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## Jury Trial in Illinois: Chancery, Multi-Remedy, and Special Remedy Civil Cases

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# Jury Trial in Illinois: Chancery, Multi-Remedy, and Special Remedy Civil Cases\*

Robert Jay Nye\*\*  
Jonathan D. Nye\*\*\*

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### INTRODUCTION

In 1933, Illinois adopted a modern set of civil practice procedures and modified its predominantly common law system of pleading.<sup>1</sup> The Civil Practice Act—still with us as Article II of the Illinois Code of Civil Procedure<sup>2</sup> and known as the "Civil Practice Law"<sup>3</sup>—was the vehicle by which Illinois established this new code for the pleading and adjudication of civil cases. The rules of the Illinois Supreme Court supplement the statutes.<sup>4</sup> Moreover, hundreds of appellate cases clarify the meaning and exemplify the application of those statutes and rules in numerous situations.<sup>5</sup>

A principal purpose of the General Assembly in adopting the legislation that comprises the Civil Practice Act was "to *amalgamate in part* equitable and common law jurisdiction in one form of action."<sup>6</sup> As noted, the amalgamation of chancery and common law practice is partial, not complete; therefore, issues arise over how to handle situations in which the practice is not or cannot be fused. Such situations arise most frequently when the dispute centers around trial by jury.

Illinois, as do most states, guarantees litigants the right to trial by jury in civil cases that seek common law relief or that are of a common law character.<sup>7</sup> In Illinois there is no constitutional or

1. Civil Practice Act of 1933, 1933 ILL. LAWS 784, art. 8, § 94 (eff. Jan. 1, 1933) (revised and amended 1982).

2. ILL. REV. STAT. ch. 110, paras. 2-101 to 2-1903 (1989) (titled "Practice"); see *infra* part I.B.

3. See ILL. REV. STAT. ch. 110, para. 1-101(b) (1989) (stating that "Article II shall be known as the 'Civil Practice Law'").

4. ILL. REV. STAT. ch. 110A, paras. 1-300 (1989) (titled "Practice Rules" with Article I subtitled "General Rules" and Article II subtitled "Rules on Civil Proceedings in the Trial Court"); see *infra* part I.C.

5. See *infra* part II.

6. Frank v. Newburger, 298 Ill. App. 548, 553, 19 N.E.2d 147, 150 (1st Dist. 1939) (emphasis added) (speaking to the general purpose of the Civil Practice Act); see also Rosewood Corp. v. Fisher, 46 Ill. 2d 249, 263 N.E.2d 833 (1970) (stating the purpose of the Act in proceedings for "Forcible Entry and Detainer"), *cert. denied*, 401 U.S. 928 (1971); Frederick v. Maggio, 23 Ill. App. 2d 292, 162 N.E.2d 590 (1st Dist. 1960) (stating the purpose of § 2-1401, previously § 72 of the Civil Practice Act); Paramount Paper Tube Corp. v. Capital Engineering & Mfg. Co., 11 Ill. App. 2d 456, 138 N.E.2d 81 (1st Dist. 1957) (same).

7. Illinois has wrestled, as have other jurisdictions, with issues such as whether the right to trial by jury in a particular case depends on the nature of the remedy sought, the

traditional right to trial by jury in cases seeking purely equitable relief. Under Illinois's amalgamated-fused procedure, however, it is unclear when to provide jury trials if demanded for the following: (1) common law issues that exist or arise secondarily or incidentally in otherwise purely equitable cases, or (2) common law aspects of cases that combine common law and equity claims or seek both common law and equitable relief.

Part I of this Article briefly summarizes the controlling provisions of law that concern civil jury trials. Part II presents selected cases and their holdings. An appendix describes additional statutory jury trial references, which only apply in specific situations.

## I. THE CONTROLLING PROVISIONS OF LAW

The right to trial by jury in civil cases in Illinois is guaranteed and governed by provisions found in the state constitution, the Civil Practice Law, and the rules of the Supreme Court of Illinois. In addition, there are jury-trial provisions in statutes that concern some specific subjects of legislation.<sup>8</sup>

### A. *The Constitution of the State of Illinois*

The 1970 Constitution of the State of Illinois<sup>9</sup> contains two provisions that protect and define the right to trial by jury in civil cases.<sup>10</sup> Both are found among the provisions in article I, the "Bill of Rights" article of the constitution. The first provision—the more general of the two—declares with apparent simplicity: "The right of trial by jury as heretofore enjoyed shall remain inviolate."<sup>11</sup> The second provision deals specifically with compensation issues in eminent domain cases: "Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law."<sup>12</sup>

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historical character or analogue of the cause of action, or some combination of both. This Article does not deal at length with these issues.

8. *See infra* part III.

9. ILL. CONST. of 1970 (adopted in convention Sept. 3, 1970; ratified by the people Dec. 15, 1970; in force July 1, 1971).

10. The right to trial by jury in *criminal* cases is guaranteed in article I § 8. ILL. CONST. of 1970, art. I, § 8.

11. ILL. CONST. of 1970, art. I, § 13 (titled "Trial by Jury").

12. ILL. CONST. of 1970, art. I, § 15 (titled "Right of Eminent Domain").

*B. Civil Practice Statutes of the State of Illinois*

Six sections of the Civil Practice Law<sup>13</sup> contain significant provisions concerning jury trial in civil cases. Paragraph 2-614 governs the "Joinder of causes of action and use of counterclaims."<sup>14</sup> Paragraph 2-619(c) directs "Involuntary dismissal based upon certain defects or defenses."<sup>15</sup> Paragraph 2-701(d) governs "Declaratory judgments."<sup>16</sup> Paragraph 2-1006 concerns "Consolidation and severance of cases."<sup>17</sup> Paragraph 2-1105(a) explains "Jury demand."<sup>18</sup> Finally, paragraph 2-1111 concerns "Juries in cases

13. ILL. REV. STAT. ch. 110, paras. 2-101 to 2-1903 (1989); see *supra* note 23.

14. ILL. REV. STAT. ch. 110, para. 2-614 (1989).

Joinder of causes of action and use of counterclaims.

(a) Any plaintiff or plaintiffs may join any causes of action, against any defendant or defendants; and the defendant may set up in his or her answer any and all cross claims whatever, whether in the nature of recoupment, setoff or otherwise, which shall be designated counterclaims.

(b) The court may, in its discretion, order separate trial of any causes of action, counterclaim or third-party claim if it cannot be conveniently disposed of with the other issues in the case. *Legal and equitable issues may be tried together if no jury is employed.*

*Id.* (emphasis added).

15. ILL. REV. STAT. ch. 110, para. 2-619(c) (1989).

Involuntary dismissal based upon certain defects or defenses.

(c) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. *If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time.*

*Id.* (emphasis added).

16. ILL. REV. STAT. ch. 110, para. 2-701 (1989).

Declaratory judgments.

(d) *If a proceeding under this Section involves the determination of issues of fact triable by a jury, they shall be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.*

*Id.* (emphasis added).

17. ILL. REV. STAT. ch. 110, para. 2-1006 (1989). It provides: "Consolidation and severance of cases. An action may be severed, and actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." *Id.*

18. ILL. REV. STAT. ch. 110, para. 2-1105(a) (1985).

Jury demand.

(a) A plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced. A defendant desirous of a trial by jury must file a demand therefor not later than the filing of his or her answer.

seeking equitable relief.”<sup>19</sup>

### C. Rules of the Supreme Court of Illinois

Three Illinois Supreme Court Rules<sup>20</sup> also relate to the matter of jury trials in civil cases. Rule 132 concerns the “Designation of cases.”<sup>21</sup> Rule 135(a) speaks to “Pleading equitable matters.”<sup>22</sup> Lastly, Rule 232 concerns the “Trial of equitable and legal matters.”<sup>23</sup>

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Otherwise, the party waives a jury. *If an action is filed seeking equitable relief and the court thereafter determines that one or more of the parties is or are entitled to a trial by jury, the plaintiff, within 3 days from the entry of such order by the court, or the defendant, within 6 days from the entry of such order by the court, may file his or her demand for trial by jury with the clerk of the court. If the plaintiff files a jury demand and thereafter waives a jury, any defendant and, in the case of multiple defendants, if the defendant who filed a jury demand thereafter waives a jury, any other defendant shall be granted a jury trial upon demand therefor made promptly after being advised of the waiver and upon payment of the proper fees, if any, to the clerk.*

*Id.* (emphasis added).

19. ILL. REV. STAT. ch. 110, para. 2-1111 (1989). It provides: “Juries in cases seeking equitable relief. *The court may in its discretion direct an issue or issues to be tried by a jury, whenever it is judged necessary in any action seeking equitable relief.*” *Id.* (emphasis added).

20. ILL. REV. STAT. ch. 110A, paras. 1 to 300 (1989) (titled “Practice Rules” with Article I subtitled “General Rules” and Article II subtitled “Rules on Civil Proceedings in the Trial Court”).

21. ILL. REV. STAT. ch. 110A, para. 132 (1989).

Every complaint or other paper initiating any civil action or proceeding shall contain in the caption the words “at law,” “in chancery,” “in probate,” “small claim,” or other designation conforming to the organization of the circuit court into divisions. Misdesignation shall not affect the jurisdiction of the court.

*Id.*

22. ILL. REV. STAT. ch. 110A, para. 135(a) (1989).

#### Pleading Equitable Matters

(a) Single Equitable Cause of Action. Matters within the jurisdiction of a court of equity, whether directly or as an incident to other matters before it, or which an equity 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.”

*Id.*

23. ILL. REV. STAT. ch. 110A, para. 232 (1989).

#### Trial of Equitable and Legal Matters.

(a) Trial of a Single Equitable Cause of Action. When matters are treated as a single equitable cause of action as provided in Rule 135(a), they shall be heard and determined in the manner heretofore practiced in courts of equity. When legal and equitable matters that may be asserted separately are pleaded as provided in Rule 135, the court shall first determine whether the matters joined are properly severable, and, if so, whether they shall be tried together or separately and in what order.

(b) Trial of Joined Equitable and Legal Matters. If the court determines that

## II. JURIES AND CHANCERY: SELECTED CASE LAW DECISIONS

A. *The Illinois Constitution and Differences  
Between Law and Equity*

It has been held that the Constitution requires certain distinctions between law and equity. The former Civil Practice Act is to be viewed in light of the Constitutional right to trial by jury and the resulting distinction between law and equity.

In 1941, eight years after enactment of the Civil Practice Act, the Illinois Supreme Court noted in *Frank v. Salomon*<sup>24</sup> that the Act reflects a "clear legislative intention to affect only the adjective as distinguished from the substantive law;" that "it was not the legislative intent to abolish substantive distinctions;" and that "it was the obvious intention to do away with [different] forms of pleading but to preserve separate procedure in law and equity."<sup>25</sup> One of the separate substantive-procedural distinctions thus preserved is that concerning trial by jury: "Presumably the legislature knew that the constitutional requirement of trial by jury in actions at law necessitates a distinction between legal and equitable proceedings, and we may assume that fact was taken into consideration when the [Civil Practice Act] statute was enacted."<sup>26</sup>

It has been held, moreover, that the Illinois constitutional guarantee of trial by jury in common law cases is the principal rationale for maintaining the distinction between law and chancery. For example, in *Serafin v. Reid*,<sup>27</sup> the plaintiff filed a bill in equity seeking an injunction to prevent the defendant from breaching a written agreement in which the defendant had acknowledged the paternity of plaintiff's child and agreed to pay ten dollars weekly for the child's support. The matter had been referred to a master pursuant to then-applicable chancery procedure. The trial court thereafter,

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the matters are severable, the issues formed on the law counts shall be tried before a jury when a jury has been properly demanded, or by the court when a jury has not been properly demanded. The equitable issues shall be heard and decided in the manner heretofore practiced in courts of equity.

*Id.*

24. 376 Ill. 439, 34 N.E.2d 424 (1941).

25. *Id.* at 444, 34 N.E.2d at 426.

26. *Id.* The precise issue in *Frank* was whether former § 72 (now § 2-1401 "Relief from Judgments") applied to chancery decrees as well as to common-law judgments. The specific holding was that former § 72 was applicable in common-law, but not in chancery, cases, and that § 72 motions in the trial court were not available to attack chancery decisions. Later, § 72 was amended to make the motion applicable to proceedings of every character, whether common-law, equitable, or statutory. See Joint Committee Comments, ILL. REV. STAT. ch. 110, para. 2-1401 historical notes (1955).

27. 335 Ill. App. 512, 82 N.E.2d 381 (1st Dist. 1948).



in conformity with the master's recommendations, entered a decree finding a specific sum due to the plaintiff and enjoined the defendant from breaching the agreement. The chancellor specifically found that "the decree is enforceable in equity on the theory that the plaintiff does not have an adequate remedy at law."<sup>28</sup>

On appeal, the decree was reversed, with the cause remanded so that the plaintiff could amend her pleadings and proceed at law. Should the plaintiff elect not to proceed at law, however, it was held that her complaint should be dismissed for want of equity. In so ruling, the First District Illinois Appellate Court noted that the ultimate relief sought by the plaintiff was a common law money judgment, that there were no special circumstances sufficient to justify equitable jurisdiction, and that the parties' rights should first be adjudicated in an action at law. The court stated, "Since the adoption of the Civil Practice Act basic distinctions between law and equity have been maintained and this distinction is necessitated by the constitutional requirement of trial by jury in actions at law."<sup>29</sup>

The impact of the constitutional guarantee was also discussed in *Rozema v. Quinn*,<sup>30</sup> filed initially as a mechanic's lien foreclosure suit, in which the defendants demanded a jury trial for their common law counterclaim seeking a money judgment. The court characterized the counterclaim as "within the class of cases to which there existed a right to trial by jury at the request of either of the parties."<sup>31</sup>

On appeal, the plaintiff claimed that issues on the counterclaim should have been tried by a jury. The court held that when the defendants indicated to the trial court that they were not abiding by their original jury trial request, the plaintiff should have made a timely objection and sought severance of the law action if he desired a jury trial. In its analysis of the issues, the court noted:

The enactment of the Civil Practice Act has greatly modified the procedures in civil actions where both legal and equitable claims are involved, but the constitutional guarantee of trial by jury in actions at law still requires that certain distinctions between law and equity be retained. The procedural problem arises from the fact that presently the forum has concurrent jurisdiction of both

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28. *Id.* at 513, 82 N.E.2d at 381-82.

29. *Id.* at 514, 82 N.E.2d at 382 (citations omitted).

30. 51 Ill. App. 2d 479, 201 N.E.2d 649 (1st Dist. 1964). This case is also discussed *infra* parts II.D, II.J, and II.V.

31. *Id.* at 487, 201 N.E.2d at 653.

legal and equitable causes of action.<sup>32</sup>

*B. Principles Concerning the Illinois Constitutional Right to Trial by Jury as to Common Law Actions*

The Illinois constitutional protection affording the right to trial by jury in civil cases extends only to common law actions, as common law actions existed when the Illinois Constitution was adopted. The nature of the controversy determines whether the right to trial by jury exists, and it is not a matter of right in equity proceedings. The right to a jury whose verdict is binding does not apply in chancery causes unless specifically authorized by statute.

A number of Illinois Supreme Court cases confirm these principles. In *Fisher v. Burgiel*,<sup>33</sup> the conservator of the estate of an incompetent person sought and obtained a decree setting aside deeds executed by the ward and directing that the defendants account as fiduciaries for certain money and personalty. Affirming the decree, the court rejected defendants' contention that the chancellor had erred in striking their jury demand:

Trial by jury in such [equity] cases does not exist as a matter of right, except in certain enumerated cases, notably contests of wills. The rule in this State is that . . . a jury trial is never a matter of right in a chancery case unless expressly made so by statute. The right to a trial by jury which is guaranteed by the Constitution applies only to actions known to the common law and is not a matter of right in equity proceedings.<sup>34</sup>

There is, moreover, no constitutional right to trial by jury when chancery properly assumes jurisdiction in a situation that otherwise (at law) would require a multiplicity of common law actions. A chancery adjudication in one proceeding of a controversy that alternatively could have been adjudicated by way of a "multiplicity" of common law actions does not change the rule. In *Weininger v. Metropolitan Fire Insurance Co.*,<sup>35</sup> the plaintiffs sought recovery upon and apportionment of a fire loss among nineteen fire insurance policies issued by sixteen defendant insurance carriers. The court concluded that the case was proper for the assumption of jurisdiction by a court of equity in order to avoid a multiplicity of suits and because an accounting was involved. As to defendants' claim that they were entitled to a jury trial, the court stated:

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32. *Id.* at 484, 201 N.E.2d at 652 (citations omitted).

33. 382 Ill. 42, 46 N.E.2d 380 (1943).

34. *Id.* at 54, 46 N.E.2d at 386 (citations omitted).

35. 359 Ill. 584, 195 N.E. 420 (1935).

Since we have resolved the question of jurisdiction against the defendants, it follows that the constitutional question is decided against them. The right of trial by jury guaranteed by the Constitution is only in such actions as were known to the common law. Where equity takes jurisdiction, the defendants are not deprived of their constitutional right to a trial by jury. A trial by jury is not a matter of right in an equity proceeding.<sup>36</sup>

Nor does the constitutional right to jury trial extend to chancery claims created by statute. In *Flaherty v. Murphy*,<sup>37</sup> the plaintiffs filed a bill in chancery, as authorized by the Dramshop Act, to subject property owned by the defendant to a lien and sale in order to satisfy a judgment previously recovered in an action at law against a saloon owner and tenant of that property. In addition to rejecting defendant's attack on the constitutionality of the Act's provision authorizing this remedy, the court held that the defendant was not entitled to a jury trial:

Section 5 of article 2 of the Constitution of 1870, which provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate," means that the right to a jury trial shall continue in all cases where such right existed at the time the Constitution was adopted. That right cannot be taken away. A jury trial is never a matter of right in chancery proceedings, except where by statute it is expressly given. The action under section 10 of the Dramshop Act is an action in rem, and the decree entered therein is in no way a personal decree, and while the test whether or not the right to trial by jury exists in a given case depends on the nature of the controversy, rather than the form of the action, there was no right of trial by jury on such issue as is raised by section 10, or on one analogous thereto, provided for under the laws of this state prior to the adoption of the Constitution of 1870. The chancellor, therefore, did not err in denying [defendant's] demand for a jury.<sup>38</sup>

### C. *The United States Constitution Seventh Amendment Right to Jury Trial in Common Law Cases*

The right to a jury trial in federal civil cases is guaranteed by the seventh amendment to the United States Constitution. Federal cases hold that this federal civil jury trial guarantee applies only to the national government and not to the states. Thus, the states

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36. *Id.* at 590, 195 N.E. at 422.

37. 291 Ill. 595, 126 N.E. 553 (1920).

