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The books are full of expressions to the effect that the law will do dirty work which a "court of conscience" is too refined to touch. Here are typical examples: "The company may have a valid legal obligation against her, but a court of equity will not enforce it when it is inequitable to do so. . . ."[1] or, "With an action at law available to appellants, with equity with the respondent, and taking cognizance of more delicate distinctions between right and wrong than may be had in courts of law . . . ."[2] The Comment to Section 367 of the Restatement of Contracts observes: "Even though the plaintiff's conduct has not been such as to cause a court to refuse him a judgment for damages . . . it may be such as to disentitle him to the remedy of specific performance." The Comment to Section 940 of the Restatement of Torts, under the heading "Unclean Hands" makes a sharp distinction between the "discretionary withholding of injunctive protection to a recognized right" and those misdeeds of a plaintiff which "operate, as a matter of substantive law, to prevent the existence of tort liability on the part of the defendant."

The precise question for analysis here is whether the distinction in law implicit in these quotations is also a distinction in fact. The rule of law obviously contemplates that there may be a legal remedy which survives a rejection of the equitable claim. Does such a remedy actually exist?

To find out the practical value of that remedy at law, we have examined 350 reported cases in which the defenses of clean hands, inadequacy of consideration, hardship, and misrepresentation have been raised in the past ten years. In selecting the basic list of 350 cases, we have excluded, first, the cases in which dismissal is solely on the grounds of adequacy of the remedy at law, since this involves application of tradition and rules apart

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† LL.B. 1953, Yale Law School. Professor Frank wishes to make explicit that while this comment can fairly be called a collaboration, the basic research was done by Mr. Endicott.

1. Savings Building & Loan Ass'n v. McCall, 20 Tenn. App. 68, 72, 95 S.W.2d 933, 935 (1935).

2. Eisenbeis v. Shillington, 349 Mo. 108, 116, 159 S.W.2d 641, 645 (1941).

from the traditions of "conscience"; second, the cases in which dismissal is on a balance of convenience, in which we assume that the plaintiff does get damages if they can be calculated; and third, the cases of dismissal for laches, since here the statute of limitations is either an absolute and obvious barrier or no barrier at all, and in the latter case we assume that a legal remedy is sought if it is of any value.

Of the 350 "pure conscience" cases, 150 most clearly turned on clean hands, inadequacy of consideration, hardship, or misrepresentation. Letters were sent to counsel of record inquiring as to the subsequent history of these 150 cases. Fifty-six responses were received. While the sample is too small to permit of firm conclusions, the results are sufficiently suggestive to be worth reporting as a possible starting point for analysis by others.

The fifty-six surviving cases were utterly diverse, involving specific performance and injunction, tort and contract. Yet in one respect they were uniform: In every instance, an equitable defeat was a total defeat. In no instance did the defeated claimant gain anything by virtue of any reserved legal rights; in only two instances did he so much as try.[3]

The reasons why equitable defeat uniformly worked total defeat are classified below.

Reasons for Defeat

1. *Equivalent legal defense.* In ten cases, claimant believed that the same defense which barred him in equity would, in perhaps slightly different form, bar him at law. For example, in *Ledirk Amusement Co. v. Schechner*,[4] plaintiff sued to require defendant to convey two theaters to him which, plaintiff alleged, defendant had purchased as his broker. But defendant "broker" was also thought by the seller to be the seller's agent, a fact known to the plaintiff; and relief was therefore denied on the theory that plaintiff's knowledge of defendant's duty to the seller gave plaintiff unclean hands in attempting to make the defendant his own agent. The plaintiff made no effort to recover at law, on the theory that the doctrine of *in pari delicto* would, in the light of his equitable defeat, bar his legal claim; and *in pari delicto* was in fact so used in two other cases.[5]

3. See the *MacRae* and *Furman* litigations, discussed in notes 15-18 infra.
4. 133 N.J. Eq. 602, 33 A.2d 894 (Ch. 1943).
5. These are the *McRae* and *Furman* matters, discussed in notes 15-18 infra. Similarly in Hoover v. Wright, 202 S.W.2d 83 (Mo. 1947), a claim for

