Loyola University Chicago Law Journal

Volume 18
Issue 2 *Winter 1986 1985-1986 Illinois Law Survey*

Article 14

1986

Real Property and Real Estate Transactions

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I. INTRODUCTION

The Illinois courts and legislature addressed many important topics concerning property issues during the *Survey* year. The Illinois Supreme Court expanded application of the implied warranty of habitability,[1] yet maintained the common law boundaries of the doctrine of lessor immunity.[2] The court also addressed the common law doctrine of emblements,[3] and the position of a trustee to a land trust.[4] The legislature again defeated the proposed Tenants Bill of Rights.[5] The City of Chicago, however, enacted a Residen-

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1. *See infra* notes 7-34 and accompanying text.
2. *See infra* notes 35-59 and accompanying text.
3. *See infra* notes 60-77 and accompanying text.
4. *See infra* notes 120-49 and accompanying text.
5. *See infra* note 177 and accompanying text.

tial Landlord and Tenant Ordinance which offers significant protections for tenants.[6]

II. LANDLORD-TENANT

A. Implied Warranty of Habitability

In *Glasoe v. Trinkle*,[7] the Illinois Supreme Court expanded tenants' rights by extending application of the implied warranty of habitability[8] to all residential leases.[9] In *Glasoe*, a landlord, Merwin Glasoe ("Glasoe"), brought suit against Jerry and Diane Trinkle (the "Trinkles"), his former tenants, to recover $960.00 in rent.[10] The court allowed the Trinkles to assert the defense of breach of the implied warranty of habitability even though the municipality in which the house was located did not have an applicable building or housing code.[11] In previous decisions involving leases of residential real estate, Illinois courts relied on a building code to determine whether the warranty had been breached.[12]

The Trinkles entered into an oral agreement with Glasoe to rent an apartment in the town of St. Joseph.[13] The Trinkles vacated the premises on October 17, 1981, and relocated to a nearby community.[14] They alleged their move was necessary because of numerous defects and substandard conditions on the premises,[15] the most

6. *See infra* notes 178-89 and accompanying text.

7. 107 Ill. 2d 1, 479 N.E.2d 915 (1985).

8. *See generally* Dutenhaver, *Non-Waiver of the Implied Warranty of Habitability in Residential Leases*, 10 LOY. U. CHI. L.J. 41 (1978). Under common law principles, a landlord had no duty to place or maintain rental premises in a habitable condition. Instead, a tenant had to rely on his own inspection and judgment. *Id.* Illinois is among the many states which have departed from this doctrine and now imply a warranty of habitability in various real estate transactions. *Id. See also* R. CUNNINGHAM, THE LAW OF PROPERTY § 6.38 (1984) (implied warranty of habitability is a doctrine which imposes a duty on landlords to maintain premises leased for residential use in a habitable condition).

9. *Glasoe*, 107 Ill. 2d at 10, 479 N.E.2d at 918.

10. *Id.* at 5, 479 N.E.2d at 916.

11. *Id.* at 12, 479 N.E.2d at 919.

12. *See* Pole Realty Co. v. Sorrels, 84 Ill. 2d 178, 417 N.E.2d 1297 (1982); Jack Spring, Inc. v. Little, 50 Ill. 2d 346, 280 N.E.2d 208 (1972).

13. *Glasoe*, 107 Ill. 2d at 6, 479 N.E.2d at 916.

14. *Id.*

15. *Id.* at 7, 479 N.E.2d at 917. The Trinkles presented testimony regarding the following defects: the only source of heat for the living room was a space heater that malfunctioned during the winter of 1978; the blower in the main furnace did not operate for two weeks in the winter of 1980; Glasoe installed an incorrect replacement motor for the blower which caused the blower to run continuously; sewage leaked through the ceiling into their bedroom and their children's bedroom on two occasions; problems with the plumbing caused the toilet to overflow at various times; the bathroom ceiling collapsed in 1979 and was not replaced; water leaked through the ceiling into the kitchen; sewage

substantial of which was a faulty furnace.[16] Subsequent to the Trinkles' relocation, Glasoe filed suit against the Trinkles to collect four months accrued rent.[17] The Trinkles denied that any rent was due and raised several affirmative defenses, including breach of the implied warranty of habitability.[18]

The appellate court held that the implied warranty of habitability did not apply because St. Joseph did not have a building code for rental housing.[19] The court reasoned that the previous decisions involving the implied warranty of habitability[20] did not require expansion of the doctrine to include residential real estate in locales lacking a building code.[21]

In overturning the appellate court's ruling, the Illinois Supreme Court stated that a rule requiring the application of housing or building code standards in cases involving leases of residential

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collected in an open ditch that had been dug by Glasoe; sewage leaked from sewer lines in the basement into a sump pump and was then pumped into the yard; the unit was infested with cockroaches and rodents; the front door was difficult to open and close because it was swollen from the weather; there was a large hole in the decaying floor of the back porch; and, the windows and doors were not properly sealed. *Id.*

16. *Id.*

17. *Id.* at 6, 479 N.E.2d at 916.

18. *Id.* The other affirmative defenses and counterclaims that the Trinkles asserted were decided prior to the appeal to the Illinois Supreme Court. In response to a claim that Glasoe constructively evicted the Trinkles, the trial court held that the unavailability of the furnace was a sufficient ground for application of that doctrine and awarded damages in an amount representing the difference between the rent the Trinkles paid Glasoe for the old premises and the rent they paid at their new premises for the period of October 17, 1981 to November 31, 1981. The claim that Glasoe breached an agreement to lower the living room ceiling and to replace the front door was withdrawn during trial. Lastly, at trial, Glasoe stipulated that he had failed to return the Trinkles' security deposit and that he had charged various calls to the Trinkles' telephone. *Id.* at 7-9, 479 N.E.2d at 917-18.

For a definition of the constructive eviction doctrine which the Trinkles asserted against Glasoe, see Freedman, Waldron, Fusco, Joslin, Schwemm, and Sing, *Eviction and Rent Claim Defenses and Counterclaims*, in TENANT'S RIGHTS § 1.60 (Ill. Inst. for CLE 1978). The constructive eviction doctrine provides qualifying tenants with a defense to actions for past due rent in those situations in which the landlord violates an express covenant or an oral agreement to provide essential services or to maintain the premises and this violation renders the premises useless for the purpose for which they were leased. In order to qualify to use this defense, the tenant must vacate the premises within a reasonable time after the landlord has had an opportunity to remedy the breach. *Id.*

19. *Glasoe*, 107 Ill. 2d at 10, 479 N.E.2d at 918.

20. *Pole Realty Co.*, 84 Ill. 2d 178, 417 N.E.2d 1297; *Jack Spring, Inc.*, 50 Ill. 2d 346, 280 N.E.2d 208.

21. *Glasoe*, 107 Ill. 2d at 10, 479 N.E.2d at 918. The court in *Jack Spring*, 50 Ill. 2d 346, 280 N.E.2d 208, was able to refer to a building code because the property was located in an area having an applicable building code. The *Jack Spring* court did not, however, state that the presence of the building code was a requirement for application of the doctrine, but instead, that substantial compliance with the pertinent building code fulfilled the warranty. *Glasoe*, 107 Ill. 2d at 10-11, 479 N.E.2d at 918.

property but not in cases involving sales of new homes by builder-vendors was inconsistent and illogical.[22] The court noted that both renters and purchasers of new homes legitimately expect that their respective dwellings will be habitable,[23] and that this expectation exists independent of a building code.[24] Therefore, the *Glasoe* court held that a breach of the implied warranty of habitability was not dependent upon the proof of a violation of a housing code.[25] Rather, the court stated that the existence of housing code violations should be only one of several factors which are considered.[26] The court declined to establish a standard for determining habitability, but set forth guidelines for such a determination.[27] The factors to be considered include the nature of the deficiency, the length of time for which it persisted, the age of the structure, the amount of the rent, the area in which the premises are located, whether the tenant waived the defects and whether the defects resulted from abnormal or unusual use by the tenant.[28] The court stressed that this list was not comprehensive, and further, that no one factor should be dispositive of whether the implied warranty of habitability had been breached.[29]

The *Glasoe* court further noted that a tenant who wishes to assert a claim of breach of the implied warranty of habitability must give notice to the landlord of the alleged defect and must allow a reasonable time for the landlord to correct the problem.[30] Additionally, the alleged defect must render the premises unsafe or unsanitary, and thus unfit for occupancy.[31] The court concluded that

22. *Glasoe*, 107 Ill. 2d at 10, 479 N.E.2d at 918.

