damaged personalty which is the determinant of the necessity for "value before" testimony in property damage cases.

In *Bowman Dairy*, the court had held that in a suit to recover damages to personal property that is unrepairable or treated as unrepairable, the measure of damages is the difference between the value of the personalty immediately before and the value immediately after the injury. Since the diminution in value is the limit of recovery in such cases, testimony of "value before" is essential.

However, Justice Leighton, while holding the exclusion of the expert in the instant case to be error, stated that if damaged personalty is repairable, the proper damage measure is the reasonable cost of

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74. 5 Ill. App. 3d 567, 283 N.E.2d 1 (3d Dist. 1972).
75. 50 Ill. App. 2d 413, 200 N.E.2d 374 (1st Dist. 1964).
repairs plus the difference in value, if the value after repairs is less than the value before the damage. "He was not testifying about nonrepairable personalty; consequently, he did not have to know their condition and value before the occurrence that caused damage." While the court's statement of the law, as far as it goes, is correct, it omitted consideration of the factor setting the outside limit on recovery for damage to personal property—the diminution in value due to the injury.

Illinois Pattern Jury Instruction 30.10, reflecting a series of Illinois decisions and the majority position in the United States, provides that in all cases of personal property damage, except in cases of injury to improvements on real estate, the following valuation of loss model is to be utilized:

30.10 Measure of Damages—Damage to Personal Property—Repairs and Depreciation or Difference in Value Before and After Damage

As to property damage, you may award the lesser of two figures only, which are arrived at as follows:

One figure is the reasonable expense of necessary repair of the property plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after the property is repaired. The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

You may award as damages the lesser of these two figures only.

The comments following the above emphasize the limiting factor of diminution in value:

Since compensatory damages are only to make a party whole, and not to enable him to make a profit on the transaction, a party may recover the reasonable expense of necessary repairs plus any difference between the value of the property immediately before the occurrence and after it has been repaired, provided that these amounts do not exceed the difference between the value of the undamaged and damaged property.

76. 16 Ill. App. 3d at 416, 306 N.E.2d at 525.
79. IPI 2d, § 30.10.
80. Id.
While, as noted in a recent federal decision, *Indiana Harbor Belt Railroad Co. v. Soo Line Railroad Co.*, Illinois law is inconsistent with respect to the damage equations for injury to realty and injuries to structures on realty, a firm exception to the diminution limit is made in the latter. In such cases the measure of damages is the cost of repairs regardless of the fact that such may exceed the diminution figure. As stated in *Kremeyer v. Shumate*, an earlier Illinois decision:

> There has been no holding of any court in this jurisdiction that has been cited to us that the measure of damages for injury to improvements on real estate is the lesser sum of the difference in value immediately before and immediately after the injury, or the cost of repair. This is the rule for personal property. . . .

Hence, it is submitted, that the court in *Barber-Colman* misstated applicable Illinois law in holding “value before” testimony to be unnecessary.

**Interference with Personalty: Replevin and Conversion**

In the case of *S. T. Enterprises, Inc. v. Brunswick Corp.*, the Illinois Supreme Court analyzed the nature of the common law remedy of replevin as enacted in statutory form in the Illinois Replevin Act and the relationship between it and the common law remedy of trover for conversion of personalty. The Brunswick Corporation, under a conditional sales contract, sold $610,000 worth of bowling equipment to Thunderbird Bowl, Inc. Through subsequent assignments, made with Brunswick's consent, interest in the equipment passed to Pala Inc. and then to the LaSalle National Bank as trustee for several individual beneficiaries. Payments by the responsible parties were suddenly discontinued, leaving an unpaid balance of $379,190.

The above parties filed a three count complaint against Brunswick seeking fraud damages, reformation, and damages for breach of warranty. These actions were consolidated with Brunswick's action

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82. 20 Ill. App. 2d 542, 156 N.E.2d 271 (2d Dist. 1959).
83. *Id.* at 546, 156 N.E.2d at 274.
84. 57 Ill. 2d 461, 315 N.E.2d 1 (1974).
seeking a writ of replevin, a deficiency judgment, and damages for wrongful detention of the equipment. During the pendency of the above actions the trust beneficiaries sold the equipment to S. T. Enterprises, subject to any defect in their title.

Brunswick was successful, receiving an order awarding possession, a deficiency judgment against Thunderbird for $431,187, an award of $157,456 for wrongful detention, and $10,000 in attorneys' fees. For purposes of the statutory double value bonding provisions, Brunswick, in its replevin affidavit, stated the current value of the disputed equipment to be $74,000.

S. T. Enterprises, obtained a temporary injunction restraining Brunswick from seizing the equipment due to the alleged hardship it would work on them. The order made no mention of S. T.'s offer to purchase the equipment from Brunswick at its stated current value of $74,000.

On appeal, the appellate court reduced the judgment for wrongful detention to $18,243, representing the interest on the stated current value for the period of detention, gave the party in possession, Pala Inc., the option of retaining possession upon payment of the current value, and affirmed the injunctive order. Brunswick argued that both the Uniform Commercial Code, with regard to non-judicial repossession and the Replevin Act, gave it the unqualified right to possession of the goods.

The Illinois Supreme Court, speaking through Justice Goldenhersh, began by stating the parameters of the Replevin Act, with respect to the common law remedies of trover and replevin:

The primary purpose of the Replevin Act is to test the right to possession of personal property and place the successful party in possession. . . . Section 18 of the Act . . . provides that when the property cannot be found or delivered, the plaintiff may proceed under the original or amended complaint for the value of the property not found or delivered. This alternative remedy was formerly identified "as in an action of trover." The measure of

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86. Brunswick's demand on defendants for non-judicial repossession pursuant to Section 9-503 of the Uniform Commercial Code was refused by the defendants.
87. The order provided for a reduction in the amount of the deficiency judgment for monies received upon resale.
damages in trover is the market value of the property at the time of conversion with interest from that time.\textsuperscript{90}

The court noted its earlier decision in the case of \textit{Keho v. Rounds},\textsuperscript{91} wherein it was held that no authority existed under the Act for a court to render judgment for the value of the property, as in trover, except in cases where the officer was unable to procure it pursuant to the writ of replevin. Since the goods here were located, it was error to give the party in possession the option of retention upon payment of the market value.

