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# ELEMENTS OF EQUITABLE RELIEF

by GEORGE N. LEIGHTON\*

## I.

### INTRODUCTION

This article is for the practicing lawyer who on occasion must determine whether a case qualifies for equitable relief. Its purpose is to provide a guide to equitable remedies as they have been affected by Illinois judicial reform and by recent statutory and case law.

#### 1. *An Historical Perspective*

The system of equity jurisprudence which originated and developed in England is the source of doctrines that govern the administration of equitable remedies in the courts of Illinois.<sup>1</sup> The history of the system is well written elsewhere.<sup>2</sup> To these every practitioner should make reference. Practical considerations with which we are concerned require only a few words to bring this history into perspective.

It has been said that equity, as a system of judicial concepts, was not originally created in the English courts of chancery.<sup>3</sup> A comparable fusion of equitable doctrines is found in a number of the world's systems of justice.<sup>4</sup> However, it was only in England that a separate court, known as the Court of Chancery, developed and evolved for administration of equitable doctrines.<sup>5</sup> It was a separate court until the Judicature Act of 1873 abolished the distinction between courts of chancery and

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<sup>1</sup> *Mahar v. O'Hara*, 9 Ill. 356, 358-59, 4 Gilm. 424, 427 (1847); *Chapman v. Northern Trust Co.*, 219 Ill. App. 492, 496 (1920), *aff'd*, 296 Ill. 353, 129 N.E. 836 (1921).

<sup>2</sup> SNELL'S PRINCIPLES OF EQUITY 5 n.13 (25th ed. R. Megarry & P. Baker 1960) states that: "The history of equity is dealt with in detail in Holdsworth's History of English Law and Kerly's History of Equity. Useful summaries are contained in Ashburner's Principles of Equity, Maitland's Lectures on Equity and Potter's Historical Introduction to English Law."

<sup>3</sup> H. HANBURY, MODERN EQUITY 4 & n.8 (7th ed. 1957).

<sup>4</sup> *Id.* at 4-5.

<sup>5</sup> *Id.* at 4.

courts of law in England.<sup>6</sup> Despite this abolition, equity as a system of concepts and principles remains an influence in the development of modern English and American law.

In this country, particularly in Illinois, equity was recognized as a separate system of jurisprudence administered by judges sitting in chancery.<sup>7</sup> Although there never was a statutory court of chancery separate and distinct as a tribunal, it was generally recognized that there always existed in Illinois two tribunals, chancery and law, presided over by the same judge, yet possessing separate and distinct jurisdictions.<sup>8</sup> From 1819 to 1933, when the Illinois Civil Practice Act was adopted, the two systems existed side by side and were treated as separate and distinct. It was in this way that the concepts of equity, the bases of equitable jurisdiction, and the principles of equitable relief evolved and developed as the system of equity we now know in Illinois law. This evolution was consistent with the American experience of a court of chancery administering a system peculiar to equitable jurisdiction and existing within a framework which provided a mode of justice similar to that administered in England.

For the Illinois practitioner, recent judicial reform has particular significance. Section 12 of article 6 of the Illinois Constitution of 1870 provided that "The circuit courts shall have original jurisdiction of all causes in law and equity. . . ."<sup>9</sup> This constitutional provision solidified the concept of separate tribunals for equity and law. As a corollary, jurisdiction of Illinois courts in equity rested in part on statutes.<sup>10</sup> This was the situation until the civil procedure reforms of the 1930's. Although lawyers generally believe that the Civil Practice Act of 1933 merged law and equity, the Supreme Court in 1952 had to remind the practicing bar that in Illinois the amalgamation of law and equity was not complete.<sup>11</sup>

In fact, this degree of amalgamation did not come until the judicial article was amended by the electorate in November 1962, effective January 1, 1964. The new judicial article provides that: "The Circuit Court shall have unlimited original jurisdiction of all justiciable matters. . . ."<sup>12</sup> This is a complete merger of law and equity. As a result, jurisdictional distinctions

<sup>6</sup> Supreme Court of Judicature Act of 1873, 36 & 37 Vict. c. 66, §§24-25.

<sup>7</sup> *Lullman v. Barrett*, 18 Ill. App. 573, 575 (1886).

<sup>8</sup> *Richards v. Hyde*, 21 Ill. 788, 789, 21 Peck 640, 641 (1859); *Ross v. Buchanan*, 13 Ill. 60, 63, 13 Peck 55, 58 (1851).

<sup>9</sup> ILL. CONST. art. VI, §12. (1870).

<sup>10</sup> Jurisdiction vested in a court of chancery remained there unless the General Assembly by statutory enactment, acting within constitutional limits, abolished or limited its exercise. *McNab v. Heald*, 41 Ill. 326, 330 (1866); *Latham v. McGinnis*, 29 Ill. App. 152, 155 (1888).

<sup>11</sup> *Ellman v. DeRuiter*, 412 Ill. 285, 292, 106 N.E.2d 350, 353 (1952).

<sup>12</sup> ILL. CONST. art. VI §9 (1870), as amended 1964.

between courts of law and courts of equity no longer exist in Illinois. Therefore, it is of no significance that a judicial district or circuit court does not have a chancery division. In fact, there are many circuit courts in the several Illinois judicial districts which do not have a separate division for equity cases.

For the practitioner, the important point is that under the new judicial article every circuit court judge has equity powers. This is in stark contrast with the judicial system that existed prior to January 1, 1964 when Illinois had a multiplicity of courts: municipal, city, and county; some, by statute, without the power to grant equitable relief.<sup>13</sup>

The injunction act, as it existed prior to 1964, is a good example. From 1932 until 1965 only circuit courts, and the superior court of Cook County, or a judge thereof, had the power to grant an injunction.<sup>14</sup> Now, because of the constitutional change, the same section of the injunction statute simply provides that: "The circuit courts shall have power to grant writs of injunction."<sup>15</sup> It follows, therefore, that if a circuit court judge sitting in a criminal case finds it necessary to issue an injunction, he can do so. A magistrate sitting in a case properly assigned to him can issue an injunction, reform a deed, grant reformation or rescission of a contract, or order any form of equitable relief which the cause requires, providing only, he is presiding over "justiciable matters."<sup>16</sup>

It appears, then, that the effort at amalgamation which began in England with the Judicature Act of 1873, brought into effect in Illinois by the Civil Practice Act of 1933, reached the conclusion visualized by reform advocates of the early 19th Century when in 1964 Illinois amended its judicial article. However, it is a mistake to believe that both as to procedure and substance there still does not exist some difference between equity and law.

## 2. *A Definition*

What is equity?

The term "equity" has both a broad and a narrow meaning. In its broad sense, equity means natural justice.<sup>17</sup> It means

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<sup>13</sup> Chancery Act, ILL. REV. STAT. ch. 22, § 1 (1929), limited equity jurisdiction to "the several circuit courts and city courts of this state, and superior court of Cook county . . ." Thus, magistrates, county and probate courts did not have equitable powers.

<sup>14</sup> "That the Superior court of Cook county, and the circuit courts [in term time, and] or any judge thereof, when the court stands adjourned or is in vacation shall have power to grant writs of injunction." ILL. REV. STAT. ch. 69, § 1 (1933).

<sup>15</sup> ILL. REV. STAT. ch. 69, § 1 (1965).

<sup>16</sup> ILL. CONST. art. VI, § 9 (1870), as amended 1964.

<sup>17</sup> SNELL'S PRINCIPLES OF EQUITY 3 (25th ed. R. Megarry & P. Baker 1960).

doing right by another. In its narrow sense, equity is a body of rules or principles that form an appendage to the general rules of law.<sup>18</sup> In this sense, equity is the kind of relief granted in courts of chancery.<sup>19</sup> It has been said by our Supreme Court that: "Equity is the correction of that wherein the law, by reason of its universality, is deficient."<sup>20</sup> Equity is based on moral rights and natural justice.<sup>21</sup> Contrary to a view held by many, including judges, "Equity is not the chancellor's sense of moral right, or his sense of what is just and equal. It is a complex system of established law."<sup>22</sup> It is from these principles of moral justice and natural law that the doctrines of equitable relief have evolved. They are unique to the system of equitable jurisprudence and they are deserving of understanding by the lawyer who must decide when a case qualifies for equitable relief.

### 3. *Requisites of Pleading*

There was a time when equity pleadings in Illinois courts differed from those filed in actions at law. These distinctions were largely abolished by the Civil Practice Act of 1933.<sup>23</sup> Section 31, as amended in 1955, provides that "there shall be no distinctions respecting the manner of pleading between actions at law and suits in equity. . . ." <sup>24</sup> Section 32, also amended in 1955, provides that: "The first pleading by the plaintiff shall be designated a complaint. The first pleading by the defendant shall be designated an answer."<sup>25</sup> Yet, it is surprising how often today one sees the first pleading of a plaintiff in equity captioned "Bill in Equity."

With regard to pleadings, the equity practitioner should examine Supreme Court Rule 135<sup>26</sup> which governs pleading of equitable matters. Subsection (a) provides that: "Matters within the jurisdiction of a court of equity, whether directly or as an incident to other matters before it, or which an equity

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *State Life Ins. Co. v. Board of Educ.*, 401 Ill. 252, 260, 81 N.E.2d 877, 881 (1948).

<sup>21</sup> *Jennings v. Kotz*, 299 Ill. 465, 132 N.E. 625 (1921); *Steger v. Traveling Men's Bldg. & Loan Ass'n*, 208 Ill. 236, 70 N.E. 236 (1904); *Rayborn v. Grand Lodge*, 234 Ill. App. 183 (1924).

<sup>22</sup> *Perry v. State*, 6 Ill. Ct. Cl. 81, 84 (1928).

<sup>23</sup> "[A]nd there shall be no distinctions respecting the manner of pleading between such actions at law and suits in equity, other than those specified in this Act and the rules adopted pursuant thereto. . . ." ILL. REV. STAT. ch. 110, §155 (1933). See *Dunham v. Kauffman*, 385 Ill. 79, 52 N.E.2d 143 (1943); *Frank v. Salomon*, 376 Ill. 439, 34 N.E.2d 424 (1941); *Hawley Products Co. v. May*, 314 Ill. App. 537, 41 N.E.2d 769 (1942); *Bartelstein v. Goodman*, 340 Ill. App. 51, 90 N.E.2d 796 (1950).

<sup>24</sup> ILL. REV. STAT. ch. 110, §31 (1955).

<sup>25</sup> *Id.* §32.

<sup>26</sup> ILL. REV. STAT. ch. 110A, §135 (1967).

court can hear so as to do complete justice between the parties, may be regarded as a single equitable cause of action and when so treated as a single cause of action shall be pleaded without being set forth in separate counts and without the use of the term 'count.'"<sup>27</sup> In subsection (b):

When actions at law and in chancery that may be prosecuted separately are joined, the party joining the actions may, if he desires treat them as separate causes of action, plead them in distinct counts, marked respectively 'separate action at law' and 'separate action in chancery.' This paragraph applies to answers, counterclaims, third party claims, and any other pleadings whenever legal and equitable matters are permitted to be joined under the Civil Practice Act.<sup>28</sup>

As a corollary, attention should be paid to Supreme Court Rule 232<sup>29</sup> that governs trial of equitable and legal matters. It is obvious that although in Illinois there is a complete merger of law and equity, there is still some distinction between these two classes of cases.

This can be seen in General Order No. 3-5<sup>30</sup> of the circuit court of Cook County, dated September 8, 1967, which provides that as to captions in chancery actions, "Every complaint or other paper initiating any action or proceeding in the Chancery Division shall designate in the caption, below the words 'In Chancery,' the nature of the relief sought (*i.e.*, foreclosure, partition, etc.)." In the circuit court of Cook County, therefore, every complaint or other paper initiating any equitable action must, in the pleading, designate the nature of relief sought. This order is consistent with Supreme Court Rule 132<sup>31</sup> that requires every complaint or other paper initiating any civil action or proceeding to contain in its caption the words "at law," "in chancery," or other designation conforming to the organization of the circuit court into divisions. It is important to observe, however, that by Rule 132, this "[m]is-designation shall not affect the jurisdiction of the court." It would follow that mis-designation of the relief sought will not affect the power of a circuit court to grant equitable relief.

The nature, quality and character of pleadings in an equity case have been the subject of extensive literature.<sup>32</sup> Although much that is said in the old books has now been outmoded by

<sup>27</sup> *Id.* §135(a).

<sup>28</sup> *Id.* §135(b).

<sup>29</sup> ILL. REV. STAT. ch. 110A, §232 (1967).

<sup>30</sup> General Orders of the Circuit Court of Cook County, G.O. 3-5 (Effective September 11, 1967).

<sup>31</sup> ILL. REV. STAT. ch. 110A, §132 (1967).

<sup>32</sup> See, *e.g.*, J. STORY, COMMENTARIES ON EQUITY PLEADINGS (10th ed. 1892); G. BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY (8th ed. 1910); S. PUTERBAUGH, PUTERBAUGH'S CHANCERY PLEADING & PRACTICE (6th ed. 1916).

modern practice, it is still true that an equity suit may require a different standard of fact allegation necessary to state a cause of action. This means, in substance, that a complaint in equity should be positive as to the facts alleged, the allegations should be certain and specific, and facts rather than conclusions should be pleaded.<sup>33</sup> The practitioner should remember that only ultimate facts rather than evidentiary conclusions should be stated in the equity complaint.<sup>34</sup>

In this connection, it is essential to remember that unless the remedy sought is made exclusive by statute, equitable relief can be obtained only where adequate and complete legal remedy cannot be had.<sup>35</sup> To invoke the powers of a court of equity, it has been required that it appear affirmatively from the face of the pleadings, and from the evidence, that plaintiff has no adequate remedy at law.<sup>36</sup>

The practitioner should notice that the Illinois Supreme Court has equated inadequacy and impracticality of remedy at law with its entire absence.<sup>37</sup> It has been held by one Illinois appellate court that if the equitable remedy is more adequate than the remedy at law, chancery will take jurisdiction, particularly if adequacy of the legal remedy depends on the will of the opposing party.<sup>38</sup>

With regard to the adequacy of legal remedy which would preclude grant of equitable relief, there is a variance in language used by our reviewing courts. In one case it was held that equitable relief will be granted unless the remedy at law is as efficient as the remedy equity will confer under the same circumstances.<sup>39</sup> In another, it was said that the aid of equity can be

<sup>33</sup> *Campbell v. Paris & D.R.R.*, 71 Ill. 611 (1874); *Bezely v. Searl*, 230 Ill. App. (1923); *Hill v. Spencer*, 196 Ill. 65, 63 N.E. 614 (1902); *Falor v. Doubet*, 164 Ill. App. 433 (1911); *City of East St. Louis v. Millard*, 14 Ill. App. 483 (1884); *Wolcott v. Village of Lombard*, 387 Ill. 621, 57 N.E.2d 351 (1944); *Barzowski v. Highland Park State Bank*, 371 Ill. 412, 21 N.E.2d 294 (1939); *Village of Clarendon Hills v. Century Indemnity Co.*, 299 Ill. App. 604, 20 N.E.2d 607 (1939).