23. *Id.*

24. *Id. See also* Dapkunas v. Cagle, 42 Ill. App. 3d 644, 356 N.E.2d 575 (5th Dist. 1976). In his dissenting opinion, Justice Moran articulated a contention similar to that set forth *Glasoe*. Justice Moran observed that allowing the nonexistence of a building code to preclude application of the implied warranty of habitability effectively punished inhabitants of the communities lacking such codes. *Id.* at 655, 356 N.E.2d at 583 (Moran, J., dissenting).

25. *Glasoe*, 107 Ill. 2d at 10, 479 N.E.2d at 918 (citing Pugh v. Holmes, 486 Pa. 272, 290-91, 405 A.2d 897, 906 (1970)).

26. *Glasoe*, 107 Ill. 2d at 10, 479 N.E.2d at 918.

27. *Id.* at 14, 479 N.E.2d at 920.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 13, 479 N.E.2d at 920. For a discussion of the test used to define which defects are of such a material nature to render the premises unsafe or unsanitary, see D. HILL, LANDLORD AND TENANT LAW 122 (2d ed. 1986). An example of a material defect is the deprivation of any of the essential "goods and services" which make up the modern leasehold. A residential tenant expects to be able to eat, sleep, and have use of sanitary facilities in the leasehold. *Id.* Further, the tenant expects to have safe and reasonable ingress and egress to and from the premises. *Id.*

an objective standard should be applied in examining the question of habitability. Accordingly, a tenant may defend an action for rent initiated by his landlord and counterclaim[32]using the doctrine of the implied warranty of habitability if the tenant can prove that the premises are not habitable in the eyes of a reasonable person.[33]

With its decision in *Glasoe*, the Illinois Supreme Court continued the trend of extending application of the implied warranty of habitability to various real estate transactions.[34] The *Glasoe* court refused to restrict application of the doctrine based on the absence of a building code, and instead, applied the doctrine to promote the maintenance of residential premises in a habitable condition.

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32. *Glasoe*, 107 Ill. 2d at 14, 479 N.E.2d at 920. The Trinkles counterclaimed for damages sustained by them as a result of Glasoe's alleged breach of the implied warranty of habitability. The breach of the implied warranty of habitability is treated traditionally as sounding in contract, with basic contract remedies of damages, rescission, and reformation. If the damage remedy is chosen, several methods of measurement have been used, including the "difference in value" and "percentage reduction in use" methods. Additionally, a "repair and deduct" damage remedy has been recognized in certain situations. *Id.* at 15, 479 N.E.2d at 920-21.

Two different means may be utilized under the "difference in value" method. With the first, the tenant's damages are measured by the difference between the fair rental value of the premises in their warranted condition and their fair value during the occupancy by the tenant in the unsafe, unsanitary, or unfit condition. Under the second, the tenant's damages are measured by the difference between the agreed rent and the fair rental value of the premises during the occupancy by the tenant in the unsafe, unsanitary, or unfit condition. *Id.* at 16, 479 N.E.2d at 921. The "percentage reduction in use" method reduces the tenant's rent by a percentage reflecting the decrease in value and enjoyment of the premises caused by defects that give rise to the breach of the implied warranty of habitability. *Id.*

33. *Id.* at 14, 479 N.E.2d at 920.

34. Prior to *Glasoe*, the Illinois Supreme Court had addressed the implied warranty of habitability in various settings. In *Jack Spring*, 50 Ill. 2d 346, 280 N.E.2d 208, the Illinois Supreme Court first ruled on the implied warranty of habitability. The court in *Jack Spring* held that the implied warranty of habitability applied to leases, both oral and written, of multiple unit dwellings. *Id.* at 366, 280 N.E.2d at 217.

Subsequently, the Illinois Supreme Court extended the implied warranty of habitability to a variety of situations. For example, the doctrine has been applied to leases of single family dwellings. *Pole Realty Co.*, 84 Ill. 2d at 182, 417 N.E.2d at 1300. Outside of the lease setting, the doctrine has been relied upon in contracts for the sale of new homes by builder-vendors. Peterson v. Hubschman Construction Co., 76 Ill. 2d 31, 39-40, 389 N.E.2d 1154, 1157-58 (1979). Further, it has been applied to the sale of a new home by a builder-vendor even though the builder-vendor lived in the house for approximately two years before the sale, and previously had built only one house. Park v. Sohn, 89 Ill. 2d 453, 463, 433 N.E.2d 651, 656 (1982). Finally, the doctrine of implied warranty of habitability has been used for subsequent purchases of homes when latent defects can be traced to the original builder-vendor. Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 185, 418 N.E.2d 324, 331 (1982).

In the latter three situations, the Illinois Supreme Court extended the implied warranty of habitabilty without requiring the existence of housing or building codes. *Glasoe*, 107 Ill. 2d at 11, 479 N.E.2d at 918.

Therefore, occupants of premises which are uninhabitable may rely on the protection offered by the implied warranty of habitabilty regardless of the absence of a building code in the particular municipality.

B. Liability of Landlord to Third Parties

In *Wright v. Mr. Quick, Inc.*,[35] the Illinois Supreme Court re-examined the general rule that the party in control of leased property, ordinarily the lessee, is liable for personal injuries caused by a defective condition on the property.[36] The plaintiff in *Wright*, an employee of the lessee, brought suit against the lessor for injuries which she sustained as the result of a defect in the premises.[37] The plaintiff attempted to impose liability upon the lessor based on an established exception to the doctrine of lessor immunity.[38] The exception attaches liability to the lessor when that lessor agrees to maintain the premises in good repair and then fails to do so.[39] The *Wright* court, however, ruled that the exception did not apply because the defendant made no such agreement in his capacity as lessor.[40] In so ruling, the *Wright* court reaffirmed the parameters of the doctrine of lessor immunity and its exceptions.[41]

Lisa Wright ("Wright"), an employee of Great Eight, Inc. ("Great Eight"), was injured when she fell in the company parking lot.[42] Great Eight operated a fast food restaurant pursuant to a franchise agreement with Mr. Quick, Inc. ("Mr. Quick") and had possession of the real property pursuant to a sublease with Mr. Quick.[43] Wright brought suit against Mr. Quick claiming that its failure to maintain the premises caused her injuries.[44]

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35. 109 Ill. 2d 236, 486 N.E.2d 908 (1985).

36. The rule that the party in control of leased premises is liable for personal injuries has been articulated in several Illinois cases. *See, e.g.*, Seago v. Roy, 97 Ill. App. 3d 6, 8, 424 N.E.2d 640, 641 (3rd Dist. 1981); Shehy v. Bober, 78 Ill. App. 3d 1061, 1066, 398 N.E.2d 80, 84 (1st Dist. 1979); Dapkunas v. Cagle, 42 Ill. App. 3d 644, 647, 356 N.E.2d 575, 577 (5th Dist. 1976); Thorson v. Aronson, 122 Ill. App. 2d 156, 160, 258 N.E.2d 33, 34 (2d Dist. 1970).

