

Michigan Law Review


Volume 47 | Issue 7

1949

COMING INTO EQUITY WITH CLEAN HANDS

Zechariah Chafee, Jr.
Harvard University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

 Part of the [Contracts Commons](#), [Estates and Trusts Commons](#), [Jurisprudence Commons](#), and the [Legal History Commons](#)

Recommended Citation

Zechariah Chafee, Jr., *COMING INTO EQUITY WITH CLEAN HANDS*, 47 MICH. L. REV. 877 ().
Available at: <https://repository.law.umich.edu/mlr/vol47/iss7/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COMING INTO EQUITY WITH CLEAN HANDS*

*Zechariah Chafee, Jr.***

THE most amusing maxim of equity is "He who comes into Equity must come with clean hands." It has given rise to many interesting cases and poor jokes. The maxim has been regarded as an especially significant manifestation of the ethical attitude of equity as contrasted with the common law. Pomeroy, for instance, argues that the principle involved in this maxim is "merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence."¹ Pomeroy's theory is that chancery has power to force a defendant to comply with the dictates of conscience as to matters outside the strict rules of law. Correspondingly, it will not interfere on behalf of a plaintiff whose own conduct in this connection has been contrary to conscience. In other words, since equity tries to enforce good faith in defendants, it no less stringently demands the same good faith from plaintiffs. This idea was lately expressed by Justice Murphy in the *Precision Instrument* case: "That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith."² Occasionally the same idea expands into enthusiastic laudation, as when a student editor writes:

"The extent of the application of the maxim appears to be limitless, but it is submitted that this is only due to its basic character and its value to all phases of equity. Throughout the equitable fields of fraud, illegality, and acts involving unconscionable conduct, the situations are few which cannot be definitely governed by the 'clean hands' doctrine."³

*Adapted from the first of five lectures on "Some Problems in Equity" given by Professor Chafee at the University of Michigan in April of this year in the third series of Thomas M. Cooley Lectures. The second lecture will appear in the June issue of the *Review*—Ed.

**Langdell Professor of Law, Harvard University—Ed.

¹ 2 POMEROY, *EQUITY JURISPRUDENCE*, 5th ed., § 398 (1941).

² *Precision Instrument Mfg. Co. v. Automatic Maintenance Machinery Co.*, 324 U.S. 806 at 814, 65 S.Ct. 993 (1945).

³ 9 *TEMPLE L. Q.* 220 at 226 (1935).

Although it is a pity to take this beautiful statue off its lofty pedestal, I propose to show that the clean hands doctrine does not definitely govern anything, that it is a rather recent growth, that it ought not to be called a maxim of equity because it is by no means confined to equity, that its supposed unity is very tenuous and it is really a bundle of rules relating to quite diverse subjects, that insofar as it is a principle it is not very helpful but is at times capable of causing considerable harm.

Notwithstanding these derogatory remarks the maxim is involved in scores of cases.⁴ From humble beginnings in suits about contracts made under the influence of liquor or amorous philandering, the doctrine has risen to high estate, for it has been the bone of bitter controversy in at least four decisions in the United States Supreme Court since Pearl Harbor. Thrice it was invoked successfully, in the *Morton Salt*⁵ case in 1942, the *Indiana & Michigan Electric*⁶ case in 1943, and the *Precision Instrument*⁷ case in 1945. Leaving these for later attention, I shall set the stage with the case where the doctrine was rejected by a divided court, *Johnson v. Yellow Cab Transit Co.* in 1944.⁸

The officers club at Fort Sill, although surrounded by the dry state of Oklahoma and confronted by a federal statute against selling or dealing in intoxicating liquors at a military post, refused to surrender. Several hundred members as individuals turned over considerable amounts of money to the club secretary, who quickly telephoned to a merchant in East St. Louis and ordered 225 cases of potables. The cargo of wines and liquors started on its westward way in a vehicle of the Yellow Cab Transit Co., but crossing the plains has never been easy. While the driver momentarily stopped at Oklahoma City to unload other freight, some state and county liquor official spied the 225 cases and seized them all. It must have been a black night at the officers' club in Fort Sill. However, undismayed by defeat, the officers rallied. The interstate carrier obligingly began a federal suit of an equitable nature praying that the court order the Oklahoma official to return the liquor so that it might then be delivered to the secretary at Fort Sill. The seizure was clearly illegal because no Oklahoma statute authorized this interference with interstate commerce. So the defendants had to fall back on the

⁴ For citation of cases involving the maxim, see 4 A.L.R. 44 (1919) and supplementary blue book.

⁵ *Morton Salt Co. v. Suppiger*, 314 U.S. 488, 62 S.Ct. 402 (1942).

⁶ *N.L.R.B. v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 63 S.Ct. 394 (1943).

⁷ *Precision Instrument Mfg. Co. v. Automatic Maintenance Machinery Co.*, 324 U.S. 806, 65 S.Ct. 993 (1945).

⁸ 321 U.S. 383, 64 S.Ct. 622 (1944).

clean hands doctrine, arguing that the club secretary could not have received the liquors without violating federal laws.

The majority, through Justice Black, declined this defense and upheld a mandatory injunction. No selling or dealing in liquors on a military area was involved, so the only possibility of a federal crime would be a violation of the general assimilative crime statute.⁹ Justice Black was puzzled to know how the Oklahoma system for licensing liquor imports could be applied to Fort Sill. The question whether this or other Oklahoma laws could be wrapped up in the assimilative statute involved many difficult legal problems, which in his opinion could not be properly decided in this private equity suit. The court was not now conducting a criminal prosecution and did not have before it either representatives from the department of justice or the war department on behalf of the government, or the army officers who were alleged criminals. This was not the place to explore such complicated collateral issues of their guilt. The hands of the carrier, at all events, were completely clean and the doors of the courthouse ought not to be slammed in its face.

This reasoning did not convince Justice Frankfurter, who dissented with the support of Justice Roberts. His opinion presented frequently recurring considerations about the proper limits of the clean hands doctrine:

"In my view therefore it was an inequitable exercise of discretion to issue this injunction. Of course, 'Equity does not demand that its suitors shall have led blameless lives.' . . . But where the relief sought is the very means, as is the case here, for completing an outlawed transaction, a court of equity should withhold its aid and not become the promoter of wrongdoing. . . . 'A question of public policy is presented—not a mere adjudication of adversary rights between the two parties.' . . . The abstention which equity exercises, as it should here, under the short-hand phrase of the 'clean hands doctrine' is not due to any desire to punish a litigant for his uncleanness. . . . 'The court protects itself.' . . . It is hardly seemly for a federal court to order the return of liquor seized with full knowledge by the court that the carrier would use the liquor to share in the commission of a misdemeanor."¹⁰

⁹ 18 U.S.C. § 468 (1947).

¹⁰ 321 U.S. 383 at 402, 64 S.Ct. 622 (1944).

HISTORY OF THE MAXIM

The time has come to compare this modern manifestation of the doctrine with its earliest expression. Let us look at the origins of what Pomeroy describes as "a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief."¹¹ Although the clean hands maxim has been judicially honored as "hoary with age," it is really a child beside some other maxims, like "Equity follows the law," which was mature in Shakespeare's day.¹² The clean hands maxim is exactly as old as the United States Constitution. The very best we can do for it, if we are willing to include its appearance in quite different language, is to push it back just before the birth of George Washington. In 1728 a barrister of the Middle Temple who is otherwise unknown, Richard Francis, published the first edition of *Maxims of Equity*.¹³ His maxim II is "He that hath committed iniquity shall not have equity." In support of this principal, he abstracts nine cases, from which I draw two samples. Here, as elsewhere, I shall call the applicant for equitable relief *A* and his opponent, the respondent, *R*; this is less confusing than to say plaintiff and defendant because the man who is plaintiff in equity is often defendant at law and vice versa.

A lent £90 to *R* when *R* was drunk and got a bond from him for £800. After getting a judgment at law for £800, *A* went into equity in 1671 to collect his judgment from lands which were held in trust for *R*'s benefit. The chancellor would not even give *A* the £90 he had really lent, but dismissed the bill.¹⁴

A few years later in the reign of the gay Charles II, *A*, a young Oxford student, debauched a girl and got her with child under promise of marriage. To cover expenses he gave her brother a bond for £500 conditioned on paying £50. *A* seems to have been bothered because the bond named no place where the £50 was to be paid, so he brought a bill in equity in 1679 and offered to bring that sum into court. The chancellor refused to grant him an injunction. The college student tried to gain the sympathy of the court by saying that he really intended to

¹¹ 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., § 397 at p. 91 (1941).

