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Equity -- 1961 Tennessee Survey

T. A. Smedley

EQUITY—1961 TENNESSEE SURVEY

T. A. SMEDLEY*

During the past year noteworthy decisions have been handed down by the Tennessee courts relating to the availability of injunctive relief to restrain the perpetration of a nuisance, the commission of a trespass, the violation of a non-competition covenant, and the prosecution of an action at law. A suit for specific performance required a determination on the issue of whether the written memorandum was sufficient to satisfy the statute of frauds; and a ruling on the application of the clean hands maxim was necessary in a suit to remove a cloud on title. Finally, a clarification was made regarding a chancellor's power to set aside a consent decree.

I. INJUNCTION

A. Perpetration of a Nuisance

The Middle Tennessee Court of Appeals took advantage of an opportunity to demonstrate the flexibility and resourcefulness which equity is capable of exercising in deciding sensitive issues based on conflicts of the legitimate interests of different segments of a community—in this instance, residential property owners and the operators of a lawful business. In *Crabtree v. City Auto Salvage Co.*,[1] plaintiffs, several residents of the area in which defendant auto salvage company is located, sued to enjoin the operation of the business on the ground that it constituted a nuisance offensive and injurious to the health, safety and comfort of plaintiffs and detrimental to the enjoyment of their property. Defendant denied that its business created a nuisance, pointed out that the county government had previously

*Professor of Law, Vanderbilt University; member, Illinois and Virginia Bars.

1. 340 S.W.2d 940 (Tenn. App. M.S. 1960).

refused to impose zoning regulations in this section, and noted that two other auto salvage companies were carrying on the same type of activities in the vicinity. However, the chancellor found that defendant's business created an unsightly appearance, produced much noise, dust, smoke and odor, greatly lessened the peaceful enjoyment of the homes nearby, seriously depreciated residential property values, and was of no benefit to the community. An actionable nuisance being found to exist, defendant was permanently enjoined from operating in that area after a period of 120 days in which to liquidate and remove the business.

The court of appeals, while refusing to overrule the finding below that a nuisance was being perpetrated, held that under the circumstances of this case the chancellor was not justified in completely enjoining the operation of the business. It was noted that auto salvage is not an unlawful activity which can be classified as a nuisance per se; and while the legislature, through exercise of its zoning powers, may entirely exclude lawful enterprises from certain areas, a court cannot forbid such businesses but can only prohibit their being conducted in such manner as to constitute an unreasonable interference with the use and enjoyment of other property in the vicinity. Therefore, the injunction was modified to restrain defendant from operating its salvage yard in a way which would cause excessive amounts of dust to be raised and would create smoke or noxious odors in the neighborhood. The court also noted that should plaintiffs' other charges of offensive noise and pest-infestation be later substantiated, the relief would be extended to cover those factors.

Controversies similar to that of the instant case, though continually being presented to the courts for adjudication, are not susceptible to easy determination on the basis of crystallized rules of law. In fact, apparently inconsistent rules may be cited on behalf of each contestant. On the one hand, a lawful business is not enjoinable as a nuisance per se,[2] and persons who choose to reside in an unrestricted area where businesses are located must submit to the discomforts and annoyances which are incidental to the conduct of commerce.[3] On the other hand, every business must be conducted with due regard to the rights of others, and even a lawful business may become a nuisance by reason of the improper manner in which it is conducted.[4]

2. Cumberland Tel. & Tel. Co. v. United Elec. Ry., 42 Fed. 273, (C.C. M.D. Tenn. 1890); Simpson v. Du Pont Powder Co., 143 Ga. 465, 85 S.E. 344 (1915).

3. L. D. Pearson & Son v. Bonnie, 209 Ky. 307, 272 S.W. 375 (1925); Thompson v. Evangelical Hosp. Ass'n, 111 Neb. 191, 196 N.W. 117 (1923).

4. Dauberman v. Grant, 198 Cal. 586, 246 Pac. 319 (1927); Clinic & Hosp. Inc. v. McConnell, 241 Mo. App. 223, 236 S.W.2d 384 (1951); Friedman v. Keil, 113 N.J. 37, 166 Atl. 194 (1933); Kirkman v. Handy, 30 Tenn. 406 (1850).

Thus, the court must consider all of the factors involved in the particular situation at bar, and render a decree which allows the challenged business establishment to operate with the greatest freedom consistent with assuring the protesting neighbors their right to reasonable use and enjoyment of their property.[5] By attempting to reach such a result in the *Crabtree* case, the court, though it probably pleased neither litigant and though it may encounter difficulties in enforcing the decree, properly served the purpose of equity to resolve conflicts of interests of property owners in a manner which promises to be most beneficial to society generally.[6]

The case had an objectionable aspect also. At one point in the opinion the observation was made that

> a Court of equity will enjoin and abate nuisances without a judgment at law establishing its existence, where the fact of the nuisance is made manifest by certain and reliable proof, and the resulting injury is of a character that cannot be compensated adequately by damages.[7]

Though the statement apparently had no bearing on the outcome of the case, it unfortunately may further the survival in Tennessee of the nonsensical rule that, where there is any real doubt as to the existence of a nuisance, equity cannot take jurisdiction of a suit for an injunction until plaintiff has obtained a judgment at law which establishes the fact that a nuisance is being perpetrated.[8] Seemingly born in misunderstanding, the rule has persisted with remarkable tenacity but with little or no logical basis. Prior to 1800, the English chancellors imposed no such condition on equity's power to enjoin a nuisance.[9] In 1784, Lord Thurlow ruled, when asked to enjoin a nuisance interfering with an easement, that since the existence and extent of plaintiff's easement was in dispute, equity would not act until the rights under the easement had been settled by a law action.[10] This ruling merely required plaintiff to resort to law to establish his rights in the property affected, similar to the requirement that a plaintiff must establish his title in a law action before seeking an injunction against a trespass on the land claimed by both

5. Higgins v. Decorah Produce Co., 214 Iowa 276, 242 N.W. 109 (1932); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919); Martin v. Williams, 141 W. Va. 595, 93 S.E.2d 835 (1956).

6. Tuebner v. California-Street R.R., 66 Cal. 171, 4 Pac. 1162, 1164 (1884); "The law looks to a medium course to be pursued by each for the mutual benefit of all." For an excellent demonstration of such adjudicative process, see Smith v. Staso Milling Co., 18 F.2d 736 (2d Cir. 1927).

7. 340 S.W.2d at 945.