Claims were abandoned on the belief that unclean hands would be found fraud at law;[6] equitable mistake might equal legal mistake;[7] or, analogically only, laches might be converted into breach of contract.[8] In one case, inadequacy of consideration freed defendant from an equitable estoppel, and thus permitted him to meet a damages claim with a defense of Statute of Frauds.[9] These cases point up the obvious fact that a legal remedy theo-

specific performance against the vendor in a land contract was defeated on the dual grounds of inadequacy of consideration and want of mental capacity by the vendor. The contract price was $100 an acre, and testimony showed the land was at most worth $125 an acre, not a large discrepancy. The evidence also showed that the defendant was "slipping" and had lost his business acumen; shortly after the trial he was declared to be of unsound mind. The plaintiff abandoned his claim in the belief that the mental state of the defendant would defeat him at law.

6. W. K. Ewing Co. v. Krueger, 152 S.W.2d 488 (Tex. Civ. App. 1941), action by vendor for specific performance of a land contract; defense, parol evidence showing that the plaintiff had told defendant at the time of contracting that defendant would not be held to the agreement. Held, dismissed because of plaintiff's unclean hands. Counsel for plaintiff wrote that if plaintiff had sued for damages only, "the defendant could still have injected the fact that the contract was procured by fraud and that having so procured there should be no recovery for damages based on it as it would be entirely vitiated, so the same result would have been reached." Letter from Clinton G. Brown, Jr., San Antonio, Texas, March 14, 1952.

7. Eisenbeis v. Shillington, 349 Mo. 108, 159 S.W.2d 641 (1941). Action for specific performance by vendor on land contract. Plaintiff's real estate agent had informed defendant that he could build a $14,000 house on the lot, whereas in fact building restrictions required a house valued at $20,000. Held, dismissed because, while there was no legal fraud, the mistake precluded specific performance. Counsel for plaintiff concluded that the prospects of recovery at law were too slim to warrant further expense.

8. Doering v. Fields, 187 Md. 484, 50 A.2d 553 (1947), action for specific performance on land contract by vendee. Plaintiff had 45 days in which to make tender, got a ten day extension; two days after the expiration of the extension, he did make tender which the defendant-vendor refused. His suit was dismissed solely for the delay in tender, and plaintiff's counsel concluded that if the same matter were raised at law, the two day delay would have been treated as breach of the contract.

9. Dessert Seed Co. v. Garbus, 66 Cal. App.2d 838, 153 P.2d 184 (1944). Plaintiff-vendee sought specific performance and damages on a contract for the sale of a crop of onion seed, which he had already partially resold. He had duly made tender, and defendant had repudiated the contract. The underlying facts, abridged from a letter of Mr. Reginald L. Knox, Jr., El Centro, California, March 14, 1952, were that the seed was of a type which, before the war, had been almost entirely imported. The torpedoing of one ship during the war, carrying almost an entire year's supply, caused the domestic price to jump from $1.00 a pound to $3.50 a pound. Defendant thereupon began producing onion seed in the Imperial Valley, and as foreign supply was more completely cut off, prices continued to rise to $4.50 and finally to $7.00 a pound. The court denied specific performance upon the ground of inadequacy of consideration, and then reached the issue of damages. At this point, defendant relied on the statute of frauds; plaintiff countered with the contention that defendant was barred from raising this defense by equitable estoppel; and the court, giving decision for defendant as to damages on the statute of frauds ground, held that defendant was not barred by equitable estoppel because, due to the inadequate consideration, there was no equity in the case.

retically reserved is useless if there is a legal parallel to the defense in equity.

2. *Absence of effective legal remedy.* In about 40 per cent of the cases there was no analogous legal remedy.