<sup>34</sup> *Fierke v. Elgin City Banking Co.*, 359 Ill. 394, 194 N.E. 528 (1935); *Penn v. Fogler*, 182 Ill. 76, 55 N.E. 192 (1899); *William v. Soutter*, 55 Ill. 130 (1870).

<sup>35</sup> *Branigar v. Village of Riverdale*, 396 Ill. 534, 72 N.E.2d 201 (1947); *Rothschild v. Village of Calumet Park*, 350 Ill. 330, 183 N.E. 337 (1932); *Freeman v. Freyer*, 30 Ill. App. 2d 185, 174 N.E.2d 217 (1961).

<sup>36</sup> *Camp v. Fincher*, 27 Ill. 346 (1862); *Hogg v. Hohmann*, 330 Ill. 589, 162 N.E. 209 (1928); *Dilatush v. Salyers*, 285 Ill. App. 281, 1 N.E.2d 923 (1936).

<sup>37</sup> *Branigar v. Village of Riverdale*, 396 Ill. 534, 72 N.E.2d 207 (1947); *Rothschild v. Village of Calumet Park*, 350 Ill. 330, 183 N.E. 337 (1932).

<sup>38</sup> *Famous Permanent Wave Shops, Inc. v. Smith*, 302 Ill. App. 178, 23 N.E.2d 767 (1939); *Metropolitan Life Ins. Co. v. Consento*, 297 Ill. App. 450, 17 N.E.2d 1019 (1938).

<sup>39</sup> *Jay-Bee Realty Corp. v. Agricultural Ins. Co.*, 320 Ill. App. 310, 50 N.E.2d 973 (1943); *Goldman v. Blanksten*, 240 Ill. App. 136 (1926); *Smith v. Bates Mach. Co.*, 79 Ill. App. 519 (1898), *aff'd*, 182 Ill. 166, 55 N.E. 69 (1899).

invoked only in absence of adequate legal remedy.<sup>40</sup> In still another, it was said that the "adequate remedy at law" must be clear, complete, and as practical and efficient to the ends of justice and its administration as is the equitable remedy.<sup>41</sup> From this it is clear that the facts alleged, and ultimately the proof made, must show that the plaintiff has no adequate remedy at law. It is not enough to allege this by way of conclusion.

Generally, grant of equitable relief is discretionary.<sup>42</sup> This fact makes necessary positive allegations, and a detail of factual statements which ordinarily are unnecessary in suits at law. It is in this respect that a complaint which seeks equitable relief differs from one that seeks a judgment at law. In other words, the complaint must contain allegations so complete, so positive, and so detailed in ultimate facts that the equity judge can be persuaded from the allegations alone in some cases, or from the allegations supported by proof, to grant the equitable relief.

Must the complaint be under oath?

It is old law, even before the Civil Practice Act, that "there is no rule in Illinois requiring bills in cases of general equity cognizance to be sworn to."<sup>43</sup> Attention should be paid to Civil Practice Act, section 35,<sup>44</sup> which provides for verification of pleadings, even where none is required. The practitioner should notice that: "If any pleading is so verified, every subsequent pleading must also be verified, unless verification is excused by the court."<sup>45</sup> It follows, therefore, that while as a general rule an equity complaint does not require an oath, there are exceptions. A complaint which seeks injunctive relief must be under oath.<sup>46</sup> A complaint seeking appointment of a receiver must also be supported by oath or affidavit.<sup>47</sup> Other examples can be found. It is perhaps the exceptions to the general rule that have led to the mistaken belief of lawyers that a suit in equity must always be under oath.

Other aspects of pleadings provided in the Civil Practice Act fully apply to actions in equity. Motion practice is the same,

<sup>40</sup> *White v. City of Ottawa*, 318 Ill. 463, 149 N.E. 521 (1925); *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N.E. 171 (1898); *Eveland v. Board of Educ.*, 340 Ill. App. 308, 92 N.E.2d 182 (1950).

<sup>41</sup> *Freeman v. Freyer*, 30 Ill. App. 2d 185, 174 N.E.2d 217 (1961); *McGinnis v. First Nat'l Bank*, 214 Ill. App. 295 (1919).

<sup>42</sup> *E.g.*, *Stein v. Isse Koch & Co.*, 350 Ill. App. 171, 112 N.E.2d 491 (1953).

<sup>43</sup> S. PUTERBAUGH, *PUTERBAUGH'S PLEADING & PRACTICE* 39 (6th ed. 1916).

<sup>44</sup> "Any pleading, although not required to be sworn to, may be verified by the oath of the party filing it or of any other person or persons having knowledge of the facts pleaded." ILL. REV. STAT. ch. 110, §35 (1967).

<sup>45</sup> *Id.*

<sup>46</sup> ILL. REV. STAT. ch. 69, §3 (1967).

<sup>47</sup> *E.g.*, *Daley v. Nelson*, 119 Ill. App. 627 (1905).



with the additional observation that petitions seeking temporary relief should conform to the requirement that allegations be positive, complete, and describe ultimate facts which will support the relief sought. It goes without saying that provisions of the Civil Practice Act and Supreme Court Rules governing discovery, apply as well to suits in equity as they do to actions at law.

## II.

### CATEGORIES OF EQUITABLE RELIEF

Generally, it can be said that there are two kinds of equitable relief.

1. Those provided by special statutes. For example, relief granted by the Burnt Records Act,<sup>48</sup> relief against deprivation of civil rights provided in Civil Rights Act.<sup>49</sup> There are others.

2. Those which are traditional to courts of chancery. These include writs of injunction, specific performance of contracts, reformation, and the like.

#### 1. *Statutory Equitable Relief*

What equitable relief is provided by statute depends on statutory provisions. Reference must be made to the particular statute for procedure as well as for substance. In the Burnt Records Act,<sup>50</sup> for example, courts of chancery are given power to establish title to land where proof is made that records affecting real estate have been destroyed. Under the provided procedure, the court has power to make all orders and enter any judgment or decree necessary to establish title to the land. There is a provision for filing of a petition, verification, description of defendants, as well as consequences of perjury in connection with such proceedings. This statute enlarges the traditional jurisdiction of courts of equity.

The Civil Rights Act<sup>51</sup> of Illinois contains elaborate provisions for equitable remedy to enjoin deprivation of rights defined in the statute. In the main, relief is by injunction; the mode, however, involves application to a court for appointment of counsel to prosecute the application for injunctive relief.

In the Eavesdropping statute,<sup>52</sup> there is a provision which entitles one whose rights under the statute are violated to apply for an injunction from any court of competent jurisdiction. Again, the relief is by injunction, a traditional remedy in courts of equity. There are other statutes specifically providing for

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<sup>48</sup> ILL. REV. STAT. ch. 116, §14 (1967).

<sup>49</sup> ILL. REV. STAT. ch. 38, §13-3 (1967).

<sup>50</sup> ILL. REV. STAT. ch. 116, §14 (1967).

<sup>51</sup> ILL. REV. STAT. ch. 38, §13-3 (1967).

<sup>52</sup> ILL. REV. STAT. ch. 38, §14-6 (1967).

equitable relief.<sup>53</sup> To these the practitioner should turn, with the admonition that when a case falls within a special law providing for equitable relief, first read the statute, then think great thoughts!

## 2. *Traditional Equitable Remedies*

Equitable remedies traditionally granted in courts of chancery differ from each other in many respects. In some the difference is procedural; in others it is substantive. A detailed discussion of each will disclose these differences and reveal the elements which must be present in each case before it can qualify for equitable relief.

### (a) *Injunction Orders*

Injunction orders are distinguishable in two ways: as to their duration and as to their mode of function. As to duration, an injunction can take the form of a temporary restraining order, a temporary injunction, or a permanent injunction. As to mode of function, an injunction can be either prohibitory or mandatory. In point of time, the earliest form of injunctive relief in an equity proceeding is the temporary restraining order. Because of this feature, we will first discuss the essential elements of this form of equitable relief.

#### (i) *The Temporary Restraining Order*

The temporary restraining order<sup>54</sup> is new in Illinois; the concept, however, is old.<sup>55</sup> This remedy is provided by the 1967 amendment to the Injunction statute which is patterned after Federal Rule 65(b).<sup>56</sup>

Before a temporary restraining order can issue, the following elements must be present:

1. Danger, shown by affidavit or by verified complaint, that immediate and irreparable injury, loss, or damage will result unless the order is issued.
2. Need to maintain the *status quo* until an application for a temporary injunction can be made.
3. If the application is without notice, need that the temporary restraining order issue before notice can be served.

The 1967 amendment is detailed and specific. Its provisions must be followed if a valid temporary restraining order is to issue. Although the amendment infuses into Illinois law a new concept in injunctive relief, there are no Illinois cases construing this kind of injunctive relief. Therefore, we must refer

<sup>53</sup> *E.g.*, ch. 82, §§1, et seq., the liens act; ch. 95, §§23 to 23.11, Illinois mortgage and foreclosure act; ch. 100½, §§1, et seq., nuisances; ch. 140, §§8-28, protection of trademarks.

<sup>54</sup> ILL. REV. STAT. ch. 69, §3-1 (1967).

<sup>55</sup> *E.g.*, Perry v. Eson, 8 Ill. App. 2d 423, 132 N.E.2d 66 (1956).

<sup>56</sup> FED. R. CIV. P. 65(b).

to decisions of other jurisdictions for an explanation of the function and meaning of a temporary restraining order. Since the amendment is verbatim the federal rule, decisions of federal courts are helpful.<sup>57</sup>

Generally, a temporary restraining order is issued without notice.<sup>58</sup> It is effective only until an application for an injunction can be heard. In contrast, a temporary injunction is usually issued with notice and it is effective until trial on the merits can be had. The distinction between a temporary restraining order and a temporary injunction is that the former maintains the status quo until hearing can be had on an application for a temporary injunction. The latter maintains the status quo until trial on the merits can be had and a permanent injunction either issued or denied.<sup>59</sup>

Section 3-1 provides that no temporary restraining order can be obtained without notice to the adverse party unless it clearly appears, by affidavit or verified complaint, that immediate and irreparable injury, loss or damage will result before notice can be served and a hearing had on the application.<sup>60</sup> Every temporary restraining order granted without notice must contain an endorsement of the date and hour of its issuance.<sup>61</sup> It must be filed forthwith in the office of the clerk and made of record. It must define the injury and state why it is irreparable, and the order must contain findings of facts by the court that will show why the order was issued without notice.<sup>62</sup> The order by its own terms will expire in 10 days unless, within a time fixed by the order and for good cause, it is extended for a like period or the party against whom the order is entered consents to its extension.<sup>63</sup>

When a temporary restraining order is granted without notice, it must contain a setting of the motion for the preliminary injunction at the earliest possible time.<sup>64</sup> Hearing on the motion for temporary injunction takes precedence over all other matters, except cases of a like kind and of the same character. If the party who obtains the temporary restraining order does not proceed with the application for preliminary injunction, the court shall dissolve the temporary restraining order.<sup>65</sup>

<sup>57</sup> *Lunkenheimer Co. v. Condec Corp.*, 268 F. Supp. 667 (S.D.N.Y. 1967); *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 978 (D.D.C. 1952).

<sup>58</sup> *E.g.*, *Swaim v. City of Indianapolis*, 202 Ind. 233, 171 N.E. 871 (1930).

<sup>59</sup> *E.g.*, *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804 (9th Cir. 1963).

<sup>60</sup> ILL. REV. STAT. ch. 69, §3-1 (1967).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

The 1967 amendment to the Injunction Act also provides that the party against whom the order issues may on 2 days' notice to the party who obtained the order, or on such shorter notice as the court may prescribe, move for dissolution or modification. The court shall proceed expeditiously to hear and determine the motion to dissolve.<sup>66</sup>

The amendment takes into account what is generally said of injunctive relief. Injunctions, whether in the form of preliminary or temporary orders, are drastic remedies.<sup>67</sup> For this reason, Section 3-1 requires that every temporary restraining order set forth the reasons for its issuance, be specific in terms, describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained. A temporary restraining order is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.<sup>68</sup> With the exception of a governmental office or agency or where a judgment is enjoined, before a temporary restraining order issues, the plaintiff shall give bond in such sum, and upon such condition and with such security as the court may require for payment of cost and damages which may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained. A temporary restraining order issued without bond is void.<sup>69</sup> The present state of Illinois law on this subject is such that the safest course for the practitioner is to see that a bond is furnished in every case in which a temporary restraining order issues. There is room for argument that this construction of the injunction act infringes on judicial power. This contention should be relegated to those who fashion law; for the pragmatist, the practitioner, a bond is indispensable to the validity of a temporary restraining order.

#### (ii) *The Temporary Injunction*

There are several terms used in referring to a temporary injunction. Sometimes it is called injunction pendente lite.<sup>70</sup> Often it is called an interlocutory injunction.<sup>71</sup> On occasion the term used is preliminary injunction.<sup>72</sup> By any name, a tem-

<sup>66</sup> *Id.*

<sup>67</sup> *E.g.* *Admiral Trailer Mfg. Co. v. All States Trailer Co.*, 351 Ill. App. 513, 115 N.E.2d 560 (1953) (Abstract).