8. For a general discussion of this rule, see WALSH, EQUITY § 34 (1930).

9. McCLINTOCK, EQUITY § 142 (2d ed. 1948). *E.g.*, Bush v. Western, Pr. Ch. 530, 24 Eng. Rep. 237 (1720).

10. Weller v. Sineaton, 1 Bro.C.C. 572, 28 Eng. Rep. 1304 (Ch. 1784).

him and the trespasser.[11] However, in 1811, Lord Eldon seems to have translated Thurlow's decision into a rule that there must be a prior legal adjudication of the fact of the existence of a nuisance though no dispute as to plaintiff's title or right in the land is involved.[12] Chancellor Kent is credited with having introduced this view into New York law,[13] and the prestige of the names of Eldon and Kent led to its widespread adoption among the state courts.[14]

A remarkable parallel exists in the development of the law in Tennessee on this point. In *Caldwell v. Knott*,[15] the earliest relevant case found, plaintiff sought the aid of equity to abate a nuisance in the form of a mill dam erected by defendant which backed up water onto plaintiff's land. Defendant claimed that the dam had been built with the consent of plaintiff's predecessor in title and under a license to overflow his land. The Tennessee Supreme Court held that the question of whether plaintiff had a right to have his land free of the overflow from the dam—that is, whether the license to overflow was actually granted, and whether, if so, it was revocable by plaintiff —must be decided in a court of law before equity could take jurisdiction to give relief. It was there declared:

> The *right* must be clear, manifest and undoubted, otherwise a court of equity cannot interfere, until the *right* is ascertained at law. The *right* must be exclusive in its character, that is, it must be inconsistent with the assertion of a similar *right* in the defendant.[16]

It seems quite obvious that in using the word "right" the court was referring to plaintiff's legal interest in the land for which he sought equitable protection, just as Lord Thurlow referred to the extent of the right under the easement for which protection was sought in his case. However, only three years after the *Caldwell* decision, the court unaccountably extended its earlier ruling by stating that

> before a court of chancery would take jurisdiction in such a case, *the existence of the nuisance* must be established at law; but in a case where the *right* is clear and the *existence of the nuisance* manifest. . . . a court of chancery interposes to prevent the mischief.[17]

These propositions have been repeated with approval in several subsequent Tennessee decisions, though in most of those instances, as in

11. CLARK, EQUITY § 192 (1954); Pillsworth v. Hopton, 6 Ves.Jr. 51, 31 Eng. Rep. 933 (Ch. 1801).
12. Attorney-General v. Cleaver, 18 Ves.Jr. 211, 34 Eng. Rep. 297 (Ch. 1811). See Lewis, *Injunctions Against Nuisances and Rule Requiring Plaintiff To Establish His Right at Law*, 47 U. PA. L. REV. 289 (1908).
13. Van Bergen v. Van Bergen, 3 Johns. Ch. R. 282 (N.Y. 1818).
14. See cases cited in WALSH, op. *cit. supra* note 8, at 176 n.22.
15. 18 Tenn. 209 (1836).
16. 18 Tenn. at 211. (Emphasis added.)
17. Vaughn v. Law, 20 Tenn. 123, 134 (1839). (Emphasis added.)

the *Crabtree* case, the court did not regard the first part of the rule as restricting equity's interference, since the existence of defendant's wrong was found to be manifest.[18]

Though it did no harm in the instant decision, the resurrection in the *Crabtree* opinion of this principle of restraint on equity's authority to enjoin nuisances is regrettable. No good reason has ever been advanced to show why an equity court is not fully as capable of determining the existence of a nuisance as is a law court. The question of whether certain conduct creates a nuisance is not one which a jury has any especial competence to decide, and chancellors are regularly called on to resolve other issues of fact presenting as much or greater difficulty. The requirement of a separate law action to establish that a nuisance is being perpetrated before allowing equity to enjoin the wrongful conduct breeds multiplicity of suits, delay in settlement of controversies, and the sustention of irreparable injury by the property owner. Fortunately, the rule has been repudiated in England, in New York, where it had its American origin, and in a number of other states.[19] Especially should this anomalous limitation on equity's power be cast off in Tennessee, where the jurisdiction of the law and chancery courts is so largely concurrent,[20] and where the right of jury trial has been so broadly extended to equity cases.[21]

B. Commission of a Trespass

In direct contrast to the restrictive attitude the Tennessee courts have manifested in regard to nuisance abatement cases, the court of appeals for the middle section has recently exercised sound discretion in ignoring a traditional but unjustifiable limitation on equity's jurisdiction to enjoin trespass to land.[22] Though there are some early instances of the English chancery courts issuing injunctions against trespasses, the view was established in England by the end of the eighteenth century that equity had no such power, and this restriction was brought into American law by a decision of the New York court in 1814.[23] The basis for this limitation has been the subject of con-

18. Wall & Co. v. Cloud, 22 Tenn. 181 (1842); Clack v. White, 32 Tenn. 540 (1852) (injunction denied on other grounds); Weakley v. Page, 102 Tenn. 178, 53 S.W. 551 (1899). See Kirkman v. Handy, 30 Tenn. 406 (1850), where a request for an injunction was refused because defendant's conduct which plaintiff alleged would constitute a nuisance was as yet only a future threat, not a present actuality.

19. See WALSH, *op. cit. supra* note 8, at 176-77; DE FUNIAK, EQUITY 68 (2d ed. 1956).

20. TENN. CODE ANN. § 16-602 (1956).

21. TENN. CODE ANN. § 21-1011 (1956); Moore v. Mitchell, 329 S.W.2d 821 (Tenn. 1959).

22. Doss v. Tennessee Prod. & Chem. Corp., 340 S.W.2d 923 (Tenn. App. M.S. 1960).

23. MCCLINTOCK, *op. cit. supra* note 9, § 133.

siderable speculation. Perhaps it lay in the cautious inclination sometimes exhibited by the English chancellors to avoid deciding controversies involving issues classically within the domain of the common law courts—such as the determination of title to land.[24] It has also been suggested that certain procedural and physical factors existing at the time this rule developed rendered the chancery courts inappropriate tribunals for trying land titles.[25] These considerations are, of course, hardly relevant to the present day, and there seems no longer to be any sound reason for equity's refusing to take jurisdiction of a case to enjoin a trespass to land. The hostility between and the strict separation of the common law and chancery divisions of the judiciary are conditions long past, and certainly the chancellors are now generally as capable as are common law judges of trying title disputes. The issues involved in such disputes are likely to be largely issues of law rather than of fact, so that in either court they would be decided by the court rather than the jury. And in any case in which the circumstances are such that plaintiff will suffer irreparable injury unless defendant is restrained from trespassing, the inadequacy of the legal remedy sustains and demands the intervention of equity.

The textwriters evidence some difference of opinion as to the extent of acceptance of the view that equity will enjoin a trespass when the remedy at law is inadequate, even though a land title dispute must be resolved in the process.[26] In the code states, the merger of law and equity has removed the question; and even where separate systems are in operation, it is clear that in many situations equity can best fulfill its function of protecting against irreparable injury by intervening to enjoin a trespass, regardless of whether or

24. See Chalk v. Wyatt, 3 Mer. 688, 36 Eng. Rep. 264 (Ch. 1810), where an injunction against trespass was granted, but the chancellor declared he would not have given relief had not plaintiff first established his title at law; Hickman v. Cooke, 22 Tenn. 640, 642 (1842); Erhardt v. Boaro, 113 U.S. 537, 538 (1885).

25. CLARK, *op. cit. supra* note 11, at 278-79: "One [reason] was that the method of trial by deposition in equity courts was not as satisfactory for dealing with complicated questions of property or torts as a trial in open court which is the normal method under the common-law. . . . The other was that at that time in England the chancery court sat only in Westminster while common-law courts sat in various parts of the country; hence after the method of trial had been changed and witnesses were examined in open court it would cause great expense to have them all come to London."