Good examples are actions to establish, rescind, or reform instruments. In one instance, plaintiff failed to secure cancellation of a deed to defendant, on the clean hands ground that the deed had been made to defraud plaintiff's creditors. Since the deed admittedly conveyed legal title, claimant had no remedy when cancellation failed.[10] In a similar case in which plaintiff sued to cancel for want of consideration a mortgage given to defendant, the defendant set up clean hands on the ground that the mortgage was given to defraud creditors, and also asked foreclosure. The court, with the stroke of Solomon, accepted the clean hands defense and refused cancellation; but it also held that the want of consideration might be offered defensively, and refused foreclosure. The decision left the property covered by a mortgage which could be neither cancelled nor foreclosed, a puzzle no legal action would solve.[11]

In other cases to reform or set aside contracts or enjoin torts, plaintiffs defeated in equity abandoned their suits because of inability to conceive of any useful legal remedy.[12]

10. Leeper v. Kurth, 349 Mo. 938, 163 S.W.2d 1031 (1942). One of plaintiff's creditors then sued him, got judgment, and had the deed set aside as a fraud on creditors.

11. Brown v. Rowland, 137 N.J. Eq. 462, 45 A.2d 592 (Ch. 1946). The attorney of record believes that the only solution for plaintiff is to wait twenty years, and then have the mortgage cancelled under a local arrangement under which mortgages can be cancelled when no payment has been made for that period.

A similar problem arose in Tutt v. Van Voast, 36 Cal. App.2d 282, 97 P.2d 869 (1939). Defendant was in possession of property, of which she had been mortgagee, by virtue of a foreclosure sale. Plaintiff possessed a sheriff's certificate on 45% of the property, based on an interest of one of the original mortgagors. Defendant had failed to join plaintiff in the foreclosure proceeding, and in the instant case, plaintiff sued for partition and accounting. The court dismissed, holding that plaintiff could not "do equity" and have clean hands except by paying his predecessor-in-title's share of the mortgage. Thereafter defendant "claimed the property openly and notoriously and paid all the taxes thereon for over a period of five years, after which time the title insurance company gave her a policy of title insurance and she sold it. The only one who could cause her trouble would of course, be Tutt, and under this decision . . . he could not become an actor against her until and unless he did equity." Letter from Mr. Lilburn Gibson, Ukiah, California, March 11, 1952.

12. Examples follow. In Smith v. Nix, 206 Ga. 403, 57 S.E.2d 275 (1950), plaintiff claimed to be a silent partner in defendant's liquor business and sought an accounting. Since Georgia law forbade silent partners in that business, the court denied the claim on grounds of unclean hands, leaving nothing further for plaintiff to do. Similarly, in Bute v. Stickney, 160 S.W.2d

3. *Procedural barriers to legal claims.* In the few remaining un-unified states, an equitable claim can easily be dismissed without prejudice to bringing a legal claim, and hence without fear of res judicata. However, in the code states, the commonly followed New York rule against splitting the legal and equitable elements of a cause of action requires a plaintiff either to present both elements of his claim at the beginning or to amend and proceed in the same cause after an equitable defeat.[13] To this limited extent, the rule against splitting bars a legal remedy.

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302 (Tex. Civ. App. 1942), plaintiff bought mineral lands as an agent of defendant, and transferred them to defendant in a written agreement. He subsequently sought to cancel this instrument and to impose a resulting trust on an interest in the lands which he claimed as a commission. However, plaintiff had received a secret payment from the vendor for negotiating the sale, and the court construed this to be disloyalty to his defendant-principal which warranted dismissal of the cancellation suit for reason of unclean hands. Plaintiff's attorney concluded that with the writing outstanding, there was no possible legal remedy.

In Dutch Maid Bakeries v. Schleicher, 58 Wyo. 374, 131 P.2d 630 (1942), the court refused to enforce an agreement not to compete, otherwise valid, on the ground that the agreement had been too hard a bargain. Mr. John U. Loomis, Cheyenne, plaintiff's attorney, in a letter of March 21, 1952, said, "The only effective remedy we had was an injunction to prevent competition by Schleicher. Damages at law would have been difficult, if not impossible, to prove. Under these circumstances, I doubt whether we ever considered the advisability of an action at law." As of 1952, both parties were still in business.

In Albright v. Karston, 206 Ark. 307, 176 S.W.2d 421 (1943), plaintiff, a bookmaker who had been raided, sought to enjoin police from further molestation of his property. He alleged that the raid was without a valid warrant. The court, denying relief, found that he had unclean hands, an occupational disease since it was illegal to make book in Arkansas. According to Mr. E. L. McHaney, Jr., Little Rock, Arkansas, March 4, 1952, no further action was taken. "As the report indicates, the great majority of the property, which was gambling equipment, was destroyed at the time it was taken. However . . . a clock and radio had not been destroyed. After the suit was concluded, the state police voluntarily returned this property to Karston." All that could do the plaintiff any substantial good was an injunction against further molestation.

In Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942), plaintiff sought an injunction and an accounting for patent infringement. The Court, finding attempted monopoly by plaintiff, dismissed for unclean hands. According to Mr. Still E. Ezell, St. Louis, Missouri, March 6, 1952, "Since we were interested in an injunction, there was no remedy for our client."

13. Hahl v. Sugo, 169 N.Y. 109, 62 N.E. 135 (1901), which originated as an action in the nature of ejectment to have defendant's house removed from its encroachment on plaintiff's property. Title was found to be in plaintiff, and a writ was issued to the sheriff which he returned because removal was impracticable. Plaintiff's motion to require defendant to remove the structure was denied. Instead of appealing, plaintiff brought a new action, in the nature of an action in equity, to compel defendant to remove. This second action was dismissed for splitting the cause of action, on the ground that there was only one cause of action and that plaintiff should have appealed the original order denying his motion that defendant remove the construction. See similarly Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N.W. 767 (1902), holding that a successful suit to enjoin a nuisance could not be followed by a separate action for damages. The point has been reiterated with particular frequency in the Texas cases included in this study; Bute v. Stickney, 160

Uncertainties as to the precise relationship of the clean hands doctrine, which is purely equitable, and the principle of *in pari delicto*, which is both legal and equitable, creates some problem as to whether an "equitable dismissal" based on haphazard references to both of these grounds of dismissal is res judicata in a suit for damages.[14]

For examples, in *MacRae v. MacRae*,[15] a husband to defraud creditors transferred land to his wife, and, for the same reason, they both then transferred to *B*. The wife sued the husband and *B* for reconveyance of the property, which was denied on the grounds that the parties were *in pari delicto* and had unclean hands. When the wife thereafter sued *B* for damages for breach of contract to reconvey, the court held the first decision res judicata and a bar to the suit.[16] In *Furman v. Furman*, a husband and wife had put funds in joint bank accounts under fictitious names to avoid deficiency judgments and the effects of bank-

S.W.2d 302 (Tex. Civ. App. 1942); W. K. Ewing Co. v. Krueger, 152 S.W.2d 488 (Tex. Civ. App. 1941); Rabbe v. Federal Land Bank of Houston, 161 S.W.2d 1097 (Tex. Civ. App. 1942).

14. Properly considered, the rule of *in pari delicto* is both a traditional subdivision of the clean hands maxim and a rule of law. Pomeroy's Equity Jurisprudence § 940 (5th ed. 1941), and see also id. § 402; Barnes v. Starr, 64 Conn. 136, 28 Atl. 980, 984 (1894). In the strict sense, *in pari delicto* covers only illegal and fraudulent conduct, in which both parties are substantially equally implicit; while the clean hands rule applies to conduct which is merely unconscionable, and of course has no requirement of equivalent responsibility. Loose use of these terms can make it acutely mystifying as to whether an order denying equitable relief was intended to be rested on *in pari delicto*, technically considered (in which case there can obviously be no legal relief on the theory of res judicata), or on clean hands (in which case at least theoretically there might be legal relief). An example of a conscientious effort to determine the point is the opinion of Judge Shientag, in Furman v. Furman, 34 N.Y.S.2d 699, 178 Misc. 582 (1941), more fully described infra note 18.

15. 37 Ariz. 307, 294 Pac. 280 (1930).