<sup>68</sup> ILL. REV. STAT. ch. 69, §3-1 (1967).

<sup>69</sup> *Belpedio v. Civil Serv. Comm'n.*, — Ill. App. 2d —, 246 N.E.2d 822 (1969); *Hoffman v. City of Evanston*, 101 Ill. App. 2d 440, 243 N.E.2d 478 (1968). ILL. REV. STAT. ch. 69, §§8-9 (1967).

<sup>70</sup> *E.g.*, *H. A. Hillmer Co. v. Behr*, 196 Ill. App. 363 (1915).

<sup>71</sup> *E.g.*, *People ex rel. Bolton v. Progressive Gen. Ins. Co.*, 84 Ill. App. 2d 109, 228 N.E.2d 152 (1967).

<sup>72</sup> *Id.*

porary injunction is an order of a court directing a person to do or refrain from doing a particular act. The office of a temporary injunction is to preserve the status quo until a final hearing.<sup>73</sup>

In order to qualify for a temporary injunction, a case must possess the following elements:

1. Notice of the time and place of the application, unless it clearly appears, from specific facts shown by the verified complaint or by an affidavit, that immediate and irreparable injury, loss or damage will result before notice can be served and hearing had.
2. Showing, by allegations or proof, that there is likelihood of success in proving the right to the ultimate relief sought.
3. Showing that the balance of convenience favors granting of the temporary injunction.
4. Showing that the *status quo* must be maintained until hearing of the cause on the merits if irreparable injury to the applicant is to be prevented.
5. Showing that the applicant has not engaged in any conduct that disqualifies him from the equitable relief of a temporary injunction.
6. Conditions that would serve to protect the party against whom the temporary injunction is issued. Usually, the condition is the giving of bond, on such terms as the court in its discretion may determine.

A temporary injunction can be either prohibitory or mandatory. Temporary mandatory injunctions are rarely issued. It has been said that while a court of equity is always reluctant to grant an interlocutory mandatory injunction, it will do so in an extreme case where right to such relief is clearly established and the claimed invasion results in serious injury.<sup>74</sup> The reason for strictures against temporary mandatory injunctions is that by its nature it terminates the litigation. Nonetheless, it is not true that temporary mandatory injunctions are never issued.

There appears to be an easy tendency on the part of practitioners to believe that a temporary injunction can be readily obtained without notice. Some even urge issuance of a temporary injunction both without notice and without bond. Illinois courts of review have consistently held that our law does not favor granting injunctions without notice.<sup>75</sup> Section 3 of the Injunction Act requires giving of notice, except in the unusual situation where it appears from complaint or affidavit that immediate and irreparable injury will result.<sup>76</sup>

The exceptional case is easily recognized. Where giving of

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<sup>73</sup> Dunne v. County of Rock Island, 228 Ill. 359, 123 N.E. 501 (1919); Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 21 N.E.2d 723 (1939).

<sup>74</sup> Ambassador Foods Corp. v. Montgomery Ward & Co., Inc., 43 Ill. App. 2d 100, 192 N.E.2d 572 (1963); Iowa-Illinois Gas & Elec. Co. v. Perrine, 351 Ill. App. 195, 114 N.E.2d 572 (1953).

<sup>75</sup> Streamwood Homebuilders, Inc. v. Brolin, 25 Ill. App. 2d 39, 165 N.E.2d 531 (1960); Miollis v. Schneider, 77 Ill. App. 2d 420, 222 N.E.2d 715 (1966).

<sup>76</sup> ILL. REV. STAT. ch. 69, §3 (1967).

notice will itself be productive of the mischief apprehended, a court of equity will award a temporary injunction without notice, even before service of summons and complaint.<sup>77</sup> The applicant, however, has the burden of establishing that his case falls within an exception to the general rule.

Snell, speaking of English equity practice, said that "It is impossible to enumerate all the cases in which the remedy by way of injunction is available."<sup>78</sup> This statement is equally true of Illinois equity. Without attempting an exhaustive list of the kinds of cases which can qualify for temporary injunctive relief, the following are the more important kinds calling for this type of equitable remedy.

Equity will enjoin the breach of a negative covenant.<sup>79</sup> It will be noticed that this is the converse of the equitable remedy of specific performance. Thus, a temporary injunction will issue in a case involving a claim that the defendant agreed not to carry on a certain trade in connection with the sale of his interest in a business.<sup>80</sup> A temporary injunction will issue to restrain the violation of covenants concerning land.<sup>81</sup> In this connection, it should be remembered that the origin of equity jurisdiction in injunctions seems to have been from the old common law writ of prohibition of waste.<sup>82</sup>

A temporary injunction will issue to restrain a threatened or apprehended trespass.<sup>83</sup> It is ancient equity law that a temporary injunction will issue to restrain a nuisance.<sup>84</sup> The passing off of trademarks or trade names can be restrained by a temporary injunction.<sup>85</sup> Infringement of patents, designs and copyrights can be protected by a temporary injunction.<sup>86</sup> Use and abuse of confidential information can support the issuance of temporary injunction.<sup>87</sup> Expulsion from voluntary associations can be protected by a temporary injunction under certain cir-

<sup>77</sup> *Miollis v. Schneider*, 77 Ill. App. 2d 420, 222 N.E.2d 715 (1966); *Sprague v. Monarch Book Co.*, 105 Ill. App. 530 (1903).

<sup>78</sup> SNELL'S PRINCIPLES OF EQUITY 594 (25th ed. R. Megarry & P. Baker 1960).

<sup>79</sup> *Dr. Allison, Dentist, Inc. v. Allison*, 360 Ill. 638, 196 N.E. 799 (1935); *Bartholomae & Roesing Brewing & Malting Co. v. Modzelewski*, 269 Ill. 539, 109 N.E. 1058 (1915).

<sup>80</sup> *E.g.*, *Bauer v. Sawyer*, 8 Ill.2d 351, 134 N.E.2d 329 (1956).

<sup>81</sup> *E.g.*, *Housing Authority of Gallatin County v. Church of God*, 401 Ill. 100, 81 N.E.2d 500 (1948).

<sup>82</sup> *E.g.*, *Wise v. Potomac Nat'l Bank*, 393 Ill. 357, 65 N.E.2d 767 (1946).

<sup>83</sup> *E.g.*, *Fidler v. Roberts*, 41 F.2d 305 (7th Cir. 1930).

<sup>84</sup> *E.g.*, *People v. Mussatto*, 216 Ill. App. 519 (1920).

<sup>85</sup> *E.g.*, *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806 (7th Cir. 1958).

<sup>86</sup> *E.g.*, *Packard Motor Car Co. v. Overland Motor Co.*, 28 F.2d 306 (N.D. Ill. 1928), *aff'd*, 30 F.2d 497 (7th Cir. 1929).

<sup>87</sup> *E.g.*, *House of Vision, Inc. v. Hiyane*, 58 Ill. App. 2d 431, 208 N.E.2d 390 (1965).

cumstances.<sup>88</sup> Finally, within well-known exceptions, judicial proceedings can be restrained by a temporary order.<sup>89</sup>

For the practitioner, it is important to remember that application for a temporary injunction is directed to the conscience and sound discretion of the court. Grant or refusal of a temporary injunction rests largely in the discretion of the chancellor.<sup>90</sup> A reviewing court will not disturb a trial court ruling on an application for a temporary injunction unless there is a showing that discretion was abused. Particularly is this true where the injunction ruling follows notice, hearing, and provision for bond.

It should be observed that the chance of sustaining the grant of a temporary injunction is greater after notice and hearing of evidence. In other words, it is difficult to show abuse of discretion where the temporary injunction issues without notice<sup>91</sup> or without hearing of evidence.<sup>92</sup> Therefore, in any important case, the practitioner should give notice and support the application with evidence at a hearing.

It is also easier to support the grant of a temporary injunction on giving of proper bond, or submission to conditions that are fair, reasonable and which tend to protect the rights of the party against whom the temporary order issues.<sup>93</sup>

Finally, it is important that the provisions of Section 3-1 of the Injunction Act, as amended in 1967, be carefully followed and the reasons for the temporary injunction spelled out. In other words, a temporary order should contain the reasons for its issuance as found by the court. The order should be clear as to its operation and effect, it should not be ambiguous, and it should be free from doubt in every respect.

Under our practice, the initial responsibility for the drafting of a temporary injunction order is that of the practitioner.<sup>94</sup> The ultimate responsibility for accuracy of the order is that of the chancellor. It is a mark of professional responsibility, however, for the practitioner to prepare an order which is in com-

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<sup>88</sup> *Parsons College v. North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967); *cf.* *Werner v. International Ass'n of Machinists*, 11 Ill. App. 2d 258, 137 N.E.2d 100 (1956).

<sup>89</sup> *E.g.*, *People ex rel. Lake County Bar Ass'n v. Circuit Court of Lake County*, 31 Ill.2d 170, 201 N.E.2d 109 (1964).

<sup>90</sup> *E.g.*, *Naxon Telesign Corp. v. Selig*, 38 Ill. App. 2d 242, 186 N.E.2d 666 (1962).

<sup>91</sup> *E.g.*, *Christian Hosp. v. People ex rel. Murphy*, 223 Ill. 244, 79 N.E. (1906).

<sup>92</sup> *E.g.*, *Ableman v. Slader*, 80 Ill. App. 2d 94, 224 N.E.2d 569 (1967).

<sup>93</sup> *Naxon Telesign Corp. v. Selig*, 38 Ill. App. 2d 242, 186 N.E.2d 666 (1962); *Sunset Hills Homeowners Assoc. v. Karel*, 39 Ill. App. 2d 477, 189 N.E.2d 41 (1963).

<sup>94</sup> ILL. REV. STAT. ch. 110A, §271 (1967). *See also* 52 ILL. BAR J. 480 (1964).

pliance not only with the words but the spirit of the Injunction Act.

How should the motion for temporary injunction be made?

Procedure for injunctive orders depends on local practice. In most Illinois circuits, the clerk docket the complaint and assigns it to one of the circuit court judges for a hearing in accordance with court rules. In Cook County, where there is a chancery division, the case is docketed by the clerk as a chancery proceeding and sent to the chief judge for assignment. If the application for temporary injunction is an emergency one without notice, the assignment clerk on the staff of the chief judge of the division will instruct plaintiff's counsel concerning the judge to whom the case is assigned. Either that clerk, or the lawyer for the plaintiff, can take the file to that judge and request an emergency hearing.

Even in an *ex parte* hearing, the better practice is for plaintiff's lawyer to have affidavits in support of his application and witnesses to support the claim for temporary emergency relief. In the well-handled case, a court reporter should be available to record the testimony of witnesses and the representations counsel makes to the court concerning reasons for dispensing with notice. Experience shows that a temporary injunction issued without notice but supported by a record which preserves the evidence heard and the hearing had on the emergency application, stands a better chance of being sustained on appeal, if one is taken. The practitioner should bear in mind that on being served with the injunction order, the party against whom the order issues can move to dissolve it. An order denying the motion to dissolve is appealable under the provisions of Supreme Court Rule 307.

If the application for temporary injunction is with notice, the practitioner should be prepared to support the hearing with testimony of witnesses. Again, a court reporter to record the proceedings will aid in sustaining the order of the trial court if a temporary injunction issues. Here too, attention is called to Supreme Court Rule 307 which provides that: "An appeal may be taken to the appellate court from an interlocutory order (1) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction; . . . ."

Should there be caution in applying for a temporary injunction? Certainly.

It should always be remembered that a temporary injunction obtained merely to please a client can lead to painful results. As has already been made clear, every temporary injunction must be supported by a bond. The purpose of the bond is to assure that the person against whom the temporary injunction



issues does not suffer damage as a result of the order.<sup>95</sup> Section 12 of the Injunction Act provides that upon dissolution of a wrongfully issued temporary injunction, the party enjoined is entitled to a hearing and to award of damages on proof that he was injured by the order.<sup>96</sup> The motion to dissolve must be made promptly; and the motion for hearing on damages must comply with the provisions of section 12 of the Injunction Act.

The motion cannot be made after entry of a final decree against the defendant<sup>97</sup> and the statute has application only to dissolution of a temporary injunction.<sup>98</sup> Despite these limitations, the practitioner is well advised to be circumspect, as well as cautious, in the application for a temporary injunction because as our courts of review have said, an injunction, temporary or permanent, is a drastic remedy which can injure those persons against whom it is issued.

### (iii) *The Permanent Injunction*

A permanent injunction is a final decree directing a person to do or refrain from doing a particular act.<sup>99</sup> The difference between a temporary and a permanent injunction is that the former maintains the status quo; and the latter disposes of the suit. In order to qualify for a permanent injunction, a case must possess the following elements:

1. Proof that a permanent injunction is necessary to protect the property or civil right involved.
2. Proof that money damages as an alternative remedy is inadequate.
3. Proof that some person, legal or natural, will respond to the injunctive command. Equity acts *in personam*.

Although a permanent injunction is sometimes referred to as perpetual, it is subject to termination. Courts of equity, even after passage of the 30 day period for appeal, have the power to modify, vacate, or set aside a permanent injunction if changed conditions of fact or law justify such action.<sup>100</sup> In this sense the oft-stated notion that a permanent injunction is a perpetual one is subject to qualifications.

With regard to the kind of acts that can be the subject of a permanent injunction, this scope is the same as for a temporary

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<sup>95</sup> *Schaefer v. Stephens — Adamson Mfg. Co.*, 36 Ill. App. 2d 310, 183 N.E.2d 575 (1962); *John Deere Co. v. Hinrichs*, 36 Ill. App. 2d 255, 183 N.E.2d 309 (1962).

<sup>96</sup> ILL. REV. STAT. ch. 69, §12 (1967).

<sup>97</sup> *E.g.*, *Schien v. City of Virden*, 5 Ill.2d 494, 126 N.E.2d 201 (1955).

<sup>98</sup> *Official Aviation Guide Co. v. American Aviation Associates*, 162 F.2d 541 (7th Cir. 1947); *Schien v. City of Virden*, 5 Ill.2d 494, 126 N.E.2d 201 (1955).

<sup>99</sup> *E.g.*, *Baton Rouge Bldg. Trades Council v. T. L. James & Co.*, 201 La. 749, 10 So.2d 606 (1942).

