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Equity—Clean Hands Doctrine—Not Automatically Invoked against Fraudulent Transferor

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EQUITY—CLEAN HANDS DOCTRINE—NOT AUTOMATICALLY INVOKED AGAINST FRAUDULENT TRANSFEROR—*McCune v. Brown*, 8 Ark. Ct. App. 51, 648 S.W.2d 811 (1983).

On December 12, 1978, six hundred fifty gold Krugerrands, thirteen Mexican pesos and one double eagle gold piece were placed in a Little Rock bank in a safety deposit box leased to Billie Jean McCune, the defendant. W.G. Brown, the defendant's father, retained the keys to the box. On August 28, 1981, Mr. Brown filed a complaint in equity against his daughter seeking a temporary restraining order to keep her from removing any of the contents of the safety deposit box. At trial Mr. Brown, who was involved in a divorce proceeding at the time of the transfer, admitted he had transferred the gold to his daughter in an attempt to defeat his ex-wife's rights to the property. The chancellor found that Mr. Brown had not made a completed gift of the gold and that he was not estopped from asserting his claim to the gold. Further, he had proved his right to the gold and was entitled to it. The court of appeals refused to invoke the clean hands doctrine on appeal and affirmed the chancellor's decree. *McCune v. Brown*, 8 Ark. Ct. App. 51, 648 S.W.2d 811 (1983).

The clean hands doctrine, when applied, operates to bar relief to a plaintiff with "unclean hands" who comes into equity seeking to assert a claim to which he would otherwise be entitled.[1] Unclean hands has been defined as any sort of conduct which equity would consider unethical even though such conduct may be legal.[2] The general statement of the doctrine has been qualified to include only inequitable or wrongful conduct which was related to the transaction or subject matter of the suit.[3]

The purpose of the doctrine is to promote public policy and protect the integrity of the court.[4] The Arkansas Supreme Court, using slightly different terms, stated that the purpose of the doctrine

1. D. DOBBS, REMEDIES 46 (1973).

2. *Id.*

3. W. DE FUNIAK, HANDBOOK OF MODERN EQUITY 39 (1956).

4. Gaudiosi v. Mellon, 269 F.2d 873 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959); Hall v. Wright, 240 F.2d 787 (9th Cir. 1957); Marshall v. Marshall, 227 Ark. 582, 300 S.W.2d 933 (1957); Katz v. Karlsson, 84 Cal. App. 2d 469, 191 P.2d 541 (1948); Pszczola v. Pszczola, 8 Misc. 2d 924, 167 N.Y.S.2d 695 (1957); *see also* 30 C.J.S. *Equity* § 93 (1965); and 27 AM. JUR. 2D *Equity* § 136-137 (1966).

was to secure justice and equity.[5] The doctrine has traditionally not been used to punish the complainant nor to favor the defendant, but has been applied in the interest of the public and to protect the court and the defendant by now allowing the complainant to use the court's powers to bring about an inequitable result.[6]

The doctrine in its general application is invoked to dismiss the plaintiff's suit,[7] and the court may invoke the doctrine of its own accord when inequitable conduct comes to its attention.[8] Alternatively, the court may allow the defendant to invoke the doctrine, but there is authority that he may be precluded from doing so where his own conduct has been inequitable or he also has unclean hands.[9] Once the case has been heard and decided on its merits, the doctrine generally may not be raised for the first time at the appellate level except on a showing of strong grounds.[10]

Although the doctrine is traditionally applied to estop the plaintiff with unclean hands from seeking the aid of equity, the courts have developed numerous limitations and exceptions to its application in an attempt to better serve the underlying purposes of the doctrine. One limitation to the application of the doctrine is that the wrongful conduct of the plaintiff must relate to the matter before the court.[11] Additionally, the conduct of the defendant may prevent him from invoking the doctrine and will be considered by the court in its decision to invoke the doctrine.[12] Another major factor in deciding whether or not to invoke the doctrine is its effect on public policy.[13] Also, where the defendant has not been injured and espe-

5. Sliman v. Moore, 198 Ark. 734, 738, 131 S.W.2d 1, 3 (1939).

6. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240 (1933); Eristavi-Tchitcherine v. Lasser, 164 F.2d 144 (5th Cir. 1947); Ford v. Buffalo Eagle Colliery Co., 122 F.2d 555 (4th Cir. 1941); *see also* 27 AM. JUR. 2D *Equity* § 137 (1966).

7. 27 AM. JUR. 2D *Equity* § 136 (1966).

8. W. DE FUNIAK, HANDBOOK OF MODERN EQUITY 39 (1956).

9. Sliman v. Moore, 198 Ark. 734, 131 S.W.2d 1 (1939); Belling v. Croter, 57 Cal. App. 2d 296, 134 P.2d 532 (1943); Buszozak v. Wolo, 125 Misc. 546, 211 N.Y.S. 557 (1925); *see also* 27 AM. JUR. 2D *Equity* § 138 (1966); 30 C.J.S. *Equity* § 98 (1965).

10. Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740 (1941); *see also* 27 AM. JUR. 2D *Equity* § 136 (1966).