After affirming the reduction of the wrongful detention award, the court addressed S. T.'s argument that the Replevin Act itself precluded seizure since the writ is executed when the party in possession posts the double value replevin bond. If possession is refused, the plaintiff is limited to an action for the bond proceeds. In rejecting this position, the court noted the clear wording of section 14 of the Act\textsuperscript{92} and stated:

[T]he losing party does not have the option of keeping the property and forcing the successful party to accept the value of the property or seek recourse to an action on the replevin bond. . . .

Neither the plaintiffs nor S.T. has cited authority which holds that after default under a conditional-sale contract, the buyer or his successor in interest may be permitted to flaunt the provisions for repossession, keep the property covered by the contract and pay only its alleged value at the time of default on the contract, a value which is considerably less than the balance due on the contract price.\textsuperscript{93}

\textbf{Injury to Realty: Lost Profits}

In a unique opinion, the first appellate district addressed the issue of the proper valuation of loss model to be utilized in instances of damage to improvements on realty. The opinion merits attention because a question was raised as to the rights of a holder of a delinquent tax certificate during the two year statutory redemption period.

\textit{In Schwartz v. City of Chicago},\textsuperscript{94} the purchasers of a statutory tax

\begin{footnotes}
\begin{itemize}
\item 90. 57 Ill. 2d at 469-70, 315 N.E.2d at 6.
\item 91. 69 Ill. 351 (1873).
\item 92. ILL. REV. STAT. ch. 119, § 14 (1973).
\item 93. 57 Ill. 2d at 473-74, 315 N.E.2d at 8.
\item 94. 21 Ill. App. 3d 84, 315 N.E.2d 215 (1st Dist, 1974).
\end{itemize}
\end{footnotes}
certificate brought an action for damages due to the alleged negligence of the city in failing to notify them of the scheduled demolition of the apartment building covered by the certificate. After dispensing with several issues concerning plaintiffs' interest in the building and their possible election of a binding remedy by receiving a statutory refund of their certificate purchase price, the court addressed the issue of damages. After noting that in cases of irreparable damage to improvements on realty the measure of damages is the difference in market value of the premises before and after the injury, the court responded to plaintiffs' "value before" argument that it was entitled to the profits lost due to the demolition.

Plaintiffs, in purchasing the tax certificate in 1966 for $6,184, estimated the building's value to be $30,000, based upon capitalization of the rental income flow, with allowance for $5,000 for repairs required to bring the building up to housing code standards. In rejecting plaintiffs' "value before" position, the court stressed that the actual basis for plaintiff's claim was one for lost profits and stated:

Lost profits as an element of damage must be the necessary and natural consequence of the injurious act. They are compensable only so far as they are plainly traceable to it, and may not be recovered when they are merely probable and speculative.

In this instance, especially in light of plaintiffs' own testimony that due to substantial vandalism and increased deterioration during the redemption period, a decision had been made not to eventually purchase a tax deed, the court found plaintiffs' "value before" argument sadly wanting:

[It] stretches credulity to consider that the building could reasonably have been expected to remain in a static condition for the ensuing two-year period of redemption. . . . Hence for [plaintiff] to rely on continuation of the same income as then received, and to anticipate no further deterioration in the premises, seems wholly unwarranted. This inference becomes incapable when it is recalled that condemnation proceedings were launched only four months after the tax sale.

Having rejected plaintiffs' suggested "lost profits" valuation

95. See discussion at pp. 318-19 infra, as to these aspects of the decision. See also Ill. Rev. Stat. ch. 120, § 734a (1973).
96. See discussion at pp. 292-94 supra.
97. 21111. App. 3d at 95, 315 N.E.2d at 224.
98. Id. at 95, 315 N.E.2d at 225.
model, it still remained for the court to delineate the extent of damage recovery in this specialized context. The court noted that although a tax certificate purchaser is not entitled to redemption from any person other than private parties who are eligible to redeem, the redemption and penalty payments equal the maximum value to him of his certificate from the date of purchase until the redemption period expires and a tax deed is issued.

The mere expectancy of acquiring title and possession of the premises was deemed the "essence" of what was meant by unrecoverable speculative lost profits. Accordingly, the court constructed the following valuation of loss model in this hybrid "ownership" setting:

We have determined that the maximum entitlement of certificate holders to money damages for injury to their investment value occurring during the redemption period must be limited to an amount equal to the price of redemption.99

Since in the instant case, plaintiffs had received a refund of their certificate purchase price pursuant to statutory provision for "sales in error,"100 the amount of damages would be limited to all or part of the penalty payment available to them upon redemption.

Interest on Judgments

Effective August 29, 1969, section 3 of the Illinois Interest Act101 was amended to increase the interest rate on outstanding judgments from five to six percent. In the case of Noe v. City of Chicago,102 the Illinois Supreme Court held the increased rate applicable, on that date, to unsatisfied judgments entered prior to the effective date of the amendment.

Plaintiff Noe and Bogoff, an intervenor, after refusing tender of satisfaction of judgments under the five percent rate, brought an action in equity requesting the court to order the city to pay interest on all unsatisfied judgments entered before August 29, 1969, at the rate of five percent up to that date and thereafter at the increased rate.

99. Id. at 96, 315 N.E.2d at 225-26.
100. ILL. REV. STAT. ch. 120, § 741 (1973).
101. ILL. REV. STAT. ch. 74, § 3 (1973).
Preliminary to its decision, the court, speaking through Justice Ward, noted the division in authority on the effect of a statutory change in interest rates upon outstanding judgments. While one view sees a judgment as a contract which accordingly fixes the rights of the parties upon entry, other jurisdictions deem interest as solely available under statute and, hence, interest should be computed per the varying statutory rates in existence during the period that the judgment remains unsatisfied.

While the Illinois Supreme Court had not passed on the precise issue before it, Justice Ward noted the court's earlier statement in *Firemen's Fund Insurance Co. v. Western Refrigerating Co.*, holding the current statutory interest rate applicable to a note when no rate was specified therein. In *Western Refrigerating*, the court based its ruling on the fact that interest, being unavailable at common law, was strictly the creature of statute, which could be altered at any time.