<sup>100</sup> *E.g.* *Field v. Field*, 79 Ill. App. 2d 355, 223 N.E.2d. 551 (1967).

injunction. In a general way, these have been discussed; therefore, that discussion need not be repeated here.<sup>101</sup>

The trial of a suit for permanent injunction is governed by the rules of civil practice. Because of the nature of the relief, before a permanent injunction is granted the right of the plaintiff to such relief should be established clearly and affirmatively.<sup>102</sup> It is a general rule, often applied in the cases, that before an injunction can issue by a final decree, there must be a clear showing of violation of the rights of the plaintiff and it must also appear clearly that the plaintiff will suffer specific injury by reason of such violation.<sup>103</sup> Often, the nature of the act sought to be enjoined affects the standard of proof required of the plaintiff to show entitlement to injunctive relief by a final decree.

As in the case of temporary injunctive orders, the initial responsibility for preparing a decree for permanent injunction rests on the practitioner. Of course, the ultimate responsibility for entry of the decree is that of the chancellor. The practitioner can aid in the discharge of this responsibility through preparation of an adequate decree, clear and specific in its terms, with plain and definitive language with regard to the nature of the act enjoined and parties to be affected thereby.

It is generally said that a decree in equity need not contain findings of fact and conclusions of law. However, a distinction should be made between a decree in equity and a final decree granting a permanent injunction. It has long been the law of Illinois that a decree granting an injunction, whether temporary or permanent, must be as clear and as explicit as the record can support. There should be no doubt concerning the injunctive relief, the person or persons enjoined, and the acts subject of the order. Because of these requirements, great care should be given to the preparation and submission of a decree granting a permanent injunction.

#### (b) *Specific Performance of Contracts*

Specific performance is an equitable remedy which compels substantial performance of a contract in a way that will do justice between the parties.<sup>104</sup> To qualify for the equitable remedy of specific performance a case must possess the following elements:

1. There must be a contract, clear, definite, and unequivocal in its terms, not vague or uncertain in any of its essential particulars.

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<sup>101</sup> See text at notes 70-98 *supra*.

<sup>102</sup> *Allott v. American Strawboard Co.*, 237 Ill. 55, 86 N.E. 685 (1908); *Wilson-Broadway Bldg. Corp. v. Northwestern Elevated R.R.*, 225 Ill. App. 306 (1922).

<sup>103</sup> *E.g.*, *Schubach v. McDonald*, 179 Mo. 163, 78 S.W. 1020 (1903).

<sup>104</sup> *E.g.*, *Powell v. Huey*, 145 Ill. App. 477 (1908), *aff'd*, 241 Ill. 132, 89 N.E. 299 (1909).

2. There must be allegations and proof that the subject matter of the contract is unique.
3. There must be proof showing facts which in equity and good conscience entitles the plaintiff to a decree for specific performance.

The cardinal requirement for specific performance is proof of a contract that is clear, specific and fair. Substantively, the subject of the contract must possess a quality which would make specific enforcement the only adequate remedy.<sup>105</sup> If it appears, either from allegations or proof, that damages at law will give the compensation entitled, or will put the complaining party in the same position as he would be if the agreement were specifically enforced, equity will not interfere.<sup>106</sup>

There must also be proof that there is mutuality of remedy. Want of mutual remedy at the inception of the contract is not a bar to relief by specific performance.<sup>107</sup> Yet, it is generally the rule in Illinois that where mutuality is lacking, courts of equity will aid neither party by specific enforcement of the contract.<sup>108</sup> There is authority for the assertion, however, that the Illinois law of specific performance has gathered a growing and developing body of exceptions which cast doubt on the doctrine of mutuality.<sup>109</sup>

The subject matter of the contract is important in determining whether specific performance will be decreed. It is commonly said that where the thing contracted for has unique value, one element of specific performance is present. Traditionally, in English and in American law, land has always been considered a subject which will justify specific performance. It is said that land has the unique characteristic of irreplaceability.<sup>110</sup>

Generally, contracts for personal service will not be specifically enforced.<sup>111</sup> A contract for the sale of a rare piece of art can be the subject of equitable relief by specific performance. In other words, where the subject of the contract cannot be duplicated either because of its kind, quality, or value, equity will grant specific performance because in the nature of things damages at law are not adequate.

There is no inflexible rule that controls grant of specific

<sup>105</sup> *Besinger v. National Tea Co.*, 75 Ill. App. 2d 395, 221 N.E.2d 156 (1966); *King Mechanism & Engineering Co. v. Western Wheeled Scraper Co.*, 59 F.2d 546 (7th Cir. 1932).

<sup>106</sup> *E.g.*, *Linder v. Potier*, 409 Ill. 407, 100 N.E.2d 602 (1951); *Tascher v. Timmerman*, 67 Ill. App. 568 (1896).

<sup>107</sup> *E.g.*, *Gould v. Stelter*, 14 Ill.2d 376, 152 N.E.2d 869 (1958).

<sup>108</sup> *E.g.*, *Swanson v. Lederer*, 159 Ill. App. 547 (1911).

<sup>109</sup> *See* 17 U. CHI. L. REV. 409, 416 (1950).

<sup>110</sup> *Id.* at 410.

<sup>111</sup> *Oswald v. Nehls*, 233 Ill. 438, 84 N.E. 619 (1908); *Annot.*, 135 A.L.R. 279 (1941).

performance.<sup>112</sup> Each case must be decided on its own facts. As in the case of equitable remedies in general, grant or denial of specific performance rests in the sound judicial discretion of the court, exercised consistent with the facts and circumstances of the case.<sup>113</sup>

In some Illinois cases, particularly those involving contracts for the sale of land, it is said that specific performance is a matter of right and not a favor. Our reviewing courts look to determine whether the surrounding circumstances show a voluntary and freely executed contract, fair in its terms, so that justice requires it be specifically enforced in accordance with the agreement of the parties.

It is not true, as often thought by practitioners, that the contract must be in writing. An oral contract can be specifically enforced if there is clear and satisfactory evidence of the agreement.<sup>114</sup> Even contracts for the sale of land, if oral, will be specifically enforced if they fall outside the Statute of Frauds. Every practitioner should look carefully at the facts to determine whether performance or other Statute of Frauds exceptions will make an oral contract to lease or sell land a subject of specific performance. The doctrine, oft-expressed in courts of equity that the Statute of Frauds will not be applied so as to be an instrument of fraud,<sup>115</sup> is a concept that has application in a myriad of situations. It is not possible nor practicable to enumerate here all the possibilities.

Contracts for the sale or lease of land have another characteristic worth noting. Courts of equity will specifically enforce them even though it may appear that money damages will give the plaintiff a complete remedy.<sup>116</sup>

With regard to specific performance, contracts for personal property stand on a different footing. In this kind of case it is easier to establish that damages at law are adequate. Yet, some peculiar attribute of the contract subject will render this defense ineffective. Thus, a court of equity will order specific performance of an agreement for the sale and purchase of corporate stock which cannot be bought in the open market.<sup>117</sup> So too, specific performance will be ordered when there is a contract for the sale of an article of unusual beauty or rarity.

There was a time in Anglo-American law when courts of

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<sup>112</sup> *Edmonds v. Gourley*, 362 Ill. 147, 199 N.E. 287 (1935); *Zempel v. Hughes*, 235 Ill. 424, 85 N.E. 641 (1908).

<sup>113</sup> *E.g.*, *Fitzpatrick v. Allied Contracting Co.*, 24 Ill.2d 448, 182 N.E.2d 183 (1962).

<sup>114</sup> *E.g.*, *Cole v. Cole*, 106 Ill. 482 (1883).

<sup>115</sup> *Ropacki v. Ropacki*, 354 Ill. 502, 188 N.E. 400 (1933); *Gladville v. McDole*, 247 Ill. 34, 93 N.E. 86 (1910).

<sup>116</sup> *E.g.*, *Brand v. Svenson*, 170 Ill. App. 54 (1912).

<sup>117</sup> *E.g.*, *Smurr v. Kamen*, 301 Ill. 179, 133 N.E. 715 (1921).

equity did not have jurisdiction to award damages for breach of a contract. Thus a plaintiff who began an action in equity for specific performance had to file a separate suit at law to recover damages.<sup>118</sup> Now, modern equity practice in courts like those of Illinois can award damages in lieu of or in addition to specific performance. If a cause of action for specific performance is alleged, but the proof shows that either in part or in whole damages at law should be awarded, our courts can award damages, in whole or in part.<sup>119</sup> The measure recoverable for breach of contract may be either nominal or substantial, depending on the facts of the given case.

Finally, it should be mentioned that there are contracts which cannot qualify for the equitable relief of specific performance. For example, illegal or immoral contracts will not be specifically enforced.<sup>120</sup> A court of equity will not enforce antenuptial agreements which are contrary to public policy, or in violation of laws governing marital relations.<sup>121</sup> A court of equity will not enforce an agreement that is involuntary or without consideration.<sup>122</sup> Contracts for interests that are tenuous or transient will not be enforced by specific performance. Also, agreements for service of a personal kind and skill will not be specifically enforced.<sup>123</sup> Finally, it should be said that courts of equity will not enforce contracts which require constant supervision.<sup>124</sup>

In this connection, however, it should be said that in one developing area of the law, that is, law governing rights and obligations in the building industry, exceptions have been engrafted into those concepts which have dictated denial of specific performance. For example, if a contract to build is clearly defined by contract, or the plaintiff has a substantial interest in performance of the contract so that damages cannot compensate him, or if the defendant is in possession of the land so that the plaintiff cannot employ another to build, there is authority that such contracts will be specifically enforced.<sup>125</sup>

Quite often, an action for specific performance will be

<sup>118</sup> *E.g.*, *Doan v. Mauzey*, 33 Ill. 227 (1864).

<sup>119</sup> *Alter v. Mollenkamp*, 23 Ill.2d 502, 179 N.E.2d 7 (1961); *Lenti v. Colomb*, 74 Ill. App. 2d 94, 220 N.E.2d 65 (1966).

<sup>120</sup> *E.g.*, *C. D. Gammon Co. v. Standard Trust & Sav. Bank*, 327 Ill. 489, 158 N.E. 810 (1927).

<sup>121</sup> *Seuss v. Schkat*, 358 Ill. 27, 192 N.E. 668 (1934); *Kuhnen v. Kuhnen*, 351 Ill. 591, 184 N.E. 874 (1933).

<sup>122</sup> *Swirsky v. Horwich*, 320 Ill. App. 568, 51 N.E.2d 822 (1943); *Lindberg Mach. Works v. Lindberg*, 305 Ill. App. 543, 27 N.E.2d 565 (1940).

<sup>123</sup> *Cowen v. McNealy*, 342 Ill. App. 179, 96 N.E.2d 100 (1950); *Rabinovich v. Reith*, 120 Ill. App. 409 (1905); *Suburban Const. Co. v. Naugle*, 70 Ill. App. 384 (1897).

<sup>124</sup> *E.g.*, *Langson v. Goldberg*, 298 Ill. App. 229, 18 N.E.2d 729 (1939), *aff'd*, 373 Ill. 297, 26 N.E.2d 111 (1940); *Schmitt v. King*, 234 Ill. App. 335 (1924).

<sup>125</sup> *E.g.*, *Klingbeil v. Blecklenberg*, 249 Ill. App. 39 (1928).

coupled with one for injunction. It has been held in Illinois that a wide measure of discretion is allowed a trial court when request is made for a temporary decree of specific performance or a temporary mandatory injunction in the same suit.<sup>126</sup> In such cases, the application for injunctive relief is in a separate count. Often, it is necessary to apply for a temporary injunction to restrain disposal of the subject matter of the contract until hearing can be had on the cause of action for specific performance. This is an instance in which two forms of equitable relief can be made the subject of one suit.

(c) *Rescission of Contracts*

In strict sense, rescission is not an equitable remedy. Rescission is the right of a party under some circumstances to set aside the transaction by making restitution.<sup>127</sup> When the right exists, it is a cancellation of the contract.

It is best, however, to discuss rescission as an equitable remedy because the action requires judicial determination and assistance in effectuating the right. For example, a court of equity can compel accounting, make allowances for changes in condition of property subject of the contract, and determine the circumstances under which restitution must be completed.

Before rescission of a contract can be effectuated by a decree in equity, the following elements must be present:

1. Fraudulent, and in some instances, innocent misrepresentation in the inducement of the contract.
2. Failure of consideration, either in total or to an extent that would make the contract unconscionable.
3. Substantial failure of performance, or breach of the party against whom rescission is asserted.
4. In a contract for the sale of land, substantial misdescription of the property.

It is a universal rule of contract law that an agreement once made can be rescinded only by mutual assent of both parties, unless the right to rescind rests on one of the recognized grounds.<sup>128</sup> Parties to a contract may, by mutual agreement, rescind. In such cases, the agreement to rescind is adequate consideration.<sup>129</sup> A written contract may be rescinded by an oral one.<sup>130</sup>

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<sup>126</sup> *Ambassador Foods Corp. v. Montgomery Ward & Co.*, 43 Ill. App. 2d 100, 192 N.E.2d 572 (1963); *Morris v. Patterson*, 311 Ill. App. 657, 37 N.E.2d 918 (1941).

<sup>127</sup> *Horan v. Blowitz*, 13 Ill.2d 126, 148 N.E.2d 445 (1958); *Mourant v. Pullman Trust & Sav. Bank*, 314 Ill. App. 567, 41 N.E.2d 1006 (1942). For an extended discussion of one aspect of rescission, see Newman, *Relief for Mistake in Contracting*, 54 CORNELL L. REV. 232 (1969).

<sup>128</sup> *Bowser, Inc. v. Hamilton Glass Co.*, 207 F.2d 341 (7th Cir. 1953); *Lane v. Brooks*, 120 Ill. App. 501 (1905).

<sup>129</sup> *Printing Mach. Maintenance, Inc. v. Carton Prod. Co.*, 15 Ill. App. 2d 543, 147 N.E.2d 443 (1957); *Dickson v. Owens*, 134 Ill. App. 561 (1907).