37. *Wright*, 109 Ill. 2d at 237, 486 N.E.2d at 908.

38. *Id.* at 239, 486 N.E.2d at 909.

39. The exception to the doctrine of lessor immunity was articulated in Logger v. Reynolds, 25 Ill. App. 3d 1042, 1043-44, 324 N.E.2d 238, 239-40 (3rd Dist. 1975).

40. *Wright*, 109 Ill. 2d at 239-40, 486 N.E.2d at 909.

41. *Id.* at 243, 486 N.E.2d at 911.

42. *Id.* at 237, 486 N.E.2d at 908.

43. *Id.* The *Wright* court noted at the outset of its analysis that the basic principles of landlord and tenant law govern the relationship between a sublessor and a sublessee. *Id.* at 238, 486 N.E.2d at 909.

44. *Id.* at 237, 486 N.E.2d at 908. The *Wright* court noted that Wright's exclusive

In her suit, Wright contended that Mr. Quick was within one of the exceptions to the general rule of lessor immunity.[45] The exception provides that a lessor is liable to his lessee or third parties if the lessor has agreed to keep the premises in good repair, fails to do so, and that failure causes physical harm to the lessee or a third party.[46] The prime lease between Mr. Quick and the owners contained a covenant which provided that Mr. Quick would maintain the premises in good condition.[47] Wright claimed that this covenant was incorporated into the sublease with Great Eight.[48] Accordingly, Wright alleged that Mr. Quick, as lessor, and not Great Eight, as lessee, was liable in tort to third parties injured on the premises.[49]

The Illinois Supreme Court rejected Wright's argument, and concluded that the general rule of lessor immunity applied.[50] The

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remedy against her employer was provided under the Worker's Compensation Act. *Id.* at 237-38, 486 N.E.2d at 908 (citing ILL. REV. STAT. ch. 48, paras. 138.1-38.28 (1985)).

45. *Wright*, 109 Ill. 2d at 239, 486 N.E.2d at 909.

46. *Id.* at 238-39, 486 N.E.2d at 909. For a general explanation of the doctrine of lessor immunity, see RESTATEMENT (SECOND) OF TORTS §§ 355-62 (1970). The Restatement provides that a lessor of land is not subject to liability to his lessee or others upon the land with the consent of the lessee or sublessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession. Further, the lessor is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession. *Id.* at §§ 355-56.

Exceptions to this general rule of lessor immunity are as follows: when the lessor contracts to repair, fails to exercise reasonable care to perform the contract, and thus creates an unreasonable risk to persons upon the land; when the land contains an undisclosed dangerous condition the presence of which is known or should be known to the lessor and which is not known to the lessee; when the land is leased for a purpose that involves the admission of the public and physical harm is caused to a member of that public by a condition of the land existing when the lessee takes possession; when the lessor retains control of some part of the land and physical harm is caused by a dangerous condition upon that part of the land; when the lessor retains control of the part of the land which is necessary to the safe use of the leased part and physical harm is caused by a dangerous condition upon that part of the land; and, when a lessor of land makes repairs in a negligent manner and the condition resulting from this negligent repair causes physical harm. *Id.* at §§ 357-62.

47. *Wright*, 109 Ill. 2d at 239, 486 N.E.2d at 909.

48. *Id.*

49. *Id.* The appellate court upheld Wright's interpretation of liability. In his dissent, Justice Stouder observed the inherent weaknesses in the appellate court holding:

> [T]he fallacy with this holding is that at the time of the execution of the original lease, Mr. Quick, Inc., was contracting as lessee, not as lessor. In order for Mr. Quick, Inc. to owe a duty to the plaintiff within this exception, the contract would have had to have been executed with the sublessee, Great Eight, Inc. Since it was not, the exception was inapplicable.

Wright v. Mr. Quick, Inc., 129 Ill. App. 3d 226, 230, 472 N.E.2d 478, 480 (3rd Dist. 1984) (Stouder, J., dissenting).

50. *Wright*, 109 Ill. 2d at 243, 486 N.E.2d at 911.

court further stated that Mr. Quick's covenant to repair in the prime lease merely provided the owner of the premises with a contract remedy if Mr. Quick allowed the premises to fall into disrepair.[51] The court reasoned that, because Mr. Quick wholly demised the property to Great Eight, the tort liability shifted to Great Eight as the tenant in possession.[52] Additionally, the court stated that there was no agreement that Mr. Quick would indemnify or protect Great Eight.[53] The court emphasized that the franchise agreement between Mr. Quick and Great Eight, which had been made a part of the sublease, expressly stipulated that Great Eight was responsible for maintenance and repair.[54] The court also emphasized that the overall language of the documents indicated the parties' intent that the sublessee, Great Eight, be responsible for repair and maintenance.[55] The court determined that the parties understood the sublease to require Great Eight to fulfill the duties which Mr. Quick agreed to undertake in the prime lease.[56] The court in *Wright* determined that there was no conflict between this allocation of the responsibility to repair and the failure of the prime lease to address the division of the duty of repair between Mr. Quick and any sublessee.[57]

The *Wright* court affirmed the principle that the parties to leasing arrangements, as well as subleasing arrangements, may rely

51. *Id.* at 239, 486 N.E.2d at 909.

52. *Id.* at 239-40, 486 N.E.2d at 909. The Illinois courts generally hold that a tenant or occupant of leased premises, and not the owner, is responsible for injuries from a defective condition of the demised premises. *See, e.g.*, Dapkunas v. Cagle, 42 Ill. App. 3d 644, 647, 356 N.E.2d 575, 577 (5th Dist. 1976); Hardy v. Montgomery Ward & Co., 131 Ill. App. 2d 1038, 1041, 267 N.E.2d 748, 750 (5th Dist. 1971).

53. *Wright*, 109 Ill. 2d at 239-40, 486 N.E.2d at 909.

54. *Id.* at 240, 486 N.E.2d at 910.

55. *Id.* at 240-42, 486 N.E.2d at 910-11. The franchise agreement provided as follows: "It is understood between the parties that the sublessee is to use the premises herein demised for the operation of a 'Mr. Quick' store, and that in the operation of the premises, the sublessee will comply with all of the terms and conditions and provisions of the store franchise agreement which exists between the parties." *Id.* at 240, 486 N.E.2d at 910. The sublease provided that the "[s]ublessee agrees to abide by and be bound by the terms and conditions of the lease above referred to, except insofar as its terms are changed and modified by this agreement," and that the sublease was "subject to" the lease between the lessee and owner of the premises. *Id.* at 241, 486 N.E.2d at 910. The *Wright* court stated that the choice of the terms "be bound by," "abide by," and "subject to" indicated that the parties intended to place responsibilities on the sublessee, rather than to create a right in the sublessee's favor. *Id.* at 241-42, 486 N.E.2d at 910-11.

56. *Id.* at 242, 486 N.E.2d at 910.