The court in *Noe*, accepting the above rationale, stated:

We consider that the holdings that judgment is a contract or in the nature of a contract are forced and unrealistic. To be preferred are the holdings that interest on a judgment arises from a statute's operation and not from any contract or other agreement of the parties.

In response to the defendant's argument that the application of the increased rate to judgments entered prior to the effective date of the amendment would amount to a retroactive enforcement, the court stated:

Rather, under our holding there is a prospective application of the new interest rate from the effective date of the amendment. Interest is purely a statutory creation. The legislature may increase, decrease or eliminate the statutory interest rate as long as it does not interfere with rights which have already accrued and vested under a previous statutory rate.

105. 162 Ill. 322, 44 N.E. 746 (1896).
106. 56 Ill. 2d at 349, 307 N.E.2d at 379.
107. Id. at 350, 307 N.E.2d at 379.
Accordingly, the court held, on the effective date of the amendment the plaintiffs became entitled to the increased interest rate on their respective unsatisfied judgments.

III. EQUITY

Restitution: The Constructive Trust

The action seeking restitution in equity of monies or property held by a wrongdoer to avoid his unjust enrichment, one of the several historical mainstays of equity jurisprudence, has had continued utility in a wide variety of social conflict settings. The traditional means of effecting restitution has been to seek the imposition of a "constructive" trust on the subject matter of the dispute, upon a showing of fraud or the abuse of a fiduciary relationship, with an accompanying order of reconveyance or transfer of the disputed proceeds to the plaintiff. By analogizing to actual, formal trusts, and treating the wrongdoer as a "trustee" holding the trust "corpus" for the plaintiff "beneficiary," the courts can effectively eliminate the vestiges of unjust enrichment in an orderly and conceptually familiar fashion.

To assist the court in locating and identifying the disputed proceeds in instances of complex non-realty related matters, the technique of equitable accounting is utilized. The accounting serves to establish the degree of unjust enrichment in cases of the transfer or alteration of proceeds and, by the use of the further technique of "tracing," helps locate the "corpus" in instances of sale or other disbursements of the disputed assets.108 In some instances, a receiver is appointed by the court to preserve the disputed assets pending resolution of the disputed matters.

The constructive trust, the major equitable conceptual tool utilized to effect restitution, has suffered much criticism, being referred to as a "shambling creature"109 due to its seemingly unlimited use and the absence of a sufficiently clear definitional base. Three recent Illinois decisions merit attention at this point because of their analysis of the prerequisites for the imposition of a constructive trust and because of the light they shed in the shadowy parameters of the concept of fiduciary relationships.

108. See generally D. Dobbs, supra note 78, at 240-77.
In the case of Williams v. Teachers Insurance and Annuity Association, the first appellate district delineated the often misunderstood distinctions between express, resulting, and constructive trusts. Plaintiff, the alleged common law spouse of a decedent covered by one of defendant's policies, sought the imposition of a constructive trust on the proceeds of the policy to prevent their receipt by the named beneficiary, decedent's mother. After reviewing plaintiff's evidence regarding her relationship with the decedent and his alleged intention to name her the beneficiary, the court addressed itself to the bases of the several constructive trust theories underlying plaintiff's claim.

Noting that all trusts are either express (actual formal trusts) or implied in law, the court analyzed the conceptual differences between pure constructive trusts and resulting trusts. While both of the latter types are implied in law, resulting trusts, where proof of the actual intent of the parties is available, are deemed to "result" constructively, according to those stated terms, even though the factors were insufficient to create an express formal trust under the generally accepted criteria of trust law.

A pure constructive trust, on the other hand, where evidence of the intent of the parties relative to the disposition of the trust "corpus" is absent, requires judicial construction of the parameters of the "trust" agreement based upon the facts and equities of the case at bar:

A constructive trust arises when advantage is taken of a fiduciary relationship by the dominant party or when fraud is proven. . . .

A resulting trust arises from the presumed intent of the parties.

Due to the absence of proof establishing the requisites of either type of implied in law trusts and the strength of the contractual beneficiary designation, the trial court's order imposing the trust was reversed.

In light of the nature of the fiduciary relationship, the abuse of which is the main basis for the imposition of a constructive trust, the Illinois Supreme Court, in the earlier decision of Warren v. Pfeil, discussed the conceptual limits of the relationship:

111. Id. at 546-47, 304 N.E.2d at 659-60.
112. 346 Ill. 344, 178 N.E. 894 (1931).
A fiduciary relationship is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, and other recognized legal relationships, but extends to every possible case in which there is confidence reposed on one side and a resulting superiority and domination on the other. The origin of the confidence may be moral, social, domestic or merely personal. If the confidence in fact exists and is reposed by one party and accepted by the other the relation is fiduciary and equity will regard dealings between the parties according to the rules which apply to such relation.113

The above guidelines aiding in determining the existence of a relationship sufficient to warrant the imposition of a constructive trust to effect restitution are vague, to say the least. However, Illinois law has long held that the existence of such relationship must be shown by proof "so clear and convincing, so strong, and unequivocal and unmistaking [sic] that it leads to only one conclusion."114 In addition, the proof must establish, to the same degree of conclusiveness, domination or influence improperly exercised by the other party to the relationship.115

In the highly publicized case of Ware v. D.R.G., Inc.,116 the first appellate district, while not clarifying to any great degree the murky requirements for the finding of a fiduciary relationship, did analyze the outer limits of the concept in the course of analyzing plaintiff’s novel use of the constructive trust device.

The plaintiff, as a result of failure to pay a $41.57 special assessment, lost title to her $25,000 home due to the purchase of a statutory tax certificate by the defendant and the eventual issuance to the defendant of a tax deed after expiration of the statutory redemption period. The defendant adhered to all statutory notice requirements in the redemption period. The plaintiff sought and received the imposition of a constructive trust on the home and an order or reconveyance to her due to the unjust enrichment of defendant arising out of the breach of a fiduciary relationship between them.

On appeal by the defendant, the court raised three questions

113. Id. at 360, 178 N.E. at 900.
deemed determinative of the sufficiency of plaintiff's restitutitional
ty: (1) In whom was trust and confidence reposed? (2) What
was the nature of the trust and confidence so reposed? and, (3)
Was such confidence accepted by defendant?

