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Equity: Plaintiff Granted Injunction Despite Unclean Hands

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NOTES

EQUITY: PLAINTIFF GRANTED INJUNCTION DESPITE UNCLEAN HANDS. It has been oft-repeated that one of the most fundamental doctrines of equity jurisprudence is the maxim that *he who comes into equity must do so with clean hands.*[1] Although it is not included among the maxims which have been codified by the Civil Code of California[2] it has been firmly established in this state since the decision of *Conrad v. Lindley.*[3]

However, in view of the California case of *Kofsky v. Smart and Final Iris Company,*[4] decided in March, 1955, by the District Court of Appeals, one might wonder just how correct Professor Chafee was when he wrote that it was "The most amusing maxim of equity. . . ."[5]

In the *Kofsky* case, plaintiff and defendant were competitors in the wholesale tobacco business and both sold cigarettes at less than cost in violation of the Unfair Practices Act[6] with intent to injure competitors and thereby destroy competition. The Superior Court held that the plaintiff was entitled to a preliminary injunction restraining such acts of the defendant pending trial of action, notwithstanding that the plaintiff also had violated such act.

The "unclean hands" of the plaintiff was the primary basis for the appeal by the defendant. Thus, the issue was put squarely before the District Court of Appeal:

> "Since the plaintiff had violated the Unfair Practices Act of the State of California, would the unclean hands doctrine, to wit, that equity will not aid one party or another to a transaction which is illegal or contrary to public policy where the parties are equally at fault, but will leave them just where it finds them, apply so as to prevent the granting of the preliminary injunction in favor of the defendant?"[7]

The District Court answered in the negative, affirming the order, basing their decision on the following applicable provisions of the Business and Professions Code:[8]

> Section 17001: The Legislature declares that the purpose of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.
>
> Section 17043: It is unlawful for any person engaged in business . . . to sell any article or product at less than the cost thereof . . . for the purpose of injuring competitors or destroying competition.
>
> Section 17078: If it appears to the court upon any application for a temporary restraining order, or upon the hearing of any order to show cause why a preliminary injunction should not be issued . . . that any defendant therein is violating, or has violated, this chapter, then the court shall enjoin the defendant from doing all acts which are prohibited by the section, or sections, of which any provision thereof is being violated, or has been violated, by the defendant.

Taking these provisions together, the District Court concluded that it was mandatory for the trial judge to grant the preliminary injunction. Their reasoning was that the unclean hands doctrine, although *usually* applicable where the parties are in *pari delicto,* would not be applied where the failure to restrain them would result in permitting an act that is declared by statute to be against public policy.

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[1] 2 POMEROY, EQUITY JURISPRUDENCE § 397 (5th ed., Symons, 1941).
[2] CALIF. CIV. CODE §§ 3509-43.
[3] 2 Cal. 173 (1852).
[4] 131 Cal.App.2d 530, 281 P.2d 5 (1955).
[5] Chafee, *Coming Into Equity With Clean Hands,* 47 MICH. L. REV. 877-906, 1065-96 (1949).
[6] CALIF. BUSINESS AND PROFESSIONS CODE § 17000-101.
[7] 131 Cal.App.2d at 531, 281 P.2d at 6.
[8] See note 6 *supra.*

The District Court felt that this case was analogous to a Virginia case[9] in which the court held that the unclean hands of the plaintiff would not be a valid objection to the maintenance by one spouse of a suit to annul a marriage which was against public policy. Although the decisions are conflicting[10] this seems to be the better view because of the public interest in having questions of marital status judicially settled.[11] The California courts have readily applied this so-called "discretionary exception" to the general doctrine of unclean hands in bigamous marriage cases,[12] and also have made exceptions where the parties are not in *pari delicto* but the defendant takes advantage of his superior knowledge or position, or of plaintiff's weakness, to accomplish an illegal result.[13]

Also, prior to this case, with the two exceptions mentioned, *supra,* the California courts have used very strong language concerning the enforcement of this maxim, e.g., ". . . unless the plaintiff brings himself within its (clean hands doctrine) rules, equity will leave the parties where it finds them."[14] The courts have made many references to it as ". . . the most important rule affecting the administration of justice. . . ."[15]

Thus, this decision raises the question: Do these code sections[16] vitiate the doctrine of unclean hands where the interest of the public is present or does it fall, by analogy, into one of the heretofore recognized exceptions. In order to answer this query adequately, it might be well to delve cursorily into the doctrine's historical origins. According to Professors Chafee and Pound,[17] in 1728, a barrister, Richard Francis, published the first edition of "Maxims in Equity"[18] and his maxim II was "He that hath committed iniquity shall not have equity." As pointed out by legal historians,[19] Francis himself seemed to be the creator of this maxim since none of his cases cited actually used it. However, Francis did abstract nine cases and in all of them the plaintiff was not given relief because of his unclean hands.

The maxim apparently did not impress the legal writers to any extent for in 1839, Story in his works on Equity had no mention of it.[20] The doctrine slowly gained recognition and by 1881, the maxim was well established as exemplified by Pomeroy devoting eleven pages to it.[21]

The California courts readily adopted the maxim and did so at a relatively early period in their judicial history[22] and with the two exceptions, stated previously, they have consistently adhered to the rule and have refused the plaintiff relief on the basis of it.[23] Notwithstanding the repeated pronouncements of the doctrine, now that the Legislature has spoken in California, it appears obvious that the unclean hands doctrine has no application in these cases under the proper interpretation of

[9] Heflinger v. Heflinger, 136 Va. 289, 118 S.E. 316, 32 A.L.R. 1088 (1923).
[10] Ancrum v. Ancrum, 9 N.J. Misc. 795, 156 Atl. 22 (1931).
[11] CLARK, EQUITY § 30 n. 5 (2d ed. 1954).
[12] Sullivan v. Sullivan, 219 Cal. 734, 28 P.2d 914 (1934).
[13] Sontag v. Denio, 23 Cal.App.2d 319, 73 P.2d 248 (1937).
[14] Richman v. Bank of Perris, 102 Cal.App. 71, 282 Pac. 801 (1929).
[15] Katz v. Karlsson, 84 Cal.App.2d 469, 191 P.2d 541 (1948); 18 CAL. JUR. 2d Equity § 28 (1954).
[16] See note 6 *supra.*
[17] Pound, *On Certain Maxims of Equity,* in CAMBRIDGE LEGAL ESSAYS, pp. 263, 264 (1926); Chafee, *supra* note 5, at 880.
[18] FRANCIS, MAXIMS OF EQUITY (1st ed. 1728).
[19] See note 17 *supra.*
[20] 1 STORY, EQUITY JURISPRUDENCE (1839).
[21] 1 POMEROY, EQUITY JURISPRUDENCE 432-43 (1881).
[22] See note 3 *supra.*
[23] See note 15 *supra.*