<sup>130</sup> *Thorsen v. Hansen Constr. Co.*, 18 Ill. App. 2d 1, 151 N.E.2d 421 (1958); *Milligan v. Hinebaugh*, 70 Ill. App. 537 (1896).

Where one party to a contract repudiates it, either expressly or tacitly by refusing to perform, the contracting party not in default has the right to rescind and be restored to his former status. On the other hand, a party to a contract who has the right to rescind but who proceeds with performance, foregoes the right of rescission.<sup>131</sup>

It is a universal rule that before a party to a contract can rescind, he must return or offer to return the goods or money received by him as a result of the contract.<sup>132</sup> What is returned must be unchanged in condition and amount so that the other party is placed in as good a position as he was before the contract was made. There are very few exceptions to this general rule. In fact, it can be safely said that in any contract which results either in the exchange of property or the payment of money, before resort to judicial assistance to effectuate rescission, it must be alleged and proved that there was a return or an offer to return the money or property received by the contract.<sup>133</sup>

The practitioner must look to determine whether the contract is an executed or executory one. In executed contracts, the party who seeks to rescind must return the benefits of the contract before he can obtain the assistance of a court of equity.<sup>134</sup> If the contract is an executory one, whatever tangible benefits are received, up to the time the act of rescission is asserted, must be returned or essential allegations and proof be made to explain failure to return the benefits received. Even in cases of a contract secured by fraud, it is generally said that one may not keep the fruits of the contract and at the same time repudiate it on the ground that he was fraudulently induced to make it.<sup>135</sup> The point is that a court of equity will look to see if the parties can be returned to their pre-contract status.<sup>136</sup>

There is one old Illinois case which holds that where a release was obtained by fraud on the payment of a small sum of money, it was not necessary that the victim of the fraud return the money before bringing suit on his original cause of action.<sup>137</sup> This case is illustrative of the distinction between asserting the

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<sup>131</sup> *Lichter v. Goss*, 232 F.2d 715 (7th Cir. 1956); *Plummer v. Worthington*, 321 Ill. 450, 152 N.E. 133 (1926); *Therm-O-Proof Insulation Mfg. Co. v. Hoffman*, 329 Ill. App. 645, 69 N.E.2d 725 (1946); *City of Chicago v. Chicago Rys. Co.*, 228 Ill. App. 579 (1923).

<sup>132</sup> *Babcock v. Farwell*, 245 Ill. 14, 91 N.E. 683 (1910); *Wollenberger v. Hoover*, 346 Ill. 511, 179 N.E. 42 (1931); *Lees v. Akshun Mfg. Co.*, 205 F.2d 577 (7th Cir. 1953).

<sup>133</sup> *E.g.*, *Duncan v. Humphries*, 58 Ill. App. 440 (1895); *Ellington v. King*, 49 Ill. 449 (1869).

<sup>134</sup> *E.g.*, *Smith v. Brittenham*, 98 Ill. 188 (1881).

<sup>135</sup> *Collett v. Louisville & N. R. Co.*, 81 F. Supp. 428 (E.D. Ill. 1948); *Hustad v. Cerny*, 321 Ill. 354, 151 N.E. 871 (1926).

<sup>136</sup> *Huiller v. Ryan*, 306 Ill. 88, 137 N.E. 484 (1922); *Bingham v. Bell & Zoller Coal Co.*, 175 Ill. App. 469 (1912).

<sup>137</sup> *E.g.*, *Chicago, R. I. & P. Ry. Co. v. Lewis*, 109 Ill. 120 (1884).

right to rescind and asserting the right to sue on an original claim.

The right to rescind a contract comes into being as a right arising from the conduct of the other party.<sup>138</sup> However, to rescind or cancel a contract, the right has to be exercised promptly on discovery of the facts which give rise to the right. The election to rescind must be made promptly.<sup>139</sup> If the right is not asserted promptly, it is waived.<sup>140</sup> It has been held that a delay of 17 months in filing suit after discovery of the alleged fraud was unreasonable.<sup>141</sup> One who waits four years before taking steps to rescind a contract for fraud, is guilty of laches.<sup>142</sup> One who desires to rescind a contract for mistake or fraud, but who engages in unnecessary delay after obtaining the necessary knowledge, will defeat his right to equitable relief. In other words, a party who claims the right to rescind cannot stand inactive after learning of the grounds for action.

How is the right to rescind asserted?

Bringing of a suit is equivalent to disaffirmance and authorizes the other party to treat the contract as rescinded.<sup>143</sup> Prior to suit, a notice of intention to rescind is adequate when followed by suit to effectuate it. If a contract contains provisions for rescission, the contract must be performed with regard to notice and other provisions which will serve to notify the other party of the election to rescind. It has been said that any course of conduct which shows the intention to rescind is sufficient.<sup>144</sup>

A contract cannot be rescinded in part and enforced in part. It is generally the rule in Illinois that a contract must be repudiated in toto or not at all.<sup>145</sup> It should be noted, however, that this rule does not apply to severable contracts.<sup>146</sup> Situations are numerous in which agreements can be separated, one from the other. In such instances, rescission can be of one agreement and performance insisted as to another agreement which is part of the undertaking. Thus, it has been held in Illinois that where a contract is one of a number, a party may rescind for fraud as

<sup>138</sup> *E.g.*, *Bowser, Inc. v. Hamilton Glass Co.*, 207 F.2d 341 (7th Cir. 1953).

<sup>139</sup> *Lichter v. Goss*, 232 F.2d 715 (7th Cir. 1956); *Worthey v. Cleveland, Cinn., C & S. L. Ry. Co.*, 251 Ill. App. 585 (1929); *Lipkin v. Burnstine*, 18 Ill. App. 2d 509, 152 N.E.2d 745 (1958).

<sup>140</sup> *Heald v. Wright*, 75 Ill. 17 (1874); *Mound City Distilling Co. v. Consolidated Adjustment Co.*, 152 Ill. App. 155 (1909).

<sup>141</sup> *E.g.*, *Cox v. Montgomery*, 36 Ill. 396 (1865).

<sup>142</sup> *E.g.*, *Brown v. Brown*, 142 Ill. 409, 32 N.E. 500 (1892).

<sup>143</sup> *E.g.*, *Herrington v. Hubbard*, 2 Ill. 569 (1839).

<sup>144</sup> *E.g.*, *Holbrook v. Electric Appliance Co.*, 90 Ill. App. 86 (1899).

<sup>145</sup> *Noth v. Fidelity Mut. Life Ins. Co.*, 211 Ill. App. 94 (1918); *Stromberg v. Western Tel. Const. Co.*, 86 Ill. App. 270 (1900).

<sup>146</sup> *Olson v. Eulette*, 322 Ill. App. 178, 74 N.E.2d 609 (1947); *Maney Milling Co. v. Baker-Wignall & Co.*, 186 Ill. App. 390 (1914).



to part of the contract, but he need not rescind the contract as a whole.<sup>147</sup>

The effect of rescission is to deny the party that asserts it any right under the agreement. Once rescission is elected, even without cause, the party who so acts cannot renew the contract without consent of the other party. In other words, since rescission is cancellation of a contract, it results in waiver of all rights under the agreement by the party who asserts the right.<sup>148</sup>

A suit in equity to effectuate rescission of a contract is an application for judicial assistance to enforce the right to rescind. The burden is on the party who claims the right to show it exists. Whether, in effectuating rescission, other forms of equitable relief are necessary will depend upon the facts and circumstances of each case. In some, injunction is sought, while in others injunctive relief and accounting will serve to restore the parties to their original position. In any event, the elementary principles of equity jurisdiction apply since the burden of the party who acts to rescind is to establish the right under the circumstances.<sup>149</sup>

#### (d) *Cancellation of Instruments*

One of the oldest of the equitable remedies is delivery up and cancellation of instruments.<sup>150</sup> In its classical form, this equitable relief will be ordered where a document appears to be valid but is in fact void or voidable. Where it appears that the existence of the document itself may be embarrassing, or some claim will be made on it to the injury of a party, or some deception may be practiced by, with or through the document, a court of equity will assume jurisdiction and order the document delivered up and cancelled.<sup>151</sup> In modern equity, the tendency has been to entertain suits for cancellation of instruments when the claim for this relief rests, not on the invalidity of the document or instrument, but rather on the circumstances of its creation.<sup>152</sup> Thus, as this form of equitable relief has developed, it has paralleled suits to effectuate rescission of contracts. Before there can be a case for the equitable relief of cancellation of instruments, the following elements must be present:

<sup>147</sup> *E.g.*, *Olson v. Eulette*, 332 Ill. App. 178, 74 N.E.2d 609 (1947).

<sup>148</sup> *Friedman v. City of Chicago*, 374 Ill. 545, 30 N.E.2d 36 (1940); *LaCueva Ranch Co. v. Brewer*, 283 F.963 (7th Cir. 1922).

<sup>149</sup> *Madison v. Clark*, 165 Ill. App. 228 (1911); *Cravener v. Hale*, 27 Ill. App. 275 (1888), *aff'd*, 128 Ill. 408, 21 N.E. 534 (1889).

<sup>150</sup> *E.g.*, *Voliva v. Cook*, 262 Ill. 502, 104 N.E. 711 (1914).

<sup>151</sup> *Springfield & N.E. Traction Co. v. Warrick*, 249 Ill. 470, 94 N.E. 933 (1911); *Shrontz v. Thyfault*, 231 Ill. App. 228 (1924); *Munnis v. Northern Hotel Co.*, 237 Ill. App. 50 (1925).

<sup>152</sup> *E.g.*, *Voliva v. Cook*, 262 Ill. 502, 104 N.E. 711 (1914).

1. An instrument or document which is void on its face, or voidable because of fraud in its procurement.
2. Possibility of a claim on the instrument or document said to be void or voidable, deception of some third party by the instrument or document, and damage or injury in the event some claim is founded on the instrument or document.
3. Absence of a remedy other than cancellation.

It is almost impossible to enumerate the kind of cases that will qualify for the equitable relief of cancellation of instruments. Generally, an instrument which is void may be set aside by cancellation.<sup>153</sup> Even where the ground for cancellation is established by extrinsic evidence, a court of equity will act to cancel the instrument.

A common and frequent kind of case that requires this form of equitable relief is cancellation of insurance policies where, because of special circumstances, the remedy at law is inadequate. In such cases, a court of equity will grant relief by cancellation, even after occurrence of a loss under the policy.<sup>154</sup>

Where, for example, it has been agreed by the parties that a lease should be surrendered and cancelled, but later demands were made under the lease, a court of equity will order cancellation on the ground that by agreement, the lease had become inoperative.<sup>155</sup> Equity will cancel a document or instrument that results from an oppressive or unconscionable bargain, particularly where the parties are not on equal terms.<sup>156</sup> Where a mortgage or other instrument of indebtedness is recorded or exists without any consideration having been given for it, a court of equity will order its cancellation.<sup>157</sup>

Since a party who seeks equity must do equity, one who sues to cancel an instrument must show that he can, has, or has offered to restore the other party to the circumstances in which the parties were before the instrument or document was executed. A party seeking to cancel a document or instrument must allege and prove that he has returned or offered to return all benefits he received under the instrument.<sup>158</sup> Otherwise, he will not be entitled to relief by cancellation of the instrument. The party seeking equitable relief of cancellation must prove that he is free from participation in any fraud that infected the

<sup>153</sup> *McIlvaine v. Foreman*, 292 Ill. 224, 126 N.E. 749 (1920); *Fraser v. Glass*, 311 Ill. App. 336, 35 N.E.2d 953 (1941); *Field v. Herrick*, 5 Ill. App. 54 (1880), *aff'd*, 101 Ill. 110 (1881).

<sup>154</sup> *E.g.*, *Jamerson v. Alliance Ins. Co.*, 87 F.2d 253 (7th Cir.), *aff'd*, 12 F. Supp. 957, *cert. denied*, 300 U.S. 683 (1937).

<sup>155</sup> *E.g.*, *Field v. Herrick*, 5 Ill. App. 54 (1880), *aff'd*, 101 Ill. 110 (1881).

<sup>156</sup> *E.g.*, *Munnis v. Northern Hotel Co.*, 237 Ill. App. 50 (1925).

<sup>157</sup> *E.g.*, *Bishop v. Thompson*, 196 Ill. 206, 63 N.E. 684 (1902).

<sup>158</sup> *Lees v. Akshun Mfg. Co.*, 205 F.2d 577 (7th Cir. 1953); *Burnham v. Kidwell*, 113 Ill. 425 (1885).

instrument.<sup>159</sup> As in rescission of contracts, there must not be laches or delay.<sup>160</sup>

(e) *Reformation of Instruments*

A written instrument that does not reflect the understanding of the parties can be the subject of the equitable remedy known as reformation of instruments. Before a case can qualify for this equitable remedy, it must possess the following elements:

1. A written instrument concerning which reformation is the only relief by which the desired result can be achieved.
2. Failure of the instrument to accord with the understanding of the parties due to a mistake in expression, common to all parties to the agreement.
3. An agreement between the parties in effect when the instrument was executed, a mutual mistake which makes the instrument fail to carry out the agreement of the parties, and finally, that if reformed, the instrument will reflect the understanding of the parties.

Often, reformation of instruments is confused with rescission. The essential feature of a reformed instrument is that as changed, it conforms to the agreement of the parties. In the nature of things, this result is not possible where no agreement results because of fraud.

A court of equity will grant reformation of an instrument when a mutual or common mistake infects the instrument.<sup>161</sup> The kinds of instrument that can be the subject of reformation are numerous. Essentially, however, there must be proof that the document does not reflect the understanding of the parties.<sup>162</sup> Insurance policies, deeds, contracts for the sale of real estate, and contracts in general, may be the subject of reformation, providing other elements are present.

It is ancient chancery law that while a written instrument cannot be altered by parole proof, a court of equity will take jurisdiction where there is a mutual mistake of fact in the preparation of a paper that is to reflect an agreement.<sup>163</sup> A court of equity has power to correct errors in a writing so as to make it conform to what the parties intended.

When it is said that in order to reform an instrument there must be proof of common or mutual mistake, it is meant that there must be evidence of such mistake, not that there is agreement between the parties that the mistake was common or mutual.<sup>164</sup> In other words, mutuality of mistake is to be shown

<sup>159</sup> *E.g.*, *Fitzgerald v. Forristal*, 48 Ill. 228 (1868).