As to the first inquiry, plaintiff's argument that confidence was
reposed in all those individuals and corporations, including the de-
fendant, that participated in the tax system in relation to the sale
or purchase of delinquent properties, was rejected out-of-hand:

We cannot place the stamp of validity upon an allegation that makes count-
less persons, unknown for the most part to the plaintiff, the repositories of
that degree of confidence necessary to establish a fiduciary

Regarding the nature of the trust and confidence allegedly reposed,
plaintiff's expectation that the designated parties would be fair and
just in relation to those in her position was deemed to lack the re-
quise degree of specificity.

Finally, in regard to plaintiff's position that the defendant's at-
torney Gray, as an officer of the court, was bound by the canon of
etics to, in effect, accept the confidence imposed, the court stated:

Indeed, to impose a duty on every lawyer "to communicate with [property
owner] about the consequences of [their] tax deficiency other than through
the formal service of notice" could well put him in peril of violating those
canons of ethics. This argument of the plaintiff is manifestly unaccept-
able.

Accordingly, because the plaintiff failed to show fraud at law, con-
structive fraud in equity, or the abuse of a clearly established fidu-

In the case of Durkee v. Franklin Savings Association, the
second appellate district discussed the scope of fiduciary relation-
ships. The court found no merit in the plaintiffs' assertion of a fidu-

117. Id. at 762, 307 N.E.2d at 743.
118. Id.
119. For a comparison of the concept of constructive fraud with fraud at law,
whether intentional, negligent, or innocent, see Jackson v. Seymour, 193 Va. 735, 71
S.E.2d 181 (1952).
profits received from the defendant's investment of pre-paid real 
estate tax funds.\textsuperscript{121}

\textit{The Constructive Trust: Accounting—Receivers}

As mentioned above, once fraud or the abuse of the requisite fidu-
ciary relationship warranting the imposition of a constructive trust 
is found to exist, the device of equitable accounting, where deemed 
necessary, may be brought into play to locate and identify the trust 
"corpus" giving rise to the action. In the case of \textit{Hurst v. Papierz},\textsuperscript{122} 
the first appellate district discussed the requisite mode of conducting 
an accounting in light of state constitutional provisions eliminating 
masters in chancery and other fee officers from the judicial sys-
tem.\textsuperscript{123}

In \textit{Papierz}, the plaintiffs sought the imposition of a constructive 
trust on the profits of a certain apartment complex with reconvey-
ance to them of certain units, because they had been defrauded by 
the defendant-joint venturers. They also sought an accounting and 
the appointment of a receiver to preserve income during the pend-
ency of the suit. The trial court appointed a receiver and engaged 
a private accounting firm to determine the net sums owing to the 
plaintiffs.

On appeal, the court first addressed defendant's argument that 
Illinois law requires an accounting procedure which gives the party 
defendant the absolute right to present its evidence and challenge 
all computations and findings:

\begin{quote}
We find no authority in law for a method of accounting which does not set 
forth a procedure by which evidentiary questions may be adjudicated. . . . 
On the hearing they have a right to introduce evidence, cross-examine wit-
nesses and take the various steps authorized by law to protect their 
rights.\textsuperscript{124}
\end{quote}

In regard to the engagement of a private accounting firm, the de-
fendants argued that the only method recognized in Illinois was the 
appointment of a master in chancery. The court, however, noting

\begin{itemize}
\item \textsuperscript{121} But see Buchanan v. Brentwood Fed. Sav. & Loan Ass'n, — Pa. —, 320 A.2d 117 (1974).
\item \textsuperscript{122} 16 Ill. App. 3d 574, 306 N.E.2d 532 (1st Dist. 1974).
\item \textsuperscript{123} ILL. CONST. art. VI, § 14.
\item \textsuperscript{124} 16 Ill. App. 3d at 579, 306 N.E.2d at 536.
\end{itemize}
the constitutional prohibition against the employment of masters in chancery set forth the current requirements with respect to equitable accountings:

[it]he trial court itself must conduct the accounting, try all the issues, administer full relief to the parties and grant a judgment for the balance found due. In so doing, it is suggested that the trial court should follow established accounting procedures, except that it should not refer the case to a master or other fee officer as prohibited by the Illinois Constitution.125

As to the propriety of the trial court's appointment of a receiver, the appellate court, while acknowledging the harshness of the remedy and the disruption that it caused to the daily functioning of an established commercial entity, upheld the action:

Appointment of a receiver is considered generally to be a harsh remedy. Nevertheless, it resides in the arsenal of equitable remedies to be used when in the sound discretion of the chancellor it is needed to insure complete justice is done between the parties.126

A much clearer statement of the same principle was made in the recent case of Duval v. Severson,127 where in the course of its decision to refuse the appointment of a receiver in a case involving a corporate dispute over financial policy, the court stated:

A court of equity has the power to appoint a receiver of a corporation when conditions of dissension, dispute, fraud or mismanagement exist which make it impossible for the corporation to carry out its business or preserve its assets, but such power should only be exercised in cases of urgent necessity where there is a present peril to the interests of the stockholders consisting of a suspension of corporate business and a threatened depreciation of corporate assets.128

Finally, in Papierz, the defendant maintained that the appointment of a receiver, when based upon allegations of fraud as opposed to corporate dissension or mismanagement, must be grounded in actual fraud at law, not "constructive" fraud, which is the equitable concept utilized to initiate restitutional relief where the facts appear to warrant it in the absence of actual fraud. In rejecting the defendant's position as "empty rhetoric," the court held that the particular circumstances surrounding the case determine the propriety of the

125. Id. at 580, 306 N.E.2d at 537.
126. Id., 306 N.E.2d at 538.
128. Id. at 642-43, 304 N.E.2d at 753.
appointment of a receiver, regardless of whether the basis is characterized as actual or "constructive" fraud. 129

Injunctions

In addition to effecting restitution through the conceptual vehicle of the constructive trust, the imposition of equitable liens to protect security interests and the ordering of specific performance of contractual agreements, 130 an additional mainstay of equity jurisprudence is the powerful remedy of the injunction. The Illinois Injunction Act 131 sets forth the basis for the granting of injunctive relief, both temporary and permanent. The discussion to follow will utilize a series of recent Illinois decisions dealing with various technical aspects relevant to the granting of injunctive relief. Since the greater number of these cases fortify earlier Illinois rulings, an attempt will be made to place them in the general context of Illinois law in this area by way of citation.