38. *Id.* at 597, 126 N.E. at 554-55 (citation omitted); see also *Lazarus v. Village of Northbrook*, 31 Ill. 2d 146, 199 N.E.2d 797 (1964) (holding that jury trial as guaranteed in the Illinois Constitutions only applies to common law claims).

need not provide the jury required in federal courts by the seventh amendment when a federally-created cause of action is tried in state courts.<sup>39</sup> The right to trial by jury in civil cases in each state is, therefore, governed by that state's own constitution, statutes, and case law.

Illinois courts, too, confirm the notion that the seventh amendment is not applicable to state courts. In an early case, *Keith v. Henkleman*,<sup>40</sup> the Illinois Supreme Court held that a jury was not required when a trial court, having jurisdiction over a chancery suit to reform and correct an injunction bond, enforced it as reformed by assessing the damages recoverable under the bond by reason of the issuance of the injunction for which the bond had been furnished:

It is well settled that, when a court of equity has jurisdiction of a cause for one purpose, it will retain such jurisdiction for all purposes. When the controversy requires any purely equitable relief, such as will give a court of equity the right to act, the court will proceed to a determination of all the matters at issue; and in doing so it may establish purely legal rights and grant legal remedies, which would otherwise be beyond its power. . . . [A] jury trial is never a matter of right in a chancery case. . . . In addition to this, the first 10 articles of amendment to the federal constitution were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone.<sup>41</sup>

More recently, in *In re Grabow's Estate*,<sup>42</sup> a legatee of an estate attempted without success to claim the right to have a jury hear evidence concerning objections to an executor's accounting. The court said:

While Article I, Section 13 of the Illinois Constitution of 1970 provides: "The right of trial by jury as heretofore enjoyed shall remain inviolate," this provision does not confer a right to a jury in any class of cases where either it had not previously existed or the proceeding was created by statute and was unknown to the common law. Probate is a purely statutory proceeding and, unless the statutes provide a right to jury in a probate proceeding, as is done in Ill. Rev. Stat. 1977, ch. 110 1/2, par. 16-3 for a

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39. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916); see also *Howlett v. Rose*, 110 S. Ct. 2430, 2440 n.17 (1990); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Colgrove v. Battin*, 413 U.S. 149, 170 n.4 (1973); *School District of Abington Township v. Schempp*, 374 U.S. 203, 253 n.17 (1963); *Bartkus v. Illinois*, 359 U.S. 121, 124-125 (1959); *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 365 (1952).

40. 173 Ill. 137, 50 N.E. 692 (1898).

41. *Id.* at 141, 50 N.E. at 693.

42. 74 Ill. App. 3d 336, 392 N.E.2d 980 (3d Dist. 1979).

limited purpose of discovery, and recovery of property of the estate, there exists no right to a jury in probate proceedings. In addition, the seventh amendment to the Constitution of the United States does not apply to State courts.<sup>43</sup>

*D. Power of the Court to Decide Legal and Equitable Claims Joined in One Action*

If there is no jury demand, a trial judge, having power under post-1933 procedures to sit as both common law judge and equity chancellor, has jurisdiction to decide a case that joins both legal and equitable claims. On the other hand, it has been noted that if a jury has been demanded (and not thereafter waived expressly or by implication), a severable law claim joined with an equity claim may not be tried in the chancery suit. In that situation, a judge sitting as chancellor does not have jurisdiction to decide the issues that properly should be presented to a jury. In *Rozema v. Quinn*,<sup>44</sup> the court rejected the plaintiff's contention, in a mechanic's lien foreclosure suit, that a master-in-chancery was without authority to hear the defendant's common law counterclaim. The defendant initially had filed a jury demand, and then the defendant requested—without plaintiff's objection or request for a severance—that the case be referred generally to a master. In rejecting the plaintiff's argument, the court stated:

To determine the issues raised by this appeal it is necessary to consider whether a court of chancery has jurisdiction over the subject matter of defendant's counterclaim. As spoken of here, jurisdiction is the power to adjudge concerning the general question involved, and concerns itself with whether the action states a claim belonging to the general class of cases over which the authority of the court may properly extend. . . . The procedural problem arises from the fact that presently the forum has concurrent jurisdiction of both legal and equitable causes of action. . . . When read together, it is the clear import of sec. 44 [now § 2-614] and Rule 11 [now Rule 232] that where no demand for a jury is made in cases involving the joinder of legal and equitable causes of action, the trial court has jurisdiction to hear the entire cause. . . . On the other hand, where a law and equity action are joined but a proper demand for a jury in the law action is made, the latter cannot be tried with the chancery action.<sup>45</sup>

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43. *Id.* at 337, 392 N.E.2d at 982 (citation omitted).

44. 51 Ill. App. 2d 479, 201 N.E.2d 649 (1st Dist. 1964). This case is also discussed *supra* parts II.A. and *infra* parts II.J. and II.V.

45. *Id.* at 485, 201 N.E.2d at 653.

The right to jury trial exists as to common law issues added to a chancery suit seeking to restrain publication of alleged libelous matter. Where, in an equity suit seeking to enjoin publication of alleged libelous matter, an additional count is added seeking compensatory and punitive damages, the defendant is then entitled to seek a jury trial on the law issues presented by the additional count. In *Gariepy v. Springer*,<sup>46</sup> an injunction granted at the request of the plaintiff, an attorney, was disapproved, and on the question of defendant's right to trial by jury, the appellate court said:

Having demanded a jury at the earliest possible moment after being confronted with a suit for damages, as to which he was entitled to a trial by jury, it is difficult to conceive that he could have asserted the right guaranteed him by the constitution, as well as the law of the State, at any earlier time. The contention that there were no severable issues raised by the additional count, and that 'equity properly did complete justice,' is likewise untenable. The original complaint was for injunctive relief. The additional count sought damages, both compensatory and punitive. Plaintiff certainly intended to treat the count at law as distinct from the count in equity, and the court evidently decided that the two causes of action were distinct, for it did not refuse a jury trial on the ground that the two counts could be tried together as a proceeding in equity.<sup>47</sup>

The severance of a previously-consolidated law action and chancery suit is proper where a jury demand exists. In *Hunsberger v. Mitchell*,<sup>48</sup> an action at law on a promissory note had initially been consolidated with a chancery suit in which the plaintiff and the defendant in the law action were, along with others, defendants in the chancery suit. The defendant in the law action filed a jury demand. The trial court thereafter vacated the order of consolidation and was affirmed on appeal. The appellate court held that because a jury had been demanded, the law action could not be tried with the chancery suit and the trial court did not abuse its discretion in vacating the original consolidation order.

### *E. Equity Jurisprudence and the Denial of Jury Trials*

The general rule in Illinois is that absent an express constitutional or statutory provision to the contrary, there is no trial by

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46. 318 Ill. App. 523, 48 N.E.2d 572 (1st Dist. 1943). The case is also discussed *infra* part II.J.

47. *Id.* at 531, 48 N.E.2d at 576.

48. 333 Ill. App. 644, 78 N.E.2d 857 (1st Dist. 1948).

jury as of right in chancery proceedings. In *Martin v. Strubel*,<sup>49</sup> the Illinois Supreme Court held that this principle applies in the adjudication of deficiency amounts in mortgage-foreclosure proceedings. The question before the court in *Martin* was whether a mortgagor is deprived of due process of law and the right of trial by jury<sup>50</sup> by the statute that confers power on courts of equity to render deficiency decrees for money amounts in foreclosure proceedings. The statute read in part:

In all decrees hereafter to be made in suits in equity directing foreclosure of mortgages, a decree may be rendered for any balance of money that may be found due to the complainant, over and above the proceeds of the sale or sales, and execution may issue for the collection of such balance, the same as when the decree is solely for the payment of money.

The deficiency decree for \$1,150 had been entered, notwithstanding the mortgagor-appellants' demand for trial by jury, which the trial court denied:

[I]n the absence of express statutory or constitutional provisions, a jury is no part of the chancery system. With certain statutory exceptions, not relevant here, no such provisions exist in Illinois. In this state the guaranty of the right to a jury trial does not extend to cases of equity jurisdiction, such as a bill to foreclose a mortgage. It is well settled that when a court of equity has jurisdiction of a cause for one purpose, it will retain such jurisdiction for all related purposes. When the controversy requires any purely equitable relief, such as will give a court of equity the right to act, the court will proceed to determine all matters at issue and do complete justice between the parties. In so doing, a court of chancery may, if it sees fit, establish purely legal rights and grant legal remedies in the same proceeding, which would otherwise be beyond its power. The concurrent jurisdiction of equity may thus adjust claims against the property arising out of tort or contract, and make all proper orders in respect to the time and manner of their payment. The provision of the Constitution of 1870, prescribing the right to trial by jury, does not extend to cases in equity but is confined to cases at law.<sup>51</sup>

*Houston v. Brackett*<sup>52</sup> was a contested adoption proceeding in which the jury demand by the respondent, the natural father and former husband, was rejected. The court found the father to be

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49. 367 Ill. 21, 10 N.E.2d 325 (1937).

50. At the time of the *Martin* case, the right to a jury trial was guaranteed under then §§ 2 and 5 of article 2 of the 1870 Illinois Constitution.

51. *Id.* at 22, 10 N.E.2d at 326 (citations omitted).

52. 38 Ill. App. 2d 463, 187 N.E.2d 545 (2d Dist. 1963).

unfit as alleged, and an adoption decree was entered in favor of the petitioners, natural mother and her present husband. Affirming the decree, the appellate court noted, on the jury-trial issue, that:

The right of trial by jury guaranteed by the constitution obtains only in such actions as were known to the common law. The adoption of children was unknown to the common law and it is governed solely by statute. In adoption cases the jurisdiction of the court over the child is the same as that exercised by courts of chancery and a trial by jury is not a matter of right in an equity proceeding. . . . Since adoption is a statutory proceeding, and the court's jurisdiction is similar to that exercised by courts of chancery, we conclude that the denial of Brackett's demand for a jury trial on the issue of his unfitness was a matter within the sound discretion of the trial court; and that in the absence of any showing of abuse of such discretion or necessity for trial of such issue by a jury, the trial court committed no error in denying the demand for a trial by jury.<sup>53</sup>

*Lundy v. Messer*<sup>54</sup> was a suit by partners to foreclose a mortgage given as security for debts owed for services rendered by the partnership. On appeal by the defendant-mortgagor, the court noted that when a court of equity has jurisdiction of a cause for one purpose, such as to foreclose a mortgage, it retains jurisdiction for all related purposes. The court in such cases will proceed to determine all matters at issue and do complete justice and in so doing, may establish what may otherwise be purely legal rights that may have been beyond its power. On the question of the right to a jury, the court stated, in accordance with the general rule, that, in the absence of express statutory or constitutional provisions, a jury is not part of the chancery system, and the constitutional right of jury trial does not extend to causes of equity jurisdiction such as a suit to foreclose a mortgage. The defendant-mortgagor's position was that a jury should have been impaneled to decide questions of fact as to the employment of the partners to represent the defendant, the services rendered, the fair and reasonable value of the services, and the partnership's expenses. Thus, it was held that the trial court did not err and did not abuse its discretion in failing to direct such issues to a jury.

There is no right to trial by jury in a suit brought under the equitable doctrine of constructive trust to recover property taxes avoided by reason of a tax reduction scheme. In *People ex rel.*

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53. *Id.* at 468, 187 N.E.2d at 548 (citations omitted).

54. 25 Ill. App. 2d 513, 167 N.E.2d 278 (2d Dist. 1960), *appeal after remand*, 32 Ill. App. 2d 303, 177 N.E.2d 863 (1961).



*Daley v. Warren Motors, Inc.*,<sup>55</sup> the Cook County State's Attorney brought suit under the equitable doctrine of constructive trust to recover property taxes that had been avoided by reason of an alleged illegal real estate tax reduction scheme. On appeal from judgment imposing a constructive trust, the court approved the trial court's actions in denying defendants' motion to sever any equitable cause of action from any common law counts, and in striking defendants' jury demand and exercising its equitable jurisdiction. Also, the court held that the suit was properly filed to recover, under the constructive trust theory, property taxes that the defendants had avoided by participating in a tax reduction scheme with certain public officials; that benefits realized by the defendants as a result of the tax reduction scheme could be subjected to the constructive trust; and that the evidence supported the finding that defendant-taxpayers should have known that the parties employed to obtain a reduction in property assessments did so by illegal means. In so holding, the court rejected defendants' claim that when legal and equitable issues are formed in the same proceeding any legal issue for which a proper demand for a jury has been made must be submitted to a jury. The court noted:

The trial court acted properly in striking the jury demand. The Supreme Court has stated that the right to a jury trial is determined by the nature of the issue to be tried. Here the one-count complaint presents the issue of whether the defendants should be declared constructive trustees of benefits they received through the fraudulent acts of deputy commissioners Lavin and Erskine. The trial court was correct in exercising its equitable jurisdiction.<sup>56</sup>

There is no right to trial by jury in an equity proceeding, even though a decree may have the same effect as a common law judgment in ejectment. *Harding v. Fuller*<sup>57</sup> was a suit dealing with four consolidated petitions under a statute known as the Burnt Records Act. The Act empowered courts of equity, without a jury trial, to establish title to land where the records had been destroyed. The decree as to each petition found the petitioner to be the owner in fee simple of the lot described therein; confirmed and established title in the petitioner, enjoined defendants from interfering with petitioner's possession of the premises and from claiming title to the real estate except through the petitioner; directed defendants in possession to surrender the premises to the petitioner; and ordered

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55. 114 Ill. 2d 305, 500 N.E.2d 22 (1986).

56. *Id.* at 316, 500 N.E.2d at 27 (citation omitted).

57. 141 Ill. 308, 30 N.E. 1053 (1892).

that in the event of failure to surrender, a writ of assistance was to issue under which petitioner was to be put in possession. On appeal, the appellant's main contention was that each suit was an action of ejectment brought on the equity side of the court under the cover of a proceeding under the Burnt Records Act, for the purpose of getting possession of the property without a jury trial on the issue of title. The court held:

If these proceedings are properly brought under the "burnt records act," the objection that the court establishes the title without a trial thereof by jury is without force. The question as to whether or not this act is constitutional, as depriving the parties of the right of a trial by jury, has been before this tribunal in a number of cases, and we have held that in this respect the act is a valid law. . . .

"It has been a common practice for years to file bills in equity to partition lands, and in a proceeding of that character the court has ample power to settle all conflicting titles, and that, too, without a jury. The power conferred upon a court of equity by the burnt records act is similar to a proceeding in equity for partition, and a proceeding under the former act is no more obnoxious to the constitutional provision for a jury than is a bill in equity for partition." It matters not what may have been the motive of each one of these petitioners in filing a petition in equity under the burnt records act. It matters not that the effect of a decree confirming the title under the act may be the same as the effect of a judgment obtained in an action of ejectment. The material question is whether the facts alleged in the petition are sufficient to give the court jurisdiction of the subject-matter. . . . The fact that there are adverse claimants is not an objection to proceeding under the act; and the statute does not require the court to remit the case to a court of law after restoring the evidences of title, but authorizes the court to inquire into and establish the title.<sup>58</sup>

There is no right to a jury trial as to the granting of injunctive relief. In *City of Girard v. Girard Egg Corp.*,<sup>59</sup> the plaintiff alleged violation of city ordinances by the defendant in the operation of its business and sought to enjoin the public nuisance. Injunctive relief was granted, based upon evidence concerning the effect of the defendant egg company's operations on persons in the neighborhood and evidence concerning obnoxious odors, the great quantities of flies caused by the defendant's business, and the defendant's inability or unwillingness to correct the situation. The injunction perpetually enjoined defendant from operating its business within the

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58. *Id.* at 312, 30 N.E. at 1054-55 (citations omitted).

59. 87 Ill. App. 2d 74, 230 N.E.2d 294 (4th Dist. 1967).

City of Girard. On appeal, the defendant contentded that it had been improperly denied a trial by jury. The appellate court rejected this argument, stating, "The gist of this action was a suit in equity to enjoin a public nuisance. The judgment of the court was that the injunction should issue. There is no right to a jury trial on the question of whether or not an injunction shall be granted."<sup>60</sup>

There is no right to jury trial as to damages awarded as equitable relief in equity actions arising out of refusal to perform real estate sale contracts. *Gordon v. Bauer*<sup>61</sup> started out as a suit by purchasers against vendors for damages and for specific performance of contracts for the sale of real estate. Claims by and against the broker were also joined in the case. After nine days of a nineteen day bench trial, the plaintiffs moved to dismiss the part of their complaint seeking specific performance, electing instead to pursue only their damage claims. In that motion, the plaintiffs asserted, with a supporting affidavit, that specific performance was no longer a viable remedy for them, since there had been a dramatic decline in the value of farm real estate during the two years between execution of the contracts and the trial and the market value of the subject real estate at the time of trial was substantially lower than the contract price. The motion was allowed and the trial court subsequently found for the plaintiffs and awarded damages. The defendant-vendors appealed asserting a number of points, the initial ones relating to the trial court's decision to allow plaintiffs to continue the trial in equity on the damage claims after they had voluntarily dismissed the specific performance claims. The appellate court ruled:

The trial court ruled that the damage claims were equitable claims. . . . The trial court then held that because the damages were equitable, it had the authority, as a court of equity, to hear the case and grant or deny the damages. . . . We agree with the holding of the trial court, however, that it had jurisdiction in equity to award the damages and that the damages constituted equitable relief even after the court dismissed the specific performance counts. . . . If the court had acted at law, the [defendants] could have requested a jury trial and the court could have granted that request at its discretion. Because the court acted in equity, however, the [defendants] were not entitled to a jury trial, and thus the court did not act improperly by continuing with the bench trial.<sup>62</sup>

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60. *Id.* at 75, 230 N.E.2d at 295.

61. 177 Ill. App. 3d 1073, 532 N.E.2d 855 (5th Dist. 1988), *appeal denied*, 125 Ill. 2d 564, 537 N.E.2d 809 (1989).

62. *Id.* at 1081, 532 N.E.2d at 859, 860, 863 (citation omitted).