57. *Id.* at 242, 486 N.E.2d at 911. The sublease in *Wright* stated that it was "subject to" the terms and conditions of the prime lease. As nothing in the prime lease referred to the allocation of the duty to repair to a sublessee, however, there was nothing to which the sublease could be subject. *Id.*

upon the doctrine of lessor immunity.[58] The lessor, or lessee/sublessor, is immune from tort liability unless he fits into one of the well delineated exceptions to the doctrine of lessor immunity. Therefore, unless expressly provided to the contrary in the leasing or subleasing agreement, a lessee or sublessee, as tenant in possession, will be held liable in tort to third parties as a result of a dangerous condition on the premises. The *Wright* case held that this liability assignment will apply to the sublease situation, regardless of any prior arrangements between the original lessor and the lessee/sublessor.[59]

C. *The Doctrine of Emblements*

In *Leigh v. Lynch*,[60] the Illinois Supreme Court examined the application of the common law doctrine of emblements to annual or perennial crops. The doctrine of emblements permits a tenant to cultivate and to remove certain crops from the land after termination of the tenancy.[61] *Leigh* involved a tenant farmer's attempt to recover damages for crops destroyed after the termination of his tenancy.[62] The court rejected the tenant farmer's contention and held that only those perennial crops which are the result of care and attention during the year in which they are harvested are protected by the doctrine of emblements.[63]

Leigh, a farmer, rented land by oral agreement with the owners, Ralph and Betty Troup, on a year-to-year basis.[64] On September 1, 1982, Leigh received written notice[65] that the Troups were selling

58. Several recent cases have restated the general principle of common law landlord immunity in absence of facts sufficient to place the situation within the parameters of an exception to that rule. *See, e.g.*, Kostecki v. Pavlis, 140 Ill. App. 3d 176, 488 N.E.2d 644 (1st Dist. 1986); Hubbard v. Chicago Housing Authority, 138 Ill. App. 3d 1018, 486 N.E.2d 1297 (1st Dist. 1985). *But see* Duncavage v. Allen, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986), which expands by its facts the dimensions of the exception to landlord immunity for criminal acts of third parties on the leased premises, thus providing an inroad for future dissolution of landlord immunity.

59. *Wright*, 109 Ill. 2d at 239-40, 486 N.E.2d at 909.

60. 112 Ill. 2d 411, 493 N.E.2d 1040 (1986).

61. *Id.* at 415, 493 N.E.2d at 1042. The doctrine, or right, of emblements was developed to ensure that a remainderman or reversioner under a life tenancy would not become entitled to growing crops immediately upon the death of the life tenant. Instead, the undertenant was permitted to harvest the crops. Roberts v. McAllister, 226 Ill. App. 356 (2d Dist. 1922). *Leigh* demonstrates the modern application of the doctrine to a tenancy other than a life tenancy.

62. *Leigh*, 112 Ill. 2d at 413, 493 N.E.2d at 1041.

63. *Id.* at 420, 493 N.E.2d at 1044.

64. *Id.* at 413, 493 N.E.2d at 1041.

65. *Id.* at 414, 493 N.E.2d at 1041. Notice was given in accordance with statutory requirements. The applicable Illinois statute provides that a year-to-year tenant is enti-

the property to Lynch, the defendant, and that Leigh's tenancy would terminate as of January 1, 1983.[66] Leigh already had seeded clover on the property in January 1982.[67] A crop of stubble hay was available for harvest prior to the date set for termination of the lease. Leigh, however, chose not to harvest it.[68] In February of 1983, after Leigh's tenancy had terminated, Leigh notified the Troups that he intended to harvest the clover crop.[69] Nevertheless, in May or June of 1983, Lynch destroyed the crop.[70] Leigh filed suit seeking damages for his loss of income, alleging that he was entitled to re-enter the property and harvest the clover under the doctrine of emblements.[71] The appellate court determined that the doctrine of emblements could be applied to clover, a perennial crop, and awarded Leigh $3,000.[72]

The Illinois Supreme Court held that, although perennial crops could qualify as emblements, the production of a qualifying perennial crop must result from the tenant's attention and care to the crop in the same agricultural year as the proposed harvest would occur.[73] The court noted that the crop claimed by Leigh was not produced as the result of care and attention during the agricultural year in which he desired to harvest the crop; rather, the crop was produced as the result of care and attention during the previous year.[74] Therefore, the doctrine of emblements did not apply.[75]

In *Leigh*, the Illinois Supreme Court set forth a modern definition of a qualifying crop under the common law doctrine of emblements. The *Leigh* court held that in order for a tenant to utilize the right of ingress and egress to harvest crops after the termination of that tenant's lease, those crops, even if perennial, must qualify as emblements.[76] The *Leigh* court then defined emblements as crops that have resulted from the attention and care of the tenant during the agricultural year in which the harvest would occur.[77]

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tled to notice to quit at least four months prior to the end of the year of letting. ILL. REV. STAT. ch. 110, para. 9-206 (1985).

66. *Leigh*, 112 Ill. 2d at 414, 493 N.E.2d at 1041.
67. *Id.*
68. *Id.* at 420, 493 N.E.2d at 1044.
69. *Id.* at 414, 493 N.E.2d at 1041.
70. *Id.*
71. *Id.*
72. *Id.* at 415, 493 N.E.2d at 1042.
73. *Id.* at 420, 493 N.E.2d at 1044.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

III. PROCEDURAL INTERPRETATION

A. Forcible Entry and Detainer

In *Vogel v. Dawdy*,[78] the Illinois Supreme Court addressed the notice and demand provisions of the Forcible Entry and Detainer Statute[79] as applied to subsequent purchasers of land sold under a land contract.[80] In *Vogel*, the vendors brought a forcible entry and detainer action against the vendees and two subsequent purchasers, seeking possession of a tract of land that the vendors had sold to the vendees by land contract.[81] The vendors did not give the subsequent purchasers written notice and demand for possession.[82] The court held that a forcible entry and detainer action may be maintained against a subsequent purchaser of land even though that subsequent purchaser was not given written notice and demand.[83]

The land contract between the vendors, the Vogels, and the vendees, the Dawdys, contained a clause which provided that the Dawdys could not convey the land without the written consent of the Vogels.[84] The Dawdys, in breach of the contract, conveyed the land to subsequent purchasers without obtaining the written consent of the Vogels.[85] The Vogels brought suit for breach of contract, alleging that the Dawdys' breaches constituted defaults under the contract.[86] The Vogels further alleged that any rights which the subsequent purchasers might have were subordinate to the Vogels' right to possession under the land contract.[87] The circuit court entered summary judgment against the Dawdys and one of the subsequent purchasers.[88] The circuit court then proceeded

78. 107 Ill. 2d 68, 481 N.E.2d 679 (1985).
79. ILL. REV. STAT. ch. 110, para. 9-102 (1985).
80. *Vogel*, 107 Ill. 2d 68, 481 N.E.2d 679.
81. *Id.* at 70, 481 N.E.2d at 680.
82. *Id.* at 75, 481 N.E.2d at 683.
83. *Id.* at 76, 481 N.E.2d at 683.
84. *Id.* at 71, 481 N.E.2d at 681. The contract provided that the purchaser would not "sell, assign, grant, set over or convey the premises . . . without the prior written consent of the sellers . . . ." *Id.* Further, the purchasers were to obtain specified insurance coverage and were to pay all taxes on the properties. The contract also provided that a breach of any provision of [the contract] would be considered a default of the contract and warrant forfeiture. *Id.*
85. *Id.*
86. *Id.* at 72, 481 N.E.2d at 681. The breaches alleged were as follows: the Dawdys assigned their interest in the contract to third parties without the consent of the Vogels; the Dawdys failed to provide the insurance coverage the contract required; the Dawdys failed to pay real estate taxes on the properties; and, the Dawdys removed timber from the property without the Vogels' consent. *Id.*
87. *Id.*
88. *Id.*

to trial and awarded to the Vogels possession of the tract of land purchased by the other subsequent purchasers, the Suttles.[89]

The Illinois Supreme Court affirmed the decision of the circuit court.[90] In reaching its decision, the *Vogel* court analyzed the parameters of the various subsections to the Forcible Entry and Detainer Statute.[91] The Suttles alleged that the Vogels failed to give them the statutory notice required under Illinois Code of Civil Procedure section 9-102(5),[92] a provision of the Forcible Entry and Detainer Statute.[93] The court stated that the Suttles were correct in their assertion that section 9-102(5) requires that an action for possession be preceded by a written demand for possession.[94] The court held, however, that the Vogels were not proceeding under that section.[95] Instead, the *Vogel* court held that section 9-102(2),[96] which does not require a prior written demand for possession, was applicable.[97] Therefore, the court concluded that the defense of lack of notice was inappropriate and affirmed the award of the property to the Vogels.[98]

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89. *Id.* at 74, 481 N.E.2d at 682.