¹² Cary 11, 21 Eng. Rep. 6; Pound, "On Certain Maxims of Equity," CAMBRIDGE LEGAL ESSAYS 259 at 270 (1926).

¹³ The DICTIONARY OF NATIONAL BIOGRAPHY has no life of Francis. I have used the 4th ed., which is not dated.

¹⁴ Rich v. Sydenham, 1 Ch. Cas. 202, 22 Eng. Rep. 762 (1671); FRANCIS, MAXIMS OF EQUITY, 4th ed., 7.

marry the girl until he found that she had been misbehaving with other men, and also that her father had lured him into the snare. Such back-scenes gossip was not to the taste of Lord Nottingham, who said, "this Court should not be a Court to examine such Matters."¹⁵

There is a very important difference between these two cases of the seventeenth century and Francis' other cases, on the one hand, and the Fort Sill liquor case on the other. In every one of Francis' cases, A has soiled his hands by wronging R, the opposite party. The Yellow Cab Co. and the army officers, according to the dissenting justices, had wronged army discipline and the indefinite public. They did not hurt the defendant Oklahoma officials at all, because these officials could not complain of any violation of state laws and were not in charge of the enforcement of any federal laws. This frequent modern use of the clean hands maxim to penalize equity plaintiffs for criminal or immoral conduct is utterly foreign to Francis' conception of the maxim. Indeed, he no sooner presents the maxim than he inserts a footnote especially repudiating the modern doctrine: "The iniquity must have been done to the defendant himself."¹⁶ He supports this statement by the case of a Royalist who was anxious to save as much of his property as possible from being confiscated by the Cromwellians during the Civil War. So, although a Roundhead owed him a large sum of money, he swore that the debt had been paid off. After the Restoration, when he brought a bill in equity to recover this very debt, this old sworn statement was set up against him by way of defense. Yet the court brushed it aside and gave the Royalist his money. Without endorsing Francis' conclusion from this case, we can easily see how one of Charles II's judges would hardly feel that a suitor had soiled his hands by playing a trick on rebel leaders.

Another interesting point, brought out by Pound,¹⁷ is that Francis himself seems to be the creator of this maxim, as of others in his book. None of his cases uses it, so far as they can be checked.¹⁸ He has simply put the results of nine cases side by side and drawn from them his own general conclusion that "He that hath committed iniquity, shall not have equity." With slight variations, this proposition was parroted in

¹⁵ Bodly's Case. 2 Ch. Cas. 15, 22 Eng. Rep. 824 (1679); FRANCIS, *MAXIMS OF EQUITY*, 4th ed., 7.

¹⁶ FRANCIS, *MAXIMS OF EQUITY*, 4th ed., 6, note (b), citing Jones v. Lenthal, 1 Ch. Cas. 154, 22 Eng. Rep. 739 (1669).

¹⁷ Pound, "On Certain Maxims of Equity," *CAMBRIDGE LEGAL ESSAYS* 259 at 263, 264 (1926).

¹⁸ Out of his nine cases, I have read seven in the reports, but cannot identify nos. 1 and 9, for which citations are not correct.

1749 by "a gentlemen of the Middle Temple" in his *Grounds and Rudiments of Law and Equity* and in 1793 by Fonblanque.

In 1787, the year of the Philadelphia Convention, the maxim as we know it was born. Oddly enough, the delivery room was not in the Court of Chancery at all, but in the Exchequer (which had equity powers) where the man-midwife was Chief Baron Eyre. In *Dering v. Earl of Winchelsea*,¹⁹ a collector of customs had given three separate bonds to the Crown for the performance of his duties. Each bond had a different surety, one of them being *A*, the collector's brother, with *R* and *S* on the other two bonds. When the collector became badly in default, the Crown sued only *A* and got a judgment for nearly £4000. *A* filed a bill in the Exchequer against his co-sureties, *R* and *S*, for contribution. The main point of the case was that contribution is not founded on contract among the co-sureties—there was none here—but is based on the equitable principle of equality of burden and benefit. An incidental defense was that *A* had encouraged his collector brother in gaming and other irregularities when *A* must have known that his brother was dipping into public funds since he had no fortune of his own. In rejecting this defense, the Chief Baron said:

"It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited . . . nor any principle. . . . It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that *a man must come into a Court of Equity with clean hands*; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense. In a moral sense, the companion, and perhaps the conductor, of [the collector], may be said to be the author of the loss, but to legal purposes, [the collector] himself is the author of it; and if the evil example of [his brother] led him on, this is not what the Court can take cognizance of."²⁰

Eyre went on to put, by contrast, the case of a man who bored a hole in the side of a ship, and then his own goods were thrown overboard to save the ship. Such a man could not claim contribution from other cargo-owners by way of general average, for he was surely the author of the loss.

¹⁹ 1 Cox Eq. 318, 29 Eng. Rep. 1185 (1787).

²⁰ Id. at 319-320 (italics added).

The second decision stating the clean hands maxim was *Cadman v. Horner* in 1810.²¹ Here the seller, R, resisted a bill for specific performance of a land contract on the ground that the buyer, A, who was the seller's man of business, had grossly under-valued the property. Although the agreed price was not shown to be inadequate, the bill was dismissed because the fiduciary's misrepresentation, according to Sir William Grant, Master of the Rolls, "disqualifies him from calling for the aid of a Court of Equity; *where he must come, as it is said, with clean hands.*"²²

In both these cases and in Eyre's illustration of the deliberately sunken ship, A's iniquity was harmful to R as in Francis' cases. We still have no use of the maxim where A was charged with injuring the general public, as in the Fort Sill liquor decision.

Yet the modern sensitiveness of the chancellor to illegality and immorality was beginning to emerge, though not yet phrased in terms of unclean hands. In 1797 we get the first judicial mention of the legendary *Highwaymen's Case*. Lord Kenyon said he had heard of a bill in chancery "to obtain an account of the profits of a partnership trade carried on at Hounslow, but when it appeared that the trade was taking the purses of those who travelled over the heath, the Court would not endure the bill."²³ The highwaymen showed equity the road to Fort Sill.

By 1817 another line of modern cases was starting. The poet Southey in his flaming youth wrote a poem on Wat Tyler. He took the manuscript to a bookseller, who neither published nor returned it. Twenty-three years later, after Southey had become a sedate and conservative poet laureate, he was horrified to learn that the revolutionary poem he longed to forget was going to be published. Southey sought an injunction against this use of his literary property without his consent, but Lord Eldon refused relief. He assumed that the nature of the work might render its publication a crime, and hence would not help Southey keep it from being published.²⁴ A few years later Lord Eldon protected religion by denying an injunction against a pirated edition of Lord Byron's *Cain*, which was copyrighted.²⁵ It was true, the chancellor admitted, that his inaction might merely increase the circulation

²¹ 18 Ves. 10, 34 Eng. Rep. 221 (1810).

²² Id. at 11 (*italics added*).

²³ 9 L.Q.R. 105 (1893).

²⁴ *Southey v. Sherwood*, 2 Mer. 435, 35 Eng. Rep. 1006 (1817). The bill was not dismissed, but an injunction was refused unless Southey sued first at law and got a verdict that his book was lawful and so capable of being his property.

²⁵ *Murray v. Benbow*, 6 Petersdorff's Ab. Cas. 558, note (1822).

of these mischievous books, but that was not his business. Let the criminal law take care of it. So Southey writhed while *Wat Tyler* sold sixty thousand copies.

The earliest judicial use of the phrase "clean hands" on this side of the Atlantic, so far as I know, was in Ohio in 1826. This case belonged to a different type from any so far discussed. A wife sued her husband for divorce for adultery. He showed that she was living with another wife-deserter and had had a child by him. The court said: "The complainant must come with clean hands and a chaste character, not stained with the same infamy and crime of which she complains. . . . [T]o grant relief to either of them would be offering a bounty to guilt." And so the happy marriage was left to continue.²⁶

The foregoing research into the early history of the clean hands maxim discloses nothing very exciting. All it amounts to is a meager scattering of cases, mostly unimportant in themselves. There was no commanding decision which inscribed the maxim on the minds of the able thinkers who were engaged, during the first half of the nineteenth century, in clarifying the principles of equity. Story, who died in 1845, said nothing about the clean hands maxim in his *Commentaries on Equity Jurisprudence*, although he paid considerable attention to other maxims of equity.²⁷ Apparently none of the succeeding editors of his book thought the maxim worth space until 1873 when F. V. Balch tucked it into a brief footnote.²⁸ In 1846, when Spence brought out the first edition of his *Equitable Jurisdiction of the Court of Chancery*, he gave a full and very interesting presentation of "He who seeks equity should do equity," but felt a single uninformative sentence to be all that the clean hands maxim deserved.²⁹ Broom seems to say nothing about it in his *Selection of Legal Maxims* (1845). By 1874 the maxim gets eight lines of text without any citations from Bispham,³⁰ and by 1881 the maxim really amounts to something with eleven pages and plenty of cases in the first edition of Pomeroy.³¹

It may be only a coincidence that extensive judicial insistence on clean hands began after the advent of the modern bathroom.