11. D. DOBBS, REMEDIES 46 (1973) (only bad conduct that is at least part of the source of plaintiff's claim is considered in applying the doctrine); W. DE FUNIAK, HANDBOOK OF MODERN EQUITY 39 (1956) (court will not examine plaintiff's general character for fair dealing).

12. Sliman v. Moore, 198 Ark. 734, 131 S.W.2d 1 (1939); Belling v. Croter, 57 Cal. app. 2d 296, 134 P.2d 532 (1943); *see also* 30 C.J.S. *Equity* § 98 (1965); 27 AM. JUR. 2D *Equity* § 138 (1966).

13. W. DE FUNIAK, HANDBOOK OF MODERN EQUITY 40-41 (1956) (plaintiff's conduct violative of public policy, even though not closely related to matter before court, may bar

cially where he would stand to gain from the transaction, he will not be allowed to force the doctrine on the court.[14] Another exception is that an unclean plaintiff who has purged himself of his wrongful conduct may be allowed to recover.[15]

Although the above limitations would seem to lend themselves to a mechanical formula for application, the use of the doctrine rests in the sound discretion of the court which should not be restrained by the rigid use of limitations.[16] It has therefore been suggested that a court, in determining whether to apply the doctrine, should weigh the relative extent of each party's wrong upon the other and upon the public and make an equitable balance.[17]

Evidence exists that the clean hands doctrine was applied long before it was expressed in its present form. Refusal of the courts to entertain actions because of a creditor's immorality stems from the Roman Law and was so well established by the time the Napoleonic Code was enacted that no need existed for a provision in the Code itself.[18] There is also an analogous doctrine in common law and Roman Law: *ex turpi causa non oritur actio*, which has been given the following translation: "[N]o cause of action will arise out of an illegal transaction."[19] The clean hands doctrine was also applied prior to 1725 in *The Highwayman's Case* in denying relief to a party who sought an accounting with his partner upon discovering that the partnership was formed to steal.[20]

The first appearance of the clean hands doctrine, essentially in its present form, was in 1787 in England: "A man must come into a Court of Equity with clean hands."[21] The doctrine appeared earlier in slightly different language in a collection of maxims by Richard Francis: "He that hath committed iniquity shall not have equity."[22]

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equitable relief); D. DOBBS, REMEDIES 46 (1973) (plaintiff with unclean hands may obtain equitable relief where denial would oppose public policy).

14. Batesville Truck Line, Inc. v. Martin, 219 Ark. 603, 243 S.W.2d 729 (1951); McClanahan v. McClanahan, 79 Ohio App. 231, 72 N.E.2d 798 (1946); Rodgers v. Tracy, 242 S.W.2d 900 (Tex. Civ. App. 1951); *see also* 27 AM. JUR. 2D. *Equity* § 144 (1966).

15. Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980); Dickerson v. Murfield, 173 Or. 662, 147 P.2d 194 (1944); *see also* 27 AM. JUR. 2D *Equity* § 143 (1966).

16. Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944); Smith v. Williamson, 208 Okla. 323, 256 P.2d 174 (1953); *see also* 30 C.J.S. *Equity* § 99 (1965).

17. Republic Molding Corp. v. B.W. Photo Utilities, 319 F.2d 347 (9th Cir. 1963).

18. R. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 250 (1961).

19. G. CLARK, EQUITY 42 (1954).

20. The case has been identified as Everet v. Williams and the date fixed prior to 1725. Notes, *The Highwayman's Case*, 9 L.Q. REV. 197 (1893).

21. Dering v. Earl of Winchelsea, 1 Cox Eq. 318, 319, 29 Eng. Rep. 1184, 1185 (1787).

22. R. FRANCIS, MAXIMS OF EQUITY 5 (1727 & photo. reprint 1978) (legal scholars have

The first use of the doctrine as a rule of decision was in 1810 in *Cadman v. Horner*.[23] In that case a buyer in a fiduciary relationship with the seller of property was not granted the aid of equity because he had misrepresented the value of the property to the seller.

The earliest mentioned case in the United States using the clean hands phraseology involved a wife suing her husband for divorce on grounds of adultery. She was denied aid of equity in obtaining a divorce because she was also guilty of adultery. The court said she must come into equity with clean hands unstained by the same crime of which she complained.[24]

Apparently the first time the doctrine was stated in an Arkansas decision was in 1878.[25] "A party seeking the aid of chancery to compel specific performance of a contract for the sale of lands, must come into court with clean hands, and there must be no fraud or breach of trust in the sale."[26] Prior to 1878, the Arkansas Supreme Court had discussed the application of the principle underlying the doctrine in two cases.[27]

In 1886 in *Millington v. Hill, Fontaine & Co.*,[28] the Arkansas Supreme Court set forth the rule that a conveyance to defraud creditors was valid between the parties and their privies, although it may be avoided by the creditors of the fraudulent grantor.[29] Over the next thirty years the court consistently followed the *Millington* decision in similar conveyance cases.[30] Although none of those cases dealt with a fraudulent transferor suing a transferee for return of his

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suggested that Francis originated the maxim); *see* Pound, *On Certain Maxims in Equity*, in CAMBRIDGE LEGAL ESSAYS 259, 263-264 (1926); *see also* Chaffee, Jr., *Coming Into Equity With Unclean Hands*, 47 MICH. L. REV. 877, 881 (1949).