<sup>160</sup> *Shapiro v. Grosby*, 25 Ill.2d 245, 184 N.E.2d 855 (1962); *Cunningham v. Fithian*, 7 Ill. 650 (1845).

<sup>161</sup> *Gromer v. Molby*, 385 Ill. 283, 52 N.E.2d 772 (1944); *Biskupski v. Jaroszewski*, 398 Ill. 287, 76 N.E.2d 55 (1947).

<sup>162</sup> *E.g.*, *Douglas v. Grant*, 12 Ill. App. 273 (1882).

<sup>163</sup> *E.g.*, *Silurian Oil Co. v. Neal* 277 Ill. 45, 115 N.E. 114 (1917).

<sup>164</sup> *E.g.*, *Matthews v. Whitethorn*, 220 Ill. 36, 77 N.E. 89 (1906).

by allegation and proof. The parties may disagree with regard to what occurred. Yet, if the evidence discloses a mutuality of mistake, a common error that precludes the instrument's reflection of the true agreement of the parties, equity will reform.<sup>165</sup>

In granting reformation, a court of equity will consider intervening rights of third parties. If there has been a delay in seeking reformation, the right to reformation may be barred by laches or by limitations.<sup>166</sup> It has been held that a vendor of land who after discovering a mistake in a deed delayed a year before filing suit to reform, was not guilty of laches.<sup>167</sup> In instances in which land is involved and there is peaceable possession, a plaintiff has greater time latitude within which to seek reformation.

In one case it was held that neither the statute of limitations nor the doctrine of laches is applicable where the plaintiff has been in undisturbed possession of the land involved.<sup>168</sup> On the other hand, an owner of land misdescribed in a conveyance by way of exchange was barred after waiting twenty years to assert the right to reform.<sup>169</sup> It was held that even though he did not understand the English language, laches applied.<sup>170</sup> The lesson to be learned from these cases is that the suit to reform should be filed promptly, and the right to reformation asserted at the earliest opportunity.

The standard of proof required in a suit to reform an instrument is different from that required in other forms of equitable relief. It is said generally that to justify a grant of reformation, the plaintiff must establish his claim by evidence that is clear and satisfactory.<sup>171</sup> One case contains language that to reform an instrument because of mistake, the ground must be proved by satisfactory evidence beyond reasonable doubt.<sup>172</sup> In another, the court held that the right to relief by reformation of an instrument because of mistake must be established by clear and convincing evidence.<sup>173</sup>

It should be noticed that the function of reformation is to change the instrument so that it will speak as of the moment

<sup>165</sup> *E.g.*, *Hamlon v. Sullivant*, 11 Ill. App. 423 (1882).

<sup>166</sup> *Calverly v. Harper*, 40 Ill. App. 96 (1891); *Lindsay v. Davenport*, 18 Ill. 375 (1857).

<sup>167</sup> *Keeley v. Sayles*, 217 Ill. 589, 75 N.E. 567 (1905); *see also* *Schroeder v. Smith*, 249 Ill. 574, 94 N.E. 969 (1911).

<sup>168</sup> *E.g.*, *Wykle v. Bartholomew*, 258 Ill. 358, 101 N.E. 597 (1913).

<sup>169</sup> *E.g.*, *Leuer v. Kunz*, 260 Ill. 584, 103 N.E. 550 (1913).

<sup>170</sup> *Id.*

<sup>171</sup> *Buck v. Garber*, 261 Ill. 378, 103 N.E. 1059 (1913); *Oswald v. Sproehle*, 16 Ill. App. 368 (1885); *Douglas v. Grant*, 12 Ill. App. 273 (1882).

<sup>172</sup> *E.g.*, *Lines v. Willey*, 253 Ill. 440, 97 N.E. 843 (1812).

<sup>173</sup> *Leuer v. Kunz*, 274 Ill. 523, 113 N.E. 878 (1916); *Wagner v. Milk Wagon Drivers' Union*, 320 Ill. App. 341 (Abstract), 50 N.E.2d 865 (1943).

of agreement. The document is made to reflect that which the parties had in mind when they agreed. As a practical matter, therefore, in the nature of the remedy, it is retroactive to the time the parties had a meeting of the minds. While we do not enumerate here all the consequences which may follow reformation of an instrument, it is necessary for the practitioner to be aware of the nuances of the doctrine of reformation and the equitable remedy available in this class of equity cases.

(f) *Account*

Account is an equitable remedy granted (1) in aid of an equitable right or (2) in aid of a legal right.

Before a case can qualify for the equitable relief of accounting, the following elements must be present:

1. A purely equitable right. For example, the right of a beneficiary to an accounting from his trustee or of a mortgagor from a mortgagee who has entered into possession.
2. A right arising out of a legal relation, such as principal and agent, mutual accounts or accounts from one side, where there are special complications rendering account by an action at law difficult.
3. A claim for an accounting incident to injunctive relief to prevent the violation of a legal right.

As a form of equitable relief, the suit for an accounting has historical vestigial remains from the days of comparable inadequacy of relief at law. Today in Illinois, a suit for an accounting presents problems which arise from the dual fact that: (1) we no longer have masters in chancery and (2) discovery is as extensive in actions at law as were available in court of chancery at the height of its jurisdiction. The student of history will remember that there was a time in England and in this country when discovery procedures were not available in suits at law. The combination of these two factors, elimination of masters in chancery and full development of discovery in law actions, now adversely affect the equitable relief of account.

Before the new judicial article took effect in 1964,<sup>174</sup> equity courts exercised jurisdiction in account by assignments to masters in chancery. In fact, complication of accounts was a factor that determined equity jurisdiction and made necessary the utilization of masters who heard evidence, determined the account, and made a report to the court for entry of an appropriate decree. At law, the statute governing actions of account<sup>175</sup> provided for appointment of auditors to hear, adjust the claims, and make reports which when approved by the court supported entry of judgment. None of these aids are now available to an Illinois judge sitting in chancery.

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<sup>174</sup> See text at note 12 *supra*.

<sup>175</sup> ILL. REV. STAT. ch. 37, §341 (1963), *repealed*, January 1, 1964.

Our judicial article prohibits the use of masters in chancery or fee officers.<sup>176</sup> Thus, in the very kind of case around which courts of chancery developed the equitable relief of account, our courts today cannot really grant this traditional form of remedy without considerable inconvenience to lawyers and litigants.

One practical solution to this problem is for the court to induce the parties to enter into a consent decree directing an account. The second solution is for the court to determine, initially, the duty to account. Then, after the account is filed, with receipts accounted and explained, and disbursements supported by vouchers, the party entitled to the account can move to strike items of the account to which he objects. The court then can rule on the legal questions raised or hear evidence concerning sufficiency of the account thus stated. It can be easily seen that this kind of procedure, in view of the fact that we no longer have adequate means of granting the traditional equitable relief of account, is just as well available in a court sitting at law as in a court sitting in chancery.

Often, the equity suit for account is to aid an equitable right. For example, a beneficiary may sue to determine the amount of trust assets and income. Where, on the other hand, the amount claimed by the plaintiff is an exact sum and the defendant admits that the plaintiff is entitled to that sum, there is no ground for an accounting.<sup>177</sup> Where the sum due can be ascertained only by inquiry into extensive books and records, which because of their complexity jurors cannot satisfactorily understand, a proper case for accounting in equity is made.<sup>178</sup>

The right to an accounting is not an absolute one. It is accorded only on equitable principles. Where the duty to account flows from a fiduciary relation, no particular mode of account is required except that the accounting must be made in a way that will ascertain what property has come into the hands of the fiduciary, what has passed out, what remains in his possession, including disclosure of all receipts and disbursements.<sup>179</sup> The right to an accounting in equity, and the way that right is protected, depend on the nature of the case. No general rule can be stated that will control all cases.

When an action for account is filed, there must first be a determination of the plaintiff's right to this form of equitable

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<sup>176</sup> ILL. CONST. art. VI, §8.

<sup>177</sup> *Hornbeek v. Hornbeek*, 5 Ill. App. 2d 253, 125 N.E.2d 535 (1955); *Manhattan State Bank v. Moritz*, 238 Ill. App. 103 (1925); *McCormick v. Page*, 96 Ill. App. 447 (1901). See also *Central Iron & Metal Co. v. Krug*, 189 Ill. App. 44 (1914).

<sup>178</sup> *People v. Small*, 319 Ill. 437, 150 N.E. 435 (1925); *Boock v. Napier*, 3 Ill. App. 2d 19, 120 N.E.2d 244 (1954); *Midland Underwriters, Inc. v. Travelers Cas. Ins. Co.*, 308 Ill. App. 239, 31 N.E.2d 614 (1941).

<sup>179</sup> *E.g.*, *Reid v. Silver*, 354 F.2d 600 (7th Cir. 1965).

relief. This right need not be determined in a hearing separate from that in which the amount due is decided. Thus, if the chancery judge hears evidence on the right to an accounting at the time he determines the amount due, entry of a decree is not abuse of discretion.<sup>180</sup> Again, like all equitable remedies, grant of ultimate relief by decree to account rests in the sound discretion of the chancellor.<sup>181</sup>

(g) *Receivers and Receiverships*

A receivership is a remedy ancillary to the principal object of an equity suit. Receiverships are of three kinds: (1.) Those governed by a statute. For example, the Commissioner of Savings and Loan Associations under the Savings and Loan Act has power to appoint a receiver after taking custody of an association for involuntary liquidation.<sup>182</sup> Under the Illinois Development Credit Corporation Act<sup>183</sup> the director of financial institutions has the power to appoint a receiver to take custody of any Development Credit Corporation which is suspended under the provisions of Chapter 32, Sec. 1028(1)(a)-(i).<sup>184</sup> (2.) Those appointed out of court pursuant to a mortgage, debenture, trust deed or other contractual undertaking. For example, in most mortgages and trust deeds there are provisions that on default the mortgagee can appoint a receiver to take possession of the mortgaged property.<sup>185</sup> In business financing by debentures, it is common for debenture holders, or someone for them, to have power to appoint a receiver of the company on default of payment or a covenant.<sup>186</sup> (3.) Those appointed by the court. It is with this latter category of receiverships that we are concerned.

Before a court of equity will appoint a receiver, the following elements must be present:

1. Need of a receiver to prevent fraud.
2. Need of a receiver to save the subject of litigation from material injury.
3. Need of a receiver to rescue the subject of litigation from probable destruction pending suit.

A receivership is a high and extraordinary remedy which a

<sup>180</sup> *Rohde v. Mayer*, 90 Ill. App. 2d 270, 232 N.E.2d 519 (1967); *Derhers v. Vaughan Co.*, 348 Ill. App. 407, 109 N.E.2d 262 (1952).

<sup>181</sup> *Freeman v. Freyer*, 30 Ill. App. 2d 185, 174 N.E.2d 217 (1961); *Forster, Waterbury & Co. v. Webster Mfg. Co.*, 108 Ill. App. 41 (1902).

<sup>182</sup> ILL. REV. STAT. ch. 32, §921 (1967).

<sup>183</sup> ILL. REV. STAT. ch. 32, §§1001-28 (1967).

<sup>184</sup> ILL. REV. STAT. ch. 32, §1028(1)(a)-(1) (1967).

<sup>185</sup> *Keller v. Rodie*, 326 Ill. App. 37, 61 N.E.2d 387 (1945); *Wright v. Matters*, 204 Ill. App. 398 (1917); *Stevens v. Pearson*, 202 Ill. App. 22 (1916).

<sup>186</sup> 2 AM. JUR. LEGAL FORMS, §798 (1953). SNELL'S PRINCIPLES OF EQUITY 604 (25th ed. R. Megarry & P. Baker 1960). See *Re B. Johnson & Co., Ltd.* (1955) ch. 634, 661, 664.

court of equity will grant only on showing that the plaintiff has a clear right to the property.<sup>187</sup> A receiver is a fiduciary of the court. Possession by the receiver is possession in the court.<sup>188</sup> Title or right to the property in receivership is not changed by grant of the relief. Undisturbed possession by a receiver is a high prerogative of a court of equity. A receiver's possession cannot be disturbed, even by judicial process.<sup>189</sup>

There is a tendency on the part of practitioners to believe that any dispute concerning property will justify appointment of a receiver. This is a misapprehension, both as to the nature of a receivership and of its extraordinary character as an equitable remedy. The main purpose of a receivership is to preserve the property in dispute.<sup>190</sup> Receivership, as a remedy, is always ancillary to the relief sought in the case. It is generally said that the appointment of a receiver must be in aid of a primary object of the suit, germane to the principal case, but never the sole aim of the litigation.<sup>191</sup>

Where a receivership is sought, it is useful to determine whether plaintiff's right in the property subject of litigation is legal or equitable. If the right is equitable, a case can be made in which a court of equity will exercise its discretionary power and appoint a receiver. Equity will preserve equitable rights by exercise of its discretionary jurisdiction. On the other hand, if the interest of the plaintiff in the property is legal, it may be necessary to resolve questions concerning the legal right before equity will grant equitable relief of a receivership. It is in making this distinction that practitioners have the most difficulty; and it is in this area that most mistakes are made concerning applications for receiverships. In other words, it is a common failing for lawyers to overlook the distinction between a legal right in property and one that is equitable.

For example, the beneficiary of a trust seeking its enforcement, alleging fraud and breach of fiduciary duties by the trustee, shows an interest in the trust res that is equitable. Shareholders of a corporation, on the other hand, who allege breach of the fiduciary duty owed them by directors and officers of the corporation, show an interest that is legal, even though the duty owed is equitable. A minor, whose property is in the custody of a guardian, who alleges dissipation of his estate,

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<sup>187</sup> *E.g.*, *Simpson v. Adkins*, 311 Ill. App. 543, 37 N.E.2d 355 (1941).

<sup>188</sup> *Anderson v. Macek*, 350 Ill. 135, 182 N.E. 745 (1932); *People v. Furey*, 306 Ill. App. 607, 29 N.E.2d 612 (1940).