²⁶ *Mattox v. Mattox*, 2 Ohio 233 at 233, 234 (1826).

²⁷ See 1 STORY, *EQUITY JURISPRUDENCE*, 1st ed., § 59a (1839) on "He who seeks equity, must do equity." Similar material appears in § 64e, 4th ed. (1846), the last edition on which Story himself worked.

²⁸ 1 STORY, *EQUITY JURISPRUDENCE*, 11th ed., 62 n. (1873).

²⁹ SPENCE, *EQUITABLE JURISDICTION OF THE COURT OF CHANCERY*, 1st ed., 423 note (a) (1846).

³⁰ BISPHAM, *PRINCIPLES OF EQUITY*, 1st ed., 48 (1874).

³¹ 1 POMEROY, *EQUITY JURISPRUDENCE*, 1st ed., 432-443 (1881).

USE OF MAXIM TODAY

In contrast to the meager assortment of early cases, an astonishing number of current decisions purport to turn on the clean hands maxim. This voluminous authority gives the impression of a single and far-reaching equitable principle. Nevertheless, an examination of the cases cited for the maxim soon reveals that they fall into many classes which are fairly well separated. I find it convenient to recognize eighteen different types of suits, which I shall now discuss. In connection with each group it is desirable to have two questions in mind: (1) Is A's misconduct more detrimental to him in equity than it would be if the same set of facts were before a law court? (2) How much is the supposed general equitable principle shaped by the requirements of substantive rules and by the general fact situation, so that it is possibly transformed into a separate defense appropriate only to this particular type of case? The bearing of these two questions will become clearer as I proceed.

CASES IN EXCLUSIVE JURISDICTION OF EQUITY

At the beginning I wish to take up groups within the exclusive equitable jurisdiction, where my first question is rather irrelevant because of the obvious difficulty of finding a parallel law suit.

1. *Suits to enforce illegal or immoral trusts.*³² Equity courts have often had to consider whether they would help carry out trusts established in return for illicit relations or compounding a felony or in connection with a collusive divorce and other forms of illegality. It is obvious that close parallels are not easily found in the law courts, which ordinarily have no concern with trusts. On the other hand, it is plain that the causes which vitiate a trust are also likely to vitiate a contract, and there are plenty of law cases on illegal contracts as we shall see when we come to that subject.³³ Judicial worries are much the same in trusts as in contracts, for example, as to the effect of illegality which is over and done with. Therefore the rule invalidating illegal trusts is, at bottom, not peculiar to equity.

Furthermore, an alleged illegal trust does occasionally come before a law court. It will be instructive to examine one such case so as to see whether the treatment of illegality was any different than it would have

³² 1 SCOTT, TRUSTS § 64 et seq. (1939). See also *id.* § 377 on illegal charitable trusts.

³³ Group 7, *infra*, p.

been if the suit had been equitable. In *Merrill v. Peaslee*,³⁴ a husband had treated his wife so badly that she left him and had ample grounds for divorce. He made overtures toward a reconciliation which were successful. As part of the arrangement which induced her to return to her repentant spouse, he gave a note for \$5000 payable to a trustee for her benefit. After his death, an action at law was brought against his executor to recover the amount of the note. Four out of seven Massachusetts judges refused to allow recovery. If they had been sitting in equity they would have said that the plaintiff had unclean hands. Being in a court of law for the time being, they said that "public policy" was a bar. They said that a wife ought to live with her husband anyway, so that he could not make a binding promise to persuade her to do so. It is amusing to find that law judges can be just as excessively sensitive to morality as equity judges. These four gentlemen saw no distinction between offering a wife money to engage in lawful sexual intercourse and offering a mistress money to engage in unlawful conduct of the same kind. Yet the law reports, the statute of frauds and hundreds of marriage settlements furnish ample proof of the validity of promises to induce a potential wife to afford similar gratification to a man. The absurd ethics of the decision were pointed out by Justice Holmes and the three dissenters: "No one doubts that marriage is a sufficient consideration for a promise to pay money. . . . I do not quite understand why it should be more illegal to make such a promise for the resumption than for the assumption of conjugal relations."³⁵

Another trust case at law shows that sometimes the test of the plaintiff's fault may be very unhelpful in solving a difficult trust problem. Instead, the court has to be guided by the special principles of the law of trusts. In *Wetmore v. Porter*,³⁶ A, the trustee, had wrongly turned over bonds belonging to the trust estate, to his partner, R, so that they could be used as collateral to get a bank loan to the firm. The trustee repented and tried to get the bonds back from his partner in order to accomplish the objects of the trust. He was unsuccessful. The trustee accordingly sued his partner at law for the return of the bonds or their value, asking judgment for \$15,000. The trustee's hands were very unclean and he lost in the trial court, which, because this was not an equity suit, chose as its telling maxim, *ex turpi causa non oritur actio*. The New York court of appeals reversed and gave judgment for the

³⁴ 146 Mass. 460, 16 N.E. 271 (1888).

³⁵ *Id.* at 465.

³⁶ 92 N.Y. 76 (1883).

guilty trustee, saying that he ought to have "his *locus penitentiae* and an opportunity to repair the wrong which he may have committed."³⁷ Insight into the law of trusts made the appellate court realize that the law court in its stress on ethics was really penalizing the innocent beneficiary of the trust. A judge has to know much more than morality to handle such a case.

2. *Suits to undo deeds and other executed transactions for such reasons as fraud and mistake, where A is himself a wrongdoer.*³⁸ This group comes closest to Pomeroy's theory that the court of equity ought to look at the consciences of both parties. The applicant is asking a good deal from the court when he requests it to rip up a settled legal situation, for example, when he tries to get land back from a person whom he himself has made the undoubted record owner. Under such circumstances, any court may fairly insist that a strong case should be made out for disturbing the legal situation. This requirement is not likely to be satisfied by an applicant who complains of his opponent's misconduct and then is shown up himself.

Yet the ethical attitude of courts in this group of cases has an odd blind-spot. So long as the wrong has not been done to the claimant, it is often said that the applicant's harmfulness to others is immaterial.³⁹ This accords with Francis' view two centuries ago, but it is of course untrue of many of our other groups, such as the trust cases already considered.

3. *Suits to undo completed transactions in fraud of creditors or for evading taxes.*⁴⁰ Cases here are very numerous and there is no legal parallel. Yet, as with the trust cases, decisions have to be shaped by the special requirements of the subject and not merely by ethics. This is particularly true of fraud on creditors, which has much less to do with morality than real fraud. The question whether the wrong exists is often difficult to answer, as every student of bankruptcy knows.

The plaintiff's conscience plays much less part in the actual result of many cases in this group than judicial talk would make us expect. On the one hand, a grantor whose hands were very black at the moment when he put his property out of his creditors' sight has often got it back in court later if he can show that he somehow managed to get enough

³⁷ Id. at 85.

³⁸ 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., § 401 (1941).

³⁹ Id. § 399.

⁴⁰ Id. §§ 401a, 401d; 89 A.L.R. 1166 (1934); id. 133 (executor of grantor). Sample cases are *MacRae v. MacRae*, 37 Ariz. 307, 294 P. 280 (1930); *Mills v. Susanka*, 394 Ill. 439, 68 N.E. (2d) 904 (1946).

money to pay off all his creditors before suing. On the other hand, an applicant for relief from mistake who has the misfortune to derive from a predecessor engaged in defrauding creditors has a conscience as white as new-fallen snow, and yet may be thrown out of court by standing in the shoes of his wicked transferor. He has to suffer for the transgressions of others.