Sections 3 and 3-1 of the Illinois Injunction Act delineate the prerequisites to the issuance of a temporary restraining order or temporary injunction. 132 Section 3 provides:

No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party unless it clearly appears, from specific facts shown by the verified complaint or by affidavit accompanying the same, that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and hearing had thereon. 133

Section 3-1, dealing with temporary restraining orders, contains identical language, but adds additional guidelines relative to the automatic expiration of the order and the later issuance of a temporary injunction in the same matter. 134

129. Constructive fraud is a breach of a legal or equitable duty, which irrespective of the moral guilt . . . the law declares fraudulent. . . . Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. An intent to deceive is an essential element of actual fraud. The presence or absence of such an intent distinguishes actual fraud from constructive fraud.


130. While such orders are injunctive in form, they are generally considered as an appropriate area for separate analysis. See discussion at pp. 317-18 infra.

131. ILL. REV. STAT. ch. 69 (1973).

132. Id. §§ 3, 3-1.

133. Id. § 3.

134. Id. § 3-1.
The issuance of a temporary injunction is an extraordinary remedy, requiring that the party seeking it make a clear showing of a need to preserve the status quo in regard to the situation underlying the request. The status quo to be preserved by the injunction is the last, actual, peaceable, uncontested status which preceded the pending controversy. Such need is only deemed to exist if the plaintiff pleads or proves, in cases of issuance after a hearing, specific facts showing a definite threat of irreparable harm to a clearly recognized right, with no adequate remedy at law.

In addition to the foregoing, the party seeking the temporary injunction must establish to the court's satisfaction, the likelihood of success on the merits at the hearing prior to the issuance of a permanent injunction. Also, the sufficiency of the pleading or proof in the above respects is within the sound discretion of the trial court, with the exception of certain statutory requisites such as bonding or the form of the order issued. In cases where the tem-


porary injunction sought is mandatory in nature, the requisites of pleading and proof are even more stringent, especially if full relief can be afforded the party after a final hearing.\textsuperscript{142}

In instances where no notice has been given or no answer filed, the injunction may issue solely on the basis of the sufficiency of the verified complaint. However, where an answer has been filed, both pleadings must be considered. If the answer contains denials of material fact, a hearing on these matters must be held before the injunction can issue.\textsuperscript{143}

Due to the extraordinary nature of the injunctive remedy, provision is made in Supreme Court Rule 307\textsuperscript{144} for an interlocutory appeal to challenge the issuance or refusal to issue the order due to the presence or absence of the requisites noted above. The Rule provides as follows:

\begin{quote}
(a) Orders appealable; Time. An appeal may be taken to the Appellate Court from an interlocutory order of court
\begin{itemize}
\item (1) granting, modifying, refusing, dissolving, or refusing to dissolve an injunction.\textsuperscript{145}
\end{itemize}
\end{quote}

On such an appeal, the court is limited to the determination of whether any of the aforementioned requisites were sufficiently established by the pleadings or proof and may not base its decision on the merits of the case.\textsuperscript{146}

Where a party has failed to object to the form or content of the order ultimately issued or other requisites of the Act, this constitutes a waiver of such issues for purposes of the interlocutory appeal.\textsuperscript{147}


\textsuperscript{144} ILL. REV. STAT. ch. 110A, § 307(a)(1) (1973).

\textsuperscript{145} Id.


Finally, the form and content of consent decrees are not generally subject to interlocutory appeal since they are viewed as a recital of agreement between the parties and not a judicial determination of their rights.\textsuperscript{148}

The injunction once issued, whether in temporary or permanent form, must be obeyed even if it is later determined to have been entered in error, including even errors of constitutional magnitude.\textsuperscript{149} The court may award\textsuperscript{150} costs\textsuperscript{151} and interest in instances of corollary damage awards,\textsuperscript{151} but it may not award attorney's fees outside of express statutory authority.\textsuperscript{152}

Finally, in the course of a contempt hearing for alleged violations of a temporary or permanent injunction, the underlying injunction may not be collaterally attacked if the issuing court had jurisdiction.\textsuperscript{153}

\textit{Limitations on Equitable Relief: Laches, Equitable Estoppel, and Clean Hands}

Aside from instances where plaintiff's pleading or proof fails to meet the substantive requirements for various types of equitable relief, several major equitable defenses exist which may limit the availability of an equitable remedy, even where the plaintiff has satisfied the prima facie requisites of his action. Three of these defenses, laches, equitable estoppel, and the "clean hands" doctrine, will be analyzed at this point in the context of recent Illinois decisions.

The modern parameters of the defense of laches, applicable like equitable estoppel and the clean hands doctrine to any type of equity

\begin{footnotes}
\end{footnotes}
action, were set forth by the Illinois Supreme Court in the early case of *Pyle v. Ferell,*\(^{154}\) where the court stated:

[A] suit is held to be barred on the ground of *laches* or stale demand "where and only where" the following facts are disclosed: (1) Conduct on the part of the defendant giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had notice or knowledge of defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit, and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is held not to be barred.\(^{155}\)

Thus, laches is such neglect or omission to assert a right, which, when considered with the lapse of time involved and all the facts and circumstances of the case, causes prejudice to the party defendant. Being an affirmative defense, laches, in the above terms, must be pleaded by the party raising it and supported by sufficient facts.\(^{156}\) Additionally, laches will not arguably apply until such time as the party against whom the defense is asserted discovered or should have discovered the facts.\(^{157}\)

As to the relation between the concept of laches and an applicable statute of limitation, the courts have consistently held that laches, unlike a limitation statute, is not based simply on the factor of delay. In some instances the courts have found laches to apply, thus barring the action, even though an applicable statute of limitation had *not* run relative to the substantive basis of plaintiff's claim.\(^{158}\)

Equitable estoppel, on the other hand, while conceptually similar to laches and often confused with it, is mainly based on the factor of affirmative conduct on the part of the party *against whom it is asserted* and accompanying detrimental reliance on the part of the party raising the defense. As stated by the Illinois Supreme Court in the case of *Hickey v. Illinois Central Railroad Co.\(^{159}\)

\[\text{[Where a party by his statements or conduct leads another to do something he would not have done but for the statements or conduct of the}\]

\(^{154}\) 12 Ill. 2d 547, 147 N.E.2d 341 (1958).