90. *Id.* at 78, 481 N.E.2d at 684.

91. *Id.*

92. ILL. REV. STAT. ch. 110, para. 9-102(5) (1985).

93. *Vogel*, 107 Ill. 2d at 74-75, 481 N.E.2d at 682. The Forcible Entry and Detainer Statute provides in relevant part:

> The person entitled to possession of lands or tenements may be restored thereto in the manner hereafter provided:
>
> . . . .
>
> (5) When a vendee having obtained possession under a written or verbal agreement to purchase lands or tenements, and having failed to comply with the agreement, withholds possession, *after demand in writing by the person entitled to possession.*

ILL. REV. STAT. ch. 110, para 9-102(5) (1985) (emphasis added).

94. *Vogel*, 107 Ill. 2d at 74-75, 481 N.E.2d at 682.

95. *Id.* at 75, 481 N.E.2d at 683.

96. ILL. REV. STAT. ch. 110, para. 9-102(2) (1985). This statute provides in pertinent part: "[t]he person entitled to possession of lands or tenements may be restored thereto in the manner hereafter provided: . . . . (2) When a peaceable entry is made and the possession unlawfully withheld." Id.

97. *Vogel*, 107 Ill. 2d at 76, 481 N.E.2d at 683 (citing Lockelt v. Stoltz, 323 Ill. App. 164, 55 N.E.2d 286 (1st Dist. 1944)). The *Lockelt* court held that a demand in writing was required only if the plaintiff brought the action for possession under a clause which specifically required it. *Lockelt*, 323 Ill. App. at 166-67, 55 N.E.2d at 287.

98. *Vogel*, 107 Ill. 2d at 78-77, 481 N.E.2d at 683-84. The court noted that the Suttles' defense that the Vogels waived their rights of nonassignment because they accepted payments under the contract after becoming aware of the claimed breach was also inappropriate. No contractual relationship existed between the Vogels and the Suttles, and therefore, the Suttles were not the proper parties to assert waiver of the nonassignment clause as a defense. Furthermore, even if the Suttles were the proper party to assert the defense of waiver, the defense of waiver generally is applied to "late payment" cases.

The Illinois Supreme Court in *Vogel* based its holding on the lack of a contractual relationship between the vendor under a land contract and the subsequent purchasers of that land. After *Vogel*, it is clear that a proceeding under section 9-102(5) of the Illinois Code of Civil Procedure, which sets out the statutory requirement of a written demand, applies only when a contractual relationship exists between the party in possession and the party seeking possession. To the contrary, no written demand is required when proceeding under section 9-102(2). Instead, a proceeding under section 9-102(2) requires only that the party in possession came upon the property peaceably and thereafter withheld possession.[99]

B. Homestead Exemption Statute

In *Bank of Illmo v. Simmons*,[100] the Illinois Appellate Court for the Fifth District clarified the Homestead Exemption Statute, which provides certain homeowners with a $7,500.00 exemption upon foreclosure.[101] The Bank of Illmo ("Bank") sought to avoid the retroactive application of an amendment to the Statute.[102] The amendment replaced the phrase "every householder having a family"[103] with "every individual."[104] The court rejected the Bank's argument and held that the amendment should be applied retroactively to the date of the execution of the instrument upon which the party sought foreclosure.[105]

In *Bank of Illmo*, the defendant borrowed funds from the Bank and executed a deed of trust[106] as security.[107] The deed of trust did not contain a waiver or release of Simmons' homestead rights.[108] Homestead rights entitle certain homeowners to an exemption amount upon foreclosure.[109] Subsequently, Simmons defaulted,

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Finally, the court noted that the other breaches were sufficient to support a judgment of default. *Id.*

99. *Id* at 76, 481 N.E.2d at 683 (citing ILL. REV. STAT. ch. 110, para. 9-102(2) (1985)).

100. 142 Ill. App. 3d 741, 492 N.E.2d 207 (5th Dist. 1984).

101. ILL. REV. STAT. ch. 110, para. 12-901 (1985).

102. *Bank of Illmo*, 142 Ill. App. 3d at 743, 492 N.E.2d at 210.

103. ILL. REV. STAT. ch. 52, para. 1 (1979).

104. ILL. REV. STAT. ch. 110, para. 12-901 (1985).

105. *Bank of Illmo*, 142 Ill. App. 3d at 746, 492 N.E.2d at 212.

106. A deed of trust is an instrument by which the legal title to real property is placed in one or more trustees, to secure payment of money or performance of some condition. Although a deed of trust differs in form from a mortgage, it is essentially a security. BLACK'S LAW DICTIONARY 373 (5th ed. 1979).

107. *Bank of Illmo*, 142 Ill. App. 3d at 742, 492 N.E.2d at 209.

108. *Id.*

109. When a homestead right is awarded, the amount of that right affixes as a first

the Bank commenced an action to foreclose, and a default judgment was entered against Simmons.[110] Simmons petitioned to have the default judgment vacated and his homestead exemption amount set aside.[111] Simmons claimed that he was entitled to a $7,500 exemption provided for under the amendment to the Homestead Exemption Statute.[112]

On appeal, the Bank asserted that Simmons was not entitled to retroactive application of the amendment. The Bank contended that Simmons was required to comply with the terms of the statute in effect at the time of execution of the deed of trust.[113] The statute provided a homestead exemption in the amount of $10,000 to every householder having a family.[114] Under this standard, the defendant would not qualify for an exemption.[115] The appellate court rejected the Bank's contention that the applicable statute was the statute in effect at the time the parties entered into the trust arrangement.[116]

In determining whether the retroactive application of the amendment to the Homestead Exemption Statute was appropriate, the court applied a balancing of interests approach.[117] The court determined that the impairment of the Bank's rights as a creditor did not outweigh Simmons' rights as the holder of a homestead exemption.[118] The court held that it would be unjust to refuse to

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lien upon the premises except as to any mortgages in which the right of homestead was waived. Dixon v. Moller, 42 Ill. App. 3d 688, 690, 356 N.E.2d 599, 602 (5th Dist. 1976).

110. *Bank of Illmo*, 142 Ill. App. 3d at 743, 492 N.E.2d at 209-10.

111. *Id.* at 743, 492 N.E.2d at 209.

112. *Id.* (citing ILL. REV. STAT. ch. 110, para. 12-901 (1985)). The amended Homestead Exemption Statute provides in relevant part: "[e]very individual is entitled to an estate of homestead to the extent in value of $7,500 . . . and such homestead, and all right and title therein, is exempt from attachment, judgment, levy or judgment sale for the payment of his . . . debts . . . ." ILL. REV. STAT. ch. 110, para. 12-901 (1985).

113. *Bank of Illmo*, 142 Ill. App. 3d at 743, 492 N.E.2d at 210.

114. *Id.* (citing ILL. REV. STAT. ch. 52, para. 1 (1979)). The Homestead Exemption Statute then in effect provided in relevant part: "[e]very householder having a family shall be entitled to an estate of homestead of the extent in value of $10,000 . . . and all right and title therein, shall be exempt from attachment, judgment, levy or judgment sale for the payment of his . . . debts . . . ." ILL. REV. STAT. ch. 52, para. 1 (1979).

115. *Bank of Illmo*, 142 Ill. App. 3d at 743, 492 N.E.2d at 210.

116. *Id.* at 744-46, 492 N.E.2d at 211-12.

117. *Id.* at 745, 492 N.E.2d at 211 (citing Sanelli v. Glenview State Bank, 108 Ill. 2d 1, 20, 483 N.E.2d 226, 234 (1985)).