The Michigan court ninety years ago was split down the middle in such a case.⁴¹ Years before, a father decided to escape his pressing creditors by conveying the whole of his farm to his son. Like other evil-doers, he bungled the job and drafted the deeds so badly that only a little of the farm was in fact conveyed. However, the bad mistakes escaped attention and the son took possession of the whole farm. Afterwards the son sold forty acres of what he did not really own to A, an innocent purchaser who took possession in his turn and paid a round sum. Sometime afterward the heirs of the guilty father discovered the mistake, threatened to throw A out of all his land, and even brought trover against A for the wood he had cut. A sued the father's heirs for reformation for mutual mistake. Since his own deed was correct, he had to get the court to rectify the original conveyance in effect. This would normally have been done,⁴² but poor innocent A was at once told by the heirs of the rascally father that it was he and not they who was coming into equity with unclean hands. This paradoxical argument convinced two out of four members of the Michigan Supreme Court in 1858. Manning and Campbell would have taken A's land away from him and left him to lose the suit for cutting wood on the ground that he stood no higher than the son from whom he had bought, a party to the intended fraud on creditors. Justice Christiancy, with the support of Chief Justice Martin, thought that this was putting ethics upside down. "What stain is discoverable upon [the hands of A?]" he asked.⁴³ It was the heirs who were asking the court to give them the reward of the father's iniquity. Thus the court was two to two and there had to be an affirmance by necessity. Luckily for A, the trial judge had decided in his favor, so he kept his farm, but other bona fide purchasers in a similar position have been less fortunate.⁴⁴ Should a bona fide purchaser who lacks the standard requirement of legal title be

⁴¹ *Quirk v. Thomas*, 6 Mich. 76 (1858).

⁴² *Cole v. Fickett*, 95 Me. 265, 49 A. 1066 (1901); CHAFEE, *CASES ON EQUITABLE REMEDIES*, enlarged ed., 478, n. 2 (1939).

⁴³ *Quirk v. Thomas*, 6 Mich. 76 at 112 (1858).

⁴⁴ *Henderson v. Dickey*, 35 Mo. 120 (1864); *Gilmore v. Thomas*, 252 Mo. 147, 158 S.W. 577 (1913).

handed out of the blue an equity of reformation which his predecessor did not have to sell to him? It is a fascinating problem, but it is a good deal closer to mathematics than to ethics.

4. *Suits to undo an executory transaction growing out of wrongful conduct in which both parties have shared.*⁴⁵ For example, in *Schley v. Andrews* in New York⁴⁶ a husband had made a written agreement with his wife for a collusive divorce. He agreed that he would pay her \$200 a month, and as collateral security would confess judgment for \$35,000. After she got the divorce, he delivered the agreement and the instrument confessing judgment. He made several payments but stopped soon after she married another man. Thereupon she entered judgment for \$35,000 and was about to collect it. The husband sued her to enjoin any proceedings such as execution for enforcing the judgment. Here his hands were just as dirty as hers, and accordingly the lower courts threw him out of equity. Yet he was not trying to get anything back. His purpose was to ward off an illegal attack. Though a plaintiff in form, he was a defendant in substance. Suppose that the wife had sued at law on the agreement and been obliged to go to trial. Then he would have been a defendant in form, and his defense of illegality would surely have prevailed. The apparent reversal of parties is irrelevant. This is not the time to talk about coming into equity with unclean hands. That maxim makes some sense as an expression of the policy against judicial aid for carrying out illegal transactions. But here the maxim collides with that policy. Insistence on clean hands leads to judicial inaction, and that is usually desirable. Yet now the policy against illegality calls for action. Otherwise the wife will gather the fruits of a wrongful divorce. Such was the view of five out of seven judges on the court of appeals.

The need for equitable relief is even plainer when the illegal instrument is negotiable. Unless the obligor gets a decree for cancellation and an injunction against transfer, he will probably be forced to pay a holder in due course, and thus the illegal bargain will have proved completely successful.

In situations like this the clean hands maxim becomes harmful. It misleads judges into ignoring the human facts before them. That is what happened to the United States Supreme Court a century ago in

⁴⁵ CHAFEE, *CASES ON EQUITABLE REMEDIES* 347, n. 1 (1938).

⁴⁶ 225 N.Y. 110, 121 N.E. 812 (1919). In *Basket v. Moss*, 115 N.C. 448, 20 S.E. 733 (1894), the essentially defensive nature of the applicant's position is recognized in a suit to enjoin the creation of a cloud on title by a foreclosure sale.

Creath v. Sims.⁴⁷ A asked an injunction against enforcement of a note given for the price of slaves illegally imported into Mississippi. Justice Daniel invoked the clean hands doctrine. "[I]n the position in which you have placed yourself, in that position we must leave you."⁴⁸ Leave him for how long? R, who was equally guilty, would soon put A in a very different position by extracting from him a large sum of money by way of ill-gotten gains. By not helping A, the Court really helped R. The maxim kept the equity judges from noticing what any layman would have seen at once.

Cases like *Creath v. Sims* are very different from the Massachusetts case of the repentant husband and from groups ahead where the clean hands maxim is not peculiar to equity because A would run into the same sort of trouble in the law courts. In such decisions as *Creath v. Sims*, the law courts reach a result squarely opposed to that in the equity courts. The law courts are right.

5. *Suits to remove cloud on title*.⁴⁹ Although here a legal counterpart exists in the action for slander of title,⁵⁰ its narrow scope is unlikely to present clean hands problems; hence we are still working through areas where it is hard for me to find any data for contesting the orthodox assumption that the clean hands doctrine is peculiar to equity.

What I do want to maintain is that the doctrine can often prove positively mischievous in this group of cases. Suppose that a suit to remove cloud on title is brought by A, who has occupied the land for many years so as to gain a legal title by adverse possession. The record title, a bare shell, still remains in R, so that A will have serious difficulties in persuading a prospective buyer or mortgagee to do business with him. A asks equity to clear his title by compelling R to give him a release which A can record so as to get himself into the recorded chain of title. R proves that A's original entry on the land was accomplished through fraud or violence.⁵¹ A runs considerable chance of being thrown out of court, for the judge may echo the passing observation of

⁴⁷ 5 How. (46 U.S.) 191 (1847). Accord, *Smith v. Kammerer*, 152 Pa. 98, 25 A. 165 (1892) (gambling); *Atwood v. Fisk*, 101 Mass. 363 (1869) (compounding a felony).

⁴⁸ 5 How. (46 U.S.) 191 at 204 (1847).

⁴⁹ CHAFEE, *CASES ON EQUITABLE REMEDIES* 369, n. 2 (1938).

⁵⁰ Chafee, "Does Equity Follow the Law of Torts?" 75 *UNIV. PA. L. REV.* 1 at 22 (1926).

⁵¹ Even without such facts A may have trouble; a few courts decline to aid an adverse possessor in equity. *Day v. Swan Point Cemetery*, 51 R.I. 213, 153 A. 312 (1931). The majority view is that relief will be given. *Sharon v. Tucker*, 144 U.S. 533, 12 S.Ct. 720 (1892); *Arrington v. Liscom*, 34 Cal. 365 (1868). A later Rhode Island statute allows a title obtained by adverse possession to be quieted under some conditions. R. I. Acts & Resolves, c. 938 (1940).

Justice Brewer that a man who wants a cloud removed must have a right "appealing to the conscience of a chancellor. . . . [I]f the conduct of the plaintiff be offensive to the dictates of natural justice, then . . . he will be held remediless in a court of equity."⁵²

This ethical attitude seems entirely out of place. What ought to count is the strong social policy in favor of making the land records furnish an accurate map of the ownership of all land in the community. Whatever A's old misdeeds, he is the lawful owner of this lot and the records ought to show this fact. The existing record falsely makes R owner. It may mislead scores of honest citizens—people who have strong reasons for wishing to buy the lot, such as creditors of A, creditors of R, or lawyers drawing deeds of adjoining lots who are anxious to insert an accurate description. What is the sense of perpetuating an erroneous land record in order to penalize A for past misdeeds by causing him inconvenience?⁵³ Better regard his dirty hands as washed during the lapse of twenty years rather than mess up the recording system.

SPECIFIC PERFORMANCE OF CONTRACTS

Thus far we have dealt with five types of cases where the man with unclean hands had to sue in equity or not sue at all.⁵⁴ In such situations it was not easy to get light on my first main question, whether the clean hands doctrine is peculiar to equity. We shall get much more help on that point from situations in which the unethical plaintiff has a real choice between starting in equity and starting at law. How much better off will he be, if he seeks damages instead of specific relief? The time has come to take up several groups of equity cases where A might have resorted to the law side.

6. *Suits for specific performance of contracts where A has engaged in fraud, sharp practice, or other unethical conduct.* This great group of cases runs back at least as far as one of Francis' cases,⁵⁵ and is illus-

⁵² *Deweese v. Reinhard*, 165 U.S. 386 at 390, 17 S.Ct. 340 (1897). The clean hands point was not necessary to the decision, for the Court also held that A had an adequate remedy at law by defending a pending ejectment suit.