To the extent that equity deprives one of the right to a jury trial, it does so only where the law may not provide an adequate remedy. *People ex rel. Barrett v. Fritz*<sup>63</sup> reversed a decree that had granted, at the instigation of the Illinois Attorney General, an injunction against some 1400 named and innumerable unnamed and unknown persons from committing certain crimes. The appellate court gave various reasons for rejecting the theory of the complaint, among which was the following:

It seems to us that this is an attempted revolutionary revision of the principles of our government and amounts to an astounding assertion of a principle of equity jurisprudence. One of the first principles of civil rights recognized for hundreds of years is, that no man shall be deprived of his right of trial by jury. When equity deprives that right, it is with intense reluctance and based on the necessity of a given case where law may not give an adequate remedy.<sup>64</sup>

#### *F. Jury Trials May Be Required in Chancery Causes and Courts*

The right to a jury trial exists in chancery cases to the extent that trial by jury is required under the constitution. In *Gage v. Ewing*,<sup>65</sup> a complainant filed suit in chancery to set aside certain allegedly void tax deeds, claiming that they amounted to clouds upon the title. The defendant's plea that there was an adequate remedy at law in the action of ejectment was overruled, on the ground that an 1872 statute conferred jurisdiction on chancery courts to hear and determine bills to quiet title and remove clouds from title in such circumstances. The Illinois Supreme Court upheld the constitutionality of the statute, although the cloud sought to be removed was "but a mere adverse legal title to the land" for which the Illinois Constitution provides a right to trial by jury:

Admitting that by this statute there may be drawn into investigation and determination, in chancery, questions of mere legal title to lands, where, before, the remedy was only by action of ejectment at law, it does not follow that there would, from the statute, be any impairment of the right of trial by jury. Conferring jurisdiction in chancery is not excluding trial by jury. Courts of chancery may submit issues of fact to trial by jury, and although it is discretionary to do so in their ordinary course of practice, yet where there comes bestowal upon such a court jurisdiction in a case where there existed, before the adoption of the constitution,

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63. 316 Ill. App. 217, 45 N.E.2d 48 (4th Dist. 1942).

64. *Id.* at 230, 45 N.E.2d at 54.

65. 107 Ill. 11 (1883). This case is also discussed *infra* part II.L.

the right of trial by jury, it is to be presumed that there would be, in such case, allowance of jury trial, that there would be obedience to the constitutional injunction that the right of trial by jury, as enjoyed at the time of the adoption of the constitution, should remain inviolate. Should there at any time, in such a case, be denial of such right, then there might arise ground of complaint of the violation of this right of jury trial secured by the constitution; but it would come from the action of the court in the administration of the law, and not from the statute itself.<sup>66</sup>

Jury trials are conducted in chancery cases when a jury trial is a matter of right. *French v. French*<sup>67</sup> was a suit by a wife asking for separate maintenance from her husband in which the husband cross-claimed for divorce, and the parties waived jury trial. The trial court dismissed the suit for divorce and entered a decree of separate maintenance.

On appeal, the decisions below were reversed and the cause remanded. The rationale for the reversal had to do with the failure of the record to show that the evidence was sufficient to sustain the decree or to sustain those factual allegations not admitted in the defendant's answer; such was the rule generally applicable at the time in chancery cases, except for chancery cases tried before a jury as a matter of right.<sup>68</sup>

A right to trial by jury does not take a suit out of a chancery court's jurisdiction. A suit to set aside tax deeds as clouds upon title to unimproved and unoccupied land, filed pursuant to a statute that confers jurisdiction upon chancery in suits to quiet title and remove clouds on title to real estate, remains within the jurisdiction of the court of equity, notwithstanding the constitutional right that a jury be impaneled to decide certain matters and notwithstanding that there is an analogous common law remedy of ejectment.<sup>69</sup> In *Turnes v. Brenckle*,<sup>70</sup> the Illinois Supreme Court addressed the constitutionality of a statute amending the mechanic's lien law to provide that where the chancellor in a mechanic's lien foreclosure suit finds the claimant not entitled to a lien, the claimant may recover at law against the owner of the property in the chancellor's discretion. That court found the statute to be unconstitutional as improper special legislation and in

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66. *Id.* at 15-16.

67. 302 Ill. 152, 134 N.E. 33 (1922).

68. *Id.* at 158, 134 N.E. at 35-36.

69. *Gage v. Ewing*, 107 Ill. 11 (1883). The case is also discussed *infra* part II.L.

70. 249 Ill. 394, 396, 94 N.E. 495, 497 (1911). This case is also discussed *infra* parts II.L. and II.N.

conflict with the right to and mode of securing trial by jury in "purely legal cases."

In a condemnation suit where there is a right to trial by jury, the proceeding retains equitable characteristics. *Chicago & Northwest Railway Co. v. Miller*<sup>71</sup> involved the trial of a condemnation suit, in which there is a constitutional right to trial by jury for the purpose of fixing the amount of compensation and damages due persons having interests in the property. A cross-petition was filed asserting ownership of the property in fee and denying the interests of others who were occupying the premises under the alleged leases. The trial court held that the leases were void by reason of the statute of frauds and that the total value to be fixed by the jury in the condemnation proceeding should be paid to the fee-owner. The supreme court agreed with the position of the appellant-tenants that, in equity, appropriate part-performance by the tenants would take the leases out of the statute of frauds, and in a condemnation proceeding, the settlement of issues as to interests in the property is equitable in character:

In a condemnation proceeding under the eminent domain act the jury is impaneled to fix the amount of compensation and damages which are to be paid to the owner or owners and parties interested in the property sought to be condemned, and it has nothing to do with the title to the property sought to be taken. The question of title, if any such question is raised, should be determined and settled by the court prior to the time the questions of compensation and damages are submitted to the jury. . . . In the determination and settlement of the interests of the respective parties . . . the court was not restricted to mere legal titles, but had the power to ascertain the rights of the parties therein, whether such rights were legal or equitable in their nature. While . . . in the trial of a condemnation suit either party is entitled to have a jury, and the introduction of evidence and mode of conducting the trial after the jury is impaneled is according to the rules of practice in trials at law, and in that sense a proceeding to condemn property under the eminent domain act is a legal and not an equitable one, in the determination and settlement of the title of the parties to a condemnation suit to the property sought to be condemned equitable as well as legal rights must be taken into consideration, and in the settlement of the question of title the proceeding is equitable in its character.<sup>72</sup>

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71. 233 Ill. 508, 84 N.E. 683 (1908).

72. *Id.* at 510-11, 84 N.E. at 684-85 (citations omitted).

*G. The Right to Jury Trial in Cases Seeking Both Legal and Equitable Relief*

The right to jury trial on issues of law is guaranteed unless waived or until the court correctly holds that decisions on equitable issues are res judicata. In *Aetna Screw Products Co. v. Borg*,<sup>73</sup> suit was initiated by a buyer of stock who alleged breach of a tax indemnification provision of the contract of sale. The seller-defendant filed an answer, a jury demand, and a counterclaim in equity seeking reformation of the contract. At the seller's request, the trial court heard the seller's reformation counterclaim first, and thereafter, denied the reformation relief; refused to impanel a jury on the breach of contract claim; and entered judgment on that claim for the buyer. On appeal, the judgment was affirmed on the seller's reformation issue, and reversed as to the buyer's contract claim:

A complaint alleging breach of contract and resulting damages is an action cognizable at common law. Therefore, once [seller] timely filed his jury demand in conformity with the requirements of . . . the Civil Practice Act he was guaranteed his right to a jury trial until he waived it or the court correctly determined that its holding on the equitable issues, heard first, was res judicata as to all legal issues as well. . . .

[Seller] did not waive his right to trial by jury either when he filed his counterclaim in equity or when he requested that the reformation issue be heard first. . . . [There is not] sufficient identity of issues and facts to create a situation in which a decision on the equitable claim would be res judicata as to the legal claim.<sup>74</sup>

*H. Powers of Judges Who Exercise Both Common Law and Chancery Jurisdiction*

Where there is no demand for jury trial, judges are authorized to try equitable actions together with actions at law. *Chicago Title & Trust Co. v. First Arlington National Bank*<sup>75</sup> involved an action by the plaintiff title-company against a general contractor and construction-loan borrowers seeking restitution for overpayment from an escrow account. The plaintiff was later permitted to amend its complaint to include a tort count for deceit. Although the defendants filed no jury demand, they claimed that because the case was

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73. 116 Ill. App. 3d 206, 451 N.E.2d 1260 (1st Dist. 1983).

74. *Id.* at 213, 451 N.E.2d at 1266 (citations omitted).

75. 118 Ill. App. 3d 401, 454 N.E.2d 723 (1st Dist. 1983).

tried in the chancery division of the circuit court, the tort action should have been dismissed "for want of equity." The appellate court did not agree:

[W]hen (as in this case) there has been no demand for jury trial, Supreme Court Rule 232 authorizes the court to try an equitable action together with an action at law. We consequently find no merit in the argument that the action at law for deceit should have been dismissed "for want of equity."<sup>76</sup>

Courts with jurisdiction over suits seeking chancery relief such as specific performance have power to grant alternative damage remedies, after concluding that chancery relief itself is inappropriate. For example, chancery relief may be inappropriate because of the time the case has been pending or actions by the defendant that render an equitable remedy inappropriate. In *Lenti v. Colomb*,<sup>77</sup> the plaintiff-vendors sought specific performance of a contract for sale of a restaurant business and also claimed damages. After evidentiary hearings, the trial court concluded that specific performance was then an inappropriate remedy because of the expiration of time for payment of purchase price installments and defendant's sale of the property that was to have been subjected to a chattel mortgage. Rather than enter an alternate damage remedy, the trial court dismissed the case from the equity division and transferred it to the law division. The plaintiffs appealed, asserting that the chancery division, having jurisdiction over the case, should have retained it to consider the plaintiffs' claim for damages. The appellate court reversed and remanded:

The suit . . . was therefore properly brought in equity, and the equity court properly assumed jurisdiction over it. . . . Events occurring after the suit was filed, none of which was attributable to the plaintiffs rendered specific performance no longer an appropriate remedy. Under these circumstances, we think the court of equity should have retained the case for consideration of plaintiffs' claim for damages. The parties were put to a lengthy and expensive hearing before a Master in Chancery, at which all of the factual and legal issues were litigated. It would seem grossly unfair as well as unnecessary to require them to begin again in a court of law.<sup>78</sup>

A judge exercising both common law and chancery powers has the right to make the issue one at law and to call a jury to try that issue. There are Illinois cases, predating the 1933 Civil Practice

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76. *Id.* at 414, 454 N.E.2d at 732 (citation omitted).

77. 74 Ill. App. 2d 94, 220 N.E.2d 65 (1st Dist. 1966).

78. *Id.* at 98, 220 N.E.2d at 67.



Act, in which both chancery and common law issues have been adjudicated and in which juries as of right have been impaneled. In *Lewark v. Dodd*,<sup>79</sup> the plaintiff filed a bill in equity to contest a will on behalf of a minor, claiming incapacity of the testator and undue influence by the sole devisee. A jury returned a verdict in favor of the contestant, and the trial court decreed that the will was void.

On appeal, the proponents of the will did not question the verdict, but claimed: (a) that the court erred in decreeing the will to be void in its entirety, instead of limiting the effect of the decree to the interest of the minor contestant; and (b) that no issue of law had been properly made up as to whether the writing was the last will of the testator. The relevant statute provided that "an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not" and directed the trial of that issue by jury. The court agreed with the proponents that the probate may be void so far as concerns the interest of the contesting heirs who had been under disability, yet valid so far as the will concerns heirs who had lost their rights to contest the will by lapse of time. Concerning the issue presented to the jury in the proceeding, the court declared:

Under our system the same judge exercises both common-law and chancery jurisdiction in the same court at the same time, and he may make the issue at law and immediately call a jury to try it. This practice has made it unnecessary in our courts to follow some of the rules which prevailed under the system of separate courts of chancery and common-law jurisdiction, and in practice some of such rules are disregarded.<sup>80</sup>

Failure by the court to decide issues that can be determined without a jury may be error. In a separate maintenance suit, the failure of the trial court to rule on a wife's claim that she was entitled to have fifty shares of stock restored to her or in the alternative, a judgment against defendant for the amount derived from sale of the shares was error. Such issues could be determined by the court without a jury, regardless of whether they present legal or equitable problems for solution.<sup>81</sup>

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79. 288 Ill. 80, 123 N.E. 260 (1919).

80. *Id.* at 86, 123 N.E. at 263.

81. *Glennon v. Glennon*, 299 Ill. App. 13, 19 N.E.2d 412 (1st Dist. 1939).

*I. Waiver of Trial by Jury in Cases Presenting Both Legal and Equitable Claims*

A defendant does not waive the right to a jury merely by filing a counterclaim in equity or by requesting that an equity issue be heard first. In *Aetna Screw Products Co. v. Borg*,<sup>82</sup> a buyer of stock alleged breach of a tax indemnification provision of the contract of sale, and the seller-defendant filed an answer, jury demand, and counterclaim in equity seeking reformation of the contract. The question arose as to whether the seller, by filing a counterclaim in equity or by making a request that its reformation issue be heard first, waived the right to trial by jury. The appellate court held that these actions did not amount to a waiver and the decision on the equitable claim was not *res judicata* as to the legal claim:

In the instant case, the only similarity between the equitable and legal issues is that [defendant's] counterclaim for reformation was the same as one of his four affirmative defenses filed in his answer to [plaintiff's] breach of contract action. . . . It is clear to us that not only did [defendant] make a proper jury demand, but he strongly and correctly objected to the court's decision that the causes of action were identical. . . . [W]e reverse the trial court's denial of [defendant's] jury demand . . . .<sup>83</sup>

A failure to make a jury demand waives a jury trial as to amounts due plaintiff for services in a suit seeking specific performance of an employment contract and other relief. In *Westerfield v. Redmer*,<sup>84</sup> the plaintiff filed a suit in equity to compel performance of an alleged oral agreement to form a corporation and employ the plaintiff as manager. Finding that the contract was only for personal services furnished by the plaintiff at the defendants' request, the chancellor denied equitable relief but did enter a \$700 judgment for the plaintiff as compensation for services.

On appeal, the appellate court, citing provisions of the 1933 Civil Practice Act, "which has very much modified the procedure in civil actions at law and in equity,"<sup>85</sup> and related Supreme Court Rules, rejected the claim that the trial court, by enforcing a purely common law right of action, had deprived defendants of their constitutional right to trial by jury:

The matter of the employment of plaintiff by defendants was set

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82. 116 Ill. App. 3d 206, 451 N.E.2d 1260 (1st Dist. 1983). The case is also discussed *supra* part II.G.

83. *Id.* at 214, 451 N.E.2d at 1266-67.

84. 310 Ill. App. 246, 33 N.E.2d 744 (1st Dist. 1941). The case is also discussed *infra* part II.P.

85. *Id.* at 248, 33 N.E.2d at 745.

up in the bill, and while the prayer was for equitable relief (namely, specific performance), the bill also prayed "for such other and further relief in the premises as the court shall deem equitable and just." It is true if the defendants had demanded trial by jury of these issues as to the amount due to plaintiff for his services, they would have been entitled to it . . . . They made no such motion. They demanded no such trial. . . . [T]he jury must be regarded as waived.<sup>86</sup>

There are circumstances in which parties who have the right to trial by jury are deemed by action or inaction to have waived the right. For example, although mandamus proceedings are considered actions at law in which the parties have the right to present issues of fact to a jury, that right may be waived and waiver may be implied if the parties proceed to a trial before the court without objection. In *People ex rel. First National Bank of Hammond v. Czaszewicz*,<sup>87</sup> the court granted a writ of mandamus requiring the former city treasurer of West Hammond, Illinois, to file with the city clerk a detailed accounting showing all receipts and expenditures and all transactions as city treasurer during the fiscal year ending April 1915. The writ sought an accounting to show the state of the treasury as it concerned certain special assessment funds, and required the former city treasurer to pay to his successor in office \$2,300 to credit those funds. On the question of waiver of jury trial, the court said:

The bill of exceptions shows no demand for a jury and no objection to proceeding with the trial by the court. A mandamus proceeding is an action at law, and parties to it have the right to have the issues of fact tried by a jury. But this right may be waived. Such waiver need not be expressly stated, but is implied if the parties proceed with the trial before the court without objection.<sup>88</sup>

#### *J. Waiver of Jury Demand By Proceeding to Trial on Equity Issues*

Proceeding to trial on an equity count may operate to waive a jury demand on law issues and law counts. For example, in *Power Electric Contractors, Inc. v. Maywood-Proviso State Bank*,<sup>89</sup> the defendant filed a counterclaim and demand for jury trial in response to a two-count complaint in the chancery division of the trial

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86. *Id.* at 250, 33 N.E.2d at 746.

87. 295 Ill. 11, 128 N.E. 739 (1920).

88. *Id.* at 15, 128 N.E. at 740.

89. 60 Ill. App. 3d 685, 377 N.E.2d 142 (1st Dist. 1978).

court. The suit then proceeded to trial before the court on the equity matter. The fact questions underlying both the legal and the equitable claims were identical. The court ruled:

[B]ecause of the identity of the factual issues raised by the complaint and by the counterclaim, defendants' conduct in proceeding to trial before [the trial judge] amounted to a waiver of their jury demand. As our review of the pleadings has shown, the factual issues upon which depended plaintiff's right to a mechanic's lien were identical to those upon which depended defendants' right to recover on the counterclaim, namely which of the parties breached the contract, and what damages flowed therefrom. . . . According to the record before us, defendants first raised this issue when they filed their response to plaintiff's motion for judgment on the counterclaim. . . . There are numerous other cases which hold that a party may, by conduct, waive its demand for a jury trial. To accept defendants' position would allow them a second opportunity to litigate the factual issues underlying this case in clear violation of the doctrine of *res judicata*.<sup>90</sup>

In *Rozema v. Quinn*,<sup>91</sup> a mechanic's lien foreclosure action, the defendants, after filing a counterclaim asserting an action at law for a money judgment and demanding a jury trial, submitted a request to the chancellor for general reference, thus indicating to the court and the plaintiff that the defendants were not abiding by their earlier request for jury trial on the counterclaim. The court held:

Plaintiff made no objection but proceeded to trial before the master. It is clear that had plaintiff sought to sever the law action or had he desired a trial by jury, it was incumbent upon him to raise these points before the court when the reference was made. When no timely objection was forthcoming from plaintiff, the court properly determined that the causes should be tried together, and the reference operated to that effect. . . . Since the jury was waived by the action of the parties, the chancellor had jurisdiction to hear both the legal and equitable actions.<sup>92</sup>

If a party demands and is denied a jury trial where the issues are properly triable by a jury as of right, there cannot be a waiver of the right to trial by jury. In *Garipey v. Springer*,<sup>93</sup> where the defendant demanded and was denied a jury trial on law issues presented by a new count (for compensatory and punitive dam-

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90. *Id.* at 689, 377 N.E.2d at 145-46 (citations omitted).

91. 51 Ill. App. 2d 479, 201 N.E.2d 649 (1st Dist. 1964). The case is also discussed *supra* parts II.A. and II.D, and *infra* part II.V.

92. *Rozema*, 51 Ill. App. 2d at 487, 201 N.E.2d at 653.