<sup>189</sup> *Kneisel v. Ursus Motor Co.*, 316 Ill. 336, 147 N.E. 243 (1925), *aff'g*, 234 Ill. App. 371 (1924); *Gunning v. Sorg*, 113 Ill. App. 332 (1904), *aff'd*, 214 Ill. 616, 73 N.E. 870 (1905).

<sup>190</sup> *Chicago Title & Trust Co. v. Arnold*, 268 Ill. App. 450 (1932); *Chicago Trust Co. v. Supreme Liberty Life Ins. Co.*, 261 Ill. App. 551 (1931).

<sup>191</sup> *E.g.*, *Davis v. Alton, J. & P. Ry.*, 180 Ill. App. 1 (1913).



shows an equitable interest in the property controlled by the guardian.

A receiver is not an agent of any party to the litigation.<sup>192</sup> He has the right to be paid his fees, expenses, and costs, from the assets of the receivership estate. His fees are determined by the court in accordance with standards of compensation that are fair, just, and reasonable.<sup>193</sup> A receiver performs a useful public function in retaining custody and preserving the property subject of litigation. As a consequence, he is entitled to just compensation. In England, under the Law of Property Act, a receiver has the right to be paid the costs, charges, and expenses incurred as receiver by a commission not exceeding 5% of the gross amount of all money received.<sup>194</sup> In most American jurisdictions, including Illinois, there is a comparable standard used in determining what is just compensation for a receiver.

What is the procedure for the appointment of a receiver?

A receiver is appointed by a petition which specifically alleges reasons for the receivership.<sup>195</sup> Mere legal conclusions of the pleader will not suffice. Therefore, an oral application for the appointment of a receiver should never be made. The petition must be clear and complete in its allegations. It should be with notice, supported by affidavit, and opposing parties should be allowed a reasonable time to answer, followed by a hearing.<sup>196</sup>

Appointment of a receiver is a remedy that results in taking property out of one party's possession and placing it in the custody of the court.<sup>197</sup> Because of this, the law imposes requirements, conformable to equitable considerations, as conditions precedent before a receiver is appointed. Generally, a receiver is not appointed before it is time to answer the complaint, unless it is alleged in the complaint and supported by petition that fraud or some other strong ground exists to induce the court to act before the defendant pleads.<sup>198</sup> All parties in interest are entitled to notice and they should be before the court when the petition for appointment is filed.

A petition for the appointment of a receiver which alleges facts on information and belief is inadequate to support an order of appointment.<sup>199</sup> Where a complaint is denied by an

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<sup>192</sup> *E.g.*, Redington v. Craig, 270 Ill. App. 163 (1933).

<sup>193</sup> *E.g.*, Robinson v. Ruprecht, 147 Ill. App. 646 (1909).

<sup>194</sup> Law of Property Act, 1925, §109(6).

<sup>195</sup> *E.g.*, Cohen v. Financial Acceptance Co., 56 Ill. App. 2d 359, 206 N.E.2d 308 (1965).

<sup>196</sup> Simpson v. Adkins, 311 Ill. App. 543, 37 N.E.2d 35 (1941); Fox v. Fox Valley Trotting Club, Inc., 349 Ill. App. 132, 110 N.E.2d 84 (1953).

<sup>197</sup> Seegren v. Decker, 263 Ill. App. 373 (1931); Bright v. Riedy, 243 Ill. App. 314 (1927).

<sup>198</sup> Nartznik v. Ehman, 191 Ill. App. 71 (1916); Daley v. Nelson, 119 Ill. App. 627 (1905).

<sup>199</sup> *E.g.*, Fox v. Fox Valley Trotting Club, Inc., 349 Ill. App. 132, 110 N.E.2d 84 (1953).

answer, a court cannot construe the allegations of the complaint as true and appoint a receiver.<sup>200</sup> As a general rule, courts of equity do not appoint receivers *ex parte*.<sup>201</sup> However, if a receiver is appointed without notice and the defendant moves and obtains a hearing on his motion to discharge, absence of notice is waived.<sup>202</sup>

Although one can find in the cases language and holdings to the contrary, it is generally said that the power to appoint a receiver is possessed by a court of equity as part of its general preventive jurisdiction, to be applied and exercised whenever necessary to prevent injury and do complete justice.<sup>203</sup> Under provisions of section 54 of the Chancery Act<sup>204</sup>

Before any receiver shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court or judge may order and with security to be approved by the court or judge conditioned to pay all damages including reasonable attorneys' fees sustained by reason of the appointment and acts of such receiver, in case the appointment of such receiver is revoked or set aside; provided, that bond need not be required, when for a good cause shown, and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond.

Consistent with this statute, it has been held that equity courts in this state are without power to waive the complainant's bond without the grounds for such waiver being given in the order of appointment.<sup>205</sup> It has been held that an order appointing a receiver which does not comply with these requirements is inadequate.<sup>206</sup> In addition to the complainant's bond, the receiver must also give bond for faithful performance of his office as a receiver. The amount and condition of the bond shall be set by the court, depending on the facts of the given case.<sup>207</sup>

It is easy to observe an incongruity in these provisions: an Illinois circuit court sitting in equity cannot issue a temporary restraining order or a temporary injunction without bond.<sup>208</sup> Yet, when the harsher remedy of a receivership is granted, bond can be waived.

The order appointing a receiver should make necessary findings of fact and reach the requisite conclusions of law. It is true

<sup>200</sup> *E.g.*, *Klass v. Yavitch*, 302 Ill. App. 229, 23 N.E.2d 936 (1939).

<sup>201</sup> *E.g.*, *Gilbert v. Block*, 51 Ill. App. 516 (1893).

<sup>202</sup> *E.g.*, *Hancock v. American Bonding & Trust Co.*, 86 Ill. App. 630 (1900).

<sup>203</sup> *E.g.*, *Simpson v. Adkins*, 311 Ill. App. 543, 37 N.E.2d 355 (1941).

<sup>204</sup> ILL. REV. STAT. ch. 22, §54 (1967).

<sup>205</sup> *Chicago Title & Trust Co. v. Bickley*, 255 Ill. App. 45 (1929); *Ayres v. Graham Steamship C. & L. Co.*, 150 Ill. App. 137 (1909).

<sup>206</sup> *E.g.*, *John Spry Lumber Co. v. Hardin*, 172 Ill. App. 86 (1912).

<sup>207</sup> *E.g.*, *Anderson v. Hultberg*, 117 Ill. App. 231 (1904), *aff'd*, 252 Ill. 607, 97 N.E. 216 (1912).

<sup>208</sup> *Gunnels v. Industrial Comm'n*, 30 Ill.2d 181, 195 N.E.2d 609 (1964); *Wise v. City of Chicago*, 36 Ill. App. 2d 196, 183 N.E.2d 538 (1962).

that absence of findings and conclusions will not result in a void order.<sup>209</sup> However, high professional craftsmanship dictates that the receivership order be complete in its findings, giving the reasons for the appointment as clearly as they can be stated under the circumstances.

There are occasions when an application for receivership cannot strictly conform with all the procedural requirements: notice, petition and bond. Even in such cases, the practitioner should attempt to minimize the risk that occurs with the absence of notice, and opportunity for the opposing side to be heard. When a true emergency exists, appearance in court with a clearly drafted petition supported by affidavit, witnesses, and a court reporter to preserve the record, will aid in upholding the court's order if emergency appointment of a receiver is ordered. Even in such circumstances, the practitioner should always bear in mind that appointment of a receiver is an extraordinary remedy and that it is the chancellor's duty to search the record to determine sufficient foundation for such action. The requirement of a complainant's bond exposes the applicant for receivership to damages in the event injury results to the opposing party by the receivership appointment. It is this possible consequence to his client that the practitioner should bear in mind when a hasty or ill-advised application for the appointment of a receiver is made.

#### (h) *Enforcement of Trusts*

A distinguished student of English equity once said that "No one has yet succeeded in giving an entirely satisfactory definition of a trust."<sup>210</sup> This statement is true because a trust is a conglomerate concept. It possesses many of the characteristics of other legal phenomena. Trusts are of many kinds and as a generic subject, it has been treated to many classifications. Hanbury, in his authoritative work, *Modern Equity*,<sup>211</sup> has suggested that trusts be divided into express and constructive, private and charitable, executed and executory. Understandably, it is impossible within the space limitations of this paper to treat a subject as broad as trusts to such an exhaustive analysis. What will be attempted is a discussion of the three trusts' divisions which are useful for the practitioner.

#### (i) *Express Trusts*

An express trust is an intentional arrangement of property so that legal title is in one person and the right to beneficial

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<sup>209</sup> *Graffeo v. O'Brien*, 333 Ill. App. 332, 77 N.E.2d 350 (1948) (Abstract); ILL. REV. STAT. ch. 110, §64(3) (1967).

<sup>210</sup> SNELL'S PRINCIPLES OF EQUITY 83 (25th ed. R. Megarry & P. Baker 1960).

<sup>211</sup> H. HANBURY, MODERN EQUITY 99 (7th ed. 1957).

enjoyment, enforceable solely in equity, is in another.<sup>212</sup> Enforcement of trusts is one of the oldest heads of chancery jurisdiction.<sup>213</sup> To qualify for the equitable relief of enforcement, a case in which it is claimed an express trust exists must contain the following elements:

1. Certainty of intent by a person competent to create a trust.
2. Certainty as to the subject matter of the trust property and the object of the trust.
3. Certainty as to designated beneficiaries who can enforce the trust.

An express trust in which land is the corpus must be in writing.<sup>214</sup> On the other hand, an express trust in which the corpus is personal property can be created by parol. A court of equity can establish and enforce a voluntary oral trust concerning personal property.<sup>215</sup>

The person who creates the trust is known as the settlor. The person to whom the property is conveyed or transferred is the trustee. The subject matter or corpus of the trust is called the res. Those who are to benefit from the trust are beneficiaries. An express trust can be created either during the life of the settlor, in which case it is said to be *inter vivos*; or, it can be created by a will, in which case it is said to be testamentary.

In the old days of chancery practice, a trust was enforced, as were most equitable rights, by a bill in equity.<sup>216</sup> In Illinois, since adoption of the Civil Practice Act, the procedure for enforcement of a trust is by complaint with the pleading of the defendant being an answer. All other procedural steps in an equity suit today are governed by the rules of civil practice. Although there is extensive literature on the subject of equity procedure, the practitioner is well advised to follow the modern texts of pleading and practice which apply equally to equity suits and to actions at law.<sup>217</sup>

As a general rule, persons who have an interest in the trust, whether vested, contingent or future, have the right to enforce it. Thus, children of a named remainderman can sue, even before death of the life tenant, to seek relief against a trustee who appropriated real estate from the trust.<sup>218</sup> In this connection, the fact that a member of a class of beneficiaries who sues

<sup>212</sup> RESTATEMENT (SECOND) OF TRUSTS §2 (1959).

<sup>213</sup> *E.g.*, Hopkins v. Granger, 52 Ill. 504 (1869).

<sup>214</sup> *E.g.*, Horne v. Ingraham, 125 Ill. 198, 16 N.E. 868 (1888).

<sup>215</sup> People v. Schaefer, 266 Ill. 334, 107 N.E. 617 (1914); Alexander v. Mermel, 27 Ill. App. 2d 281, 169 N.E.2d 569 (1960).

<sup>216</sup> S. PUTERBAUGH, PUTERBAUGH'S CHANCERY PLEADING AND PRACTICE 523-40 (6th ed. 1916).

<sup>217</sup> See generally C. NICHOLS, NICHOLS ILLINOIS CIVIL PRACTICE (revised 1960-63); CALLAHAN'S ILLINOIS CIVIL PRACTICE FORMS (H. Clark et al. 1954).

<sup>218</sup> *E.g.*, Burns v. Hines, 298 Ill. App. 563, 19 N.E.2d 382 (1939).

may take nothing from the trust does not disqualify him from bringing action to redress injury to the trust.<sup>219</sup>

A court of equity has exclusive jurisdiction to determine the rights, duties, and obligations in an express trust.<sup>220</sup> Even though the ultimate relief may be the recovery of money, equity may exercise jurisdiction and grant relief.<sup>221</sup> This doctrine extends to actions by a beneficiary against a trustee for negligence in the administration of the trust estate.<sup>222</sup> The fact that the complainant, a beneficiary, has a legal remedy does not oust a court of equity from its power to grant relief.

The kind of relief which a court of equity will grant in enforcing a trust depends on the facts, there being no general rule controlling all cases. In the exercise of its exclusive jurisdiction over trusts and trustees, a court of equity has broad powers to fashion the remedy as the circumstances require.<sup>223</sup>

A trustee will not be allowed to profit from his trust. Yet, even where he is ordered to reconvey property he acquired *ex maleficio*, a court of equity will decree that reconveyance be subject to reimbursement for the amount the trustee spent in acquiring the property involved.<sup>224</sup> In other words, contrary to a common view, equity will not decree forfeiture of money or property on finding that the trustee wrongfully dealt with the trust res. Where a court of equity assumes jurisdiction over a trust, its trustees and its beneficiaries, it will retain it for the purpose entering any order justice may require.<sup>225</sup> The final decree, of course, is appealable. However, it must be a final decree before the right of review accrues.

#### (ii) *Implied or Resulting Trusts*

A resulting trust is a presumption from the acts of the parties. It arises by operation of law. Before there can be a resulting trust, the following elements must be present:

1. An express trust, accompanied by a failure to exhaust all beneficial interests.
2. Purchase of property in the name of one, when the consideration, in whole or in part, is furnished by another.
3. An express trust created for a consideration, followed by a total failure of that consideration.
4. An express trust for a purpose that is unlawful; but the unlawful purpose is only contemplated and not consummated.

A resulting trust is implied from the facts and circum-

<sup>219</sup> *E.g.*, *Edgerton v. Johnson*, 178 F.2d 106 (7th Cir. 1949).

<sup>220</sup> *E.g.*, *Dowland v. Staley*, 201 Ill. App. 6 (1914) (Abstract).

<sup>221</sup> *E.g.*, *Clews v. Jamieson*, 182 U.S. 461 (1901).

<sup>222</sup> *E.g.*, *Hukill v. Page*, 12 F. Cas. 850 (No. 6854) (C.C.N.D. Ill. 1874).