26. *Compare* MCCLINTOCK, *op. cit. supra* note 9, at 362 ("[T]his form of relief has become one of the most common forms of injunctions.") *with* CLARK, *op. cit. supra* note 11, at 279-80 (only a temporary injunction pending settlement of title at law will be granted), *and with* WALSH, *op. cit. supra* note 8, at 168 ("In non-code states the prevailing rule seems still to be that a dispute of title must first be settled by an action at law before equity will intervene . . . .").

not a title dispute must be settled in the process.[27]

It is not clear that the Tennessee courts ever have recognized this restriction on their jurisdiction in trespass cases. In 1842, the supreme court conceded that chancery courts have no jurisdiction "to try a mere simple legal title to land"; but it added immediately: "Such a power is exercised only in difficult and complicated cases, affording peculiar grounds for equitable interference."[28] No explanation of the precise meaning of the last clause was advanced, but the threat of irreparable injury would ordinarily be regarded as "peculiar grounds for equitable interference." Though no decision has been found expressly declaring that equity has jurisdiction to enjoin a trespass where defendant disputes the validity of plaintiff's title, there are several instances in which this action has been taken by the courts, without discussion in the opinion as to the existence of jurisdiction.[29] The current decision of *Doss v. Tennessee Products & Chemical Corp.*[30] follows the same pattern, and gives further evidence that the historical limitation on equity's trespass-injunction jurisdiction, if it ever applied in Tennessee, has now been abandoned here. In the *Doss* case, the trespass which the chancellor was asked to enjoin was of a type causing definite irreparable injury to land—timber clearing and strip mining operations—and so equitable relief was obviously needed urgently. On the other hand, the situation presented a title dispute which must have been very difficult to resolve. The parties supposed that they had purchased adjacent tracts by deeds from a prior owner of both tracts, but the descriptions in the two deeds which would fix the boundary between the tracts were inconsistent with each other and were phrased in most unsatisfactory terms.[31] Nevertheless, the chancellor made his determination as to the location of the boundary, found that plaintiff's claim of title to the disputed area was valid, and enjoined further trespassing by defendant; and the court of appeals affirmed without expressing any doubt as to the propriety of the chancery court's taking jurisdiction.

In order to provide a complete remedy for plaintiff, the chancellor

27. See Shipley v. Ritter, 7 Md. 408 (1855); WALSH, *op. cit. supra* note 8, § 32.

28. Hickman v. Cooke, 22 Tenn. 640, 642 (1842).

29. Tuggle v. Southern Ry., 140 Tenn. 275, 204 S.W. 857 (1918); Scott v. Goss, 43 Tenn. App. 659, 311 S.W.2d 326 (E.S. 1957). And the Tennessee court has declared that equity has jurisdiction of cases involving bills to remove cloud on title even though plaintiff may be in position to bring an action at law to try the title. Almony v. Hicks, 40 Tenn. 39 (1859).

30. 340 S.W.2d 923 (Tenn. App. M.S. 1960).

31. For example, one monument in plaintiff's deed was "a rock in Higgins Gap," and the line was said to run "eastwardly to an oak corner in line of [a railroad]." The surveyor could not locate such an "oak corner," but found "a large stump hole" which he took to be the remains of that particular monument.

awarded him supplemental legal relief in the form of damages for the coal already removed from plaintiff's land before the suit was brought. This action was, of course, quite proper as a means of avoiding the imposition on both parties which would have resulted from multiple suits. The court of appeals approved the chancellor's setting of the damages at $1750 because the evidence showed that 5000 tons of coal had been taken from plaintiff's land and "a reasonable value thereof was thirty-five cents a ton . . . ."[32] By this simple declaration, the court avoided a controversy which has given trouble in other jurisdictions as to the proper formula for measuring the damages for wrongful mining of coal or other materials from the land of another.[33]

In setting the measure of such damages, American courts ordinarily have made a distinction between a deliberate wrongdoer and an unintentional wrongdoer. The former, having acted willfully in extracting and applying another's minerals to his own use, is generally required to pay damages in the amount of the full market value of the commodity after it was mined and ready for use.[34] Thus, plaintiff receives not only the value of the materials as they lay in his land, but also the enhanced value produced by defendant's efforts in mining, transporting, and otherwise processing them. Since the latter part of the award is not needed to compensate plaintiff for his actual loss, it seems to be added as a means of punishing defendant for his deliberate misconduct. The unintentional wrongdoer—typically one who mines in good faith, mistakenly thinking the minerals to be in land in which he owns the mineral rights—does not need to be punished; so plaintiff's damages should be compensatory only, and are generally said to be the value of the minerals as they previously lay in place in plaintiff's land.[35] Adoption of this measure, however, merely leads to the further problem of how to evaluate unmined minerals. Different courts have supplied different answers. One view is that "value in place" refers to royalty value, and so plaintiff is to be awarded whatever he could have obtained in royalties from the sale of the mining rights.[36] This rule has been criticized because it has the effect of forcing plaintiff to sell the mining rights to defendant and allows defendant to make a profit, since he keeps all of the proceeds from his sale of the minerals and is charged only with the royalty

32. 340 S.W.2d at 929.

33. For general discussions, see MCCORMICK, DAMAGES 495-96 (1935); Note, 39 KY. L.J. 236 (1951).

34. Ward v. Spadra Coal Co., 168 Ark. 853, 272 S.W. 353 (1925); Tracy v. Athens & Pomeroy Coal & Land Co., 115 Ohio St. 298, 152 N.E. 641 (1926).

35. Warrior Coal & Coke Co. v. Mabel Mining Co., 112 Ala. 624, 20 So. 918 (1896); 3 SEDGWICK, DAMAGES § 935 (9th ed. 1920); *Developments in the Law—Damages*, 61 HARV. L. REV. 113, 162 (1947).

36. Falls Branch Coal Co. v. Proctor Coal Co., 203 Ky. 307, 262 S.W. 300 (1924); Trustees v. Lehigh Valley Coal Co., 241 Pa. 481, 88 Atl. 768 (1913).

payment. Even though defendant was innocent in his wrong-doing, the law should not allow him to profit by his illegal acts, and so most courts have adopted yet another measure of damages to prevent that result. This measure awards plaintiff the value of the minerals at the mouth of the mine, less the reasonable expense of mining them (or if defendant has marketed the minerals, the value when sold, less the reasonable expense of mining and marketing).[37] This view is calculated to make allowance to defendant for his expenses in enhancing the value of the minerals but to deprive him of any profits from his misadventure, while giving plaintiff the full amount he could have expected to obtain by mining the minerals himself.