93. 318 Ill. App. 523, 48 N.E.2d 572 (1st Dist. 1943). The case is also discussed *supra* part II.D.

ages) added to the original complaint for injunctive relief against publication of alleged libelous matter, the appellate court held that the defendant had not waived the right to a jury trial by proceeding to a hearing before a master in chancery:

However, he had no other recourse. Having demanded trial by jury and being denied that right by the court's order, he was obliged to proceed with the hearing before the master. . . . In the case at bar the court did not refer the cause to a master for hearing until after defendant's motion for a jury was denied. Having insisted upon a trial by jury and having preserved his objections to the court's denial, it was not necessary for defendant to object to every other step that took place during the progress of the case.<sup>94</sup>

*K. Claims for Monetary Relief Cognizable Under Equity Principles Without a Jury, Notwithstanding a Jury Demand*

A court may act in equity in awarding damages after plaintiffs voluntarily dismiss their specific performance claims. When a trial court has jurisdiction over a suit in which the plaintiff is seeking equitable relief, such as one by a vendee seeking specific performance and damages against a vendor under a real estate sales contract, the court may award damages as equitable relief in lieu of specific performance relief. In such circumstances, the parties are not entitled to trial by jury on the claim for damages. In *Gordon v. Bauer*,<sup>95</sup> the court held that the trial court acted in equity in awarding damages to the plaintiff-contract purchasers when the purchasers, after nine days of a nineteen day trial, voluntarily dismissed their specific performance claims so that the defendants were not entitled to try the damage claim before a jury:

[T]he damages awarded to the [plaintiffs] were in the form of equitable relief which the trial court could properly grant even after dismissing the specific performance claims. . . . If the court had acted at law, the [defendants] could have requested a jury trial and the court could have granted that request at its discretion. Because the court acted in equity, however, the [defendants] were not entitled to a jury trial, and thus the court did not act improperly by continuing with the bench trial.<sup>96</sup>

Where fixing and apportioning a loss is beyond the capacity of

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94. *Garipey*, 318 Ill. App. at 532, 48 N.E.2d at 576.

95. 177 Ill. App. 3d 1073, 532 N.E.2d 855 (5th Dist. 1988), *appeal denied*, 125 Ill. 2d 564, 537 N.E.2d 809 (1989). The case is also discussed *supra* part II.E.

96. *Gordon*, 177 Ill. App. 3d at 1081, 532 N.E.2d at 862-63 (citations omitted).

the average jury, the action is cognizable in equity. Equitable jurisdiction, based on the principles of avoiding a multiplicity of suits and on the necessity of an equitable accounting, exists notwithstanding statutes that permit free joinder. *Jay-Bee Realty Corp. v. Agricultural Insurance Co.*<sup>97</sup> was a proceeding against twenty-two insurance companies to determine the insurers respective liabilities under forty-five Michigan standard fire insurance policies covering plaintiff's frame hotel building and its contents. The hotel had been destroyed by a fire. Concluding that the liabilities of the defendants were interrelated and interdependent, that the question of multiplicity of suits was involved, and that the case also presented the necessity of an accounting to fix pro rata amounts for which the defendants might be liable, the appellate court also noted that the "[n]ecessity for an accounting in the present case is greater [than in certain cited cases]. . . . Fixing the total loss within any reasonable degree of accuracy, or correctly apportioning the loss among the various defendants would be beyond the average jury."<sup>98</sup>

Where, by statute, the court is to fix the amount of price overcharges for which treble damages are allowable, no trial by jury is required. *O'Brien v. Brown*<sup>99</sup> concerned an action filed under the Federal Emergency Price Control Act of 1942 seeking treble damages for alleged rent overcharges. After the presentation of evidence, the trial judge directed the jury, impaneled pursuant to the defendant's jury demand, to find that the defendant had demanded and received \$1,320 in violation of the statute. Thereafter, the court entered a judgment against defendant for three times the overcharge (\$3960) plus an additional \$500 as reasonable attorney fees, and also directed the jury to find the issues for the plaintiff on the defendant's counterclaim for expenses to repair damage to the premises.

On appeal, the court affirmed the judgment against the defendant as to the plaintiff's statutory claim but reversed and remanded on defendant's counterclaim. As to the defendant's assertion that liability under the Emergency Price Control Act was limited to an "amount not more than three times the amount of the overcharge" to be fixed "as determined by the Court" and that the imposition of damages by the judge at some figure between the overcharge and

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97. 320 Ill. App. 310, 50 N.E.2d 973 (1st Dist. 1943).

98. *Id.* at 317, 50 N.E.2d at 978 (citations omitted).

99. 403 Ill. 183, 85 N.E.2d 685, *cert. denied*, 338 U.S. 827 (1949).

three times that amount deprived him of a trial by jury, the court said:

[T]he constitutional right argued for is not impaired when the amount of damages is found by a court, after a jury or a pleading has established a factual basis out of which damages arise. The guaranty of the [1870] constitution is "the right of trial by a jury as heretofore enjoyed." This means the right as it existed at common law. At common law an assessment of damages is an inquest of office, usually performed by the sheriff upon a writ of inquiry of damages, or might be assessed by the court. It has been distinctly held that assessment of damages is not a trial, and does not come within the provisions of the constitution.<sup>100</sup>

*L. Claims for Monetary Relief Not Cognizable Under Equity Principles and Therefore Subject to Trial by Jury*

The request for an accounting does not state a cause of action for equitable relief unless it also appears that alternative common law remedies are inadequate or that the accounting sought is so complicated that it cannot be ascertained by a jury. In *Sonney Amusement Enterprises v. Astor-Entertainment Co.*,<sup>101</sup> the court held that the mere allegation that a theater was exhibiting a film owned by the plaintiff under some arrangement with a third person to whom payment for such exhibition was to be made, did not state a cause of action for injunctive relief. The court ruled that there was no allegation: (a) that the plaintiff did not have an adequate remedy at law; or that; (b) either the defendant was insolvent or could not respond in damages; or (c) the film could not be restored to the plaintiff by replevin or other action; or (d) the film had any unique value; or (e) the accounting requested by plaintiff was too complicated or intricate and could not be ascertained by a jury.

In mechanic's lien enforcement suits where no liens are found to exist, a statute allowing chancellors to enter money judgments for amounts due intrudes on the right to trial by jury. The legislature may not defeat the right to a jury trial by transferring a cause which is legal in nature to an equity court where the right to a jury trial exists. In *Turnes v. Brenckle*,<sup>102</sup> the Illinois Supreme Court held that the 1903 amendment to the Mechanic's Lien Act allowing a personal decree to be entered where the right to a lien had been denied, was unconstitutional because the legislation (1) con-

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100. *Id.* at 193, 85 N.E.2d at 691 (citations omitted).

101. 339 Ill. App. 275, 89 N.E.2d 746 (1st Dist. 1950).

102. 249 Ill. 394, 94 N.E. 495 (1911). The case is also discussed *supra* part II.F, and *infra* part II.N.

stituted class legislation, and (2) because it denied the defendant his right to a trial by jury, as that action would be virtually an action at law:

While the power of a court of equity to enter a personal decree for a deficiency after there has been a sale has been recognized, we are not aware of any case which holds that the court may enter a personal decree where there has been an entire failure to establish a lien under the statute. The amendment of 1903 was manifestly intended to give the court the power to enter a personal decree under circumstances where no such power existed before. . . . The right of trial by jury in respect to matters wherein such right existed at the time the Constitution was adopted cannot be taken away, directly or indirectly, by transferring the jurisdiction to try purely legal cases to a court of chancery, where, according to the usual practice, juries are not demandable as a matter of right. A party who directly invokes the jurisdiction of equity thereby waives his right to demand a jury, but such action on the part of a plaintiff cannot deprive the defendant of his right to a jury trial.<sup>103</sup>

In *Gage v. Ewing*,<sup>104</sup> the Illinois Supreme Court held that a suit to set aside tax deeds as clouds upon title to unimproved and unoccupied land, filed pursuant to an 1872 statute that conferred jurisdiction upon chancery in suits to quiet title or remove clouds from title to such real estate, remains within the jurisdiction of the court of equity. The court ruled that equity courts retain jurisdiction despite the constitutional right that requires a jury to be impaneled to decide certain matters and notwithstanding that there is an analogous common law remedy of ejectment.

A money judgment on motion filed after entry of a default judgment in a mechanic's lien foreclosure suit, is not allowed where it circumvents the right to jury trial. In *Swords v. Risser*,<sup>105</sup> the appellate court ruled that the trial court erred when it granted a money judgment on the plaintiff's motion filed subsequent to the entry of a default judgment in a mechanic's lien foreclosure suit. The defendant had sold the property to a third party, thus precluding a foreclosure sale that would have allowed for a deficiency judgment. The court held that the lien foreclosure complaint had failed to request a personal money judgment, and the plaintiff was not permitted to deprive the defendant of the right to a jury trial by allowing recovery on contract rather than on a lien:

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103. *Turnes*, 249 Ill. at 401, 94 N.E. at 496-97.

104. 107 Ill. 11 (1883). The case is also discussed *supra* part II.F.

105. 55 Ill. App. 3d 676, 371 N.E.2d 182 (4th Dist. 1977).



If the plaintiff's motion for judgment at law is treated as an amendment to the complaint to foreclose the mechanic's lien seeking judgment under a contract, the right to jury trial upon timely demand for purposes of such judgment remains the law. Prior to the filing of such pleading defendant had no right to demand a jury trial. Plaintiff in our case erred by not filing an amended pleading which would have entitled him to new relief. The trial court erred in not requiring an amended pleading before granting the new relief, and in proclaiming that the issues were *res judicata*. It is well established that a substantial amendment to a complaint under which a default judgment has been entered vacates the default judgment.<sup>106</sup>

Monetary recovery on an insurance policy, sought under an equitable bill for discovery, intrudes on the right to trial by jury. In *Henry v. East & West Insurance Co. of New Haven*,<sup>107</sup> a bill for the discovery of the terms of a lost fire policy and for recovery under the policy was held to be improper in view of objections that the complainant had an adequate remedy at law and that the bill deprived the defendant of the right of a trial by jury. Since the complainant knew the contents of the policy, the policy was available, and the discovery remedy was available by a motion to produce, the bill constituted an attempt to use discovery as a means for obtaining relief of a purely legal nature.

*M. Statutes that Grant Jury Trial Rights in Actions Not Covered by the Constitutional Guaranty of Jury Trial*

The legislature may extend the right to trial by jury to areas of litigation not previously subject to jury trial. Except where provided by statute, the guaranty of jury trial in civil cases applies only to common law actions. Thus, except where expressly given by statute, jury trial is never allowed in chancery proceedings as a matter of right.

The right to trial by jury exists not only "as heretofore enjoyed" as stated in the Illinois Constitution, but also in whatever additional litigation the legislature by statute has extended that right. As stated in *People v. Woerly*,<sup>108</sup> a case in which the court held that the appellant had been improperly denied his statutory right to jury trial in a reckless driving case:

When the drafters of the constitution of 1870 wrote in section 5 of article II that, "the right of trial by jury, as heretofore enjoyed,

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106. *Id.* at 679, 371 N.E.2d at 184 (citation omitted).

107. 292 Ill. App. 646, 10 N.E.2d 972 (3d Dist. 1937) (unpublished opinion).

108. 50 Ill. 2d 327, 278 N.E.2d 787 (1972).

shall remain inviolate," they were using language identical with that used in the preceding constitutions of 1848 and 1818. The solicitude underlying section 5 and its predecessors was for the protection of the right to jury. Plainly it was designed to safeguard the right from violation or destruction; it was not to prevent the legislature from extending the right to further areas of litigation. . . . The legislature did not offend the constitution of 1870 when it broadened the right to trial by jury.<sup>109</sup>

A jury trial is never a matter of right in chancery proceedings, unless it is expressly given by statute. This rule was the basis for the ruling in *Flaherty v. Murphy*,<sup>110</sup> in which the court rejected the defendant's claim of a right to a jury in a chancery proceeding, filed by the plaintiffs. The plaintiffs had filed suit under the Dramshop Act in order to subject property owned by the defendant to a lien and sale in order to satisfy a judgment previously recovered in an action at law against a saloon-owner tenant of that property. The court held that no statute provided for a jury trial in such a proceeding, and "[T]here was no right of trial by jury on such issue . . . , or on one analogous thereto, provided for under the laws of this state prior to the adoption of the Constitution of 1870. The chancellor, therefore, did not err in denying [defendant's] demand for a jury."<sup>111</sup>

The constitutional right to trial by jury does, however, extend to certain issues that arise in chancery proceedings. Thus in *Cooper v. Williams*,<sup>112</sup> the appellate court disapproved a permanent injunction that had been awarded to the plaintiffs directing the defendant to remove a gate constructed to close a lane that ran to the defendant's property. The plaintiff alleged ownership of the property upon which the gate had been constructed, and the defendant asserted ownership of the land by adverse possession. The court held that title to property must initially be determined as a common law matter, and on that matter, the defendant had the right to demand a jury:

Except in certain statutorily enumerated situations, the constitutional guaranty of a jury trial applies only to actions known to the common law and is not a matter of right in equity proceedings. Certainly, a suit for an injunction is an action in equity. However, the Illinois Supreme Court has held that when a plaintiff seeks an injunction against a continuing trespass, alleging

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109. *Id.* at 329, 278 N.E.2d at 788.

110. 291 Ill. 595, 126 N.E. 553 (1920). The case is also discussed *supra* part II.B.

111. *Id.* at 598, 126 N.E. at 554-55.

112. 60 Ill. App. 3d 634, 376 N.E.2d 1104 (3d Dist. 1978).

ownership in the property, and the defendant's answer denies ownership in the plaintiff, "the legal right must be determined in an action at law before there can be a resort to equity." As a result, title should have been determined in a court of law, enabling the defendant to demand a jury, before a determination of the propriety of issuing the sought-after injunction was had in equity.<sup>113</sup>

Where legality of a will is subject to jury trial, the court may sever issues and direct that issue to be tried by jury. In cases contesting either the admission of a will to probate or the denial of a will to probate, there is a statutory right to trial by jury: "Any party to the proceeding may demand a trial by jury."<sup>114</sup> *Flynn v. Troesch*,<sup>115</sup> a suit by first cousins of the testator to contest his will, involved issues regarding the validity of the will and the validity of the testator's marriage to the person named as a principal beneficiary in the will. The trial court entered an order severing the issue of the legality of the marriage from that of the legality of the will and directed that the issue involving the marriage be tried separately before the court, after which, the plaintiffs stipulated in writing to try both issues without a jury:

In such a case, involving two material issues, the plaintiff was entitled to a jury trial only upon the will issue, but the other issue, of marriage, was triable by the court without a jury. The contention of the plaintiffs that the court was without authority to sever these two issues is without merit, as . . . the Civil Practice Act . . . clearly indicates that an action involving materially different issues may be severed by the court and our rule . . . has recognized the principle by providing "equitable issues shall be heard and decided in the manner heretofore practiced in courts of equity." Such practice heretofore has been to try the question of heirship by the court and the validity of a will by a jury. . . .

In order to enable the plaintiffs to prevail, there must be a successful will contest and also a decree holding void the marriage between Helen and David Shannahan. The law provides that the first of these issues may be tried by a jury, the other by the court; they involve different characters of proof and may affect, differently, the competency of witnesses. The question in this case, however, is largely academic, because of a written stipulation to

113. *Id.* at 635, 376 N.E.2d at 1104-05 (citations omitted).

114. Probate Act of 1975, ILL. REV. STAT. ch. —, paras. 8-1(c), 8-2(c) (19—) (article 8 is titled "Will Contests," subsection (c) of § 8-1 is subtitled "Contest of admission of will to probate," and subsection (c) of § 8-2 is subtitled "Contest of denial of admission of will to probate").

115. 373 Ill. 275, 26 N.E.2d 91 (1940).

try both issues without a jury.<sup>116</sup>

*N. Jury Trial Under Statutes that Create Special Statutory Proceedings*

The right to jury trial on a common law claim does not disappear when the claim is permitted to be joined in a special statutory proceeding. In *Twin-City Inn, Inc. v. Hahne Enterprises, Inc.*,<sup>117</sup> a lessor brought suit to recover (pursuant to amendments to the Forcible Entry and Detainer Act<sup>118</sup>) possession of the leased commercial premises and the amount of rent allegedly due. A judgment against the defendant lessee and its surety was reversed, and the case was remanded because defendants were entitled to a jury trial on the rent claim. The defendants had this right whether or not a jury was assured concerning the possessory component of the case:

The scope of the possessory action was thus expanded by permitting the inclusion of a claim for rent. Such a claim, however, is based upon a contract, express or implied, and was clearly cognizable at common law. . . . Even if, therefore, the action of forcible entry and detainer is regarded as a special statutory proceeding unknown to the common law, to which the constitutional right of trial by jury does not extend, the right to a jury trial upon a common law claim does not disappear when that claim is permitted to be joined in the special statutory proceeding.<sup>119</sup>

The Illinois constitutional right to jury trial does not automatically apply in special proceedings created by statute. Thus, when the General Assembly creates special or statutory proceedings unknown to the common law, no constitutional guarantee of jury trial attaches to those proceedings. In *City of Monmouth v. Pollution Control Board*,<sup>120</sup> the Illinois Environmental Protection Agency sought a fine and a cease and desist order against the city concerning a sewerage lagoon system that was emitting obnoxious odors. The Pollution Control Board levied a \$2,000 fine and required the city to cease and desist within six months from permitting the emission of odors. The supreme court held that an appeal from the cease and desist aspect of the case was moot and the im-

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116. *Id.* at 278, 26 N.E.2d at 93.

117. 37 Ill. 2d 133, 225 N.E.2d 630 (1967).

118. The most relevant amendment, ILL. REV. STAT. ch. 57, para. 5 (1937), added the words: "Provided, however, that a claim for rent may be joined in the complaint, and judgment obtained for the amount of rent found due." *Id.*

119. *Twin-City Inn*, 37 Ill. 2d at 138, 225 N.E.2d at 633.

120. 57 Ill. 2d 482, 313 N.E.2d 161 (1974).

position of a penalty was improper in view of the city's cooperation; the court also rejected the city's claims that the fine was a criminal penalty and that in any event the city had a constitutional right to jury trial. "The constitutional guarantee that 'the right to trial by jury as heretofore enjoyed shall remain inviolate' has been consistently interpreted by this court as inapplicable to special or statutory proceedings unknown to the common law."<sup>121</sup>

In *In re Grabow's Estate*,<sup>122</sup> the appellate court similarly rejected a legatee's claim of a right to trial by jury on evidence concerning objections to an executor's accounting. The court held that "this provision does not confer a right to a jury in any class of cases where either it had not previously existed or the proceeding was created by statute and was unknown to the common law."<sup>123</sup>

A statute may not deprive litigants of their constitutional right to a jury trial in a common law claim simply because the statute authorizes that the claim be litigated in chancery. A statute that, in a mechanic's lien enforcement proceeding, subjects to the court's discretion a right to jury trial granted as to amounts due where a lien is not allowed, is invalid. In *Turnes v. Brenckle*,<sup>124</sup> the court declared invalid a mechanic's lien law amendment that authorized a court of chancery, in its discretion, to allow recovery, as at law, to a lien-claimant where the court finds that the claimant is not entitled to a lien:

The right of trial by jury in respect to matters wherein such right existed at the time the Constitution was adopted cannot be taken away, directly or indirectly, by transferring the jurisdiction to try purely legal cases to a court of chancery, where, according to the usual practice, juries are not demandable as a matter of right. . . . Whether the right to a jury trial exists in any given case depends upon the nature of the controversy rather than upon the form of the action.<sup>125</sup>

There is no Illinois constitutional right to trial by jury under the Illinois Consumer Fraud and Deceptive Business Practices Act.<sup>126</sup> In *Richard/Allen/Winter, Ltd. v. Waldorf*,<sup>127</sup> the trial court en-

121. *Id.* at 485, 313 N.E.2d at 163.