16. MacRae v. Betts, 40 Ariz. 454, 14 P.2d 253 (1932). Here plaintiff claimed that she had conveyed the title in trust to *B* to reconvey if he could not exchange the property at issue for property in Los Angeles. Held, that plaintiff was still relying on the original deed to establish her own title, and that the first decision was res judicata as to this. Subsequently the husband remarried and, shortly before his death, conveyed all his property to his second wife. After his death, the second wife sued the first wife (plaintiff in the above cases) alleging that the original conveyance was void as against creditors of the husband's estate. The second wife was the only creditor, and this by virtue of having paid the funeral expenses. The second wife's suit was dismissed on the ground of *her* unclean hands, since it was the transfer of his property to her immediately before death that made the estate unable to pay its debts. MacRae v. MacRae, 57 Ariz. 157, 112 P.2d 213 (1941). (The property had come back to the first wife most circuitously; she had mortgaged the property to her lawyers as security for legal fees before the Arizona Supreme Court's decision in the first case of the sequence of three. After the second case, the lawyers sued her and Betts to foreclose the mortgage; it was foreclosed, and after title had been acquired by the lawyers, it was deeded by them back to their client, the first wife.)

ruptcy. The wife withdrew the funds, investing part of them in an annuity, and the husband sued her to recover that part of the funds and to establish a lien on the annuity policy. The court denied relief on clean hands grounds, with an allusion to the lawless purpose for which the money was deposited but with no specific reference to *in pari delicto*.[17] The husband then sued at law to recover money fraudulently concealed from creditors, and this second suit was barred on the grounds that since the identical facts and issues were involved, and the parties had been *in pari delicto*, the first suit was res judicata.[18]

4. *Practical barriers to legal claims.* In almost half the cases, plaintiff lost interest in the dispute. Property values had changed,[19] damages were not worth the bother,[20] the case had become moot,[21] the only solvent defendant had been absolved of

17. 17 N.Y.S.2d 907 (1939), aff'd without opinion 259 App. Div. 988, 20 N.Y.S.2d 1017 (1940), appeal dismissed 284 N.Y. 591, 29 N.E.2d 666 (1940).

18. Furman v. Furman, 262 App. Div. 512, 30 N.Y.S.2d 516 (1941), two judges dissenting on the ground that since the original dismissal was on clean hands grounds, plaintiff might still be entitled to recover at law; aff'd without opinion 287 N.Y. 772, 40 N.E.2d 643 (1942).

After the text decision, the wife purchased the deficiency judgment which the couple had been trying to escape. The cost was low, and she used part of "the very money" she had stolen from her husband, vesting the deficiency judgment in her paramour. In a suit against the wife and her paramour to declare the husband the owner of the deficiency judgment, the defendants offered the defenses of res judicata and clean hands. Since the parties were different, res judicata was not applicable; and while the court had considered the parties' misdeeds equal when the wife bought an annuity, it held that when she bought a deficiency judgment for the purpose of helping her friend to harass her husband, she had gone too far; her conduct had become so much worse than her husband's that he was allowed to proceed. Furman v. Krauss, 175 Misc. 1018, 26 N.Y.S.2d 121 (1941), aff'd without opinion, 262 App. Div. 1016, 30 N.Y.S.2d 848 (1941) (but see for related discussion of the case, Furman v. Furman, 262 App. Div. 512, 513, 30 N.Y.S.2d 516, 517 [1941]).

19. W. K. Ewing Co. v. Krueger, 152 S.W.2d 488 (Tex. Civ. App. 1941). The apartment building at issue in a suit for specific performance of a purchase contract was sold to another person at a higher price.

20. McKee v. Fields, 187 Ore. 323, 210 P.2d 115 (1949). Plaintiff sought a mandatory injunction to compel defendant to remove a cement wall which encroached from ⅛ inch to 4¾ inches on plaintiff's property. While the suit was pending, defendant made legitimate efforts to have a third person buy plaintiff's property with a view to settlement of the boundary dispute, and plaintiff dissuaded the third person with a fanciful argument that the purchase would be illegal. This conduct was held to amount to unclean hands on the part of plaintiff, and the court dismissed the suit. Mr. Harold A. Olson, North Bend, Oregon, December 3, 1951, wrote that, "This seems to be one of those cases in which many interesting and difficult points of law could be raised, but in actual practice when the value of property is small, neither the client nor the attorney can afford to spend time and effort which might be necessary to exhaust all legal possibilities and remedies. There seems to be a theoretical and a practical side to the practice of law."