From the cryptic statement in the *Doss* opinion, it is impossible to determine what view as to the measure of damages the court applied, or, indeed, whether the court realized that there were different measures from which to choose. One may suspect that counsel simply failed to take note of the matter. In fact, answer to the damages problem in this case appears to have been supplied in 1887 by the well-considered decision in *Dougherty v. Chestnutt*.[38] There the court discussed the "harsh rule" assessing the full value of the mined minerals against a willful wrongdoer, and the "mild rule" applying the royalty measure against the innocent wrongdoer. The court found the defendant to be in the latter classification, but adopted an intermediate measure setting the damages at the value of the minerals after being mined and processed ready for market, less the reasonable cost (or defendant's actual cost, whichever was lower) of the mining and processing operations. At least one later Tennessee case expressly approved the rules announced in the *Dougherty* case, and assessed the damages for wrongful removal of coal as being the value of the coal at the mouth of the mine less the cost of mining.[39] One element of uncertainty regarding the status of Tennessee law on this point still remains, in that the cases continue to speak of a "mild rule" as something different from the measure of mined value less mining expenses, thus implying that the royalty value measure is

37. Dolch v. Ramsey, 57 Cal. App. 2d 99, 134 P.2d 19 (Dist. Ct. App. 1943); Hughett v. Caldwell County, 313 Ky. 85, 230 S.W.2d 92 (1950) (changing the Kentucky rule, which had previously allowed only the royalty value); Pan Coal Co. v. Garland Pocahontas Coal Co., 97 W. Va. 368, 125 S.E. 226 (1924).

38. 86 Tenn. 1, 5 S.W. 444 (1887). The case involved marble wrongfully quarried by defendant from plaintiff's farm, but the court's discussion of the measure of damages referred to the taking of minerals generally.

39. Staub v. Sewanee Coal, Coke & Land Co., 140 Tenn. 505, 205 S.W. 320 (1917). In several other cases involving wrongful cutting of timber, the Dougherty case has been referred to approvingly: Holt & Johnson v. Hayes, 110 Tenn. 42, 73 S.W. 111 (1902); Stearns Coal & Lumber Co. v. Kitchen Lumber Co., 27 Tenn. App. 468, 182 S.W.2d 4 (E.S. 1944).

properly applicable in some situations.[40] In some of these cases the writers of the opinions appear to have overlooked the fact that the court in the *Dougherty* case applied neither the harsh nor the mild rule but instead chose a measure which was regarded as giving more appropriate compensation for an unintentional wrongdoing than the mild rule does.[41] However, the *Staub* opinion seems to indicate that any of the three measures may be employed in Tennessee: the harsh rule in case of willful wrongdoing, and either the *Dougherty* measure or the mild rule in case of unintentional wrongdoing, depending on the degree of defendant's good faith in the individual case.[42]

C. Violation of Non-Competition Covenant

The decision in *Greene County Tire & Supply, Inc. v. Spurlin*,[43] though based on some rather puzzling reasoning, demonstrates the continuing strong inclination of the Tennessee courts to enforce non-competition covenants contained in contracts for the sale of a business. In 1958, the assets of a tire company operating in Greeneville, Tennessee, were sold to plaintiff, the contract including the agreement of defendant, one of the owners of the vendor company, that he would not engage in a similar business for five years within a radius of 100 miles from Greeneville. A year later plaintiff, charging that defendant had re-entered the same kind of business in that city, brought a suit in equity to enjoin him from further violation of his covenant. Defendant argued in defense that the agreement is "unreasonable and void," constitutes "an unlawful restraint of trade," and is "contrary to public policy," but the chancellor upheld its validity and issued the injunction. On appeal, the supreme court approved the rule applied in earlier cases that such non-competition covenants of sellers of businesses are lawful and enforceable provided they "are reasonable and go no further than affording a fair protection to the buyer."[44] It was then decided that the area limitation imposed in the covenant in question is excessive, because the protection needed for plaintiff's business does not require that defendant be excluded from carrying on the same business within a distance of 100 miles. Nevertheless, the court concluded that the covenant is binding on defendant,

40. See cases cited note 39 *supra*, and Frankfort Land Co. v. Hughett, 137 Tenn. 32, 191 S.W. 530 (1916).

41. Holt & Johnson v. Hayes; Stearns Coal & Lumber Co. v. Kitchen Lumber Co., note 39 *supra*.

42. See 140 Tenn. at 510-12, 205 S.W. at 322.

43. 338 S.W.2d 597 (Tenn. 1960). For a discussion of other aspects of the law relating to this case, see Hartman, *Contracts—1961 Tennessee Survey*, 14 VAND. L. REV. 1212 (1961).

44. Citing Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S.W. 1104 (1906). See also Scott v. McReynolds, 36 Tenn. App. 289, 255 S.W.2d 401 (M.S. 1952).

and the issuance of the injunction was upheld.

The opinion does not make clear how the court reconciled the findings that the area restriction is excessive but that the covenant itself is valid.[45] Perhaps the agreement is not rendered unenforceable merely because it has one objectionable feature, if under all the circumstances of the case it can fairly be enforced. Such a view may be found in a recent court of appeals decision which held that if the area in which competition is forbidden is reasonable, the agreement is not against public policy merely because it is unlimited as to time.[46] It may be that the *Spurlin* covenant is sustainable because the time limitation was reasonable, even though the area restriction was excessive; however, this point is not expressly made in the opinion. Rather, the supreme court went on to determine that while the area restriction exceeds plaintiff's need for protection, it will not inflict "an insurmountable obstacle" on defendant in regard to his efforts to make a living.[47] Thus, though the benefit conferred on the buyer was unreasonably broad, the detriment imposed on the seller was not unreasonably harsh. Apparently the weight which tipped equity's balance in favor of enforcement of the covenant was a third factor—public interest. In this regard, it is recognized that two conflicting public policies must be considered: (1) the policy of having all members of society free to exercise their capacities to produce goods and services for consumption by the public;[48] and (2) the policy of promoting honesty in business dealings and of assuring those who enter into contracts fairly that the terms will be enforced.[49] Since

45. Not only do the two Tennessee decisions cited in note 44 *supra* both endorse rules under which such covenants are unenforceable if the restrictions are broader than is needed to protect the plaintiff's business interests, but the same rule has been announced several times in upholding covenants by employees not to engage in a competitive business after leaving plaintiff's employment. Di-Deeland, Inc. v. Colvin, 347 S.W.2d 483 (Tenn. 1961); Arkansas Dailies, Inc., v. Dan, 36 Tenn. App. 663, 260 S.W.2d 200 (W.S. 1953); Matthews v. Barnes, 155 Tenn. 110, 293 S.W. 993 (1926). *Accord,* Grand Union Tea Co. v. Walker, 208 Ind. 245, 195 N.E. 277 (1935); Worrie v. Boze, 191 Va. 916, 926, 62 S.E.2d 876, 881 (1951); Annot., 98 A.L.R. 963 (1935); RESTATEMENT, CONTRACTS § 515 (1932).

46. Scott v. McReynolds, 36 Tenn. App. 289, 255 S.W.2d 401 (M.S. 1952). The court quoted 17 C.J.S. *Contracts* § 244 as its authority for this proposition. This decision was cited with approval in the *Spurlin* case, 338 S.W.2d at 599-600.

47. In response to defendant's contention that the covenant was unreasonable because it would prevent him from engaging in the kind of work which is "his only means of livelihood," the court stated: "[C]onsidering the modern facilities of travel, the obstacle as to distance from Greeneville which the limitation places upon Spurlin in the carrying on of, or employment in, such business does not seem to be such an obstacle as will inflict upon him an insurmountable obstacle." 338 S.W.2d at 600.