\(^{155}\) *Id.* at 553, 147 N.E.2d at 344.


\(^{157}\) *See,* e.g., Tarpoff v. Karandjef, 17 Ill. 2d 462, 162 N.E.2d 1 (1959).

\(^{158}\) *See,* e.g., Slatin's Properties, Inc. v. Hassler, 53 Ill. 2d 325, 291 N.E.2d 641 (1973).

\(^{159}\) 35 Ill. 2d 427, 220 N.E.2d 415 (1966).
other, the one guilty of the expressions or conduct will not be allowed to deny his utterances or acts to the loss or damage of the other party. *The party claiming the estoppel must* have relied upon the acts or representations of the other and have *had no knowledge or convenient means of knowing the true facts.* . . .

Where silence is the ground of the estoppel it is essential that the party estopped should have knowledge of the facts *and the other party be ignorant of the truth* and be misled into doing that which he would not have done except for such silence.160

Since equitable estoppel is also an affirmative defense, the burden of proving it is on the party asserting it.161

Two recent Illinois decisions, *Perlman v. First National Bank*162 and *Atwater v. Atwater,*163 address both equitable defenses, illustrate the fine line between them and serve as examples of the wide variety of equitable actions in which the defenses may be raised. *In re Estate of Vandeventer,*164 to follow the above cases, discusses the applicability of laches to the exercise of governmental functions.

In *Perlman,* a commercial borrower of the defendant bank brought a class action seeking the imposition of a constructive trust on the aggregate amount of interest allegedly illegally collected by defendant on its commercial loans, due to their computation of annual interest over a ten year period on the basis of a 360 day calendar year, in violation of the 365 day year required by the Illinois Interest Act.165 The plaintiff sought the establishment of a fund and restitution due to defendant’s unjust enrichment. The trial court denied the defendant’s motion to dismiss the complaint and appeal was taken.

After noting the clear statutory requirement of a 365 day calendar year unless otherwise specified and rejecting defendant’s assertion that the “universal” bank custom of computing interest on commercial loans on a 360 day period should govern the relationship between the parties, the court addressed the defendant’s affirmative defenses of laches and equitable estoppel. The defendant argued

160. *Id.* at 447, 220 N.E.2d at 425 (emphasis added).
162. 15 Ill. App. 3d 784, 305 N.E.2d 236 (1st Dist. 1973).
that the plaintiff's acquiescence in the customary rate over the years, in the course of satisfying other loans, brought the defenses into play, thus requiring dismissal of the instant suit. As to equitable estoppel, the court began by noting that the 360 day "customary" interest computation period was never publicly announced or disclosed in any form of advertising or in any of the documents executed in the course of finalizing the loan agreements. In rejecting the defense of estoppel, the court stressed the importance of knowledge of relevant facts being within the ken of the party against whom it is raised:

Not only is it doubtful that the Bank can show how the plaintiffs had knowledge of the facts other than by the bills that they paid, but it is certain that the Bank did have knowledge of the facts. Acceptance of the argument of the Bank would indeed be a strange twist of the law that would permit the party with knowledge of the facts to estop the party without knowledge.\(^{166}\)

On the issue of laches, the defendant again raised plaintiff's knowledge through prior payments and alleged substantial prejudice from the delay, thus justifying the court in barring the action. The court, on the basis of plaintiff's lack of knowledge also held laches inapplicable, at least at the pleading stage. If however, at trial it could be demonstrated that Perlman, through his accountant or otherwise, had actual notice of the 360 day period, then laches could be utilized, in the trial court's discretion, to bar the claim.

In Atwater v. Atwater,\(^ {167}\) defendant's ex-wife brought an action seeking payments due on a 1957 divorce settlement. By its terms, in lieu of alimony, the plaintiff was to receive $127,500, $49,000 of which was paid. The remainder, until such time as plaintiff should remarry, was to be paid in monthly installments of $1,000, commencing four years from the date of entry of the decree. Only one such payment was made. The plaintiff brought the instant action some ten years later to which the defendant raised the defenses of estoppel and laches.

Both defenses were based on the defendant's belief that the plaintiff had remarried, thus terminating all payments. He introduced evidence that the plaintiff applied for a marriage license in Nevada with one Mattson in 1958, that they lived together as man and wife

\(^{166}\) 15 Ill. App. 3d at 797, 305 N.E.2d at 246.

\(^{167}\) 18 Ill. App. 3d 202, 309 N.E.2d 632 (5th Dist. 1974).
until 1971, that the defendant's attorney in 1961 had sent plaintiff a letter stating that due to her remarriage no further payments would be forthcoming, and that plaintiff had made no demand for payment since that time. The plaintiff countered such evidence by proving that she had not in fact remarried and that at a meeting between the parties in 1961, at which she demanded payment, defendant was informed of the fact. She did admit taking no further steps during the ensuing ten years to enforce her rights.

In rejecting defendant's defense of equitable estoppel, the court stressed the factor of defendant's knowledge of the true facts:

In order to claim reliance, one must be able to establish that he has acted without knowledge of the truth of the matter represented to him. . . . The facts herein do not present such a case. Defendant, after the September 1961 meeting acted with knowledge that plaintiff contended she was not remarried. He could have initiated court action to have determined her marital status and his obligation under the decree. That he voluntarily chose to ignore her representation cannot now give rise to the interposition of the defense of equitable estoppel. . . .

Regarding defendant's alleged detrimental reliance, the court stressed that the change in his position inured to his benefit not detriment, since he made no payments.

As to laches, the court noted that mere delay, even though ten years as here, is not equivalent to laches, and that prejudice to the party asserting the defense is also a necessity:

[D]efendant here has not suffered injury or prejudice as a result of plaintiff's delay. . . . [T]he argument raised that defendant is injured because he might be forced to pay in one lump sum as opposed to the contemplated monthly installments is unimpressive.