<sup>223</sup> *E.g.*, *Coates v. Woodworth*, 13 Ill. 654 (1852).

<sup>224</sup> *Mruk v. Mruk*, 379 Ill. 394, 41 N.E.2d 490 (1942); *Walden v. Gridley*, 36 Ill. 523 (1864); *Tegtmeyer v. Tegtmeyer*, 314 Ill. App. 16, 40 N.E.2d 767 (1942).

<sup>225</sup> *E.g.*, *Ohlheiser v. Shepherd*, 84 Ill. App. 2d 83, 228 N.E.2d 210 (1967).

stances.<sup>226</sup> It does not arise out of a contract. The law presumes an intent to create a trust where the conduct of the parties supports such a presumption.

Where, for example, a plaintiff alleges that he conveyed property to his father with the understanding that the father retain it for support and reconvey it by deed or will, there is an express trust and the law will not presume a resulting one.<sup>227</sup> On the other hand, where a deceased kin of the plaintiffs furnished all the consideration for purchase of land, and the defendant took title in joint tenancy with the deceased, a resulting trust was found on the intent presumed from the conduct of the parties. The trust arose the instant legal title was taken.<sup>228</sup>

The most common situation in which resulting trusts arise is that in which one party furnishes the consideration, in whole or in part, and the title to the property is taken by one who is either a stranger or, if a kin or close relative, was not intended to be the sole owner. Where title is taken by a kin or close relative, there is a prima facie presumption that the money for the purchase price was an advancement or gift.<sup>229</sup> This presumption is rebuttable, the burden of proof being initially on the party claiming the resulting trust.

The nature of the property is not important in determining whether a resulting trust will arise. If the property is land, the Statute of Frauds does not apply. Resulting trusts and constructive trusts are outside the Statute of Frauds.<sup>230</sup>

A resulting trust arises, if at all, at the moment the legal estate is acquired and the title vests.<sup>231</sup> Inquiry into the facts and circumstances giving rise to the claim of a resulting trust must be addressed to the moment the legal interest in the property was acquired by the person against whom the resulting trust is claimed. If the evidence discloses that at that moment of time the intention of the parties was that no trust result, the resulting trust may be defeated.<sup>232</sup> In the final analysis, the surrounding circumstances and the conduct of the parties control. Where, for example, a transaction is of such a kind that it is equitable that a resulting trust arise, even an agreement to the contrary will not prevent this result.<sup>233</sup>

A resulting trust can never arise where a grantor exe-

<sup>226</sup> *Fox v. Fox*, 250 Ill. 384, 95 N.E. 498 (1911); *Suwalski v. Suwalski*, 88 Ill. App. 2d 419, 232 N.E.2d 64 (1967).

<sup>227</sup> *E.g.*, *Monson v. Hutchin*, 194 Ill. 431, 62 N.E. 788 (1902).

<sup>228</sup> *E.g.*, *Kane v. Johnson*, 397 Ill. 112, 73 N.E.2d 321 (1947).

<sup>229</sup> *E.g.*, *Wright v. Wright*, 242 Ill. 71, 89 N.E. 789 (1909).

<sup>230</sup> *E.g.*, *Murray v. Behrendt*, 399 Ill. 22, 76 N.E.2d 431 (1947).

<sup>231</sup> *E.g.*, *Suwalski v. Suwalski*, 88 Ill. App. 2d 419, 232 N.E.2d 64 (1967).

<sup>232</sup> *E.g.*, *Frewin v. Stark*, 319 Ill. 35, 149 N.E. 588 (1925).

<sup>233</sup> *E.g.*, *Kochorimbus v. Maggos*, 323 Ill. 510, 154 N.E. 235 (1926).

cuted an absolute deed.<sup>234</sup> Implicit in a transaction of this kind is the intent that title vest in the grantee. On the other hand, where a grantor conveys property as consideration for title to other property, the conveyance is no different than payment of purchase money. Where this is shown, one important element for a resulting trust is present.

Where identical property is already subject to an express trust, a resulting trust cannot be imposed on it.<sup>235</sup> It is common equity law, however, that where an express trust is created, but there is a failure to dispose of all beneficial interests, a resulting trust arises for benefit of the settlor, to the extent that beneficial interests remain undisposed.<sup>236</sup>

For example, where a settlor set aside property for the purpose of creating an express trust but died before completion of the settlement, to the extent that title was acquired by the intended trustee, a resulting trust arose in favor of the settlor's heirs and devisees.<sup>237</sup> In fact, whenever an express trust fails, a resulting trust arises in favor of the settlor, his heirs and devisees. More complicated questions can arise if an express trust fails and there are creditors or other claimants.

For the imaginative lawyer, the resulting trust concept is a useful device. It can be used to resolve many complex difficulties into which laymen fall in dealing with property. When understood, these doctrines are easy to apply. They begin with the notion that a resulting trust is a presumption the law raises from the conduct of the parties. When a settlor creates a trust, but all beneficial interests are not disposed, the law presumes an intention to settle the remainder. So too, where a trust is created for a contemplated but unconsummated unlawful purpose, a resulting trust arises in favor of the settlor. Where one furnishes consideration and title to the property is taken in another, the law presumes an intention to create a trust, said to be resulting. These examples do not exhaust the full potential of this concept. As a form of equitable relief, its use depends on the adeptness with which it is understood, and in its application from case to case.

### (iii) *Constructive Trusts*

A constructive trust is a device administered in courts of equity to remedy frauds and breaches of fiduciary relations.<sup>238</sup>

<sup>234</sup> *E.g.*, *Lancaster v. Springer*, 239 Ill. 472, 88 N.E. 272 (1909).

<sup>235</sup> *E.g.*, *Baker v. LeMire*, 355 Ill. 626, 189 N.E. 904 (1934).

<sup>236</sup> *E.g.*, *Zimmerman v. Schuster*, 14 Ill. App. 2d 535, 145 N.E.2d 94 (1957).

<sup>237</sup> *Wagner v. Clauson*, 399 Ill. 403, 78 N.E.2d 203 (1948); *Jones v. McCollen*, 85 Ill. App. 2d 375, 227 N.E.2d 788 (1967).

<sup>238</sup> *E.g.*, *First Nat'l Bank v. Dierking*, 87 Ill. App. 2d 4, 230 N.E.2d 520 (1967).

Whenever one held in confidence takes advantage of his position or whenever a person commits a fraud, equity will impose a constructive trust on the product and compel its return as justice may require.<sup>239</sup> Before a court of equity will impose a constructive trust, the following elements must be present:

1. Actual fraud or circumstances which stamp the conduct of the person unfair or wrongful.
2. A confidential relationship and a subsequent abuse of confidence.
3. A res — that is money, property or other subject matter on which a constructive trust can be imposed.

Even more than the resulting trust, the constructive trust is an effective means of undoing injustice. In determining whether there are facts raising a constructive trust, the moment of inquiry is the time when the res was acquired by the alleged wrongdoer.<sup>240</sup> At that moment if there was fraud or such conduct which in equity and good conscience stamps the wrongdoer as unfair, equity will compel him to return what he obtained. The constructive trust is sometimes called a trust *ex maleficio*.<sup>241</sup> The other inquiry, absent actual fraud, unfair or wrongful conduct, is whether at the time there was a relationship of trust and confidence.<sup>242</sup> Here, the possibilities are numerous.

An agent is in a fiduciary relation with his principal.<sup>243</sup> A joint venturor owes a duty of trust and confidence to his fellow joint venturor.<sup>244</sup> An employee, in most instances, is in a fiduciary relation with his employer.<sup>245</sup> A husband owes a duty of trust to his wife with regard to family property.<sup>246</sup> A son or daughter may be in a fiduciary relation with a parent who is unable to care for his or her affairs.<sup>247</sup> Other relations can be found out of which flow trust and confidence, and are thus fiduciary in nature. In any of these, breach of the fiduciary relation will give rise to the trust *ex maleficio* to be imposed on the thing gained.

The constructive trust is created by implication and may be proved by parol evidence.<sup>248</sup> Like resulting trusts, constructive trusts are not within the Statute of Frauds.<sup>249</sup> Once actual fraud, wrongful, unfair, or unconscionable conduct is shown, or when

<sup>239</sup> *E.g.*, *Mortell v. Beckman*, 16 Ill.2d 209, 157 N.E.2d 63 (1959).

<sup>240</sup> *E.g.*, *Streeter v. Gamble*, 298 Ill. 332, 131 N.E. 589 (1921).

<sup>241</sup> *E.g.*, *Ryder v. Ryder*, 244 Ill. 297, 91 N.E. 451 (1910).

<sup>242</sup> *Stephenson v. Kulichek*, 410 Ill. 139, 101 N.E.2d 542 (1951); *Fowley v. Braden*, 4 Ill.2d 355, 122 N.E.2d 559 (1954).

<sup>243</sup> *E.g.*, *Bremer v. Bremer*, 411 Ill. 154, 104 N.E.2d 299 (1952).

<sup>244</sup> *E.g.*, *Spencer v. Wilsey*, 330 Ill. App. 439, 71 N.E.2d 804 (1947).

<sup>245</sup> *E.g.*, *Tinkoff v. Wyland*, 272 Ill. App. 280 (1933).

<sup>246</sup> *E.g.*, *Maurica v. Haugen*, 387 Ill. 186, 56 N.E.2d 367 (1944).

<sup>247</sup> *E.g.*, *Oster v. Oster*, 414 Ill. 470, 111 N.E.2d 319 (1953).

<sup>248</sup> *Wrla v. Wrla*, 342 Ill. 31, 173 N.E. 768 (1930); *Rice v. Dougherty*, 148 Ill. App. 368 (1909).

<sup>249</sup> *E.g.*, *Murray v. Behrendt*, 399 Ill. 22, 76 N.E.2d 431 (1948).



a fiduciary relation is established, the bases for a constructive trust are established.

However, there are limitations to the application of the concept. Breach of an express trust, or of a written contract, will not give rise to a constructive trust.<sup>250</sup> Where no charge of fraud or overreaching is made and there is no evidence of either, and, additionally, there is no evidence of a fiduciary relation and its breach, there is no basis for a constructive trust.<sup>251</sup>

In every case where a constructive trust is sought, there must be a corpus: that is some money, property or subject matter of value acquired from the fraud or the breach of fiduciary relation. It is characteristic of all trusts, constructive or otherwise, that there be a res.<sup>252</sup> In other words, a constructive trust in the abstract does not meet fundamental principles of trust law.

What is fraud? That is, fraud forming the basis of a constructive trust?

Fraud is either actual or constructive.<sup>253</sup> Actual fraud, which courts of equity remedy concurrent with courts of law, is a false statement of a material fact knowingly made or without belief in its truth, or made recklessly without caring whether it is true or false, with the intent that it be acted on and which is acted on to the injury of a party.<sup>254</sup> In actual fraud there must be proof of intent to defraud.<sup>255</sup> Whether there is intent will depend on the facts and circumstances.

Constructive fraud, on the other hand, is an act which the law will presume fraudulent even though there is no evidence of actual fraud.<sup>256</sup> Constructive fraud is committed when the wrongdoing party is under a legal or equitable duty to act otherwise. As a general statement, it is said that constructive fraud is a breach of duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive, to violate confidence, and to injure public interest.<sup>257</sup> It can be easily seen that these are broad concepts having broad applica-

<sup>250</sup> *E.g.*, *Swanson v. Randall*, 30 Ill.2d 194, 195 N.E.2d 656 (1964).

<sup>251</sup> *E.g.*, *Fender v. Yagemann*, 29 Ill.2d 205, 193 N.E.2d 794 (1963).

<sup>252</sup> *E.g.*, *Williams v. Rock River Sav. & Loan Ass'n*, 51 Ill. App. 2d 5, 200 N.E.2d 848 (1964).

<sup>253</sup> *Miller v. Miller*, 266 Ill. 522, 107 N.E. 821 (1915); *Kochorimbus v. Maggos*, 323 Ill. 510, 154 N.E. 235 (1926); *Stein v. Stein*, 398 Ill. 397, 75 N.E.2d 869 (1947).

<sup>254</sup> *McMeen v. Whipple*, 23 Ill.2d 352, 178 N.E.2d 351 (1961); *Broberg v. Mann*, 66 Ill. App. 2d 134, 234 N.E.2d 89 (1965).

<sup>255</sup> *Dahlke v. Hawthorn, Lane & Co.*, 36 Ill.2d 241, 222 N.E.2d 465 (1966); *Miller v. Howell*, 2 Ill. 498 (1838).

<sup>256</sup> *E.g.*, *Blake v. Thwing*, 185 Ill. App. 187 (1914).

<sup>257</sup> *E.g.*, *Edward Edinger Co. v. Willis*, 260 Ill. App. 106, 131 (1931).

tions. As is the case with most legal concepts, they are easier to define than to apply.

The task of determining whether a case is one in which a constructive trust can arise, first devolves on the practitioner. The ultimate responsibility, of course, is on the court of equity to which application is made for this important branch of equitable relief.

### III

#### A SUMMARY

Every equity case requires a practitioner to determine initially whether it will qualify for equitable relief. In making this determination, use must be made of those doctrines which originated in English equity and developed in this country until the complete amalgamation of equity and law. In Illinois, the amendment to the Judicial Article which took effect in 1964 abolished jurisdictional distinctions between courts of equity and courts of law. Today, circuit courts of this state have unlimited jurisdiction of all justiciable matters with power to grant any form of relief which the case requires.

For the practitioner this is important because it is no longer necessary to resort to chancery or a division for equitable relief. Any judge, and this includes magistrates and associate judges of our circuit courts, can grant equitable relief. There was a time in Illinois when this was not possible.

Despite this modern development, it is necessary that statutory and traditional forms of equitable relief be understood. Having in mind the changes taking place in our society as a whole, no practitioner should hesitate to suggest to a judge of a circuit court in Illinois relief which may combine traditional equity concepts, providing only there is a justiciable matter before the court. It is in this spirit that the history of equity should be looked to in formulating modern remedies. And it is in this spirit that traditional concepts of equity should be applied in determining whether a case which a practitioner is called upon to handle qualifies for equitable relief.