48. See McCLINTOCK, *op. cit. supra* note 9, at 192-93.

49. On this point the court quoted from Annot., 78 A.L.R. 1038, 1039 (1932) in identifying "two public interests" which tend to sustain the enforcement of the covenant: "the policy of promoting honesty and fidelity among men,

specific note was taken of the fact that there is clearly a sufficient number of persons in the tire sales and repair business in the area in question to satisfy fully the public's need for that type of service, the court apparently concluded that the exclusion of defendant from this trade would not violate the first policy consideration.[50] On the other hand, the direct relevance of the second policy to this case was shown by the fact that defendant, having accepted valuable consideration for his promise not to compete anywhere in the area for five years, deliberately attempted to enter a competing business in the same city in less than one year, with no excuse other than that he would have difficulty making a living otherwise.

Logically, it may be said that there are three tests of reasonableness to be applied in these non-competition covenant cases: (1) is the restriction on defendant reasonable from the standpoint of plaintiff's need, in that it is necessary to provide him due protection in the operation of the business he has purchased; (2) is the restriction reasonable from the standpoint of the effect it will have on defendant, in that it leaves him still in position to be able to earn a living in some other place or in some other occupation; (3) is the restriction reasonable from the standpoint of the public's interest, in that the public in the area and during the period specified will not be unduly inconvenienced by being unable to obtain the benefits which would accrue from defendant's engaging in the restricted activity.[51] While it is generally assumed that if the covenant fails to meet any one of these tests it should not be enforced in its entirety, the Tennessee court now seems to take the position that satisfying two of the tests may be sufficient to justify complete enforcement in equity.[52] This

and the interests of the public as a whole in an individual's being able to sell on the most advantageous terms whatever property he owns or has produced, whether tangible or intangible." 338 S.W. at 600. The latter part of the statement does not seem precisely directed toward the problem in cases like *Spurlin,* as it is the buyers, rather than the sellers, who need the aid of the law to protect the benefits for which they have contracted. Concern for promoting the general stability of contracts seems to be more directly in point.

50. See Meissel v. Finley, 198 Va. 577, 95 S.E.2d 186 (1956) in which this line of reasoning was followed in the sustaining of a covenant by defendant not to re-enter the insurance business in a stated area; the court noted that there were already some 250 to 300 insurance agencies serving the area in question.

51. Welcome Wagon, Inc. v. Morris, 224 F.2d 693 (4th Cir. 1955); Securities Acceptance Corp. v. Brown, 106 N.W.2d 456 (Neb. 1960); Meissel v. Finley, note 50 *supra;* RESTATEMENT, CONTRACTS, note 45 *supra.*

52. MCCLINTOCK, *op. cit. supra* note 9, at 192-93 regards equity's refusal to enjoin the breach of an unreasonable non-competition covenant as an application of the general principle that equity will not enforce an obligation when its enforcement would cause hardship to the defendant greatly in excess of the injury which the plaintiff will suffer from a refusal to enforce. Thus, it is possible that equity may refuse to enforce a covenant by injunction even though the agreement is valid and an action at law for damages

decision may introduce a new element into the law of the state; but it is quite in accord with the favorable attitude with which the Tennessee courts have approached non-competition covenants in earlier cases.[53]

D. Prosecution of Action at Law

Robinson v. Easter[54] is of some interest in that it presents one of the relatively few situations in which Tennessee chancery courts will decline to take jurisdiction of a case because the complainant's remedy at law is adequate. Traditionally, of course, inadequacy of the legal remedy is a necessary condition to the jurisdiction of equity over a case. Though this limitation was founded in history rather than on logic, it continues to be in general effect except where removed by statute. Such statutory revision occurred in Tennessee in 1877, with the passage of the act which vests the chancery courts with jurisdiction over many types of legal causes of actions.[55] Thus, in regard to causes over which the circuit and chancery courts have concurrent jurisdiction, the defendant's plea that the complainant has an adequate remedy at law will generally be unavailing in equity.[56]

In the *Robinson* case, complainant, claiming to be a lessee, brought suit in chancery court to enjoin an unlawful detainer action which had been instituted by the alleged lessor before a justice of the peace to obtain possession of a storehouse. Complainant claimed the right to possession under an oral lease, but defendant denied the existence of any such lease. The chancellor sustained defendant's demurrer on the ground that complainant had an adequate remedy at law, inasmuch as the issue of the existence of a lease could be decided in the unlawful detainer suit, and no type of extraordinary

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would lie. See Welcome Wagon, Inc. v. Morris, note 51 *supra,* at 701. However, the buyer's cause of action for damages may be ineffectual because he will often be unable to prove with reasonable certainty the extent of the loss which the seller's illegal competition has caused him. Jackson v. Byrnes, 103 Tenn. 698, 34 S.W. 984 (1900); CLARK, *op. cit. supra* note 11, § 68.

53. No case has been found by this writer in which either the supreme court or a court of appeals has held a non-competition covenant unenforceable. The validity of the covenants were sustained in: Jackson v. Byrnes, note 52 *supra;* Bradford & Carson v. Montgomery Furniture Co., note 44 *supra;* Turner v. Abbott, 116 Tenn. 718, 94 S.W. 64 (1906); Baird v. Smith, 128 Tenn. 410, 161 S.W. 492 (1913); Matthews v. Barnes, note 45 *supra;* Scott v. McReynolds, note 44 *supra;* Arkansas Dailies v. Dan, note 45 *supra;* Di-Deeland, Inc. v. Colvin, note 45 *supra.* In Barner v. Boggiano, 32 Tenn. App. 351, 322 S.W.2d 672 (W.S. 1948), the court, in dictum, stated that such a covenant as plaintiff alleged was made would be invalid because the restriction on defendant was unlimited as to time or space; but the decision for defendant was based on the court's finding that no non-competition agreement had been made by the parties.

54. 344 S.W.2d 365 (Tenn. 1961).

55. TENN. CODE ANN. § 16-602 (1956).

56. 1 GIBSON, SUITS IN CHANCERY § 301 (5th ed. 1955).

equitable relief was needed to protect complainant's rights. This decision was affirmed by the Tennessee Supreme Court. While unlawful detainer actions are within the concurrent jurisdiction of the two courts, it was held that the chancellor properly refused to retain the case because the controversy had already been taken before a court of law which could provide complainant with a prompt and complete remedy. The defense of adequacy of the remedy at law may still be effective in Tennessee, therefore, against a bill to enjoin an action already pending before the law court, even though the cause is within the scope of the jurisdiction of both courts. Only on a clear showing that the processes of the law court would not provide sufficient protection for complainant's rights would equity interfere with the legal action and assert its own concurrent power to decide the case.