21. In Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 50 (1941), aff'd without opinion 263 App. Div. 802, 32 N.Y.S.2d 129 (1941), plaintiff sought

any responsibility,[22] and so on through all the practical alternatives[23]—including one case in which the plaintiff solved at least this one of his problems by marrying the defendant.[24] In one

to compel defendant landlord to permit telephone company employees to install telephone wires for service to plaintiff. Defendant's reluctance stemmed from an underlying labor dispute involving other persons working on the project. The request was denied, and plaintiff was left to his remedy at law. Mr. Walter G. Merritt, New York City, July 3, 1951, replied, "In the course of time, however, which elapsed the building trades working on the Parkchester development finished their work so that they lost their strategic position to prevent the telephone employees from resuming work and completing the job. The result was that finally after many extensions of time the case was dismissed as moot."

In Crouch Transp. System v. Hargus, 35 F. Supp. 148 (W.D. Mo. 1938), a decision denying an injunction against the state's interference with plaintiff's business resulted in a dissolution of plaintiff corporaton and its withdrawal from Missouri, mooting the issue. In Devon Knitwear Co. v. Levinson, 19 N.Y.S.2d 102, 173 Misc. 779 (1940), dismissal of an application for an injunction against picketing was followed by settlement of the labor dispute, which mooted the matter. In Renaud Sales Co. v. Davis, 104 F.2d 683 (1st Cir. 1939), an application for injunction against infringement of trademark and unfair competition was dismissed for want of clean hands; but plaintiff company had been formed only to liquidate an inventory, and the job was done by the time the case was over.

22. In Savings Building & Loan Ass'n v. McCall, 20 Tenn. App. 68, 95 S.W.2d 933 (1935), the net effect of a complicated fact situation was that a claim was made on a destroyed note against the maker and two sureties. The case was dismissed as to the only solvent defendant because of a want of clean hands by the plaintiff. Mr. Kent Herrin, Johnson City, Tennessee, September 4, 1951, reported that the release of the solvent defendant had the effect of making any further action appear valueless, and hence no further legal action followed.

23. In Neely v. Merchants Trust Co. of Red Bank, N.J., 113 F.2d 953 (3d Cir. 1940), cert. denied 311 U.S. 705 (1940), plaintiff was completely out of funds, so that it was unlikely that he went further for this reason if for no other. In Heffron v. Rosenberg, 51 Cal. App.2d 156, 124 P.2d 74 (1942), any further action would have required one of the parties to admit perjury in a prior suit, and this was sufficient to deter further proceedings.

In Abell v. Safe Deposit & Trust Co., 192 Md. 438, 64 A.2d 722 (1949), the losing party took no further action because he was substantially satisfied with the results of his "loss." A company had issued 1,000 bonds, to be redeemed serially, secured by a $1,000,000 mortgage. Almost all the bonds had been redeemed by the time of suit except plaintiff's $13,000 worth, and defendant, trustee of the mortgage, had relinquished the mortgage to the company. Plaintiff sued to set aside that release as void. The court, agreeing that the trustee had no power to relinquish the mortgage so long as any bonds were outstanding, felt that it was unconscionable to maintain a $1,000,000 mortgage to cover a $13,000 debt, particularly when the company needed capital to expand. The court therefore denied the equitable remedy, suggesting methods of obtaining damages. The attorney involved replied to our inquiry that his client secured, by virtue of this decision, what he really wanted; since the decision, the trustee has called the bonds serially and on the date of redemption, as provided in the original indenture, and interest is meanwhile being regularly paid. In case of any default, it will be time enough for the client to avail himself of the legal remedies suggested by the decision.

24. Coker v. Supreme Industrial Life Ins. Co., 43 So.2d 556 (La. App. 1950). Plaintiff, alleging ownership of the stock in the hands of the individual defendant on the ground that he had paid for them and had vested them in defendant only to qualify her for the board of directors, sued to enjoin her from exercising control of the stock and the company from holding any meetings of stockholders. The suit was dismissed on clean hands grounds

instance in which an action at law might have succeeded, plaintiff left the jurisdiction for personal reasons and abandoned the suit.[25] In another case, a vendor seeking specific performance became most content to forget the matter when his property increased in value by 50 per cent while the equitable suit was on appeal.[26]

5. *Settlements.* Six cases were settled after the equitable defeat, with none of them involving any benefit to the plaintiff based on a theory of a residual legal interest. An example of a settlement which did no more than clean up the muddle left by the equitable decision is *Gavina v. Smith*,[27] in which defendant had an option for an oil and gas lease from plaintiff. Defendant tendered his funds, which plaintiff rejected, and defendant paid the money in escrow. Plaintiff sued to quiet title, alleging that defendant's exercise of the option created only an executory contract to make a lease. The court denied relief for want of clean hands, since plaintiff's own behavior had prevented execution of the contract. The decision left plaintiff with land to which he could not quiet title, and defendant with an option he could not enforce. The parties settled with a new lease.