⁵³ An example of such morality is *King v. Antrim Lbr. Co.*, 70 Okla. 52, 172 P. 958 (1917). But the ethical approach was properly rejected in *Cochran Timber Co. v. Fisher*, 190 Mich. 478, 157 N.W. 282 (1916); *Basket v. Moss*, 115 N.C. 448, 20 S.E. 733 (1894).

⁵⁴ I ignore the possibility of a suit for a declaratory judgment, e.g., to determine non-liability in group 4. Such a declaratory suit might well be considered equitable, and at all events the clean hands maxim has been little discussed in declaratory judgment cases.

⁵⁵ *Anon*, 2 Ch. Cas. 17, 22 Eng. Rep. 825 (1679); FRANCIS, *MAXIMS OF EQUITY*, 4th ed., 6.

trated by *Cadman v. Horner*, in 1810,⁵⁶ already discussed as the second decision to talk about "clean hands." Since then, the cases have become so numerous that a selection of them fills 119 pages of the first edition of Chafee & Simpson's *Cases on Equity*.⁵⁷ A glance through the leading decisions in this group reveals something surprising. In most of them, the judges never use the words "clean hands." This omission has an important bearing on my second main question, whether the maxim is a single principle or several rules. Evidently a judge faced with a case within this group finds so many precedents relating to the specific defense involved that he views the question before him as one of fraudulent misrepresentation or innocent misrepresentation, concealment or nondisclosure, mistake of some special type or hardship. He is likely to forget all about the magic maxim and decide the case within the orbit of the agreement, the surrounding facts, and the nature of the particular inequity with which *A* is charged. Instead of a vague general principle we have a number of separate defenses.

This judicial junking of the maxim involves no apparent loss of ethical attitude, and it has the great advantage of inducing a more critical examination of the various policies, ethical or otherwise, which ought to govern the case. Sometimes this critical process may make an applicant's unethical conduct more of a bar to relief than it is made out to be by writers engaged in a Cook's tour over the whole clean hands maxim. Both Francis and Pomeroy, for example, state that *A*'s inequitable conduct must harm *R*;⁵⁸ but when we look at the specific performance cases we find decisions like *Kelly v. Central Pacific R.R. Co.*,⁵⁹ which denies relief in order to avoid fraudulent injury to a third party, and *Curran v. Holyoke Water Power Co.*,⁶⁰ refusing to enforce a contract so as to cause great hardship to third parties. Conversely, the interests of outsiders have led a court to aid an applicant despite his misconduct. During the period of the National Industrial Recovery Act codes, *A*, an organization of dress jobbers, made a collective bargaining agreement with *R*, an association of manufacturing shop owners, as to fair business relations with one another and with their respec-

⁵⁶ 18 Ves. 10, 34 Eng. Rep. 221 (1810).

⁵⁷ 2 CHAFEE & SIMPSON, *CASES ON EQUITY*, 1st ed., c. 10, 1270-1388 (1934), reduced to 48 pages in op. cit., 2nd ed., c. 12, 658-705 (1946). There are 55 pages in McCLINTOCK, *CASES ON EQUITY* 729-783 (1936).

⁵⁸ FRANCIS, *MAXIMS OF EQUITY*, 4th ed., 5 n. (b); 2 POMEROY, *EQUITY JURISPRUDENCE*, 5th ed., § 399 (1941).

⁵⁹ 74 Cal. 557, 16 P. 386 (1888); see also 1 CHAFEE & SIMPSON, *CASES ON EQUITY*, 1st ed., 1280, n. 4 (1934); op. cit., 2d ed., 665, n. 17 (1946).

⁶⁰ 116 Mass. 90 (1874).

tive employees. Because of repeated violations of this agreement by A, R ordered its members to close their shops and cease to deal with A. This shutdown would throw 40,000 wage earners out of work. The arbitrator accordingly decided that this order was illegal and ought to be revoked, but R insisted upon carrying it out. A sued R to enjoin continuance of the order which was contrary to the agreement. Although R tried to use A's own violation of the agreement as a defense, the court held A entitled to relief because the interests of the workers and the national recovery program were paramount.⁶¹ Whatever we think of the N.R.A. now, this was a very sensible decision.

Now I turn to my first main question. In all the cases in this group the inequitable applicant could conceivably sue at law for damages. What would be the effect there of the discretionary defense which prevents him from getting specific performance? Sometimes his fraud or mistake would be a legal defense, too, and he would be just as badly off. In other situations, the fraud or mistake which keeps equity from enforcing the contract would also be a ground for its cancellation, and then the wrongdoer would of course get nowhere at law. Still, there are a great many cases in which cancellation or rescission is not sought, and often the court which denies specific performance intimates that A might succeed in a law court. For example, this happened in *Cadman v. Horner*, and it is well known that some types of mistake are probably not serious enough to offset an agreement although they make equity decline to enforce it.⁶²

In the famous case of *Willard v. Tayloe*,⁶³ a lease in 1854 of a house next Willard's Hotel to A, the owner of the hotel, gave the tenant the option of purchasing the house for \$22,500 at any time within ten years. In 1854, dollars were measured in gold. In 1864, two weeks before his option expired, A tendered \$22,500 in greenbacks, which had meanwhile become legal tender. The landlord refused to take the paper money but was willing to take gold, which was then at a premium. The house was undoubtedly worth a great deal more than \$22,500 in greenbacks. Because of the hardship to the seller, the court declined to force him to convey the house unless the buyer would do equity by paying him the price in gold and silver coins. Otherwise, said Justice Field, the enforcement of the contract would be inequitable.

⁶¹ Natl. Dress Mfgs. Assn. v. United Assn. of Dress Mfgs., 151 Misc. 827, 272 N.Y.S. 360 (1934), 48 HARV. L. REV. 336 (1935).

⁶² Mansfield v. Sherman, 81 Me. 365, 17 A. 300 (1889).

⁶³ 8 Wall. (75 U.S.) 557 (1869).

Now suppose that after the landlord's refusal to accept legal tender, the tenant had sued at law for breach of contract. Theoretically, the measure of damages would have been the value of the house in greenbacks minus \$22,500.⁶⁴ The payment of such a very large sum of money seems about as great a hardship on the landlord as for him to take the agreed price in depreciated currency. In other words, does the seller in these cases really gain anything worthwhile by fending off specific performance and subjecting himself instead to the rigor of the law?

This is a puzzle which has never been solved. The reports do not tell us, for the most part, what happened in a damage case after *A* was thrown out of equity. My guess is that there are two reasons *R* feels that he has won a victory. In the first place, he will have a jury trial at law and the jurymen may not give *A* the benefit of the theoretical measure of damages. After all, jurymen are sometimes just as sensitive as an equity judge to the unconscionable behavior of a plaintiff. No doubt an inadequate verdict which disregards the law of damages may get *A* a new trial, but there is no assurance that a second jury will be more favorably disposed toward him than the first. So he may accept his low damages and call it a day. In the second place, even though the damages are measured accurately by the jury, the defeated seller now retains his land. The same cause which made it rise in value between the contract and the breach often continues to operate. The seller may feel that future accretions in value will give him back some of what he has lost in the law courts. At all events, whatever the explanation, there is no doubt that many equity defendants have fought fiercely against specific performance although they knew they were risking a later action at law. These men must have believed that they had something substantial to gain by keeping out of equity. Therefore, it looks as if they thought that *A*'s misconduct would be of some disadvantage to him at law as well as in equity. In short, a jury and a law judge will not be altogether blind to unclean plaintiffs in this group of situations.

Suppose the shoe is on the other foot—the tricky person suing is the seller. The defendant gets still less good out of being let off in equity so long as he is held at law. If the unfairness or mistake has led him to

⁶⁴ Inasmuch as the contract was made with gold in mind, it is possible to argue that the measure of damages would have been present gold-value of house minus \$22,500 in gold. This would have been a considerable sum, since the house had increased greatly in value during the ten years, but a good deal less than the damages as measured in my text. However, in view of the Legal Tender Acts, I think that the law court would have left gold entirely out of consideration. Whatever the thought of the parties, they did not mention gold in their contract.

promise considerably more than the land is worth, the usual measure of price minus value will make him pay over a big sum of money with nothing at all to show for it. His only hope is that the jurymen will disregard the judge's charge. In several states, like New York, the buyer at law has to pay the full price. There the law court gives the dirty-handed seller exactly what equity says he ought not to have.