II. SPECIFIC PERFORMANCE—STATUTE OF FRAUDS

The ever-recurring problem of what constitutes a sufficient writing to satisfy the requirements of the Statute of Frauds was dealt with in the case of *Brister v. Estate of C. B. Brubaker*.[57] The purchaser sought specific performance of a contract with decedent for the sale of land, the only written evidence of the alleged oral agreement being in the form of a $200 check made by plaintiff and payable to decedent. The following notation appeared on the face of the check: "Deposit on Lot 58 by 135 located east side of Highway 61 S 216 feet north of Eastman Road, Shelby County, Tenn. Bal. $65.00 per front ft. due $35.00 per month after $500.00 is paid at closing, title guaranteed." Decedent had endorsed the check, cashed it and received the proceeds. Defendants entered a plea of the Statute of Frauds,[58] contending that the check is too vague, indefinite and uncertain to constitute a contract for the sale of the land claimed by plaintiff. The defense of laches was also set up, the suit having been filed about two and one half years after the making of the sale agreement, and sixteen months after decedent's death. The chancellor denied specific enforcement, sustaining both defenses; however, he granted plaintiff a decree for the repayment of the $200 which had been paid to decedent by the check.

Both parties appealed that decision, and the court of appeals

57. 336 S.W.2d 326 (Tenn. App. W.S. 1960).

58. TENN. CODE ANN. § 23-201 (1956): "No action shall be brought. . . . upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year . . . unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized."

reversed, remanding the case for the entry of a specific performance decree. The laches defense was quickly overthrown on two bases. First, the delay in bringing the suit was deemed not to be unreasonably long. This point, of course, turned on a matter of opinion on which reasonable persons could easily differ. Secondly, however, the court relied on the rule that to constitute laches there must be not only lapse of time but also prejudice arising from the delay. This proposition is too well founded to be a subject of argument,[59] and defendants apparently had failed to show any element of prejudice resulting from plaintiff's delay in bringing the action to enforce the contract.

The matter of whether the check given as a down payment on the purchase price constituted a written memorandum satisfying the Statute of Frauds presented a more difficult question, especially in view of some Tennesseee Supreme Court decisions which seem to demand that the description of the land be set out quite definitely in the writing.[60] However, the court of appeals, evidencing a commendably liberal approach, found the description adequate.

> This description identifies a particular piece of land and designates its location. Without other or further information, a surveyor could locate and stake out this tract of land. That, in our opinion, is sufficient to comply with the requirements of the Statute of Frauds.[61]

In support of this general test, the court could have called upon an observation made in a case decided in 1870:

> We apprehend that the object of the statute would be met if the memorandum were sufficiently specific to enable the officers of the court to go into the country and find the land, and enforce its decrees against it.[62]

The court also noted that even if a memorandum does not, within itself, adequately describe the land, parol evidence is admissible to designate the property intended, "if [the] writing appears to refer to a particular tract of land and does not fit any other tract."[63] The allowance of parol evidence to cure the indefiniteness of the memorandum obviously increases greatly the situations in which specific performance relief may be granted; and nearly a century ago the

59. Conner v. Holbert, 204 Tenn. 164, 171, 319 S.W.2d 72, 75 (1958): "[M]ere delay or laches alone is never sufficient to cause a court of equity to penalize on account of same unless some deleterious result flows from the delay." POMEROY, EQUITY JURISPRUDENCE § 419d (5th ed. 1941).

60. Campbell Farmers Co-op. v. Moore, 202 Tenn. 215, 303 S.W.2d 735 (1957); Denison-Gholson Dry Goods Co. v. Hill, 135 Tenn. 60, 185 S.W. 723 (1916); Sheid v. Stamps, 34 Tenn. 172 (1854).

61. 336 S.W.2d at 331.

62. Hudson v. King, 49 Tenn. 560, 572 (1870).

63. 336 S.W.2d at 331.

Tennessee Supreme Court sanctioned the admission of such evidence in these terms:

> Where an instrument is so drawn that, upon its face, it refers necessarily to some existing tract of land, and its terms can be applied to that one tract only, parol evidence may be employed to show where the tract so mentioned is located. But where the description employed is one that must necessarily apply with equal exactness to any one of an indefinite number of tracts, parol evidence is not admissible to show that the parties intended to designate a particular tract by the description.[64]

It was further explained that the parol evidence may be admitted if it merely "particularizes" the description of the premises which appears in the writing, but not if it supplies a material part of the agreement by parol. A later case, approving this rule, observed that it means that "parol evidence is admissible to 'apply' the description contained in the written instrument, but such evidence is inadmissible to 'supply' a description omitted therefrom."[65] In at least one modern Tennessee decision, an even more extensive use of parol evidence is approved. Whereas the *Dobson v. Litton* statement requires that before parol evidence is admissible the writing must be in terms which can be applied to one tract only, it was later declared: "The descriptive terms employed, *together with the parol proof,* must be such as to point out and comprehend some especial parcel of land to the exclusion of any other parcel of land."[66] This more liberal view seems to be endorsed by the authors of the two leading American treatises on the law of contracts, who decry the tendency of some courts to demand a description "that will identify beyond possibility of doubt the subject matter of the sale,"[67] or that will exclude "all possibility that any tract, other than the one asserted, was intended as the subject matter."[68] The adoption of such a view would tend to prevent unfortunate decisions like that in *Campbell Farmers Co-op v. Moore,*[69] in which the party seeking specific enforcement of a land sale contract was not accorded any opportunity to submit parol proof in order to establish the exact location of the property referred to in the written memorandum. Though the description of the tract

64. Dobson v. Litton, 45 Tenn. 616, 619 (1868).
65. Parsons v. Hall, 184 Tenn. 363, 367, 199 S.W.2d 99, 101 (1947). The Dobson case has been cited with approval repeatedly: *E.g.,* Schultz v. Anderson, 177 Tenn. 533, 151 S.W.2d 1068 (1941); Case v. Brier Hill Collieries, 145 Tenn. 1, 235 S.W. 57 (1921); Denison-Gholson Dry Goods Co. v. Hill, note 60 *supra.*
66. Case v. Brier Hill Collieries, note 65 *supra,* 145 Tenn. at 11, 235 S.W. at 59 (1921). (Emphasis added.)
67. 2 WILLISTON, CONTRACTS 1658 (rev. ed. 1936).
68. 2 CORBIN, CONTRACTS 719 (1950).
69. Note 60 *supra.*

contained some ambiguities, there seemed to be sufficient detail included to make possible the precise identification of the land intended without much difficulty.[70]

Having concluded that the description of the land noted on the face of the check was sufficient to satisfy the statute, the court gave no consideration to the problem of whether the term of the statute requiring that the writing be "signed by the party to be charged therewith" had been fullfilled. Tennessee decisions have construed this provision to mean that the vendor of the land is the party who must have signed,[71] and in the *Brister* case, while the vendor was named as payee on the face of the check, his signature did not appear thereon. Most of the cases passing on the issue of whether a check or note given by the purchaser for the purchase price provides a sufficient memorandum turn on the matter of whether the instrument contains an adequate description of the land, and make little or no reference to the matter of the signing by the party to be charged.[72] In those cases in which the instrument is held to satisfy the Statute of Frauds, it is usually indicated, though without any particular emphasis, that the vendor had in some way put his signature on the back of the instrument, usually as an endorsement when cashing the check or negotiating the note.[73] Without this factor, it would seem that the statutory requirement would not be met, as the mere appearance of the vendor's name as payee of the check or note is not sufficient.[74] Since in the *Brister* case the opinion notes that decedent had endorsed the check upon cashing it, the court apparently assumed that the memorandum of the contract was thereby signed by the party to be charged therewith. However, this act of signing, being for

70. Professor Corbin's suggestion would seem especially applicable in such a situation: "[I]f the court is convinced that no fraudulent substitution of property is being attempted and that the land actually agreed upon has been clearly established by all the evidence, including the written memorandum, the surrounding circumstances, and the oral testimony, little time should be wasted in listening to argument that the written description is inadequate." CORBIN, *op. cit. supra* note 68, at 718.