118. *Bank of Illmo*, 142 Ill. App. 3d at 745, 493 N.E.2d at 211-12. The purpose of a homestead exemption statute is to provide the debtor with the necessary shelter or the means to acquire shelter required for his welfare during difficult economic circumstances. *Id.* at 745, 492 N.E.2d at 211 (citing State Bank of Antioch v. Nelson, 132 Ill. App. 3d 120, 477 N.E.2d 77 (2d Dist. 1985)). The court in *Bank of Illmo* held that this purpose

apply the amended Act retroactively.[119]

The decision of the appellate court in *Bank of Illmo* confirms the retroactive application of the 1984 amendment to the Homestead Exemption Statute. The holding in *Bank of Illmo* is consistent with the purpose of the homestead exemption: to provide the debtor with the necessary shelter or means to acquire shelter during difficult economic circumstances. Nevertheless, by utilizing a balancing of interests approach, rather than establishing a rule of retroactive application, the *Bank of Illmo* court left the door open for a party to convince the court that the retroactive application of the amendment to the Homestead Exemption Statute would result in manifest injustice in a particular situation.

IV. CONSITUTIONAL DECISIONS

A. Land Trustee as Creditor: Retroactive Provision

In *Sanelli v. Glenview State Bank*,[120] the Illinois Supreme Court upheld the constitutionality of the Illinois Land Trust Act (the "Act").[121] The Act permits a trustee to serve as both trustee and creditor of the same land trust.[122] Additionally, the Act provides

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outweighed the Bank's rights as a creditor. *Bank of Illmo*, 142 Ill. App. 3d at 746, 492 N.E.2d at 210.

But see Capitol Bank & Trust of Chicago v. Fascetta, 771 F.2d 1077 (7th Cir. 1986), in which the court held unconstitutional the retroactive application of an amendment to the Illinois Homestead Act. *Id.* at 1080. The amendment provided that the homestead exemption be applied to personal property, including the res of a land trust. *Id.* The court in *Capitol Bank* specifically noted the priority of the Bank's interest as creditor. *Id.*

119. *Bank of Illmo*, 142 Ill. App. 3d at 745-46, 492 N.E.2d at 211-12.

120. 108 Ill. 2d 1, 483 N.E.2d 226 (1985).

121. ILL. REV. STAT. ch. 148, paras. 81-84 (1985).

122. *Sanelli*, 108 Ill. 2d at 7-9, 483 N.E.2d at 228-29. The Illinois Land Trust Act provides in pertinent part:

> The fact that a trustee of a land trust is or becomes a secured or unsecured creditor of the land trust, the beneficiaries of the land trust, or a third party whose debt to such creditor is guaranteed by a beneficiary of the land trust, shall not be deemed evidence of a breach of any fiduciary duty owed by said trustee to the beneficiaries.

ILL. REV. STAT. ch. 148, para. 83 (1985). This legislation was passed in response to the Illinios Supreme Court holding in Home Federal Savings & Loan Ass'n. v. Zarkin, 89 Ill. 2d 232, 432 N.E.2d 841 (1982). *Sanelli*, 108 Ill. 2d at 7, 483 N.E.2d at 228.

For purposes of the Act, a land trust in Illinois is defined as follows:

> "Land trust" means any express agreement or arrangement whereof a use, confidence or trust is declared of any land, or of any charge upon land, for the use or benefit of any beneficiary, under which the title to real property, both legal and equitable, is held by a trustee subject only to the execution of the trust, which may be enforced by the beneficiaries who have the exclusive right to manage and control the real estate, to have possession thereof, to receive the net

for its retroactive application.[123] The Glenview State Bank ("Bank") brought an action to foreclose on Sanelli's property.[124] In his defense, Sanelli contended that the retroactive application provision of the Act was unconstitutional.[125] The court rejected this contention, and held that the retroactive provision of the Act was constitutional.[126]

Sanelli and his wife entered into a land trust agreement with the Bank, naming the Bank as trustee.[127] Under the agreement, the Bank held both legal and equitable title to the property in trust for the benefit of the Sanellis.[128] The Sanellis subsequently assigned their beneficial interest in the land trust to the Bank as security for a loan from the Bank.[129] The Bank, therefore, was both trustee for the Sanellis and a secured creditor.[130] The Sanellis defaulted on their loan, and their beneficial interest in the trust property was sold to the Bank at a public sale.[131] The Bank then evicted the Sanellis from the property.[132]

The Bank, serving as both trustee and creditor, acted pursuant to authority granted by the Act.[133] Serving in these dual capacities, however, was contrary to a 1982 Illinois Supreme Court case.[134] In *Home Federal Savings & Loan Association v. Zarkin*,[135] the Illinois Supreme Court held that a land trustee owes a fiduciary duty to the trust's beneficiaries and it is a breach of fiduciary duty for a land trustee to act as both trustee and secured creditor of the same land trust.[136] Accordingly, Sanelli contended that the Act vi-

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proceeds from the rental, sale, hypothecation or other disposition thereof, and under which the interest of the beneficiary is personal property only.

ILL. REV. STAT. ch. 148, para. 82(a) (1985).

123. *Sanelli*, 108 Ill. 2d at 8-9, 483 N.E.2d at 229 (citing ILL. REV. STAT. ch. 148, para. 83 (1985)). The Act "applies to all security interests in a beneficial interest in land trusts and all mortgages on land trust property and to all debts secured thereby, whether arising before, on, or after the effective date of this Act." ILL. REV. STAT. ch. 148, para. 83 (1985).

124. *Sanelli*, 108 Ill. 2d at 6, 483 N.E.2d at 227-28.

125. *Id.*

126. *Id.* at 29, 483 N.E.2d at 238.

127. *Id.* at 6, 483 N.E.2d at 228.

128. *Id.* A beneficiary is defined as a person for whose benefit property is held in trust. BLACK'S LAW DICTIONARY 143 (5th ed. 1979).

129. *Sanelli*, 108 Ill. 2d at 6, 483 N.E.2d at 228.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 7, 483 N.E.2d at 228 (citing ILL. REV. STAT. ch. 148, paras. 81-84 (1985)).

134. Home Federal Savings & Loan Ass'n v. Zarkin, 89 Ill. 2d 232, 432 N.E.2d 841 (1982).

135. *Id.*

136. *Id.* at 239, 432 N.E.2d at 845.

olated the principle of separation of powers[137] by attempting to nullify the court's decision in *Zarkin*.[138] Sanelli further asserted that approval of the retroactive application of the statute would render the *Zarkin* decision meaningless.[139] The Illinois Supreme Court disagreed, stating that it was permissible to change the effect of a prior decision with respect to others in similar circumstances whose rights have not yet been finally adjudicated.[140] The court in *Sanelli* cautioned, however, that a court may not apply a statute retroactively in an attempt to change the result of a final decision regarding the parties before it.[141]

Sanelli also argued that the provision allowing retroactive application of the statute violated the United States Constitution's prohibition against laws that impair contracts.[142] Additionally, Sanelli asserted that the application of the Act permits a taking of property without due process of law.[143] The court, however, rejected both of these contentions.[144] Considering the arguments together, the court stated that, assuming a law impairs the obligations of private contracts, it nevertheless may be constitutional if it is reasonable and necessary to serve an important public purpose.[145] The *Sanelli* court held that the Act satisfied this standard because its stated purpose was a reasonable exercise of the legislature's authority to provide for the public welfare and to safeguard the interests of the people.[146] The court also stated that the Act codifies the accepted practice of one party serving as both the lender and the trustee to a land trust.[147] The court in *Sanelli* further noted that the Act was designed to encourage the continued availability of real estate financing.[148] Therefore, the court held that the retroactivity provision was constitutional and did not deprive Sanelli, or

137. *Sanelli*, 108 Ill. 2d at 9, 483 N.E.2d at 229 (citing ILL. CONST. art. II, § 1). The Illinois Constitution provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. II, § 1.