The parties were left in a similarly unsatisfactory state in *Byers v. Fuller*.[28] Plaintiff leased oil and gas lands to defendant, defendant having an option to purchase and an obligation to clean the wells. Plaintiff sued to recover possession when defendant failed to clean wells, and defendant counterclaimed for specific performance of the option. The court refused possession to plaintiffs, because there was no forfeiture provision in the

because of a statutory requirement that directors be bona fide shareholders. This decision precluded the injunction but did not settle the issue of ownership of the stock, and the case was fixed for trial on that point. It was subsequently dismissed because of the marriage.

25. Rech v. Borst, 63 N.Y.S.2d 552 (1946), was an action of specific performance of a contract to purchase land which was dismissed because of misrepresentations by the plaintiff which were neither fraudulent nor malicious. Plaintiff then left the state for unrelated business reasons, and abandoned the matter.

26. Clay v. Landreth, 187 Va. 169, 45 S.E.2d 875 (1948) was a suit for specific performance by a vendor on a land contract. It was dismissed on the ground that plaintiff had known and defendant had not of impending zoning alteration which would make the land useless for defendant's purposes, and that therefore it would be inequitable to enforce the contract specifically. Mr. James P. Hart, Jr., Roanoke, Virginia, February 4, 1952, wrote, "While the case was being tried in the appellate court and shortly subsequent thereto land values advanced to such an extent that it became obvious to the plaintiff that the land had advanced from the $8,000 contract price to about $12,000. Therefore, there was no action at law and no settlement."

27. 25 Cal.2d 501, 154 P.2d 681 (1944).

28. 58 F. Supp. 570 (E.D. Ky. 1945).

lease, but it also refused specific performance on the theory that defendant had unclean hands for failing to comply with the agreement to clean the wells. This left plaintiff as lessor of lands of which he could not get possession, and defendant as lessee of lands he wanted to own. In settlement, plaintiff bought the surrender of the lease for the amount of defendant's original investment plus a good consideration.

The other settlements also attached no value to a theoretically still extant legal claim. Here, as in all the other categories discussed, the plaintiff in fact lost as much by his equitable defeat as if his defeat had been theoretically complete.

Conclusions

In view of the smallness of the sample, only tentative conclusions can be offered. These are:

First, a defeat because of a defense in equity is in fact final, regardless of theoretical reservations.

Second, that in one basic sense the legal system is operating satisfactorily in these cases. One proceeding ought to terminate these matters without duplicating litigation even in the same case, and the system as it works almost never results in second proceedings.

Third, there is here at least a possibility of serious judicial self-deception. Whether judges are deluded on this score is not known, and it is possible that, when they recite a "seek thy relief at law," they are aware that this is only a form of words. If, however, the judge occasionally denies an equitable remedy because he really believes that a legal remedy somehow remains, and if without that mistaken belief he might have given judgment for the plaintiff, then serious injustice is done.

If all the defenses in equity under discussion here were bodily and overtly taken out of the cloud of conscience and transferred to law, this particular small problem would disappear. This study is obviously not broad enough to warrant a conclusion as to the wisdom of such a transfer. It is broad enough to suggest that so far as claimants in equity are concerned such a transfer would not cost them anything substantial; and it might help them by increasing the conscious responsibility of the judge.

At a minimum, the law should be rewritten to dispel any

illusion there may be that an equitable defeat on grounds of clean hands, want of consideration, hardship, or misrepresentation leaves a valuable legal right. Whether or not the sophisticated are fooled, the language as it stands is needlessly misleading to the uninitiated.