71. Ashley v. Preston, 162 Tenn. 540, 39 S.W.2d 279 (1931); Lusky v. Keiser, 128 Tenn. 705, 164 S.W. 777 (1913).

72. See Annots., 20 A.L.R. 363 (1922), 153 A.L.R. 1112 (1944).

73. Clark v. Larkin, 172 Kan. 284, 239 P.2d 970 (1952); Purtell v. Bell, 179 Ky. 356, 200 S.W. 644 (1918); Cousbelis v. Alexander, 315 Mass. 729, 54 N.E.2d 47 (1944); Barton v. Molin, 219 Mich. 347, 189 N.W. 74 (1922); Harper v. Battle, 180 N.C. 375, 104 S.E. 658 (1920).

74. CORBIN, *op. cit. supra* note 68, § 520: "It is not sufficient that the party's name appears on the memorandum or document merely to identify him as one of the contracting parties or for some other wholly extraneous purpose. It must have been inscribed as an authentication of the contents of the memorandum." See, indicating that the court considered the matter of whether the vendor had signed the instrument to be relevant: Duteil v. Mullins, 192 Ky. 616, 234 S.W. 192, 193 (1921); Howie v. Swaggard, 142 Miss. 409, 107 So. 556, 557 (1926); Stockdale v. Sellers, 102 Pa. Super. 447, 157 Atl. 30, 32 (1931).

the purpose of cashing the check, can hardly be said to have been done "as authentication of the contents of the memorandum,"[75] or to give the check "vitality as a contract" of sale, as some authorities have demanded.[76] No prior Tennessee decision has been found in which this issue was involved, and since the point apparently was not argued in the *Brister* case, the question may still be regarded as an open one in this state.

III. BILL TO REMOVE CLOUD ON TITLE—CLEAN HANDS MAXIM

The decision in *Chance v. Geldreich*[77] aptly illustrates the limitations of the clean hands maxim[78] as a device for precluding a party from obtaining equitable relief in consequence of his prior inequitable or illegal conduct. Several years before the suit was instituted, plaintiff was in need of borrowing money but had nothing to offer as security except an apartment house already encumbered in the amount of its full mortgage value. In order to circumvent this obstacle, she made an agreement with one of her tenants, who was eligible for a G. I. loan, whereby she was to convey the apartment property to the tenant, who was to obtain a loan on a G. I. full value mortgage and then turn the money over to plaintiff and reconvey the property to her upon her assumption of the mortgage debt. This plan was successfully executed, but the deed of the tenant conveying back to plaintiff was not recorded. Subsequently, the tenant complained to plaintiff that her defaults on the mortgage debt were causing the lender to threaten foreclosure, whereupon plaintiff apparently told the tenant that the unrecorded deed had been destroyed and that the tenant could do as she pleased with the property. However, the evidence showed that the parties did not thereafter treat the property as belonging to the tenant, and that the deed was never in fact destroyed. After about two years, the tenant conveyed the property to defendant, who, however, had learned about the foregoing transaction and knew of the existence of the tenant's deed to plaintiff before taking his deed to the premises. Plaintiff then sued to have defendant's deed removed as a cloud on her title, and defendant pleaded in defense that he was an innocent purchaser of the property.

75. CORBIN, *op. cit. supra* note 68, § 520.

76. Second Nat. Bank v. Rouse, 112 Ky. 612, 134 S.W. 1121, 1122 (1911): Defendant-vendor's endorsing the note given by vendee for the purchase price was not to give the note "vitality as a contract" of sale, but "to invest the bank with title to the note. This his indorsement did, and beyond that it had no effect whatever." Also see Hibernian Petroleum Co. v. Davies, 41 Cal. App. 59, 181 Pac. 836 (Dist. Ct. App. 1919).

77. 337 S.W.2d 770 (Tenn. App. M.S. 1960).

78. 2 POMEROY, EQUITY JURISPRUDENCE § 397 (5th ed. 1941): "He who comes into equity must come with clean hands."

The chancellor rejected defendant's plea, but dismissed the complaint on the ground, among others, that because of plaintiff's illegal conduct in obtaining the G. I. loan she was excluded from equitable relief under the clean hands maxim.

On appeal, each ground for the chancellor's dismissal of the complaint was examined by the court of appeals and found to be inadequate.[79] In regard to the clean hands factor, the issue was whether plaintiff's misconduct, though admittedly illegal, bore a close enough relationship to the right which she now asserted to preclude her from equitable relief. In defining the degree of relationship which calls for the application of the clean hands maxim, the court quoted Gibson to the effect that

> the operation of the maxim is confined to misconduct connected with the particular matter in litigation; and does not extend to any misconduct . . . which is unconnected therewith, and with which the defendant is not concerned.[80]

And Pomeroy was quoted for the proposition that

> a court of equity . . . will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands.[81]

While conceding that "this entire situation . . . is due to the negligent, inequitable conduct" of plaintiff, and that defendant's position "is the more equitable one as between [plaintiff] and himself,"[82] the court still ruled that no sufficient connection between plaintiff's misconduct and the right she asserts existed to justify a finding of unclean hands. For one thing, the illegal transaction in which plaintiff participated was with a third party (the tenant), not with de-

79. In addition to the unclean hands maxim, the chancellor's bases for dismissing the complaint were: (1) that plaintiff had in effect sold the property to the tenant by telling the latter that plaintiff's deed to the property had been destroyed and that the tenant might do as she pleased with it; and (2) that plaintiff was equitably estopped to assert title to the property. The appellate court reasoned that the only equitable principle on which the first finding could be made is the maxim that "equity regards and treats that is done, which, in good conscience, ought to be done"; but it held that this maxim could not properly be applied to the case at bar because neither plaintiff nor her tenant had ever considered the property as belonging to the tenant. As to the second point, equitable estoppel was held not to be properly invoked here because: (a) no estoppel was pleaded by the defendant, and this defense cannot be raised by the court itself; and (b) plaintiff had taken no overt action which caused defendant to do a thing he would not have done otherwise, as the latter party knew all of the facts when he accepted the deed from the tenant. 337 S.W.2d at 773.

80. GIBSON, SUITS IN CHANCERY § 42 (2d ed. 1916), quoted in 337 S.W.2d at 774. The court might have referred to a more recent edition of *Gibson* for the same rule. See 1 GIBSON, *op. cit. supra* § 51 (5th ed. 1955).