138. *Sanelli*, 108 Ill. 2d at 9, 483 N.E.2d at 229.

139. *Id.*

140. *Id.* at 10, 483 N.E.2d at 229.

141. *Id.* at 10, 483 N.E.2d at 230.

142. *Id.* at 19, 483 N.E.2d at 234 (citing U.S. CONST. art. I, § 10).

143. *Sanelli*, 108 Ill. 2d at 19, 483 N.E.2d at 234 (citing U.S. CONST. amend XIV; ILL. CONST. art. I, §§ 2, 16).

144. *Sanelli*, 108 Ill. 2d at 29, 483 N.E.2d at 238.

145. *Id.* at 22, 483 N.E.2d at 235.

146. *Id.* at 23-24, 483 N.E.2d at 236.

147. *Id.* at 21, 483 N.E.2d at 234.

148. *Id.* at 22-23, 483 N.E.2d at 235 (citing ILL. REV. STAT. ch. 148, para. 81(b) (1985)).

others similarly situated, of property without due process of law.[149]

The decision of the Illinois Supreme Court in *Sanelli* lays to rest any challenge to the constitutionality of retroactive application of the Illinois statute permitting an individual or entity to act both in the capacity of land trustee and lender to the land trust. Though the *Sanelli* case did not alter the principle that a land trustee's duties are fiduciary in nature, it did enunciate one type of transaction which would not be considered a breach of that fiduciary duty. Following *Sanelli*, land trustees in Illinois may continue the practice of borrowing from themselves upon the security of the trust property. This transaction does not violate any duty by which the land trustee is bound.

B. Real Estate Sales Contract: Voidability Provision

In *Meeker v. Tulis*,[150] the Illinois Appellate Court for the Fifth District examined the constitutionality of the Illinois Sale of Dwelling Structures Act (the "Act").[151] The Act provides that a buyer of real estate under an installment contract may void that contract unless there is a certificate of compliance attached to the contract or incorporated therein.[152] The *Meeker* court upheld the statute's constitutionality.[153] Accordingly, the court allowed the defendant to void a contract to which the plaintiff had failed to attach a certificate of compliance.[154]

In *Meeker*, the seller, Meeker, and the buyer, Tulis, entered into an installment sales contract for the sale of real estate.[155] Tulis allegedly failed to make payments under the contract and, in response, Meeker brought suit to recover the amount due.[156] The trial court granted Tulis's motion to dismiss based on Meeker's

149. *Sanelli*, 108 Ill. 2d at 29, 483 N.E.2d at 238. The *Sanelli* holding recently was applied by the Illinois Appellate Court for the First District. *See* Willard v. Northwest National Bank, 137 Ill. App. 3d 255, 484 N.E.2d 823 (1st Dist. 1985).

150. 134 Ill. App. 3d 1093, 481 N.E.2d 810 (5th Dist. 1985).

151. ILL. REV. STAT. ch. 29, paras. 8.21, 8.22 (1985).

152. *Meeker*, 134 Ill. App. 3d at 1095, 481 N.E.2d at 812-13 (citing ILL. REV. STAT. ch. 29, para. 8.22 (1985)). A certificate of compliance is defined by the Act as follows:

> An affidavit executed by a contract seller stating that the dwelling structure was inspected within 30 days before the contract was executed by an Inspector of the Municipality of the County wherein the premises is located, and that at the date of the execution of the contract the structure is not in violation of any dwelling code.

ILL. REV. STAT. ch. 29, para. 8.21(f) (1985).

153. *Meeker*, 134 Ill. App. 3d at 1098, 481 N.E.2d at 815.

154. *Id.*

155. *Id.* at 1094-95, 481 N.E.2d at 812.

156. *Id.* at 1095, 481 N.E.2d at 812.

failure to attach a certificate of compliance to the installment contract as required by the Illinois Sale of Dwelling Structures Act.[157] On appeal, Meeker argued that the Act was unconstitutional because it deprived sellers under installment real estate contracts of the right to contract without due process of the law.[158]

In considering the Act's constitutionality,[159] the court utilized a test of reasonableness.[160] The reasonableness test considered whether the statute sought to achieve an end within the State's police power and whether the means utilized to achieve those ends were reasonable.[161] The *Meeker* court concluded that the purpose of the Act was to force the seller under an installment contract to furnish the buyer with information about the property being purchased.[162] The court held that such a purpose was within the state's police power.[163]

Next, the court determined that the statute was a reasonable means to achieve the constitutionally permissible purpose.[164] Under the statute, a buyer is permitted to declare void any nonconforming real estate contract.[165] The court concluded that because this power merely enables the buyer to regulate the transaction, rather than prevent it, the Act was a reasonable means of achieving its intended purpose.[166]

Meeker further argued that the Act was unconstitutionally arbitrary because it was limited to installment contracts and excluded cash sales.[167] The court disagreed and held that the statute was designed to protect the majority of purchasers:[168] those who cannot pay cash and do not have bargaining leverage with the seller.[169] The court reasoned that purchasers for cash are generally in a better position to bargain and often have more financial expertise.[170]

157. *Id.* (citing ILL. REV. STAT. ch. 29, para. 8.22 (1985)).
158. *Meeker*, 134 Ill. App. 3d at 1095, 481 N.E.2d at 813.
159. *Id.* at 1096, 481 N.E.2d at 813. The *Meeker* court noted that acts of the legislature are presumptively constitutional. It is the burden of the party challenging a statute to prove its unconstitutionality. *Id.* (citing Rawlings v. Department of Law Enforcement, 73 Ill. App. 3d 267, 273, 391 N.E.2d 758, 762 (3rd Dist. 1979)).
160. *Meeker*, 134 Ill. App. 3d at 1096, 481 N.E.2d at 814.
161. *Id.* at 1096, 481 N.E.2d at 813.
162. *Id.*
163. *Id.*
164. *Id.* at 1096, 481 N.E.2d at 814.
165. *Id.*
166. *Id.* at 1097, 481 N.E.2d at 814.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

Consequently, in the court's view, such purchasers do not need the protection of the statute.[171]

Sellers of residential property pursuant to installment sales contracts should be aware of the existence and constitutionality of the Illinois Sale of Dwelling Structures Act.[172] The Act grants to the purchaser a right to void the installment sale contract if the seller fails to include a certificate of compliance in the installment sale contract, or, in the alternative, to provide the purchaser with an express written warranty.[173] If the seller fails to comply with the statute, the purchaser has the right to void the contract.[174] This right is not violative of the seller's constitutional right to contract.[175]

V. LEGISLATION

During the *Survey* year, the Illinois General Assembly addressed various aspects of real estate law. The General Assembly considered, but failed to pass, a bill enhancing service of process on out-of-state landlords[176] and a Tenants Bill of Rights.[177] Despite State

171. *Id.*

172. ILL. REV. STAT. ch. 29, paras. 8.21-.22 (1985).

173. *Id.* at para. 8.22.

174. *Id.*

175. *Meeker*, 134 Ill. App. 3d at 1098, 481 N.E.2d at 815.

176. S.B. 2041, 84th Ill. Gen. Assem., 1st Sess. (1986). The Bill would require the owner of a residential structure containing twelve or more dwelling units to record the name of a registered agent for service of process with the recorder of deeds for the county in which the structure is located. The Bill was intended to prevent an out-of-state landlord from being able to avoid service of process. *Id.* The Bill was referred to the Rules Committee on April 11, 1986. 1 LEGISLATIVE SYNOPSIS AND DIGEST 552 (July 23, 1986).