Now that law and equity are merged, has not the time come to abandon this double standard for land contracts? Why should the same judges be very moral in a specific performance suit and brutally mathematical in a damage suit? The real issue in either case is not the plaintiff's misbehavior, but the nature of the transaction which the court is asked to enforce. In favor of relief by either method is the policy of the stability of transactions—a contract should not be lightly tossed aside every time that it proves disadvantageous to one party. Against this, however, must be balanced the policy that a court of justice should be very reluctant to do injustice. That covers *any court*. The outcome of this balancing process should not be shaped by historical accidents in the fourteenth century which entrusted one kind of contract enforcement to the chancellor and another kind to the common-law judges.

For the most part, if a contract is too unfair to be specifically performed, then it is too unfair for damages. At least, the single court of today ought to take the facts which bar specific performance and ask whether they do not also render damages unjust. This means that denial of specific performance should usually result in rescission of the agreement. Of course, the procedure may take various forms. It may be cancellation in response to a counter claim; it may be dismissal of the equitable complaint with prejudice to a subsequent damage action. The mode is unimportant beside the main point that, when unfairness is imputed to an agreement, judges ought to do plenty of thinking before they allow damages to be awarded.

No doubt there will still be a few situations where unfairness ought to prevent specific performance without preventing damages. The distinction, however, ought not to depend on the old line between law and equity or on varying degrees of morality. The distinction ought to turn on the difference in the actual nature of the two remedies which the single court has at its disposal. Specific performance sometimes operates more severely than an award of damages and hence may be less appropriate under the circumstances. For example, if R has improvidently agreed to sell his home, a court may be unwilling to force him to move out and yet feel that he ought to pay some damages for the

privilege of calling the bargain off and staying on. The same difference in the nature of the two remedies is a factor in contracts calling for continuous and complex supervision where morality usually has nothing to do with the case. A court may refuse specific performance simply because the facts make damages a more suitable remedy.

In other words, I am not asking judges to treat a damage claim just like a claim for specific relief where the discretionary defenses, such as unfairness, are raised. What I do ask is that judges should look at what they themselves are doing, and not at what dead judges did before the Pilgrims landed on Plymouth Rock. Suits for breach of contract involve morality, within the proper limits of its application in a courthouse, just as much as suits for specific performance. At the same time, any student of ethical principles knows that their application depends greatly on the facts of the particular case.

7. *Suits to enforce illegal contracts.*⁶⁵ This group runs back to the *Highwaymen's Case*.⁶⁶ The continuity is illustrated by Jessel, M. R., in dismissing a bill connected with a scheme for a lottery in violation of statutes. After citing the old case as authority, Jessel went on:

"If two persons go partners as smugglers, can one maintain a bill against the other to have an account of the smuggling transaction? I should say certainly not. . . . [It] would be lending the aid of the Court to assert the rights of the parties in carrying out and completing an illegal contract."⁶⁷

Observe that Jessel stresses the nature of the transaction, not A's misconduct. Such a judicial attitude is very common in this group of cases, and it supports the principle I have just presented in connection with unfair contracts. The real objection is not to one man's clean hands, but to the whole enterprise. The court does not want to touch an unlawful transaction with a ten-foot pole. It always refuses to help carry it out, and it often refuses to pick up the pieces after the enterprise has fallen apart. Courts were set up to enforce the law, not to enforce violations of law.

Plainly, this is just as true of law courts as equity courts. Suppose that one highwayman, instead of making the other highwayman his partner, had hired him as an employee to join in robbing postchaises on Hounslow Heath at a pound a day. After putting in several days'

⁶⁵ 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §§402, 402f, 403 (1941).

⁶⁶ 9 L.Q.R. 105 (1893); see 41 HARV. L. REV. 650 (1928) on partnerships for an illegal purpose.

⁶⁷ Sykes v. Beadon, 11 Ch. D. 170 at 196 (1879).

lucrative work, the employee was discharged without a penny of pay, and sued at law for his wages. Of course he would fare no better than in chancery.

There are hundreds of law cases on illegal contracts. They fill five chapters and 550 pages in *Williston on Contracts*.⁶⁸ The wrongs discussed by him also come up in equity. All the problems are the same, whether the court is asked for specific performance or for damages.

To start with, is the main transaction really illegal? This is sometimes a hard question, particularly when restraint of trade is involved. Once illegality is determined, denial of specific relief⁶⁹ or damages is automatic whenever the illegality is central to the litigated claim. For example, take a law case in the United States Supreme Court in 1929. A bankruptcy rule forbade counsel for the creditors to be also counsel for the trustee. Samuel Untermeyer, who was acting for the creditors in a very difficult bankruptcy, agreed to supervise the work of the trustee's attorney in return for a large percentage of the latter's fee. No fraud was shown, and Untermeyer's advice enabled the trustee and his lawyer to do an excellent job for all concerned. When Untermeyer failed to receive his promised percentage, he assigned his claim to a man who sued the trustee's attorney for over \$70,000. The plaintiff was thrown out as fast as if he had gone into equity. Chief Justice Taft said:

"A question of public policy is presented—not a mere adjudication of adversary rights between the two parties. . . . [That Untermeyer did good service is immaterial.] What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases."⁷⁰

The court could not have been more ethical if Untermeyer had gone into equity to get compensation in the form of a promised house or painting by Picasso.

Equity courts have much more trouble with illegality when it is coupled with a legal transaction or is somewhat peripheral to the suit.⁷¹ Suppose that a seller resists a bill for specific performance of a land contract on the ground that the buyer got the price as a bribe in exchange for political favors to some third person. It is often hard to determine the effect of unlawful acts which are over and done with. The Supreme Court struggled with this question for many pages in

⁶⁸ 5, 6 *WILLISTON, CONTRACTS*, rev. ed., cc. 48-52, pp. 4553-5101 (1937, 1938).

⁶⁹ *Ben Lomond Co. v. McNabb*, 109 W. Va. 142, 153 S.E. 905 (1930).

⁷⁰ *Weil v. Neary*, 278 U.S. 160 at 171, 173, 49 S.Ct. 144 (1929).

⁷¹ 2 *POMEROY, EQUITY JURISPRUDENCE*, 5th ed., §§402f, 403 (1941).

McMullen v. Hoffman in 1899,⁷² a suit for an account of the profits of work done by a contractor in pursuance of illegal bidding.

Yet, like many state courts,⁷³ the Supreme Court has been equally perplexed in damage suits by the same problems about the closeness of the connection between the illegality and the relief sought. We get the same talk about the illegality being "remote" and "collateral."⁷⁴ These words are not helpful reasons; they are pretty much labels for the result which has been reached.

An interesting example of the Court's treatment of peripheral problems at law is *A. C. Frost & Co. v. Coeur d'Alene Mines Corp.* in 1941,⁷⁵ where a banker sought damages from a copper company for breach of a contract for him to underwrite a large issue of its stock. The defense was that the stock had never been registered with the S.E.C. for sale in a public offering, as *A* knew. The highest state court ordered judgment for the defendant, holding that the parties must be left in the situation where they were found because of the violation of the securities act. The Supreme Court reversed this judgment and decided for the underwriter. Justice McReynolds said that the act of Congress imposed criminal and other penalties upon the corporation for marketing unregistered stock. The Court ought not to go further and make the transaction void. The clear legislative purpose was protection of innocent purchasers of securities. To deny relief to this particular purchaser would merely help the wrongdoing seller, the very person picked out by Congress for punishment.

So far is judicial repugnance to illegality from being a purely equitable doctrine that Justice Brandeis, in his famous dissenting opinion in the *Wire-tapping Case*,⁷⁶ pointed out that criminal courts faced much the same problem when considering the admissibility of evidence which has been illegally procured, for instance, by an unlawful search and seizure. He maintained that the considerations affecting the offeror of such evidence were much the same as those applicable to a plaintiff seeking civil relief. When should the wrongdoer, in either event, be thrown out of court?

⁷² 174 U.S. 639 at 654, 19 S.Ct. 839 (1899). See also *Brooks v. Martin*, 2 Wall. (69 U.S.) 70 at 79 (1863); *Eastman Kodak Co. v. Sutherland*, (C.C.A. 3d, 1931) 52 F. (2d) 592 (U.S. official charged with violating anti-trust laws).

⁷³ 6 WILLISTON, CONTRACTS, rev. ed., § 1752-1762 (1938).

⁷⁴ See *Loughran v. Loughran*, 292 U.S. 216 at 228, 54 S.Ct. 684 (1934); and many state equity cases.

⁷⁵ 312 U.S. 38, 61 S.Ct. 414 (1941).

⁷⁶ *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564 (1928).