122. 74 Ill. App. 3d 336, 392 N.E.2d 980 (3d Dist. 1979). The case is also discussed *supra* part II.C.

123. *Grabow's Estate*, 74 Ill. App. 3d at 337, 392 N.E.2d at 982.

124. 249 Ill. 394, 94 N.E. 495 (1911). The case is also discussed *supra* at II.F. and II.L.

125. *Turnes*, 249 Ill. at 402, 94 N.E. at 497.

126. ILL. REV. STAT. ch. 121 1/2, para. 261 (1989).

127. 156 Ill. App. 3d 717, 509 N.E.2d 1078 (2d Dist. 1987), *appeal denied*, 116 Ill. 2d 575, 515 N.E.2d 126 (1987).

tered a judgment following a jury verdict which found liability and assessed compensatory and punitive damages under the Illinois Consumer Fraud and Deceptive Business Practices Act.<sup>128</sup> The appellate court reversed and remanded the case for a bench trial. The court held that the Act creates a special or statutory proceeding unknown to the common law, and there was neither a constitutional nor a statutory right to jury trial on the claim:

This section has been judicially interpreted to stand for the principle that the constitutional right to trial by jury does not extend to actions unknown at common law. This constitutional provision does not require that a jury trial be had in every case or preclude all restrictions on the exercise of that right. . . . [T]he ICFDBPA is a statutory enactment which created a new cause of action unknown at common law. Consequently, the counter-plaintiffs in this case did not have a constitutionally guaranteed right to trial by jury. . . . [T]he legislature intended that actions brought under section 270a of the ICFDBPA are to be heard by a judge sitting without a jury. . . . Therefore, since the ICFDBPA has created a cause of action unknown at common law, and the language of the Act does not specifically provide for a jury trial, the trial court erred in granting the counterplaintiff's jury request. We reverse and remand for a bench trial.<sup>129</sup>

Similarly, there is no Illinois constitutional right to trial by jury in tax proceedings. *Hoffman v. Department of Finance*<sup>130</sup> was a proceeding in which taxpayers sought review of the Department of Finance's action of correcting certain tax returns and increasing assessments against the taxpayers. On the question of the taxpayers' right to trial by jury, the court found that "the Constitution does not guarantee the right of trial by jury in tax proceedings. The Constitution guarantees the right of a jury trial only as that right existed at common law."<sup>131</sup>

Further, there is no Illinois constitutional right to trial by jury in chancery proceedings involving municipal code violations. In *City of Chicago v. Westphalen*,<sup>132</sup> the city and private plaintiffs filed suit pursuant to a section of the Illinois Municipal Code that authorized a proceeding in equity to restrain the violation of ordinances governing building code violations. The trial judge denied the defendant's motion for a jury trial, advising that although numerous

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128. ILL. REV. STAT. ch. 121 1/2, para. 261 (1989).

129. 156 Ill. App. 3d at 720, 509 N.E.2d at 1080-83 (citations omitted).

130. 374 Ill. 494, 30 N.E.2d 34 (1940).

131. *Id.* at 498, 30 N.E.2d at 36.

132. 93 Ill. App. 3d 1110, 418 N.E.2d 63 (1st Dist. 1981), *cert. denied*, 455 U.S. 996 (1982).

municipal code violations were alleged, the case was a chancery matter and would be treated as such. The appellate court agreed, quoting with approval from an earlier case:

Where a new class of cases is directed by the legislature to be tried in chancery, and it appears, when tested by the general principles of equity, that they are of an equitable nature and can be more appropriately tried in a court of equity than a court of law, the chancellor will have the right, as in other cases in chancery, to determine all questions of fact without submitting them to a jury.<sup>133</sup>

Addressing more family-related causes of action, there is no Illinois constitutional right to trial by jury in paternity proceedings. In *People ex rel. Cizek v. Azzarello*<sup>134</sup> and *Clark v. Brown*,<sup>135</sup> it was noted that while the Paternity Act created a statutory right to jury trial, there is no such right provided by the Constitution: “[I]n a paternity proceeding there can be no question as to one’s constitutional right to trial by jury since this cause of action was not recognized at common law.”<sup>136</sup>

There is no right to a jury trial in proceedings on a petition seeking a finding of unfitness and termination of parental rights under the Juvenile Court Act and the Adoption Act, in the absence of a specific provision in those Acts for trial by jury. In *In re Weinstein*,<sup>137</sup> denial of the respondent mother’s motion for a jury trial was upheld on appeal:

The fact that a jury trial was permitted under the old Family Court Act does not establish that the right exists under the new Juvenile Court Act. . . . Furthermore, the fact that a right existed under a prior Act does not mean it becomes a constitutional guarantee. Proceedings under both the Juvenile Court Act and the Adoption Act are created by statute and were unknown at common law. The constitutional guarantee of a jury trial does not apply to special or statutory proceedings which were unknown to common law.<sup>138</sup>

There is no constitutional right to jury trial in delinquency proceedings conducted in the juvenile court, although under the Juvenile Court Act, juveniles may be proceeded against criminally with

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133. *Id.* at 1128, 418 N.E.2d at 77 (quoting *City of Highland Park v. Calder*, 269 Ill. App. 255, 261, 18 N.E.2d 123 (1932)).

134. 81 Ill. App. 3d 1102, 401 N.E.2d 1177 (1st Dist. 1980).

135. 121 Ill. App. 2d 280, 257 N.E.2d 565 (1st Dist. 1970).

136. *Cizek*, 81 Ill. App. 3d at 1105, 401 N.E.2d at 1181; *Clark*, 121 Ill. App. 2d at 280, 284, 257 N.E.2d at 565, 567.

137. 68 Ill. App. 3d 883, 386 N.E.2d 593 (1st Dist. 1979).

138. *Id.* at 886, 386 N.E.2d at 594-95 (citations omitted).

the right, therefore, to a jury trial. *In re Fucini*<sup>139</sup> was a delinquency adjudicatory proceeding in which a demand for trial by jury had been made and denied. On appeal, the court concluded that neither the due process clause of the fourteenth amendment to the United States Constitution, nor the jury-trial provisions of the Illinois Constitution, require or grant a right to jury trial in such proceedings. Quoting from an early Illinois case that had upheld the Juvenile Court Act of 1899,<sup>140</sup> the court agreed that:

[P]roceedings under the Act were not "according to the course of the common law in which the right of a trial by jury is guaranteed, but the proceeding is a statutory one, and the statute, . . . [was] enacted since the adoption of the Constitution. There was not, at the time of such adoption, the enjoyment of a jury trial in such a case."<sup>141</sup>

There is no Illinois constitutional right to trial by jury in administrative proceedings which were unknown at common law. *Lloyd A. Fry Roofing Co. v. Pollution Control Board*<sup>142</sup> was an appeal from an order of the Pollution Control Board denying a manufacturer of asphalt roofing a variance from the Environmental Protection Act. The court found that the manufacturer had caused air pollution in amounts exceeding the permissible limits, and ordered the manufacturer to cease and desist and assessed a penalty. The appeal resulted in a remand to the Board for redetermination of an appropriate penalty. As to the petitioner-manufacturer's asserted constitutional right to trial by jury, however, the court said:

[T]he Act provides for the creation of an administrative agency to enforce the Act. The constitutional guarantee of right to trial by jury was never intended to apply to administrative proceedings which were unknown at common law, and therefore, petitioner cannot argue that this right has been abridged.<sup>143</sup>

*Cobin v. Illinois Pollution Control Board*<sup>144</sup> also involved an appeal from orders of the Illinois Pollution Control Board. The court held that the Board's cease and desist order against open burning by the petitioner-operator of a salvage company was proper, but that the assessment of a \$3000 monetary penalty was

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139. 44 Ill. 2d 305, 255 N.E.2d 380 (1970).

140. *Lindsay v. Lindsay*, 257 Ill. 328, 335-36, 100 N.E. 892, 895 (1913).

141. *Fucini*, 44 Ill. 2d at 310, 255 N.E.2d at 382.

142. 20 Ill. App. 3d 301, 314 N.E.2d 350 (1st Dist. 1974), *cert. denied*, 420 U.S. 996 (1975), *appeal on other grounds after remand*, 46 Ill. App. 3d 412, 361 N.E.2d 23 (1st Dist. 1977).

143. *Id.* at 310, 314 N.E.2d at 357-58.

144. 16 Ill. App. 3d 958, 307 N.E.2d 191 (5th Dist.), *affirmed*, 56 Ill. 2d 582, 401 N.E.2d 1390 (1974).



improper because grants of power to impose variable fines constitute an unconstitutional delegation of judicial power. The court also upheld the denial by the Board of the petitioner's demand for a jury trial and the petitioner's motion to transfer to the circuit court:

The language [of the Illinois Constitution] may seem ambiguous, but the courts have generally construed it as excluding special or statutory proceedings, unknown at common law, from the traditional guarantee of a jury trial. The only rights which the section was intended to preserve are those pertaining to the right of trial by jury at common law and its essential features as known to the common law tradition.<sup>145</sup>

Moving to more statutory actions, there is no right to a jury trial, absent a special provision allowing it, in a proceeding to enforce the statutory liability of relatives for the support of poor persons. In *People ex rel. Peoria County v. Hill*,<sup>146</sup> the supreme court reversed a circuit court order quashing the complaint which sought enforcement of the Pauper's Act, and on the jury trial question, the court said:

It is only the right of trial by jury "as heretofore enjoyed" that section 5 of article 2 of the constitution [of 1870] provides "shall remain inviolate." The section was not intended to confer the right of jury trial in any class of cases where it had not previously existed; nor was it intended to introduce it into special summary jurisdictions unknown to the common law, and which do not provide for that mode of trial.<sup>147</sup>

The statutory provision for jury trial to try rights to property in certain attachment and garnishment matters, does not require a jury when the matter presents only questions of law. If the issue, as stated in the pleadings of an attachment proceeding, presents only questions of law, the court need not call a jury to try the right of property. In *Ray v. Keith*,<sup>148</sup> a writ of attachment had been levied upon land that the attachment-plaintiff asserted belonged to the attachment-defendant. Also an interplea was filed claiming that the land was the property of the interpleader and not that of the attachment-defendant. The relevant statute provided that a jury be impaneled to try the right of property. The court held, however, that when there are no facts to be tried, no such jury is required:

[W]hen the claimant demurred to the amended replication, she

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145. *Id.* at 964, 307 N.E.2d at 195 (citation omitted).

146. 163 Ill. 186, 46 N.E. 796 (1896).

147. *Id.* at 194, 46 N.E. at 799.

148. 218 Ill. 182, 75 N.E. 921 (1905).

admitted the facts therein alleged, and upon overruling that demurrer she further elected to abide by the same, and submitted to the court the question of law whether or not the facts so admitted entitled her to a judgment for the property, or whether it was, under those facts, subject to the attachment. While section 29 [of the then Attachment Act] requires the court, upon the filing of the interpleader, to immediately, unless good cause is shown by either party for a continuance, direct a jury to be impaneled to inquire into the right of property, when the result of the pleadings is to submit to the court only a question of law a jury is dispensed with.<sup>149</sup>

There is no right to jury trial under the Attorney's Lien Law. *Standidge v. Chicago Railways Co.*<sup>150</sup> involved a petition filed to enforce an attorney's lien. Notice of the petition had been served upon the defendant pursuant to the Attorney's Lien Law. After service of the notice, the defendant settled the underlying personal injury claim with the attorney's client but without the attorney's knowledge or consent. Judgment for \$300 (one-third of the settlement amount) was entered against the defendant and affirmed on appeal:

[The] constitutional provision has never been held to prohibit the Legislature from creating new rights unknown to the common law and provide for their determination without a jury. Appellant concedes that the attorney's lien law creates new rights which have heretofore not been recognized in this state. This being conceded, it is clearly within the power of the Legislature to provide for the enforcement of such rights without a jury trial.<sup>151</sup>

The same jury-trial issue was presented and similarly decided in the more recent case *Zazove v. Wilson*.<sup>152</sup> Citing *Standidge* as authority,<sup>153</sup> the appellate court rejected the defendants' claim of a right to jury trial. The court affirmed the \$1,350 judgment for the attorney lien-claimants based on an agreed contingent fee arrangement of 50% and a \$2,700 settlement of the underlying personal injury claim effected by the defendants' insurer with the attorneys' client.

#### O. "Equitable Defenses" in Actions at Law

All questions that concern the issue of equitable estoppel, including fact questions, may be determined by the court without a

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149. *Id.* at 187, 75 N.E. at 923.

150. 254 Ill. 524, 98 N.E. 963 (1912).

151. *Id.* at 532, 98 N.E. at 965 (citation omitted).

152. 334 Ill. App. 594, 80 N.E.2d 101 (1st Dist. 1948).

153. *Id.* at 597, 80 N.E.2d at 102-03.

jury when the issue is considered separately and prior to the underlying cause of action itself. In *Vaughn v. Speaker*,<sup>154</sup> the questions concerning estoppel were: (a) whether the evidence raised the possibility that the defendant insurer's conduct equitably estopped defendants from asserting the statute of limitations as a defense to plaintiffs' personal injury action; and (b) whether there was a constitutional right to a jury trial on the equitable estoppel issue. The court held that in hearings on the estoppel issue, no jury is required:

Considering the totality of the alleged representations and conduct of the insurance company and the estate, we believe there is a question for the trier of fact as to whether this conduct lulled plaintiffs into delaying the filing of their suit and whether, if defendant's conduct in this regard was unintentional, plaintiffs' reliance in delaying suit was reasonable. . . . We do agree with the appellate court that the estoppel issue should be determined by a trier of fact other than the jury which may determine the merits of the negligence action. We do not agree, however, that the estoppel issue must be determined by a separate jury. Equitable estoppel, when considered separately and prior to the cause of action itself, may be determined by the circuit court. . . . There is no constitutional right to a jury trial in equitable proceedings or proceedings seeking equitable relief. In accordance with section 2-1111 of the Civil Code, the circuit court may, of course, in its discretion, use a jury to determine the estoppel issue.<sup>155</sup>

An "equitable defense" is to be disposed of before jury trial on the basic action at law. In *Williams v. Northern Trust Co.*,<sup>156</sup> a plaintiff's action at law to recover earnest money paid upon a contract for purchase of real estate had been met by a counterclaim in the nature of an interpleader claim. The counterclaim alleged that the defendant was only a trustee of the fund and offered to pay the fund into the court. The trial court ordered that the equity questions be tried first. A decree was entered for the defendant, and the plaintiff appealed to the supreme court. The appeal was transferred for lack of a constitutional question to the appellate court. The court affirmed the decree, adopting a quotation from a similar 1922 United States Supreme Court opinion: "Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then if an

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154. 126 Ill. 2d 150, 533 N.E.2d 885 (1988), *affirming* 156 Ill. App. 3d 962, 509 N.E.2d 1084 (3d Dist. 1987), *cert. denied*, 109 S. Ct. 3218 (1989).

155. *Vaughn*, 126 Ill. 2d at 166, 533 N.E.2d at 891-92 (citations omitted).

156. 316 Ill. App. 148, 44 N.E.2d 333 (1st Dist. 1942).

issue at law remains, it is triable to a jury."<sup>157</sup>

*P. Power of Court in Cases Seeking Chancery Relief to Decide All Law Issues Absent Jury Demands*

Where a plaintiff seeks specific performance of an employment contract and such further relief as the court deems equitable and just, but there is no demand for a jury trial on the issues of the amount due to the plaintiff for his services, the court does not abuse its discretion if, after finding no ground for equitable relief, the court tries the issues of the amounts due the plaintiff without a jury and enters a money judgement.<sup>158</sup>

*Q. Jury Trial and Declaratory Judgment Actions*

The right to jury trial refers to the common law at the time of adoption of the Illinois Constitution. Where a taxpayer who is seeking a declaratory judgment would not have been entitled to trial by jury under the common law at the time of the adoption of the Illinois Constitution, the taxpayer has no right to a jury. In *Berk v. Will County*,<sup>159</sup> the taxpayer requested a trial by jury in his declaratory judgment action challenging the constitutionality of the Public Building Commission Act. The supreme court held that the trial court did not violate the taxpayer's constitutional rights when it denied that request. The issues presented and the relief prayed for were not of such a nature as would entitle a party to jury trial under the common law at the time of adoption of the constitution.<sup>160</sup>

The proceedings must be examined to determine whether an action is one in which there is a right to jury trial. *Berk v. Will County*<sup>161</sup> also discusses the method one uses to determine whether a particular declaratory judgment action is one in which there is a constitutional right to trial by jury:

The determination of whether an action is an action at law and one in which there is the constitutional right of jury trial can only be resolved by an examination of the proceedings. . . . Such [declaratory judgment] proceedings are neither legal nor equitable actions, but have characteristics of both types of actions.

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157. *Id.* at 152, 44 N.E.2d at 334 (quoting *Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 242 (1922)).

158. *Westerfield v. Redmer*, 310 Ill. App. 246, 33 N.E.2d 744 (1st Dist. 1941). This case is also discussed *supra* part II.I.

159. 34 Ill. 2d 588, 218 N.E.2d 98 (1966).

160. *Id.* at 588, 218 N.E.2d at 101.

161. *Id.* at 588, 218 N.E.2d at 98.