81. 2 POMEROY, *op. cit. supra* note 78, § 399, quoted in 337 S.W.2d at 774.

82. 337 S.W.2d at 775.

fendant, whose claim to title plaintiff seeks to remove by this suit. In the second place, plaintiff is not attempting to enforce any rights arising out of the G. I. loan transaction, but seeks only to protect her title to property which long antedated that transaction.

Reference to precedent ordinarily is not very helpful in testing the propriety of a specific application of the clean hands maxim. The fact situations vary in every case, and the court must necessarily be accorded broad discretion in determining when a plaintiff's conduct has been such as to require denial of relief. Further, explanations of the basis for invoking or refusing to invoke the maxim in an individual case are almost inevitably couched in indefinite phrases which are open to differing interpretations.[83] The Tennessee court, in laying down rules to indicate what connection must exist between the plaintiff's past misconduct and present claim to justify a finding of unclean hands, has understandably had trouble in being specific enough in its language to make its meaning clear. In a very early case it was said that "if a complainant's cause of action originates in inequity," equity should deny relief;[84] and later even broader terms were employed in declaring that relief would be refused if plaintiff

> has been guilty of unconscientious, inequitable or immoral conduct, in and about the same matters whereof he complains of his adversary, or if his claim to relief grows out of, or depends upon, or is inseparably connected with his own prior fraud.[85]

In more modern cases, the court has spoken in terms which seem to demand a closer and more obvious connection. Thus, *Overton v. Lewis,* cited approvingly in several later decisions, declared that the misconduct "must relate directly to the very transaction concerning which complaint is made,"[86] and that the wrongful act "must bear an immediate relation to the subject matter of the suit."[87] It is said that this direct and immediate relation does exist when a debtor who has conveyed his property in order to delay, hinder or defraud his creditors asks equity to aid him by forcing the collusive grantee to reconvey the property.[88] However, in the *Chance* case the court

83. See Note, 5 WAYNE L. REV. 263 (1959), pointing out that such terms as "indirect and remote," used to designate insufficient connection between the plaintiff's misconduct and the subject matter of the current litigation, and "immediate and necessary," used to designate sufficient connection, are largely statements of conclusion rather than of reason.

84. Goodwin v. Hunt, 11 Tenn. 123, 126 (1832), quoted with approval in Christians v. Town of East Ridge, 12 Tenn. App. 101 (E.S. 1928).

85. C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84, 94, 23 S.W. 165, 168 (1893).

86. 152 Tenn. 500, 509, 279 S.W. 801, 804 (1925), quoted with approval in Chappell v. Dawson, 202 Tenn. 672, 308 S.W.2d 420 (1957).

87. 152 Tenn. at 510, 279 S.W. at 804, quoted with approval in Seaton v. Dye, 37 Tenn. App. 323, 263 S.W.2d 544 (E.S. 1953).

88. Rosenbaum v. Huebner, 277 Ill. 360, 115 N.E. 558 (1917); Bellin v.

found no such relation where, after in effect conveying to defraud a prospective creditor, plaintiff covertly regained the title from the original grantee who then attempted to convey the property to a third party.

The court, in placing significance on the fact that defendant had not been a party to the fraudulent transaction, may have intended to adopt the view that a defendant cannot bar relief under the clean hands maxim unless he has been prejudiced by plaintiff's misconduct. If so, it has the support of at least one prior Tennessee decision, as well as cases in some other jurisdictions.[89] On the other hand, another Tennessee case and decisions in yet other jurisdictions adopt the view that plaintiff's wrongful acts may preclude him from obtaining equitable relief even though they have caused no injury to defendant.[90] And the rule applied in fraudulent conveyances cases would seem to support this position, as the grantee of such conveyance has ordinarily not been harmed by, but has instead profited from, the fraud.

Considering the nature of the clean hands maxim and the purpose of its employment by equity, however, one is rarely justified in saying that a court has clearly been wrong in declining to refuse relief because of unclean hands. Certainly it must necessarily be true that "in applying the maxim, the courts are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion."[91]

IV. Setting Aside Consent Decrees

Kelly v. Walker[92] is worthy of notice as a clarification of the Tennessee rule regarding the status of a consent decree entered in chancery court. Here it appeared that a consent decree had been entered in favor of complainants in a suit which had been pending for seven years; but within thirty days thereafter defendant filed a petition to have the decree set aside on the ground that she had not authorized her attorney to agree to such a disposition of the case. The chancellor sustained complainant's demurrer, applying a rule of English origin which has repeatedly been held controlling in regard

Bloom, 217 Ind. 656, 28 N.E.2d 53 (1940); Gibson, *op. cit. supra* note 56, § 51; Pomeroy, *op. cit. supra* note 78, § 401a.

89. Nolen v. Witherspoon, 182 Tenn. 333, 339, 187 S.W.2d 14, 16 (1944), citing decisions in Kentucky and Washington, and references in legal encyclopedias. See also Pomeroy, *op. cit. supra* note 78, at 99.

90. Christians v. Town of East Ridge, *supra* note 84; Leo Feist, Inc. v. Young, 46 F. Supp. 622 (E.D. Wis. 1942); Note, 5 Wayne L. Rev., *supra* note 83, at 265.

91. Vanity Fair Mills v. Cusick, 143 F. Supp. 452, 455 (D.N.J. 1956).

92. 346 S.W.2d 253 (Tenn. 1961).

to the finality of consent decrees: "Where a decree is made by consent of counsel, there lies not an appeal or re-hearing, though the party did not really give his consent; but his remedy is against his counsel . . . ."[93] However, the Tennessee Supreme Court reversed, finding that under the circumstances of this case the chancellor had not exercised his discretion soundly, and remanded the case for a hearing on the merits. While approving the rule quoted above as appropriate for a case in which the decree had become final, the supreme court noted that it should not apply in the case before it. Defendant having raised his objections within thirty days,[94] "the present consent decree is still within the breast of the court and it is still within the power of the court to do anything the facts and circumstances demand . . . ."[95] Therefore, since defendant, by filing his sworn petition denying that his counsel was authorized to enter a consent decree, had overcome the presumption of such authority in counsel, the chancellor should have held a hearing on the merits to determine whether or not the authority did exist.

93. Bradish v. Gee, Amb. 229, 27 Eng. Rep. 152 (Ch. 1754). However, if the consent of counsel was obtained by fraud, the party against whom the decree has been entered may have it set aside. This view has been adopted in numerous Tennessee decisions: Clinchfield Stone Co. v. Stone, 36 Tenn. App. 252, 254 S.W.2d 8 (E.S. 1952). See GIBSON, *op. cit. supra* note 56, § 619; Kentucky-Tennesseee Light & Power Co. v. Beard, 152 Tenn. 348, 277 S.W. 889 (1925); Lindsay v. Allen, 112 Tenn. 637, 82 S.W. 171 (1904); Jones v. Williamson, 45 Tenn. 371 (1868).

94. Under TENN. CODE ANN. § 27-312 (1956), thirty days is the time allowed for seeking an appeal from a judgment or decree of an inferior court to the court of appeals or supreme court.

95. 346 S.W.2d at 256.