"The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime however long; makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. . . . [T]he objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself."⁷⁷

Evidently, we have strayed far away from a maxim of equity into one of the bitterest controversies of constitutional law: what happens to the prosecutor or F.B.I. agent who comes into a criminal court with unclean hands? Wigmore always thought it absurd for courts to punish a lawless government official by excluding the evidence illegally obtained and so making it much harder to convict men who were probably guilty of much more serious offenses:

"All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, this view appears indifferent to the direct and immediate result, viz., of making Justice inefficient, and of coddling the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer. . . .

"The natural way to do justice here would be to enforce the splendid and healthy principle of the Fourth Amendment directly, *i.e.*, by sending for the high-handed, over-zealous marshal who had searched without a warrant . . . imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal. But . . . the unnatural method . . . of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody who broke something else."⁷⁸

⁷⁷ *Id.* at 484, 485.

⁷⁸ 8 WIGMORE, EVIDENCE, 2d. ed., §§2184 (1940).

This argument is eloquent, but a good deal can be said on the other side. There is abundant proof during recent decades that just so long as illegally-seized evidence is admissible, prosecuting officials will disregard the Constitution in order to get it, and will feel that the conviction of the accused is ample compensation for the slight risk which they themselves run of prosecution by the very same district attorney who probably ordered them to make the seizure.⁷⁹

Plainly this constitutional controversy, like the specific performance cases, is merged into one broad problem about illegality: is it desirable in a given situation to bring extra pressure to induce obedience to the criminal law, over and above the usual punishments provided by statute? In wrongful searches and seizures, the extra pressure on officials consists of exclusion of the evidence and the consequent possibility of acquittal for the accused. For private persons contemplating all sorts of crimes, the extra pressure comes from the prospective denial of civil remedies to enforce a trust or contract, and, as I shall point out, to get relief against tortfeasors.

Wigmore is consistent in denouncing this use of extra-statutory pressure in civil suits by much the same reasoning as he employed in the search and seizure problem. As long ago as 1891, he commented upon the common doctrine of quasi-contracts, that a plaintiff, although he has conferred a benefit upon the defendant, gets no right to restitution if he has, in the course of the transaction, taken part in a violation of the penal law deemed serious enough to require an indirect penalty. For instance, when an alien and a citizen jointly owned a vessel and illegally registered it in the citizen's name in order to avoid a tax on alien shipowners, the alien was denied the help of the courts in making the defendant account for half of the vessel's profits—a sum far bigger than the tax and the penalty for not paying it.⁸⁰ Wigmore remarks:

“But the whole notion is radically wrong in principle and produces extreme injustice. If A owes B \$5,000 why should he not pay it whether B has violated a statute or not? Where the issue is as to the rights of two litigants, it is unscientific to impose a penalty incidentally by depriving one of the litigants of his admitted right. It is unjust, also, for two reasons: first, one guilty party suffers, while another of equal guilt is rewarded; secondly, the penalty is usually utterly disproportionate to the offense. If there

⁷⁹ See Chafee, “Progress of the Law 1919-1922—Evidence,” 35 HARV. L. REV. 694 to 703 (1922).

⁸⁰ *Cambiozo v. Maffet*, 2 Wash. (C.C. U.S.) 98 (1807).

is one part of criminal jurisprudence which needs even more careful attention than it now receives it is the apportionment of penalty to offense. Yet the doctrine now under consideration requires, with monstrous injustice and blind haphazard, that the plaintiff shall be mulcted in the amount of his right, whatever that may be. . . . [A] fine of thousands of dollars may be imposed for petty violations of law. One cannot imagine why we have so long allowed such an unworthy principle to remain.

"The expedient that naturally suggests itself is merely to order the sum due to be paid into court and to deduct from it such a portion as may be named by the proper tribunal as the penalty for the violation of the law."⁸¹

Wigmore's criticism has a good deal of force to it. It is strange for a civil court to determine *A*'s criminal guilt without the presence of a prosecutor and without any of the constitutional safeguards surrounding criminal proceedings, such as indictment by a grand jury trial by petty jury whenever demanded, and proof beyond a reasonable doubt. And after *A*'s guilt has been determined without the usual formalities, it is harsh to punish him by depriving him of property rights worth far more, in many cases, than the fine imposed by the legislature for such an offense.

On the other hand, there are at least two difficulties about Wigmore's proposed solution. In the first place it is hard to visualize the administrative procedure by which the direct attack on *A*'s alleged offense in a criminal court is to be geared into the pending civil suit. How can one be sure that *A* will be prosecuted and sentenced in time for the civil judge to deduct the assessed fine from what *A* recovers against the defendant? Secondly, here, as in the search and seizure problem, Wigmore seems to underestimate the value of extra-statutory pressure to induce obedience to important criminal laws. Perhaps these difficulties may serve to explain the failure of any jurisdiction to adopt his proposal. Instead of bothering to demarcate a money penalty approximately corresponding to the gravity of *A*'s offense, the courts find it simpler to go on giving him all or nothing, as before Wigmore wrote. They either disregard *A*'s crime entirely or make it a total bar to relief.

Without qualifying as an expert on this subject, I do feel that courts would do well to ignore *A*'s alleged crime more often than they do. Of course, it is an essential factor in the case whenever the civil suit

⁸¹ Wigmore, "A Summary of Quasi-Contracts," 25 AM. L. REV. 695 at 712 note k. (1891).

seeks judicial aid in carrying through the illegal enterprise. Moreover, in spite of what Wigmore says, it may sometimes be desirable to let a peripheral offense bar relief as an indirect method of deterring serious offenses for which convictions are hard to obtain. Nevertheless, a good many judges in civil suits have been hyper-sensitive to offenses involving very little moral turpitude. And it is one more weakness of the clean hands maxim that equity cases before thin-skinned judges appear to be less frequent than damage suits. No chancellor was ever so puritanical as the New Hampshire judges in *Thompson v. Williams*,⁸² a decision excoriated by the late Walter Wheeler Cook.⁸³ A sold two cows to R on Sunday, to be paid for later. When R refused to pay for them, A took back the cows. The New Hampshire courts gave R the value of the cows (the agreed price) in an action of trespass, and then held that he did not have to carry out his Sunday promise to pay for them. In effect, the seller was forced to buy back his own cows and the buyer got a windfall although he was equally guilty of profaning the Sabbath. The theory behind this discrimination was that the buyer got a solid ownership to the cows by an executed transaction whereas the seller had to rely on an executory promise which was unenforceable for illegality. According to Cook this outrageous result of an offense punishable by a small fine is perpetuated by section 538 of the *Contracts Restatement*.⁸⁴ An equally shocking law case comes from Wisconsin.⁸⁵ An alien went to work in a restaurant, but the owner refused to pay him his wages. When the alien sued, he was met with the defense that he had illegally entered the United States. Although this offense did not require indirect enforcement in a civil suit because deportation was bound to occur swiftly, still the alien got no wages. The Wisconsin judges excused their conduct by saying that one purpose of the immigration laws is to protect domestic labor from competition. They did not explain how this purpose is served by allowing an employer to get work done free by a foreigner.

Whatever may be the sound solutions of the difficult problems of illegality, enough has been said to show that they form a distinct branch

⁸² 58 N.H. 248 (1878).

⁸³ Cook, "Rescission of Bargains Made on Sunday," 13 N.C. L. REV. 165 (1934).

⁸⁴ The Restatement and the result of the New Hampshire case seem to be accepted as proper by WILLISTON, CONTRACTS, rev. ed., §§1702, 1703 (1937).

⁸⁵ Coules v. Pharris, 212 Wis. 558, 250 N.W. 404 (1933), 47 HARV. L. REV. 520 (1934). Contra, Rodney v. Interborough Rapid Transit Co., 149 Misc. 271, 267 N.Y.S. 86 (1932); Martinez v. Fox Valley Bus Lines, (D.C. Ill. 1936) 17 F. Supp. 576. See Feldman v. Murray, 171 Misc. 360, 12 N.Y.S. (2d) 533 (1939).

of the law. Civil judges who have to deal with A's illegality will get little help from the vague generalities of the clean hands maxim.

We now pass from specific performance of contracts to several groups of cases involving different types of torts.