While it is the practice in many courts to docket such cases as law cases and in other courts as equity cases, such practices are administrative only. This does not determine the matter of the right to jury trial, nor does the mere fact that there is an issue of fact create a right to jury trial.<sup>162</sup>

The existence of an issue of fact in a declaratory judgment action does not of itself create the right to jury trial. The supreme court, in *Berk*,<sup>163</sup> determined that the right to a jury trial in a declaratory judgment proceeding does not depend upon "the mere fact that there is an issue of fact" to be decided.<sup>164</sup> Further, in *In Berk*,<sup>165</sup> the court said that the right to trial by jury does not depend on where, for judicial administration purposes, the case has been filed or docketed: "While it is the practice in many courts to docket such cases as law cases and in other courts as equity cases, such practices are administrative only."<sup>166</sup>

That the declaratory judgment procedure was unknown to the common law does not mean that there is no right to trial by jury in such proceedings. Such proceedings are neither legal nor equitable, and the right to a jury trial in any such case requires an examination of the nature of the relief sought and an examination of the predominant characteristics of the underlying issues in dispute. *Zurich Insurance Co. v. Raymark Industries, Inc.*<sup>167</sup> was a case in which the insurer of a manufacturer of asbestos products sought declaratory judgment as to its obligations under the manufacturer's liability policy as well as the insurer's right to contribution from other insurers with respect to asbestos-related litigation. The manufacturer also sought declaratory judgment as to the liability of the various insurers. The court affirmed the appellate court's decision, including the court's approval of the trial court order striking jury demands that had been filed by several of the insurers:

Actions for a declaratory judgment were unknown to the common law, and are neither legal nor equitable, but are sui generis. Consequently, the right to trial by jury depends upon the relief sought. When a declaration of rights is the only relief sought, the predominant characteristics of the issues in dispute determine whether there exists the right to a jury trial. If additional relief is sought, the nature of that relief determines the right to a trial by

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162. *Id.* at 591, 218 N.E.2d at 100-01.

163. *Id.* at 588, 218 N.E.2d at 98.

164. *Id.* at 591, 218 N.E.2d at 101.

165. *Id.* at 588, 218 N.E.2d at 98.

166. *Id.*

167. 118 Ill. 2d 23, 514 N.E.2d 150 (1987), *aff'g* *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co.*, 145 Ill. App. 3d 175, 494 N.E.2d 634 (1st Dist. 1986).

jury. . . . This case concerns a complaint and a counterclaim, both of which seek only a declaratory judgment. . . . The issues in dispute concern the construction of a contract. The construction of a contract and the determination of the rights and obligations of the parties to the contract are questions of law, the determination of which rests exclusively with the court. For these reasons, the judgment of the appellate court is affirmed insofar as it held that there was no right to a jury trial on either the complaint or the counterclaim.<sup>168</sup>

The court's opinion in *Zurich*<sup>169</sup> also referred to an earlier decision, *Lazarus v. Village of Northbrook*.<sup>170</sup> *Lazarus* affirmed a declaration of the invalidity of zoning ordinances as they applied to the plaintiffs' property and held that the denial of a special use permit for construction of a hospital in an industrial zone was improper. A hospital use, the court said, would not be incompatible with other uses in the neighborhood and would have no adverse effect upon the other uses. Approving the trial court's action of striking the Village's demand for a trial by jury on plaintiffs' motion the court said:

What this provision [Article Two, Section Five of the Illinois Constitution of 1870] guarantees is the right to trial by jury as it existed in common law actions when the constitution was adopted. There was then and there is now no constitutional right of trial by jury in equity. There may, of course, be disputed issues of fact in a declaratory judgment action. When a declaration alone is sought, and no further relief is requested, the right to a trial by jury must be determined by an examination of the disputed issues and an appraisal of their predominant characteristics as indicating the appropriateness of legal or equitable relief. But when, as is ordinarily the case, relief in addition to the naked declaration of rights is sought, the nature of that relief determines the right to a trial by jury. Although the complaint in this case was designated in the caption as a complaint at law, such a designation, required . . . as a matter of administrative convenience, does not finally determine the right to a trial by jury. The complaint contained a prayer for injunctive relief. It is the position of the Village that the equitable relief thus sought was "ancillary" to the relief sought by way of declaratory judgment. This position is unsound. . . . The Village was not deprived of its constitutional right of trial by jury.<sup>171</sup>

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168. 118 Ill. 2d at 57, 514 N.E.2d at 166 (citations omitted).

169. *Id.* at 23, 514 N.E.2d at 150.

170. 31 Ill. 2d 146, 199 N.E.2d 797 (1964); see *supra* note 38.

171. *Id.* at 148, 199 N.E.2d at 799 (citations omitted).

An insurer has no right to a jury trial on either its complaint or a manufacturer's counterclaim in a declaratory judgment action concerning the manufacturer's liability policy. Thus, in *Zurich*,<sup>172</sup> claims concerning the correct construction of an insurance contract and a declaration of rights and obligations of the parties to the contract constituted questions of law resting exclusively with the court.

There is no right to a jury trial in an action seeking a declaration that a zoning ordinance is invalid as applied to landowners' property, where the landowners also seek other relief of a purely equitable character. Thus, in *Lazarus*,<sup>173</sup> where plaintiff-landowners sought injunctive relief as well as a declaratory judgment concerning the validity of certain zoning ordinances, the Village had no constitutional right to a trial by jury.

In a plaintiff-purchaser's declaratory action seeking return of a down payment, there may exist questions of fact that are triable by a jury. In *Murphy v. Roppolo-Prendergast Builders, Inc.*,<sup>174</sup> issues existed concerning what was a reasonable time for the defendant-vendor-contractor to build a condominium unit and as to whether the purchaser in fact had notified the vendor of the purchaser's inability to obtain financing. Thus, the appellate court found that the trial court's entry of a judgment on the pleadings on the ground that a nineteen month lapse of time in the building of the unit was unreasonable as a matter of law, was error:

[J]udgment on the pleadings is proper only if questions of law and not of fact exist after the pleadings have been filed. Where there are controverted questions of fact evidence from an examination of the pleadings, the trier of fact must hear evidence to determine the correct facts and may not give judgment on the pleadings alone. . . . The existence of these factual issues on the face of the pleadings should have precluded the trial court's disposal of this matter by judgment on the pleadings.<sup>175</sup>

In a declaratory judgment action that involves the rights and liabilities of a party on an account stated, a jury verdict is not merely advisory, but has the effect of a common law jury verdict. *Burgard v. Mascoutah Lumber Co.*<sup>176</sup> involved an action by a contractor against a lumber company for a declaratory judgment stating the account between the parties and an accounting for that

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172. *Zurich*, 118 Ill. 2d at 57, 514 N.E.2d at 166.

173. 31 Ill. 2d 146, 199 N.E.2d 797 (1964).

174. 117 Ill. App. 3d 415, 453 N.E.2d 846 (1st Dist. 1983).

175. *Id.* at 417, 453 N.E.2d at 848-49 (citation omitted).

176. 6 Ill. App. 2d 210, 127 N.E.2d 464 (4th Dist. 1955).

same purpose. Under the statutory provision which provided for the giving of further relief upon a declaration of rights and after the jury found a balance due to the defendant, a judgment was entered for the lumber company:

There is no technical form prescribed for the declaration of rights; it is sufficient if the rights may be ascertained therefrom in connection with the findings of court or jury in view of the controversy presented. . . . In our opinion it is neither necessary nor desirable to classify this type of action as at law or in chancery, it may be docketed either way, but where issues of the kind here involved are tried by a jury, the verdict is not merely advisory, it has the effect of a jury verdict at law. To hold otherwise might permit this procedure to evade the constitutional right of trial by jury.<sup>177</sup>

#### R. *Jury Trial and Summary Judgment in Chancery Proceedings*

Summary judgment in chancery proceedings is improper when issues depend on facts to be decided by jury in law proceedings. In such a case, a reversal of the judgment in the common law action may also require reversal of the related chancery judgment. In *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*,<sup>178</sup> an action had been instituted on a complaint in law seeking monetary relief for alleged fraud. The defendant filed a counterclaim in equity seeking injunctive relief. The plaintiffs' answer to the counterclaim raised issues of the defendants' breach of warranty and performance of their contractual duties, and also questioned the plaintiffs' right to equitable relief. Judgment on the common law claim was reversed:

In raising the issues of breach of warranty and performance of contractual duties by Strawberry Camel, Mother Earth's answer called into question the right of Strawberry Camel to equitable relief. Accordingly, the granting of such relief could only be proper if it were found that these issues were without merit. Because determination of these issues depended on questions of fact reserved for jury determination in Mother Earth's action at law, our reversal of the judgment entered in the law division mandates that the summary judgment entered for Strawberry Camel without an evidentiary hearing in the chancery division must also be reversed.<sup>179</sup>

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177. *Id.* at 219, 127 N.E.2d at 468.

178. 72 Ill. App. 3d 37, 390 N.E.2d 393 (1st Dist. 1979), *appeal after remand*, 98 Ill. App. 3d 518, 424 N.E.2d 758 (1980).

179. *Mother Earth*, 72 Ill. App. 3d at 53, 390 N.E.2d at 406-07.



### S. *Jury Trial and "Summary" Proceedings*

There is no right to trial by jury in a summary proceeding such as a proceeding by a former client to compel an attorney to surrender files held pursuant to the attorney's retaining lien. In *Intaglio Service Corp. v. J. L. Williams & Co.*,<sup>180</sup> the attorney performed services for a client who failed to pay. The client filed a petition for a summary proceeding seeking an order directing the attorney to surrender his files for use in the defense of the suit by petitioner and new counsel. The trial court held that a retaining lien existed, and ordered that the client pay over \$67,500 as security for payment of fees due or as a substitute for the retaining lien, the petitioner should pay \$27,500 directly to the attorney and the balance to be held in escrow pending determination of the amount of fees owed in an action already filed by the attorney. The appellate court affirmed, holding, *inter alia*:

[A]lthough by filing a suit to recover attorney fees [the attorney] became subject to discovery, he did not waive his right to his retaining lien . . . . Since a proceeding to post security in lieu of a retaining lien is a summary proceeding, [client] was not entitled to a jury trial when it elected to pursue this route. But even if it had been entitled to a jury trial, it waived that right when it failed to file a jury demand with the petition.<sup>181</sup>

The same rule applies in proceedings by attorneys to enforce attorney's liens against defendants or their insurers, who after service of notice of lien, settle directly with attorneys' clients. Thus, in *Zazove v. Wilson*,<sup>182</sup> the appellate court ruled that "petitioners' claim was based on their right to an attorneys' lien and defendants were not entitled to a jury trial."

### T. *Jury Trial on Remand After Appeal*

When an appellate court concludes that a case in which the plaintiff is seeking equitable relief involves only a common law claim, the defendant can demand trial by jury. Upon remand, *Kaplan v. Kaplan*<sup>183</sup> involved an employment agreement that was found to be a retirement contract for the plaintiff, one of the owners of a family owned close corporation. The trial court entered an order permanently enjoining the company, another family member, and others in active concert with them, from taking any action

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180. 112 Ill. App. 3d 824, 445 N.E.2d 1200 (1st Dist. 1983).

181. *Id.* at 832, 445 N.E.2d at 1201, 1205 (citation omitted).

182. 334 Ill. App. 594, 602-03, 80 N.E.2d 101, 107 (1st Dist. 1948).

183. 98 Ill. App. 3d 136, 423 N.E.2d 1253 (1st Dist. 1981).

that would negatively affect plaintiff's employment relationship. The defendants appealed. The appellate court held that:

The injury [plaintiff] complains of, which is a breach of the employment contract, is capable of being measured and corrected by an award of money damages alone. In a suit for mandatory injunctive relief founded on breach of contract, in which there was no evidence that defendant was insolvent so that plaintiff could not collect a money judgment from defendant for such breach, plaintiff is not entitled to injunctive relief. . . . [T]he matter before us involves a cognizable legal claim and, thus, Laurence can now assert his demand for a jury trial.<sup>184</sup>

#### *U. Jury Trial Is Not a Matter of Right as to Equitable Claims*

As noted previously, the constitutional guaranty does not extend to equity proceedings. In *Weininger v. Metropolitan Fire Insurance Co.*,<sup>185</sup> a suit in equity against sixteen insurers to recover on nineteen fire policies was held proper in order to avoid a multiplicity of suits and to perform an accounting to pro-rate the fire loss among insurers. The court denied a trial by jury. Further, *McCowan v. McCowan*<sup>186</sup> involved a separate maintenance suit in which the purchaser of the husband's medical practice was directed to pay the purchase price to the wife in satisfaction of sums due to her from the husband rather than to the husband's corporation. The court again held that there was no right to jury trial. *Metropolitan Life Insurance Co. v. Davis*<sup>187</sup> was an interpleader suit in which \$1,100 deposited by plaintiff insurer as proceeds of a group life insurance policy was awarded to the decedent's sister. The court found that the decedent had been competent and was not acting under undue influence when he changed the beneficiary from his spouse to his sister. The issue was decided without a jury.

In foreclosure actions, there is no constitutional right to trial by jury on affirmative defenses such as an assertion that the mortgagor was incompetent to execute the principal note, trust deed and other agreements, and that usury exists in an extension agreement. Such actions are within the jurisdiction of chancery, and the constitutional guarantee refers only to those actions that were known to the common law.<sup>188</sup>

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184. *Id.* at 144, 423 N.E.2d at 1258-59 (citation omitted).

185. 359 Ill. 584, 195 N.E. 420 (1935). The case is also discussed *supra* part II.B.

186. 324 Ill. App. 520, 58 N.E.2d 338 (1st Dist. 1944) (abstract opinion).

187. 295 Ill. App. 582, 15 N.E.2d 874 (4th Dist. 1938).

188. *Placzkwicz v. Borgmeier*, 286 Ill. App. 603, 3 N.E.2d 293 (1st Dist. 1936) (unpublished opinion).

In partition proceedings, the parties are not entitled to a jury as a matter of right, since the constitutional provision that preserves the right of trial by jury makes no reference to cases in which courts of equity have jurisdiction. Under the common law and under the partition statute, which confer jurisdiction on courts of chancery to partition land held by tenants in common whether title is derived by purchase, devise or descent, courts of chancery have jurisdiction over partition cases.<sup>189</sup>

There is no constitutional right to a jury trial in chancery suits by a corporation creditors against stockholders for amounts unpaid on the stockholders' stock subscriptions. Such a suit was involved in *Parmelee v. Price*.<sup>190</sup> The supreme court approved the appellate court's affirmance of a decree dismissing the bill in equity and said as to a jury trial:

The constitution of 1870 guarantees the right to a trial by jury practically as that right existed at the common law. It does not give the right to a jury trial in any class of cases in which that right did not exist at common law. Where a new class of cases is directed by the Legislature to be tried in chancery, and it appears, when tested by the general principles of equity, that they are of an equitable nature, and can be more appropriately tried in a court of equity than a court of law, the chancellor will have the right, as in other cases in chancery, to determine all questions of fact without submitting them to a jury. The constitutional provision in question "introduced no new rule of law, but merely preserved the right already existing. It does not apply to suits in equity, or to any statutory proceeding to be had in courts of equity." The remedy given by this section is one which did not exist at common law. The relief sought may involve the taking of an account between the corporation and the stockholder and between the various stockholders, the appointment of a receiver, and a marshaling of the assets of the corporation. It is apparent that the machinery of the common law is inadequate for these purposes, and that the right of a trial by jury does not exist.<sup>191</sup>

In a related fashion, there is no constitutional right to a trial by jury in chancery proceedings initiated by the Attorney General to dissolve a corporation. Where a new class of cases is directed to be tried as chancery causes and it appears that they are of an equitable character, either as to subject matter or the relief requested when tested by the general principles of equity, a statute may provide for

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189. *Flaherty v. McCormick*, 113 Ill. 538 (1885).

190. 208 Ill. 544, 70 N.E. 725 (1904).

191. *Id.* at 558, 70 N.E. at 729 (citations omitted).

the determination of the questions of fact involved by the court without submission to a jury. In *Chicago Mutual Life Indemnity Association v. Hunt*,<sup>192</sup> the court characterized the Attorney General's suit as neither in the nature of a criminal prosecution nor a *quo warranto* proceeding, but as a special civil proceeding brought to protect and enforce property rights that had been assigned properly to the jurisdiction of courts of equity. Citing to its earlier opinion *Ward v. Farwell*,<sup>193</sup> the court rejected the contention that transferring suits to dissolve corporations from courts of law to courts of equity deprived the corporations of the constitutional right of trial by jury.<sup>194</sup>

There is no right to jury trial in equity suits by judgment creditors to have Dramshop Act judgments made into liens on the properties in which the intoxicating liquor had been sold. In *Flaherty v. Murphy*,<sup>195</sup> the court declared that the test to determine whether or not the right to trial by jury exists in a given case depends on "the nature of the controversy, rather than the form of the action" and on whether there was a "right of trial by jury on such issue . . . or on one analogous thereto, provided for under the laws of this state prior to the adoption of the Constitution."<sup>196</sup>

Whether a plan of distribution concerning the cost of an improvement is an equitable plan is a question for the court, not for the jury. This is not to be confused with jury questions as to whether the property has been assessed more than it is benefitted or more than its proportionate share. In *City of Monticello v. LeCrone*,<sup>197</sup> property owners appealed a judgment entered after a hearing was held on objections by property owners to a special assessment for a sewer improvement. Holding that the only question appropriate for jury determination was whether the objectors' properties were benefitted to the extent of the amounts assessed against those properties, the court noted:

Whether the plan of distribution of the cost of an improvement is equitable is a question for the court, and this issue is not to be confused with the questions whether property is assessed more than it is benefitted or more than its proportionate share, as those are only questions to be tried before a jury.<sup>198</sup>

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192. 127 Ill. 257, 20 N.E. 55 (1889).

193. 97 Ill. 593 (1881).

194. *Hunt*, 127 Ill. at 275, 20 N.E. at 59.

195. 291 Ill. 595, 126 N.E. 553 (1920). This case is also discussed *supra* part II.B.

196. *Id.* at 598, 126 N.E. at 554-55.

197. 414 Ill. 550, 111 N.E.2d 338 (1953).

198. *Id.* at 558, 111 N.E.2d at 342.

If the question of whether a motion picture is obscene arises in the course of a suit in equity thus raising a constitutional issue, the question of obscenity is not required to be passed upon by a jury. *American Civil Liberties Union v. City of Chicago*<sup>199</sup> involved a suit by distributors of a motion picture, after refusal of a permit to distribute and exhibit the film in the city, for declaratory judgment and injunctive relief concerning the relevant city ordinance and its enforcement. The defendants filed a jury demand and also claimed that there was an adequate remedy at law by way of mandamus. The court held that the city had the power to require submission of films for censorship and deny a permit to those which are obscene. The court remanded for the trial court to determine whether the film in question was obscene. On the defendants' contention that a jury must determine whether or not the film is obscene, the court stated:

The proposition is based on the premises that this issue involves only the applicability of the ordinance rather than its validity, and that it may therefore be raised only in an action of mandamus brought to compel the issuance of a license. The proposition also presupposes that a trial by jury may still be required in mandamus actions, despite the language of the present statute and that the question is an appropriate one for determination by a jury, even though the purpose of the proceeding is to review administrative action. We need not consider whether these latter assumptions are correct, since in the case before us the question of the film's obscenity arises in the course of a suit in equity based upon a constitutional question, and therefore need not be passed upon by a jury.<sup>200</sup>

*V. Jury Trial Is "Discretionary" in Actions that Are Equitable in Nature or Raise Equitable Matters*

In an equitable action, the trial court may impanel an advisory jury, even over an objection by the parties. In *Carroll v. Hurst*,<sup>201</sup> landowners sought to enjoin the defendant's operation of a junkyard and salvage operation on his land on theories of nuisance and violation of zoning ordinances. Plaintiff-appellants argued that it was error for the court first to impanel an advisory jury on its own motion, and then to fail to either instruct the jury or apply the law to the jury's findings, and finally to adopt the jury's findings when rendering its decision. The appellate court disagreed, stating:

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199. 3 Ill. 2d 334, 121 N.E.2d 585 (1954), *appeal dismissed*, 348 U.S. 979 (1955).