Here, the court continued, the defendant would be merely required to fulfill his original obligation and the trial court's disallowance of the equitable defenses was not error.

In a final case addressing the equitable defense of laches, the fourth appellate district, in In re Estate of Vandeventer, held laches inapplicable to the exercise of governmental functions.

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168. *Id.* at 210, 309 N.E.2d at 639.
169. *Id.* at 209, 309 N.E.2d at 638.
170. The court also upheld that portion of the order refusing to grant plaintiff $28,000 in interest on the basis that because of the delay, the interest payment, as opposed to that of the principal, would be inequitable.
Vandeventer was declared incompetent in 1931 and was placed in Jackson State Hospital until his release in 1971 and replacement in a shelter home for the aged. In 1969, letters of conservatorship were issued to defendant's estate. In 1972, the Department of Mental Health, pursuant to statute, filed a claim for payment for the care and treatment provided in the forty year period.

The defendant raised the defense of laches, asserting that the requirement of payment after a forty year lapse, even though the statute has no payment limitation relative to claims brought against the estate, would cause substantial prejudice relative to the estate assets. In addition, the defendant urged that any type of general refusal to allow the defense of laches against a governmental unit would be a vestige of the currently disfavored principle of sovereign immunity.

In rejecting the estate's position in that regard and its defense of laches, the court stated:

The difficulty with such argument is that the doctrine of sovereign immunity is not alone the rationale of denying laches as a bar to an action by the state. More important is the public policy involved and the possibility that application of laches or estoppel doctrines may impair the functioning of the State in the discharge of its governmental functions and that valuable public interest may be jeopardized or lost by the negligence in the State or inattention of public officials.

As to the facts of the case at bar, the court noted that requiring the estate to pay the costs of the benefits received at this date would only require it to pay what it should have paid in the past.

The final case to be discussed with regard to the limitations on equitable relief, *Excellent Builders, Inc. v. Pioneer Trust & Savings,* analyzes the equitable defense known as the "clean hands" doctrine.

Briefly stated, the "clean hands" doctrine provides that in instances where equitable relief of any type is sought, even if the party seeking it has established a substantive basis for relief, the parties will be left where they stand if the moving party is guilty of illegal

173. There is a five year payment limit in suits brought against responsible relatives. *Id.*
174. 16 Ill. App. 3d at 164, 305 N.E.2d at 300-01.
or inequitable conduct on his own part.\textsuperscript{176} The general equitable position that a co-wrongdoer is not entitled to relief is subject however, to an exception where the culpability of the defendant far outweighs that of the party seeking relief. In an interesting modern application of this exception, the first appellate district in \textit{Pioneer Trust & Savings} analyzed what the court referred to as the doctrine of "balancing degrees of culpability," in relation to its application of the doctrine to the sought establishment and enforcement of a mechanics lien.

The plaintiff sought to foreclose on a mechanics lien resulting from efforts expended on new construction work performed for defendant, the beneficiary of a land trust. The plaintiff had secured a building permit on the basis of plans and specifications submitted to it by the defendant. The evidence established that, earlier, one of the land trust beneficiaries had obtained rezoning of the premises on the basis of plans different than those turned over to the plaintiff for purposes of securing the building permit. The permit was revoked and work halted by the city upon discovery that the latter set of plans violated city zoning ordinances. The trial court entered summary judgment for the defendant because of the resulting illegality of the contract underlying the lien foreclosure request.

On appeal, the defendants argued non-liability on the basis that Illinois law requires that a valid contract exist before a lien may attach.\textsuperscript{177} Since the contract here violated zoning regulations on its face, it was void, and hence, per statute, could not serve to establish a mechanic's lien. In response, the plaintiff argued that even if the contract was illegal on its face, defendant's culpability in its fraud upon the city called for enforcement of the lien.

The court noted the absence of precise authority utilizing the doctrine of "balancing degrees of culpability" in a mechanics lien setting. But after analyzing the early case of \textit{Evans v. Funk},\textsuperscript{178} the court held the general principles of the doctrine applicable to the case at bar:

\textbf{As between the parties, plaintiff's participation in the fraud on the city of Chicago was purely formal and passive in that, as required by the contract,}

\begin{itemize}
  \item \textsuperscript{176} See D. Dobbs, \textit{supra} note 78, at 45-46.
  \item \textsuperscript{177} ILL. REV. STAT. ch. 82, § 1 (1973).
  \item \textsuperscript{178} 151 Ill. 650, 38 N.E. 230 (1894).
\end{itemize}
it merely applied for the permit on the basis of the illegal plans and specifications which had been furnished to it but took no active part in the alleged fraud by reason of which the permit wrongfully issued. It is our opinion that the allegations of fact, if true, would invoke the doctrine of imbalance of culpability as between the parties.\textsuperscript{179} 

While acknowledging that the mechanics lien, being in derogation of the common law, required strict construction, the court held that validating this contract for lien purposes would prevent the more culpable party from benefiting from his own wrongdoing, thus contributing to the public order. Accordingly, the summary judgment was reversed and the case remanded for trial.

IV. ELECTION OF REMEDIES

The final group of cases to be analyzed in this survey of Illinois remedies deals with the confusing and misunderstood principle known as the election of remedies doctrine. In its most basic statement, the doctrine provides that a party plaintiff is bound by his choice of a particular remedy if there are two or more inconsistent remedies available to him to satisfy an alleged wrong and the plaintiff takes affirmative action pursuant to one of them.\textsuperscript{180} 

Unfortunately, the doctrine is not restricted in application to any set grouping of "remedies," to any type of actions deemed to constitute an "election," nor to any stage in the course of dispute or litigation as to when an election can take place.\textsuperscript{181} The doctrine even applies with respect to the binding choice of a remedy among multiple party defendants. Additionally, many courts will utilize the conceptual label of "election of remedies" in instances where the case could be more properly disposed of on the more familiar grounds of res judicata, waiver, or estoppel.\textsuperscript{182} Finally, since the doctrine appears to be in disfavor in many jurisdictions, the minimal parameters of the doctrine are stretched to the breaking point to avoid the often harsh and unnecessary results of its application.