8. *Miscellaneous tort suits by a person charged with crime.*⁸⁶ This group includes the Fort Sill liquor case,⁸⁷ which shows that much the same problems are raised as in connection with illegal contracts. The chief difference is that the defense appears to have less chance of success in warding off a tort injunction than in resisting specific performance. Perhaps a defendant who is proved to have committed acts of a tortious nature gets less indulgence than a promise-breaker. Furthermore, the illegality is less likely to be central to the relief sought. Occasionally, however, an injunction is asked for the sake of enabling crimes to continue. An amusing example of this is an old Missouri suit by the Modern Horse Shoe Club, where liquor was unlawfully sold, to make the police stop constantly entering the clubhouse and arresting the members as vagrants and prosecuting them under "the false charge" of idling. (Their only occupation at the club, according to the court, was cardplaying and drinking.) An injunction was refused on the ground of unclean hands and because "it is not the province of equity to assist a wrongdoer in violating the law."⁸⁸

However, the Fort Sill case is typical of the peripheral nature of the illegality in most of the equity cases I have noted in this group, and also of the frequency with which the defense is unsuccessful. A Delaware secretary of state was enjoined from taking the charter of a Delaware corporation out of the state for use in prosecuting its officers elsewhere for perjury in falsely swearing about the incorporation.⁸⁹ Equitable replevin was granted to A, who had bought a car to run his former mistress around in and put it in her husband's garage, so that the husband could teach A to drive. Since she had broken off relations besides keeping the car, the court found nothing but past illegality.⁹⁰

Much more was at stake in a recent equitable suit by the Standard

⁸⁶ 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §402 (1941); CHAFEE & POUND, CASES ON EQUITABLE RELIEF AGAINST TORTS, 383, n. 1 (1933).

⁸⁷ Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 64 S.Ct. 622 (1944).

⁸⁸ Modern Horse Shoe Club v. Stewart, 242 Mo. 421 at 431, 146 S.W. 1157 (1912). Accord, Gaither v. Cate, 156 Md. 254, 144 A. 239 (1929), 28 MICH. L. REV. 83 (1929) (seizure of slot machines).

⁸⁹ Delaware Surety Co. v. Layton, (Del. Ch. 1901) 50 A. 378.

⁹⁰ Overton v. Lewis, 152 Tenn. 500, 279 S.W. 801 (1926).

Oil Co. of New Jersey against the alien property custodian to recover patents and stock in other American corporations, which had been seized on the ground that they were still the property of German chemical companies from which Standard had acquired them.⁹¹ Besides unsuccessfully contending that the sales to Standard were a sham, the custodian urged the defense that, even if the patents and shares had become American property, still Standard could not recover them because it had got them through participation in an international cartel in violation of the anti-trust laws. A consent decree had already declared that these laws were violated by the relationship between Standard and the German firms. This defense was rejected by Judge Charles Clark, who said that Standard's violations of law were in the past. It had not used the property unlawfully since the consent decree.

"These plaintiffs have paid once, in the consent decree, for their wrongdoing and should not be made to pay again for those same acts. We do not believe the taint of illegality clings to property as long as it is in the hands of the illegal acquirer so that he may never restrain or redress its wrongful seizure."⁹²

This *Standard Oil* case suggests one more difficulty with the application of the illegality defense in civil cases. It may cause *A* to pay twice over for the same crime, for after losing his suit in law or equity he can still be prosecuted and fined or imprisoned. May there not be some clash with the policy of the double jeopardy clause?

The prevailing judicial attitude in equity cases in this group was presented in the leading case of *Kinner v. Lake Shore & Michigan Southern Railway Co.* in 1903.⁹³ In allowing the railroad to enjoin ticket-scalping, the Ohio court refused to turn the case before it into an elaborate investigation of a possible violation of the Sherman act through a combination of railroads to fix passenger fares and suppress competition. Judge Shauck said:

"But a court of equity is not an avenger of wrongs committed at large by those who resort to it for relief. . . ."⁹⁴

The round-trip tickets at reduced fares, which the defendant was misusing contrary to their restrictions, contained no clause violating any law.

Much more severity is shown by law courts to the victims of torts

⁹¹ *Standard Oil Co. v. Clark*, (C.C.A. 2d, 1947) 163 F. (2d) 917. Judge Frank concurred in a separate opinion.

⁹² *Id.* at 927.

⁹³ 69 Ohio St. 339, 69 N.E. 614 (1903).

⁹⁴ *Id.* at 344.

who have themselves been transgressors. The truth is that what we are concerned with in this group, and in the several other tort groups ahead of us, is not a factor in the discretion of equity. Instead, it is a principle of the substantive law of torts. Wigmore realized this decades ago in his summary in the back of his casebook on torts, one of those unteachable books which is a gold-mine for teachers. In analyzing what he calls "The Excuse Element," he starts with "Excuses Based on the Plaintiff's Own Conduct or Condition" and gives as the fourth such excuse, which of course he applied in damage suits, "Plaintiff a Law-Breaker." This Wigmore states as follows:

"The fact that a plaintiff at the time of receiving an injury is doing an act in violation of the law is not an excuse for the defendant who has negligently caused the harm; unless . . . the law violated had for a main purpose, (a) if a criminal law, to prevent by penalty the entire transaction in which the plaintiff was engaged, or (b) if a civil or a criminal law, to protect an interest of the defendant which the plaintiff was attempting to injure."⁹⁵

Enlightening as this statement is, it gives the impression of a greater unity than really exists. We shall see that the principle is considerably shaped by the special nature of each kind of tort; for example, patent infringement.

One law case cited by Wigmore in support of his principle is *Gilmore v. Fuller*.⁹⁶ The parties were two country schoolboys. Hearing about an evening wedding in the neighborhood, they met several other boys at their schoolhouse to prepare for a charivari for the newly-married couple. The boys took the school bell and provided themselves with bells, pans, ploughshares, revolvers, a shot-gun, and other implements for making noise. Reaching the bride's home, they made all the racket they could. While young Fuller and young Gilmore were enjoying the charivari much more than the bride and groom, the Gilmore boy kept firing off his pistol. Because of his carelessness, one bullet shot the Fuller boy in the face, and in consequence he was sued for trespass to the person. A verdict for \$1500 was set aside because the injured boy was violating the criminal code by wilfully disturbing "the peace and quiet of [a neighborhood] family . . . by loud and unusual noises."⁹⁷ At the time of the negligence, both boys were engaged in an unlawful enterprise.

⁹⁵ 2 WIGMORE, TORTS 885 (1912).

⁹⁶ 198 Ill. 130, 65 N.E. 84 (1902); 2 WIGMORE, CASES ON TORTS 180 (1912).

⁹⁷ 198 Ill. 130 at 136, 65 N.E. 84 (1902).

This law case involved the same defense of illegality which occasionally succeeds in equity injunction suits. Still more Draconic is the Massachusetts doctrine that the occupants of a car which is unregistered by Massachusetts law are outlaws on the highway who can be killed or maimed with impunity by negligent motorists. It makes no difference that the careful victim carried plates duly acquired in another state so long as he had lived for a month in Massachusetts before being hit.⁹⁸ And a recently married woman who left her car registered in her maiden name was held to come into law with unclean hands.⁹⁹ But the Massachusetts judges were lenient to a different kind of transgressor, an immigrant girl who was tricked into a void marriage and was allowed to get damages in deceit from the man even though she had engaged in illicit intercourse. The maxim that "Ignorance of the law is no excuse" was thrown out of the window along with the defense of illegality.¹⁰⁰

Probably the worst case of judicial insistence on the spotlessness of tort victims was in Illinois. A father had permitted his son, fifteen years old, to work in violation of the child labor law, an offense for which he could have been fined \$25. After the boy had been killed on the job while operating a freight elevator the father (as administrator) was denied damages because of his illegal conduct. "It is a fundamental principle of the law that no one be allowed to benefit by his own wrong. . . ."¹⁰¹ And so the court let the negligent employer benefit from *his* wrong. As the *Yale Law Journal* remarks,¹⁰² this decision deprives both the death damage and child labor statutes of their force. Equity judges have never been thus guilty of turning morality into cruelty, although the next group of cases¹⁰³ shows that they are fully capable of turning morality into absurdity.

(To be concluded.)

⁹⁸ *Hanson v. Culton*, 269 Mass. 471, 169 N.E. 272 (1929). See also *Johnson v. Boston & Maine R.R. Co.*, 83 N.H. 350, 143 A. 516 (1928) (no driver's license).

⁹⁹ *Bacon v. Boston Elevated Co.*, 256 Mass. 30, 152 N.E. 35 (1926).

¹⁰⁰ *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N.E. 609 (1929), 27 MICH. L. REV. 965 (1929).

¹⁰¹ *Newton v. Illinois Oil Co.*, 316 Ill. 416 at 423, 147 N.E. 465 (1925).

¹⁰² 35 YALE L. J. 513 (1926).

¹⁰³ To be discussed in the succeeding article in the June issue of the *Review*.