200. *Id.* at 351-52, 121 N.E.2d at 594.

201. 103 Ill. App. 3d 984, 431 N.E.2d 1344 (4th Dist. 1982).

The impaneling of an advisory jury is within the discretion of the trial court. The jury's verdict is only advisory; the trial court is free to accept or reject the jury's findings, in whole or in part. The court may impanel a jury under [then Civil Practice Act] section 63 even though the parties in the proceeding object.<sup>202</sup>

In a similar application of the rule, *Fisher v. Burgiel*<sup>203</sup> involved a suit by the conservator of an incompetent person's estate to set aside deeds executed by the ward and for defendants to account as fiduciaries for certain money and personalty. The supreme court rejected the defendants' contention that its jury demand should not have been stricken.

It has also been held that the court in an equitable action may properly refuse to submit certain questions to a second advisory jury after a first jury has disagreed and has been discharged. In such a case, the court may base a decree on the testimony already heard.<sup>204</sup> In *Smith v. Newton*,<sup>205</sup> the court held that the chancellor may submit the issues to a new jury or render a decree upon the evidence presented after an advisory jury's finding was clearly against the evidence.

Since mortgage foreclosure actions are equitable in nature, trial by jury is subject to the discretion of the trial court. Only if trial by jury is properly requested on particular issues, where there is a right to jury trial, is it "imperative" that the chancellor direct those issues to be tried by jury. *Brown v. Miner*<sup>206</sup> was a mortgage foreclosure suit in which the supreme court noted that no request in fact had been made in the lower court to direct that the mental capacity of one of the mortgagors be tried by jury. The court said:

Nor do we think there was error in the failure of the court to send an issue as to the mental capacity of . . . one of the mortgagors, to be tried by a jury. It does not appear that the court was requested to direct the issue to be thus tried. The statutes of this state require the submission to a jury of an issue arising upon the contest of a will on the ground of insanity of the testator, or of his want of mental capacity. The statute seems to be imperative in this respect. . . . It would seem . . . where the question of insanity of the defendant is properly presented by the pleadings and by affidavit, that the better practice is to submit the question of sanity to a jury. It by no means follows, however, that the

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202. *Id.* at 991, 431 N.E.2d at 1349 (citation omitted).

203. 382 Ill. 42, 54, 46 N.E.2d 380, 386 (1943). This case is also discussed *supra* part II.B.

204. *Hardy v. Dyas*, 203 Ill. 211, 67 N.E. 852 (1903).

205. 84 Ill. 14 (1876).

206. 128 Ill. 148, 21 N.E. 223 (1889).

court is bound upon its own motion to submit such an issue, or that it is error not to make such submission. . . . [T]he duty of the court to submit an issue to be tried by a jury, was in the case under consideration discretionary, not imperative.<sup>207</sup>

Suits to foreclose trust deeds and obtain incidental deficiency judgments are equitable in nature. Thus, trial by jury is, under section 2-1111 of the Code of Civil Procedure, a matter of discretion and not of right. In *First State Bank of Princeton v. Lefelman*,<sup>208</sup> the trial court entered orders confirming a foreclosure sale and granting a deficiency judgment for the trust deed beneficiary-plaintiff; the court rejected defendants' claim of the right to jury trial to determine if there was a mortgage in existence. The same result was reached in *South Holland Trust & Savings Bank v. Witvoet*.<sup>209</sup>

The trial court may, pursuant to section 2-1111 of the Code of Civil Procedure, exercise its discretion to impanel an advisory jury in order to determine whether a defendant is estopped to raise the statute of limitations as a defense to plaintiff's personal injury lawsuit. In *Vaughn v. Speaker*,<sup>210</sup> the supreme court, in agreement with the appellate court, held that: (1) when an issue of equitable estoppel is considered separately and prior to a principal common law negligence action, it should be determined by a trier of fact other than the jury that may adjudicate the merits of the negligence action; and (2) while there is no constitutional right to jury trial as to such equitable relief, the trial court may in its discretion impanel an advisory jury on the issue.

While a jury is a matter of statutory right in a will contest and the request for trial by jury as to that matter must be timely made, a jury trial is a matter of the trial court's discretion in equity litigation. Thus, where equitable issues are also included in the case, the trial court acts within its allowable discretion in directing that the equitable issues be tried before a jury. In *Kelley v. First State Bank of Princeton*,<sup>211</sup> the appellate court held that even assuming that the plaintiffs' request for jury trial was untimely as to the will contest there presented, the granting of the request as to the equitable issues in the case was not prejudicial in light of the trial court's discretionary power.

A suit that involves only the enforcement of a mechanic's lien is

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207. *Id.* at 154, 21 N.E. at 224.

208. 167 Ill. App. 3d 362, 521 N.E.2d 195 (2d Dist. 1988).

209. 18 Ill. App. 3d 24, 309 N.E.2d 306 (1st Dist. 1974).

210. 126 Ill. 2d 150, 533 N.E.2d 885 (1988), *cert. denied*, 109 S. Ct. 3218, (1989).

211. 81 Ill. App. 3d 402, 401 N.E.2d 247 (3d Dist. 1980).

an action in equity in which neither party has a right to demand trial by jury, but if jury trial is demanded then the granting of the demand is discretionary. The court's discretion concerning jury trial extends also to defenses that are asserted to defeat the plaintiff's cause of action rather than to obtain affirmative relief. In *Rozema v. Quinn*,<sup>212</sup> where the answer alleged that the plaintiff's work was so defective as to amount to a lack of substantial performance of the terms of the oral contract, and prayed that the lien action be dismissed for want of equity, the appellate court noted: "Such [a] defense merely defeats the plaintiff's cause of action and does not seek affirmative relief, and a jury trial under such circumstances would also have been discretionary with the court."<sup>213</sup>

Where, in a mortgage foreclosure proceeding, an issue is presented as to the defendant's capacity to execute the note and mortgage, the decision of whether or not to direct that issue to a jury is within the court's discretion. The court's duty is not imperative under such circumstances but is discretionary. In *Brown v. Miner*,<sup>214</sup> no request had been made to the chancellor to direct that the mental capacity of one of the mortgagors be tried by jury. Also, in *Myatt v. Walker*,<sup>215</sup> the court held that in chancery proceedings involving questions of insanity, it is the court's duty to direct that an issue be formed and tried by a jury.

Similarly, in a suit by a conservator of an incompetent person to set aside deeds and transfers of personalty by the ward, and for an accounting, the chancellor has discretion to call a jury on questions of fact. "Trial by jury in [equity] cases does not exist as a matter of right, except in certain enumerated cases."<sup>216</sup> In *Fisher v. Burgiel*,<sup>217</sup> the supreme court held that the chancellor did not commit reversible error in striking defendants' jury demand.

In proceedings to assess damages against the plaintiff upon dissolution of an injunction that defendant claims has been wrongfully issued, it is discretionary with the chancellor to decide whether there shall be a trial by jury. In *Holmes v. Stateler*,<sup>218</sup> the court pointed out that such proceedings are not new proceedings

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212. 51 Ill. App. 2d 479, 201 N.E.2d 649 (1st Dist. 1964). The case is also discussed *supra* part II.A., II.D., and II.J.

213. *Rozema*, 51 Ill. App. 2d at 483, 201 N.E.2d at 652 (citation omitted).

214. 128 Ill. 148, 21 N.E. 223 (1889). The case is also discussed *supra* part II.V.

215. 44 Ill. 485 (1867).

216. *Fisher v. Burgiel*, 382 Ill. 42, 54, 46 N.E.2d 380, 386 (1943).

217. 382 Ill. 42, 54, 46 N.E.2d 380, 386 (1943). The case is also discussed *supra* parts II.B. and II.W.

218. 57 Ill. 209 (1870).



but are part of the original chancery suit, and that proceedings seeking "damages" do not invariably implicate a common law right to jury trial:

It was a part of a proceeding in chancery, where trial by jury is not a matter of right. It is only discretionary with the chancellor, whether there shall be formed an issue of fact to be tried by a jury. It is not an answer to say that it involves the rendition of a decree for damages. This court and the circuit courts have rendered judgments for damages on the dismissal of appeals, for more than a quarter of a century, without the right being questioned. And on the dissolution of an injunction, restraining the execution of a judgment, such damages have been awarded under the statute for a much longer period without the right being questioned, so far as our observation has extended.<sup>219</sup>

### *W. The Verdict of a "Discretionary" Jury Is Advisory Only*

Where the judge in a chancery case exercises discretion to allow a jury trial, the verdict of that jury is merely advisory and is not binding on the chancellor.<sup>220</sup> This means, among other things, that, in a chancery case, an issue that is not required by the constitution or by statute to be submitted to a jury, but is, nonetheless, tried before a jury, the chancellor has discretion either to reject the jury verdict and enter a decree contrary to that verdict, or to grant a new trial, as the chancellor believes justice requires.<sup>221</sup> Further, if a matter goes to the jury in an action seeking equitable relief as well as damages, the chancellor need not accept the jury's verdict as to the matters in chancery.<sup>222</sup>

Where the granting of a jury trial in an equity case is discretionary with the trial court, the advisory verdict of such a jury binds neither the trial court nor a reviewing court.<sup>223</sup> The advisory character of the verdict of an advisory jury has also been interpreted to mean that the trial court, in its discretion, may submit any issue or issues to a jury in an advisory capacity on matters of fact<sup>224</sup> and

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219. *Id.* at 214-15.

220. *Fisher v. Burgiel*, 382 Ill. 42, 54, 46 N.E.2d 380, 386 (1943). The case is also discussed *supra* part II.B.

221. *Biggerstaff v. Biggerstaff*, 180 Ill. 407, 411, 54 N.E. 333, 334 (1899); *see also Kelly v. Kelly*, 126 Ill. 550, 18 N.E. 785 (1888).

222. *Pasulka v. Koob*, 170 Ill. App. 3d 191, 202, 524 N.E.2d 1227, 1234 (3d Dist. 1988), *appeal denied*, 122 Ill. 2d 579, 530 N.E.2d 250 (3d Dist. 1988).

223. *City of Chicago v. North Chicago News, Inc.*, 106 Ill. App. 3d 587, 595, 435 N.E.2d 887, 893 (2d Dist. 1982).

224. *Fleming v. Fleming*, 85 Ill. App. 3d 532, 541, 406 N.E.2d 879, 885 (5th Dist. 1980).

that the court is free to accept or reject the jury's findings in whole or in part.<sup>225</sup>

The submission to a jury of questions of fact rests in the chancellor's discretion, and even when so submitted, the chancellor is not bound by the jury's verdict on questions of fact. In *Keith v. Henkleman*,<sup>226</sup> the supreme court approved the appellate court's judgment affirming a decree of the superior court of Cook County that reformed an injunction bond and enforced the bond by assessing the damages recoverable under it. As to the contention that the damages should have been assessed by a jury, the court said, in part:

The rule, however, in this state, is that it is discretionary with the chancellor to require the issues of fact arising in equity cases to be tried by a jury before the entry of a decree. The chancellor is the sole judge of the evidence and its weight; and, when he directs an issue of fact to be tried by jury, to inform his conscience, he may adopt the verdict of the jury, or he may disregard it.<sup>227</sup>

Also, in chancery cases, where trial of an issue by a jury is merely advisory to the chancellor, the supreme court held in *Riehl v. Riehl*:<sup>228</sup>

[T]he parties are entitled to the judgment of the chancellor upon the issues of fact in the case. . . . If the court is satisfied with the verdict, he may adopt it and render a decree in accordance therewith, or he may, without setting aside the verdict, render a decree contrary thereto.<sup>229</sup>

In *Pittenger v. Pittenger*,<sup>230</sup> after noting that the chancellor "may adopt the verdict or set the same aside, and resubmit the question to the jury, or he may disregard it and enter such a decree as in his judgment equity demands," it was decided that:

The final decree shows that it was based not only upon a consideration by the chancellor of the evidence, but also upon a consideration of the finding made by the jury; and it may be that the chancellor did not rely as completely upon his own interpretation of the evidence as he would have done if there had been no action on the part of the jury.<sup>231</sup>

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225. *Caroll v. Hurst*, 103 Ill. App. 3d 984, 991, 431 N.E.2d 1344, 1349 (4th Dist. 1982). This case is also discussed *supra* part II.V.

226. 173 Ill. 137, 50 N.E. 692 (1898). The case is also discussed *supra* part II.C.

227. *Id.* at 139, 50 N.E. at 693.

228. 247 Ill. 475, 93 N.E. 318 (1910).

229. *Id.* at 477, 93 N.E. at 319 (1910) (suit to set aside a deed and for partition).

230. 208 Ill. 582, 70 N.E. 699 (1904).

231. *Id.* at 596, 70 N.E. at 704 (1904).

In *Stevens v. Shannahan*,<sup>232</sup> the court reversed a decree enjoining the sale of land under a mortgage and requiring an accounting yet approved the trial court's action of disregarding the jury finding that a grantor had been incompetent at the time that she executed the deed. The court stated:

[I]n this state the rule in respect to verdicts of juries on issues out of chancery that are not required by statute to be submitted to a jury is that the chancellor may either act upon such verdict, or disregard it, and find the issue himself, as in his opinion and judgment the weight of the evidence may justify.<sup>233</sup>

In *Jones v. Glos*<sup>234</sup> and *Larson v. Glos*,<sup>235</sup> the court held:

Even the verdict of a jury in a chancery case, where the issue is not required by the Constitution or a statute to be submitted to a jury, is advisory only, although the chancellor supervises the trial, and the verdict is based only upon legal and competent evidence admitted by him, and is found under instructions from him. The purpose of such a verdict is to inform the conscience of the chancellor, who is the sole judge of the evidence, and is in no manner bound by the verdict, but may either accept or reject it, as he believes justice requires.<sup>236</sup>

The following are examples of equity claims as to which the chancellor is not bound by the verdict of an advisory jury. The first is a suit to set aside an antenuptial agreement. Where a party seeks to set aside an antenuptial agreement, any error in submitting the issue of the validity of the agreement to a jury is not prejudicial to that party in light of the fact that the trial court is not bound by the jury's advisory verdict and is free to disregard the verdict in its entirety. This principle applies whether the issue put to the jury was a question of law or a question of fact.<sup>237</sup>

Second, in a suit in equity for reformation of a deed and to have title to a tract described in the deed, the verdict of the jury is advisory only. "[T]he jury and the chancellor were justified in finding that fraud was committed," because "[t]he decree shows that it was not based upon the verdict of the jury, alone, but was the result of an independent consideration of the evidence by the court in connection with the verdict of the jury."<sup>238</sup>

Third, in a suit to set aside a deed for fraud or undue influence

232. 160 Ill. 330, 340, 43 N.E. 350, 353 (1896).

233. *Id.*

234. 236 Ill. 178, 86 N.E. 282 (1908).

235. 235 Ill. 584, 85 N.E. 926 (1908).

236. *Id.* at 587, 85 N.E. at 927.

237. *Id.*

238. *Dunn v. Heasley*, 375 Ill. 43, 50, 30 N.E.2d 628, 630 (1940).

where the issue is whether its execution was procured by fraud or undue influence, and the chancellor is "satisfied to rest a final decree, without reference to any verdict that the jury might render, the chancellor may discharge the jury without a verdict, or, as was done in this case, direct a verdict in accordance with the court's views, and render a decree accordingly."<sup>239</sup>

Fourth, in a suit involving the issue of sanity, the chancellor is not bound by the verdict of an advisory jury. In an equity suit when the issue of sanity is sent to a jury, as distinct from an action in which the issue concerns whether a writing is the will of a testator (in the latter action there is a statutory right to trial by jury), the court may set aside the verdict even though it is not so manifestly contrary to the evidence as to raise a presumption of fraud or partisanship.<sup>240</sup>

Finally, the chancellor is not found in a suit to prevent termination of lease. In actions of a nature such as a tenant's equitable counterclaim seeking to prevent termination of a lease, there is no statutory right to a jury trial. "[M]oreover, even if a jury is empaneled, it serves a purely advisory function, [and the tenant] suffered no prejudice as a result of the court's denial of his request for jury a trial" on that counterclaim.<sup>241</sup>

#### X. *Reviewability of Chancellor's Actions Concerning Advisory Juries*

The chancellor's action of allowing or refusing a jury trial of issues of fact is not reviewable and may not be assigned as error. In *Maynard v. Richards*,<sup>242</sup> a suit to settle accounts between the estate of a deceased partner and the surviving partner, the court stated, "The whole of the account of [the surviving partner], including the item as to [sums due an attorney for] fees, was thus brought within the equitable jurisdiction of the circuit court."<sup>243</sup>

Since the verdict of a jury in a chancery suit is merely advisory, rulings on the admission of evidence on the hearing of an issue in a chancery suit may not be reviewable and cannot be assigned as error. *Peabody v. Kendall*<sup>244</sup> was a suit to set aside deeds for lack of mental capacity, lack of consideration, lack of delivery, and for

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239. *DeGraff v. Manz*, 251 Ill. 531, 96 N.E. 516 (1911).

240. *Stevens v. Shannahan*, 160 Ill. 330, 331, 43 N.E. 350, 353 (1896).

241. *Yuan Kane Ing v. Levy*, 26 Ill. App. 3d 889, 892, 326 N.E.2d 51, 54 (1st Dist. 1975).

242. 166 Ill. 466, 486, 46 N.E. 1138, 1144 (1897).

243. *Id.*

244. 145 Ill. 519, 521, 32 N.E. 674, 675 (1892).

fraud and undue influence allegedly practiced upon the grantor. The supreme court reversed a decree entered by the chancellor in accordance with a jury verdict for the complainants, in which the court held that because the jury verdict was not binding, any ruling of the court on the admission or rejection of evidence during the trial would not affect the decree which the court finally rendered.