Two recent Illinois decisions, Geist v. Lehman,\textsuperscript{183} and Schwartz

\textsuperscript{179} 15 Ill. App. 3d at 838, 305 N.E.2d at 278.
180. See generally D. Dobbs, supra note 78, at 13-23.
181. Id.
182. Id. at 19-20.
183. 19 Ill. App. 3d 557, 312 N.E.2d 42 (2d Dist. 1974).
In the context of disputes involving real property, discuss the factor of prejudice to the defendant, which is the major basis for the doctrine's applicability. The cases provide interesting examples of the efforts taken by courts to avoid it.

In *Lehman*, the plaintiff and the defendant entered into a contract for the sale and purchase of residential property. Upon examination of the legal description and survey by the buyer's counsel, a variance was found from the acreage specified in the contract of sale. The buyer Geist demanded a correction of all title defects or the contract would be treated as rescinded. Following the closing date, at which time the seller stood ready to close, the buyer filed for rescission based upon the seller's innocent misrepresentations regarding the acreage. The seller in turn filed suit for specific performance and the two cases were consolidated.

During the pendency of the suits two fires caused extensive damage to the residence on the property. A decree of specific performance was granted the seller and the buyer filed an amended complaint based on the clause in the contract of sale allowing him to treat the agreement as null and void if there were material damage to the premises prior to closing. The seller then sought the vacation of the earlier decree of specific performance in his favor and the reaffirmance of the dismissal of the purchaser's rescission suit, because of the latter's subsequent bankruptcy and the fact that the fire insurance carrier would only deal with the seller. The trial court dismissed the buyer's suit, vacated the order of specific performance, and allowed the seller to elect forfeiture of the earnest money as damages.

The appellate court, after reviewing the evidence, affirmed the dismissal of the purchaser's rescission suit and upheld the propriety of the court's vacating its earlier decree of specific performance:

> It has long been recognized that when events subsequent to the execution of a contract produce a change of circumstances of such a nature as to cause a peculiar hardship or an inequitable result, a court of equity will refuse to grant specific performance. 185

Geist then argued that by pursuing the remedy of specific perform-

184. 21 Ill. App. 3d 84, 315 N.E.2d 215 (1st Dist. 1974). For a discussion of this case with respect to the injury to realty damage issue, see p. 296 supra.
185. 19 Ill. App. 3d at 561, 312 N.E.2d at 46.
To judgment, Lehman was precluded from now seeking forfeiture due to the election of remedies doctrine.

Prior to responding to Geist’s position, the court noted the scope of the doctrine:

Generally, where a party obtains a decision on the issues but fails to obtain satisfaction of his claim, the party is precluded from seeking another remedy when the other remedy is inconsistent with the first remedy sought.186

The remedies of specific performance in equity and forfeiture of a contract are inconsistent, the court conceded, inasmuch as the equity action is predicated upon the continued validity of the contract after breach, while the latter is based upon disaffirmance of the contract after breach.

However, the court continued, the election of remedies doctrine envisages a choice involving actual as opposed to theoretical “inconsistency”:

The doctrine of election of remedies however, presupposes a choice between two or more existing inconsistent remedies. Accordingly, if a party has but one remedy, a mistaken resort to an unavailable inconsistent remedy will not bar him from later choosing his correct remedy unless the other party has relied on the election of the first remedy.187

Here, due to the intervening fires, the equitable remedy of specific performance was not really “available” to the seller. By way of the interesting exercise in semantics quoted above, plaintiff’s clear election to judgment was deemed no election at all.

In Schwartz v. City of Chicago,188 the other election of remedies case selected for study, the affirmative defense was raised in a suit seeking damages from the city for the negligent failure to notify plaintiff of the scheduled demolition of a building subject to a tax certificate. The facts and decision relative to the appropriate damage model in such cases have been discussed in the damages section of this article.

In the suit for damages, plaintiffs also sought and received a statutory refund in return for the surrender of the certificate. After plaintiffs received their refund, the legislature amended the relevant statute to provide that upon application of the tax purchaser that the

186. Id. at 563, 312 N.E.2d at 47.
187. Id.
188. 21 Ill. App. 3d 84, 312 N.E.2d 215 (1st Dist. 1974).
improvements on the realty have been substantially destroyed prior to the issuance of a tax deed, such sale can be voided and refund made.\textsuperscript{189}

The city argued that the legislature thus intended the refund option to be an exclusive remedy, or in the alternative, that plaintiffs had elected a binding inconsistent remedy and hence could not seek damages. After holding the refund provision to be a cumulative and not exclusive remedy, the court addressed the election of remedies issue:

The doctrine of election among cumulative remedies does not apply when multiple avenues of remedy are pursued, as long as double compensation of the plaintiff is not threatened, the defendant has not been actually misled by the plaintiff's conduct and res judicata principles cannot be applied to bar an inconsistent theory.\textsuperscript{190}

The decisions in \textit{Geist v. Lehman}\textsuperscript{191} and \textit{Schwartz v. City of Chicago}\textsuperscript{192} serve as good examples of the paucity of concreteness in the much maligned doctrine of election of remedies. By stressing the need for the \textit{actual} as opposed to \textit{theoretical} availability of inconsistent remedies in \textit{Lehman} and the absence of double compensation, res judicata or estoppel in \textit{Schwartz}, the questionable utility of the doctrine as a separate affirmative defense in Illinois seems apparent. While the doctrine has and continues to be the basis for denying relief in a variety of commercial law settings in other jurisdictions,\textsuperscript{193} the Illinois lawyer, until some definitive writing is done in the area, remains in the dark as to the relative dangers of the eventual hard choice of remedies decision.

\textsuperscript{189} ILL. REV. STAT. ch. 120, § 741 (1973).
\textsuperscript{190} 21 Ill. App. 3d at 94, 312 N.E.2d at 224.
\textsuperscript{191} 19 Ill. App. 3d 557, 312 N.E.2d 42 (2d Dist. 1974).
\textsuperscript{192} 21 Ill. App. 3d 84, 312 N.E.2d 215 (1st Dist. 1974).
\textsuperscript{193} \textit{See}, e.g., Thornburg v. Homestead Minerals Corp., 513 P.2d 219 (Colo. Ct. App. 1973) (successful action to remove corporate prohibition against sale of stock barred later damage action for same prohibition).