177. H.B. 0329, 84th Ill. Gen. Assem., 1st Sess. (1986). The Tenants Bill of Rights, which was put on the Interim Study Calendar/Judiciary I on May 3, 1986, provides a scheme for the protection of tenants from actions by landlords in retaliation to reporting of housing or health code violations. *Id.* The widespread adoption of housing codes and residential landlord-tenant legislation, and the subsequent assertion of rights by tenants pursuant to this legislation, was met with retaliatory conduct by many landlords. D. HILL, *supra* note 31, at 144. This retaliatory conduct included refusal to renew leases, termination of leases, and rent increases. *Id.*

The Tenants Bill of Rights defines a landlord as an owner or lessor of a building of seven or more units. H.B. 0329 at sec. 3(d)(1). A tenant is defined as a party in possession of a dwelling unit for a week-to-week term or any longer term pursuant to a written or oral agreement with a landlord. *Id.* at sec. 3(d)(2). The Bill specifies actions which may be taken and available remedies for both landlord and tenant. *Id.* at sec. 2-12. If, for example, a landlord fails to maintain a tenant's rental unit, the tenant may, after notification to the landlord of his intent, repair the condition of the unit or area and deduct the appropriate amount from his rent. *Id.* at sec. 4. The benefit of a provision defining available remedies is that it allows the courts to circumvent the problem of determining damages when landlord-tenant disputes arise. *See supra* note 33 for a discussion of damages

legislative inaction in areas of landlord-tenant reform, the Chicago City Council approved the Residential Landlord and Tenant Ordinance (the "RLTO" and the "Ordinance") in September 1986.[178]

The RLTO provides comprehensive regulation of residential tenancies with the goal of equalizing and clarifying the rights and duties of landlords and tenants.[179] The RLTO explicitly requires that it be construed liberally in order to promulgate its purposes and policies.[180] The Ordinance sets forth the responsibilities of landlords and tenants.[181] Additionally, the RLTO provides remedies for injured landlords or tenants upon a violation by the other party.[182]

The Chicago RLTO is patterned closely after the Uniform Residential Landlord and Tenant Act and an ordinance passed in the City of Evanston, Illinois, in 1975.[183] The RLTO regulates landlord-tenant relationships in Chicago with respect to landlords' access to apartments, security deposits, subleases, abandonment, retaliatory conduct, lock-outs, disclosure of information, provision of receipts and notices, and building maintenance.[184] The law creates several remedies for tenants if their landlords fail to maintain their buildings and apartments in compliance with applicable housing codes.[185] Those remedies include recovery of damages based

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resolution. For additional commentary, see K. Dutenhaver, *Basic Landlord-Tenant Law*, LANDLORD-TENANT PRACTICE I, § 1-14 (Ill. Inst. for CLE 1979).

More than forty states have enacted comprehensive laws regulating landlord-tenant relationships within their jurisdictions. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503, 523-24, (1982). In addition, many major municipalities have approved legislation which affects residential tenancies within their borders. *See, e.g.*, EVANSTON, ILL., ORDINANCE § 5-3 (June 1, 1975). Legislative bodies in Illinois and Chicago have considered such comprehensive legislation for many years. Prior to September 1986, any statutory regulation of the landlord-tenant relationship by either jurisdiction was piecemeal, focusing on specific problems in the relationship. For example, in 1963, the State of Illinois enacted the Tenant's Complaint of Violations of Governmental Regulations Act. ILL. REV. STAT. ch. 80, para. 71 (1985). This Act precludes retaliatory conduct by a landlord when a tenant reports violations of an applicable building code to a governmental authority. *Id.*

178. CHICAGO, ILL., ORDINANCE § 193.1 (September 8, 1986).

179. *Id.* at § 193.1-1.

180. *Id.*

181. For a representation of the responsibilities set forth in the Ordinance, see *id.* at § 193.1-4 (Tenant Responsibilities), § 193.1-7 (Landlord's Responsibility to Maintain), § 193.1-8 (Security Deposits), § 193.1-9 (Identification of Owner and Agents), § 193.1-10 (Notice of Conditions Affecting Habitability), and § 193.1-15 (Prohibition of Retaliatory Conduct by Landlord).

182. *Id.* at § 193.1-11 (Tenant Remedies).

183. EVANSTON, ILL., ORDINANCE § 5-3.

184. CHICAGO, ILL, ORDINANCE § 193.1.

185. *Id.* at § 193.1-11.

on the reduction in the fair rental value of the unit during the time when the defects exist, recovery of damages based on any difference in rent paid by reason of substitute housing, and recovery of damages based on a repair and deduct theory.[186] The RLTO requires landlords to supply tenants with a summary of the Ordinance when a tenancy is commenced.[187]

By enacting the RLTO, the City of Chicago has entered the modern era of landlord-tenant regulation. The Ordinance itself is only moderately reformative with regard to substantive rights and remedies, as compared to laws which license landlords or regulate rents. Thus, the RLTO will affect only minimally good landlords and tenants who maintain their properties. Nevertheless, the RLTO will promote a better balance in legal rights of landlords and tenants[188] in Chicago by providing effective remedies when either landlords or tenants fail to comply with the law or their rental agreements.[189]

VI. CONCLUSION

The Illinois courts decided numerous real property and real estate transaction issues during the *Survey* year. The Illinois

186. *Id.* at § 193.11(e).

187. *Id.* at § 193.1-17.

188. The legal principles applicable to the relationship between landlords and tenants in Illinois have long favored landlords. The common law in this area, rooted in English concepts of feudal property rights, granted virtually all rights to landlords and minimal rights to tenants. The tenant at common law had no direct cause of action and was somewhat unprotected. D. HILL, supra note 31, at 2. Case decisions in Illinois over the years similarly have reflected adherence to these common law precedents. *See supra* note 29 and accompanying text. Historically, in the legislative bodies in Illinois, real estate interests possessed much more political influence than tenants and, consequently, most statutory enactments favored landlords. Landlords, for example, have long had the right to terminate tenancies by written notice. *See* ILL. REV. STAT. ch. 110, para. 9-209 (Supp. 1986). Tenants in Illinois have no similar statutory right to terminate.

Finally, written leases in Illinois usually are standard forms written by representatives of landlords and offered to tenants on a take-it-or-leave-it basis. Most of these standard form leases carefully protect the interests of landlords while creating virtually no rights or remedies for tenants. In fact, these leases often contain language by which a tenant purports to waive various rights and remedies. *See* Dutenhaver, *Non-Waiver of the Implied Warranty of Habitability in Residential Leases*, 10 LOY. U. CHI. L.J. 41, 44 (1978).

189. The Ordinance has received significant attention from tenants' groups as well as various realtor organizations. The Chicago Board of Realtors brought suit in the District Court for the Northern District of Illinois and received a temporary restraining order, delaying the effectuation of the Ordinance. On November 3, 1986, Judge James B. Parsons vacated the temporary restraining order and denied the request for a preliminary injunction. Judge Parsons indicated, however, that upon plaintiff's request, he would certify the matter for appeal. *Chicago Board of Realtors v. City of Chicago*, No. 86 - 7763 (N.D. Ill. Nov. 3, 1986) (order denying preliminary injunction and vacating temporary restraining order).

Supreme Court extended the implied warranty of habitability to all residential property regardless of the absence of a building code in the municipality in which the property is located. Additionally, the court reaffirmed the parameters of the doctrine of lessor immunity and redefined the common law doctrine of emblements. On the transactional level, the Illinois Supreme Court ruled that the trustee to a land trust may serve both as trustee and creditor to that land trust. The Illinois legislature defeated several bills containing significant landlord-tenant reform. The City of Chicago, however, enacted the Residential Landlord and Tenant Ordinance which provides both landlords and tenants with significant protections.

AUTHORS' NOTE

The Illinois Legislature passed a new Mortgage Foreclosure Act after this article went to press. The new Mortgage Foreclosure Act seeks to simplify mortgage foreclosure procedure as well as to codify existing mortgage foreclosure law. The Act goes into effect July 1, 1987.