*Y. Review of Trial Court Discretion in Denying  
Advisory Jury Trial*

Since the granting of a jury trial in equity cases is discretionary with the trial court, the denial of a jury demand is not error unless an abuse of discretion is shown. In *Kjellesvik v. Shannon*,<sup>245</sup> a former wife was denied a jury trial in the former husband's proceeding to modify the divorce decree and to transfer custody of their daughter to him. *Sidwell v. Sidwell*<sup>246</sup> was a wife's action asserting special equities in her husband's property and seeking alimony and attorneys fees. Rejection of the claim of right to a jury trial by the husband, who had previously obtained a divorce in another state, was approved because "[d]enial of the jury demand is not error in the absence of an abuse of discretion."<sup>247</sup>

There is no abuse of discretion when the court denied a jury demand in a custody modification matter. Where a former husband sought modification of the child custody provision of a previously entered divorce decree, the trial court did not abuse its discretion in finding that the determination of the child's best interests was better left to the court and in rejecting the former wife's demand for a jury trial.<sup>248</sup>

The abuse of discretion standard applies as to the denial of a discretionary jury in adoption proceedings. The allegedly unfit father of a child is not entitled to a jury trial in an adoption proceeding by the mother and her second husband, and denial of the natural father's demand for a jury trial is not erroneous, absent a showing of abuse of discretion.<sup>249</sup>

There is no abuse of discretion when court failed to impanel a jury in mortgage foreclosure suit. In a suit to foreclose a mortgage given as security for debts owed the plaintiff partnership for services rendered by it, the trial court's failure to direct that issues be

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245. 41 Ill. App. 3d 674, 678, 355 N.E.2d 120, 125 (3d Dist. 1976).

246. 28 Ill. App. 3d 580, 585, 328 N.E.2d 595, 599 (4th Dist. 1975).

247. *Id.*

248. *Kjellesvik v. Shannon*, 41 Ill. App. 3d 674, 355 N.E.2d 120 (3d Dist. 1976).

249. *Houston v. Brackett*, 38 Ill. App. 2d 463, 187 N.E.2d 545 (2d Dist. 1963).

tried by a jury does not constitute an abuse of discretion, even if there are questions of fact as to the employment of the partners to represent the defendant, the services rendered, the fair and reasonable value of those services, and the partners' expenses.<sup>250</sup>

There is no abuse of discretion in refusing jury trial in an insurance-proceeds interpleader action. In an interpleader proceeding to determine who, as between an insured's widow and his sister, is entitled to the proceeds of a group life insurance policy, the court did not abuse its discretion by refusing to submit to a jury the issue of whether the insured was insane when he changed the beneficiary from the widow to the sister.<sup>251</sup>

### Z. *Review of Trial Court Discretion in Allowing Advisory Jury Trial*

In a suit to set aside a will, it was proper under the predecessor statute<sup>252</sup> to submit to the jury questions of fact as to whether the complainant was the heir at law of the testatrix, even though the questions related to whether the court had jurisdiction and "the verdict of findings was advisory, only."<sup>253</sup>

Further, there is no abuse of discretion when a court submits an equitable issue as to rescission of a home sales agreement to a jury, along with law issues. In an action brought by home buyers to recover damages and for rescission of the sales contract for defects in a new home built and sold by the defendant, the trial court did not err in submitting to the jury, along with common law issues, the equitable issue of whether the home buyers were entitled to rescind the sales agreement. The home buyers were entitled to seek both remedies, legal and equitable, even though inconsistent, in the absence of an election of one remedy or the other. In *Finke v. Woodard*,<sup>254</sup> the court also held, as to the rescission remedy recommended by the jury and adopted by the trial court:

Since the jury recommended rescission, the trial court accepted their verdict, and we have affirmed this remedy, those questions as to what the proper measure of damages should be is moot.

The only remaining question is the appropriate amount of resti-

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250. *Lundy v. Messer*, 25 Ill. App. 2d 513, 167 N.E.2d 278 (2d Dist. 1960), *appeal after remand*, 32 Ill. App. 2d 303, 177 N.E.2d 863 (1961). The case is also discussed *supra* at II.E.

251. *Metropolitan Life Ins. Co. v. Davis*, 295 Ill. App. 582, 15 N.E.2d 874 (4th Dist. 1938).

252. ILL. REV. STAT. ch. 110, para. 2-1111 (1989) (current version).

253. *Stone v. Salisbury*, 209 Ill. 56, 68, 70 N.E. 605, 609 (1904).

254. 122 Ill. App. 3d 911, 919, 462 N.E.2d 13, 18 (4th Dist. 1984).

tution to which plaintiffs are entitled to return them to the status quo ante.<sup>255</sup>

*AA. Title to Land and the Right to Jury Trial  
in Chancery Cases*

Title to land is an issue to which the right to trial by jury extends. Thus, where ownership of real estate becomes an issue, either by claim of adverse possession or otherwise, a jury is required on that issue if demanded by either party. In *Cooper v. Williams*,<sup>256</sup> the trial court, after granting plaintiffs' motion to strike defendant's jury demand and trying the suit without a jury, entered judgment directing the defendant to remove a certain gate that she had constructed in order to close access to a lane that ran to her property. Plaintiffs claimed that the lane ran across their property to the defendant's property, and defendant asserted the affirmative defense that she had acquired ownership of the land through which the lane ran by adverse possession. Judgment granting the injunctive relief was reversed and the cause remanded:

Except in certain statutorily enumerated situations, the constitutional guaranty of a jury trial applies only to actions known to the common law and is not a matter of right in equity proceedings. Certainly, a suit for an injunction is an action in equity. However, the Illinois Supreme Court has held that when a plaintiff seeks an injunction against a continuing trespass, alleging ownership in the property, and the defendant's answer denies ownership in the plaintiff, "the legal right must be determined in an action at law before there can be a resort to equity." As a result, title should have been determined in a court of law, enabling the defendant to demand a jury, before a determination of the propriety of issuing the sought-after injunction was had in equity.<sup>257</sup>

The defendant in an equity suit to cancel deeds is entitled to demand a jury trial if the remedy is determined to be solely at law. The general rule is that there is no jurisdiction to grant chancery relief in a case if there is an available adequate alternative common law remedy. The right to trial by jury exists, of course, in an action for such a common law remedy. *Fleming v. Reheis*<sup>258</sup> was a suit in equity to set aside deeds and enjoin prosecution of an action in ejectment, where the evidence did not sustain the grounds upon

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255. *Id.* at 921, 462 N.E.2d at 20.

256. 60 Ill. App. 3d 634, 376 N.E.2d 1104 (3d Dist. 1978).

257. *Id.* at 635, 376 N.E.2d at 1104-05 (citations omitted).

258. 275 Ill. 132, 113 N.E. 923 (1916).

which the right to equitable relief was predicated. The chancellor's decree granted the requested relief, however, based on the chancellor's findings of lack of consideration and lack of delivery. The supreme court reversed, holding that the plaintiff's only proper remedy was at law, and the defendant was entitled to have a jury hear evidence on the matter of whether or not there had been a delivery of the deed in question.

Where a third party interplead in an attachment action claims ownership of the land levied upon, and an issue is formed as to whether the attachment-debtor has an equitable interest subject to attachment, the issue should be submitted to a jury. In *Laclede Bank v. Keeler*,<sup>259</sup> the court interpreted the then Attachment Act, noting:

The evident purpose of the amendment was to render equitable interests in lands subject to attachment to the same extent as legal titles. . . . The statute in terms provides that when the issue is made on filing an interpleader, the court shall cause a jury to be impanelled to try the issue. Nor does the statute make any distinction between legal and equitable titles. It is peremptory that the issue shall be tried, and tried by a jury.<sup>260</sup>

There is no right to a jury trial in a suit to establish title under the Burnt Records Act in an equity court. *Heacock v. Hosmer*<sup>261</sup> affirmed a trial court decree granting a petition brought under that Act to restore the title to a certain tract of land in Cook County, holding that the case was indeed within the jurisdiction of chancery. Noting first that the statute expressly confers jurisdiction on courts of chancery,<sup>262</sup> the supreme court held that the statute does not deprive parties of their constitutional right to trial by jury:

It has been a common practice for years to file bills in equity to partition lands, and in a proceeding of that character the court has ample power to settle all conflicting titles, and that, too, without a jury. The power conferred upon a court of equity by the Burnt Records act is similar to a proceeding in equity for partition, and a proceeding under the former act is no more obnoxious to the constitutional provision for a jury than is a bill in equity for partition.<sup>263</sup>

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259. 103 Ill. 425 (1903).

260. *Id.* at 428-29.

261. 109 Ill. 245 (1884).

262. *Id.* at 249.

263. *Id.* at 251; see also *supra* notes 57-58 and accompanying text.



*BB. Civil Contempt Proceedings and the Right to Trial by Jury*

In contempt proceedings of a civil nature, there is no right to trial by jury. Even where possible incarceration is pursuant to civil contempt proceedings and where actual incarceration is consistent with proceedings of a civil nature, the contemnor-respondent is not entitled to trial by jury. In *People v. Schmoll*,<sup>264</sup> a defendant's claim that he was entitled to trial by jury on his contempt charge, because after six months' imprisonment the incarceration was for a serious contempt offense, was rejected. Under prosecution for theft by deception and forgery, the defendant had repeatedly refused to comply with requests and an order for handwriting exemplars and was held in contempt and incarcerated for refusing to comply with the order. The trial court directed that the defendant's release from incarceration would be contingent upon his complying with the order, and the appellate court affirmed:

It is our opinion that the present cause falls clearly within the realm of civil contempt, since defendant has repeatedly refused to comply with a discovery order entered by the court to provide information that had been properly requested by the state. The imprisonment which was imposed on defendant is an attempt by the trial court to coerce him into complying with that order. The court has not imposed a specific term of imprisonment on defendant, but rather, in the classic terms, defendant has the keys to his prison in his own pocket and need merely comply with the order to be released.<sup>265</sup>

Also, in *People v. Burkert*,<sup>266</sup> the supreme court reversed on other grounds the judgment of contempt and commitment for a term of six months and approved the denial by the trial court of a motion for jury trial on the question of whether the defendant, a witness before a grand jury, was guilty of contempt. The court noted that "here the defendant admitted his refusal to answer before the grand jury. There was thus no factual issue to be tried, by jury or otherwise."<sup>267</sup>

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264. 77 Ill. App. 3d 762, 396 N.E.2d 634 (2d Dist. 1979), *cert. denied*, 447 U.S. 928 (1980).

265. *Id.* at 765, 396 N.E.2d at 637-38.

266. 7 Ill. 2d 506, 513, 131 N.E.2d 495, 498 (1955).

267. *Id.*

### III. APPENDIX: "JURY TRIAL" IN CERTAIN OTHER STATUTES

In addition to the basic civil practice laws and rules noted in Part One, there are a number of other Illinois statutory references to jury trial that are relevant to some civil cases which the Illinois constitutional right to trial by jury may not extend, or which implicate aspects of chancery jurisprudence. Some of these additional references are here described or quoted below. Any emphasis is added by the author.

A. Agriculture and Horticulture—Inspection and Standardization of Farm Products. ILL. REV. STAT. ch. 5, para. 102.15 (1989).

Confiscation and disposition of seized articles. Procedure—Release of articles not in violation of Act.

. . . .

Any product seized pursuant to the provisions of this Act may be proceeded against either before or after permission to take corrective action in any court within the jurisdiction of which the same may be found, and seized for condemnation and confiscation; and authority and jurisdiction are vested in the several courts to issue the warrant and to hear and determine the proceedings herein provided for. . . . The hearing shall be summary, and except as herein otherwise provided, shall conform, as near as may be to the proceedings in civil cases before such court; however, either party may demand a trial by *jury*.

B. Animals—Service of Stallions and Jacks. ILL. REV. STAT. ch. 8, para. 59-9 (1989).

Actions for services—Finding of court—Verdict—Costs.

. . . .

In all actions prosecuted under the provisions of this Act, the court or jury who shall try the same, or make an assessment of damages therein, shall in addition to finding the sum due the plaintiff, also find that the same is due for the service fee of plaintiff's stallion or jack and is a lien on the mare or jennet or progeny thereof, or both, as described in plaintiff's claim for lien: Provided, however, that if the court or *jury* shall find the amount due the plaintiff is not a lien upon the property described in the plaintiff's claim for lien, the plaintiff's action shall not be dismissed thereby if personal service of summons has been had upon the defendant, but the plaintiff shall be entitled to judgment as in other civil actions . . . .

C. Cities and Villages—Illinois Municipal Code—Corporate Powers and Functions—Public Health, Safety and Welfare—

Powers Over Certain Businesses. ILL. REV. STAT. ch. 24, para. 11-42-11.1. (1989).

Community antenna television system—Interference with and payment for access.

....

(d) [an action by a building owner to enforce a claim against a community antenna television company franchisee of a municipality to pay just compensation for the franchisee's construction and installation of demand] may require that the amount of just compensation be determined by a *jury*.

....

(f) . . . (iv) [in an action by a public utility, railroad, or owner or operator of an oil, petroleum product, chemical or gas pipeline, to enforce a claim against a community antenna television company franchisee for just compensation, the plaintiff] "upon timely demand, may require that the amount of just compensation be determined by a *jury*.

D. Counties—Counties Code—Powers and Duties of County Boards. ILL. REV. STAT. ch. 34, para. 5-1096 (1989).

Community antenna television systems—Interference with and payment for access.

....

(d) [in an action by a building owner to enforce a claim against a community antenna television company franchisee of a county to pay just compensation for the franchisee's construction and installation of cable television facilities within and upon the building, the building owner] upon timely demand, may require that the amount of just compensation be determined by a *jury*.

....

(f) [in an action by a public utility, railroad, or owner or operator of an oil, petroleum product, chemical or gas pipeline, to enforce a claim against a community antenna television company franchisee for just compensation, the plaintiff] upon timely demand, may require that the amount of just compensation be determined by a *jury*.

E. Courts—Juvenile Court Act of 1987—Delinquent Minors. ILL. REV. STAT. ch. 37, para. 805-35 (1987).

Habitual Juvenile Offender.

. . . trial on a petition to adjudicate a juvenile as an Habitual Juvenile Offender, shall be by *jury* unless the minor demands, in open court and with advice of counsel, a trial by the court without *jury*.

F. Domestic Relations—Domestic Violence Act of 1986—Or-

ders of Protection. ILL. REV. STAT. ch. 40, para. 2312-14(12) (1986).

Order of Protection Remedies.

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Order for payment of losses . . . suffered as a direct result of the abuse. . . . [A] respondent shall have a right to trial by *jury* on the issue of whether to require payment under this paragraph, except for reimbursement of losses affecting family needs . . . and reimbursement of petitioner's attorney's fees and court costs.

G. Domestic Relations—Parentage Act of 1984. ILL. REV. STAT. ch. 40, para. 2513 (1984).

Civil Action; Jury.

.....

[A party may demand] trial by jury on the issue of parentage.

H. Liens—Horseshoer's Lien. ILL. REV. STAT. ch. 82, para. 210 (1989).

Assessment of damages.

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In all actions prosecuted under the provisions of this act, the court or jury, who shall try the same, or make an assessment of damages therein, shall in addition to finding the sum due to the plaintiff, also find that the same is due for the cost of shoeing the horse, mule, ox or other animal described in plaintiff's claim for lien and is a lien upon the same: Provided, however, that if the court or *jury* shall find the amount due the plaintiff is not a lien upon the property described in the plaintiff's claim for lien, the plaintiff's action shall not be dismissed thereby if personal service of summons has been had upon the defendant, but the plaintiff shall be entitled to judgment as in other civil actions.

I. Mental Health—Miscellaneous Laws—Persons in Need of Mental Treatment Confined in Certain Penal Institutions. ILL. REV. STAT. ch. 91 1/2, para. 142 (1987).

Hearing on petition—trial-court order.

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[In a hearing on a petition to subject a person to involuntary admission to an institution in accordance with procedures prescribed in the Mental Health and Developmental Disabilities Code,] if the *jury* by its verdict, or the court if no jury is requested, finds that the named person is not subject to involuntary admission, he shall be returned to the institution to which he was sentenced and committed. If the *jury* by its verdict, or the court if no jury is requested, finds that the named person is subject to

involuntary admission, the court shall commit him to the Department of Mental Health and Developmental Disabilities.

J. Practice—Code of Civil Procedure—Attachment. ILL. REV. STAT. ch. 110, para. 4-134 (1989).

Intervention.

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[In all cases of attachment when any third person by verified petition claims the property attached or garnisheed, the court] shall immediately (unless good cause be shown by either party for a continuance) direct a *jury* to be impaneled to inquire into the right of the property.

K. Professions and Occupations—Department of Professional Regulation—Barber, Cosmetology and Esthetics Schools. ILL. REV. STAT. ch. 111, para. 1703B-6 (1987).

Private right of action.

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[In any action brought by a person who seeks damages for a violation of this article] the court in its discretion may award actual damages, treble actual damages if fraud is proved, injunctive relief, and any other relief which the court deems proper. . . . In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party. Either party to an action under this Section may request a trial by *jury*.

L. Professions and Occupations—Department of Conservation—Timber Buyers. ILL. REV. STAT. ch. 111, para. 716 (1987).

[In an action seeking confiscation or forfeiture of timber, equipment or vehicles seized for alleged use in violation of the Act,] the owner of such property may have a *jury* determine the illegality of its use.

M. Public Health and Safety—Nursing Home Care Act—Rights and Responsibilities—Licensing, Enforcement, Violations, Penalties and Remedies. ILL. REV. STAT. ch. 111 1/2, para. 4153-607 (1989).

Jury trial—Waivers.

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Any party to an action brought under Sections 3-601 through 3-607 [§ 3-602 allows a facility resident, whose rights are violated by a licensee, triple damages, costs and attorneys fees; § 3-603 allows a resident to maintain an action for any other type of relief, including injunctive and declaratory relief, permitted by law]

shall be entitled to a trial by jury and any waiver of the right to a trial by jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

N. Revenue—Coin-Operated Amusement Device Tax Act. ILL. REV. STAT. ch. 120, para. 481b.15 (1986).

Search warrant—Seizure of property—Trial—Redemption by owner—Disposition of forfeited devices.

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[After seizure of property in accordance with this Act] the court or jury, if a jury shall be demanded, shall proceed to determine whether or not such property so seized was displayed in violation of this Act. In case of a finding that the amusement device seized was, at the time of seizure, being displayed in violation of this Act, judgment shall be entered confiscating and forfeiting the property to the State and ordering its delivery to the Department, and in addition thereto, the court shall have power to tax and assess the costs of the proceedings.

O. Universities, Colleges, Academies, Etc.—Private Business and Vocational Schools Act. ILL. REV. STAT. ch. 144, para. 161.2 (1989).

Private right of action.

.....

The court in its discretion may award actual damages, treble actual damages if fraud is proved, injunctive relief, and any other relief which the court deems proper. In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party. Either party to an action under this Section may request a trial by jury.