23. 18 Ves. 10, 34 Eng. Rep. 221 (1810) (buyer sought specific enforcement of sale contract).

24. Mattox v. Mattox, 2 Ohio 233 (1826).

25. Livingston v. Cochran, 33 Ark. 294 (1878).

26. *Id.* at 304.

27. Glenn v. Case, 25 Ark. 616 (1869); Irons v. Reyburn, 11 Ark. 378 (1850). "[Story] says, on this subject, that 'relief will never be granted where the parties are *in pari delicto* [in equal fault], unless in cases where public policy would be thereby promoted; for it is not the benefit of the party, but of the public, that is regarded.' " *Glenn*, 25 Ark. at 620. "[H]e had committed inequity and therefore that the door of the court ought to have been closed to him and the Chancellor's ears deaf to his complaint." *Irons*, 11 Ark. at 381-82.

28. 47 Ark. 301, 1 S.W. 547 (1886).

29. *Id.* at 309, 1 S.W. at 547.

30. Maupin v. Gains, 125 Ark. 181, 188 S.W. 552 (1916) (one who was unable to show she was a defrauded creditor not allowed to attack fraudulent conveyance); Johnson v. Johnson, 106 Ark. 9, 152 S.W. 1017 (1912) (second wife of grantor had no creditor standing because the conveyance was not intended to defraud her); Bell v. Wilson, 52 Ark. 171, 12 S.W. 328 (1889) (fraudulent conveyance good against all except creditors of grantor).

property, they would seem to indicate that the clean hands doctrine would prevent the fraudulent transferor from seeking the assistance of equity to invalidate the transfer.

The Arkansas appellate courts, however, have not automatically invoked the clean hands doctrine to prevent the fraudulent grantor from recovering his property. Prior to *McCune v. Brown*,[31] the Arkansas appellate courts had heard seven cases in which the transferor attempted to recover property conveyed to the transferee in fraud of some third person.[32] In four of these cases the court did not allow the clean hands doctrine to be invoked and the transferor was allowed to recover the conveyed property.[33] This seems to imply that the mechanical rule of the *Millington* decision is subordinate to equity's discretionary powers in choosing whether or not to invoke the clean hands doctrine.

In each of the four cases allowing recovery by the transferor, the transferee on appeal sought to have the appellate court invoke the doctrine to prevent recovery by the transferor after the chancellor had heard the case on its merits and awarded the property to the transferor. The court set forth various justifications for refusing to invoke the clean hands doctrine in these cases.[34]

In *Sliman v. Moore*[35] the Arkansas Supreme Court stated that the purpose of the doctrine is to secure justice and equity, not to aid one in an effort to acquire property to which he has no right.[36] The court also stated that the doctrine may not be invoked by one who is himself guilty of fraud and applied this rule to the transferee who was seeking the aid of equity.[37]

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31. 8 Ark. App. 51, 648 S.W.2d 811 (1983).

32. Melvin v. Melvin, 270 Ark. 522, 606 S.W.2d 90 (Ark. Ct. App. 1980); Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980); Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979); McClure v. McClure, 220 Ark. 312, 247 S.W.2d 466 (1952); Batesville Truck Line, Inc. v. Martin, 219 Ark. 603, 243 S.W.2d 729 (1951); Smith v. Smith, 199 Ark. 660, 135 S.W.2d 679 (1940); Sliman v. Moore, 198 Ark. 734, 131 S.W.2d 1 (1939).

33. Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980); Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979); Batesville Truck Line, Inc. v. Martin, 219 Ark. 603, 243 S.W.2d 729 (1951); Sliman v. Moore, 198 Ark. 734, 131 S.W.2d 1 (1939).

34. Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980) (unjust enrichment of transferee outweighed reprehensible conduct of transferor); *see also* Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979) (balancing of equities favored transferor); Batesville Truck Line, Inc. v. Martin, 219 Ark. 603, 243 S.W.2d 729 (1951) (court decided application of doctrine would defeat purpose, transferee was not injured and fraud did not relate to equity sought); Sliman v. Moore, 198 Ark. 734, 131 S.W.2d 1 (1939) (doctrine cannot be invoked by one guilty of fraud).

35. 198 Ark. 734, 131 S.W.2d 1 (1939).

36. *Id.* at 738, 131 S.W.2d at 3.

37. *Id.* at 739, 131 S.W.2d at 3.

In *Batesville Truck Line, Inc. v. Martin*,[38] the court stated that the doctrine will not be invoked if the alleged wrong appears not to have injured or prejudiced the transferee.[39] The court also stated that the wrong must be related to the equity which the transferor sought to enforce, not merely collateral.[40] Here the alleged wrong was against a third party, not the transferee. The purpose of the doctrine, to secure equity and justice, as stated in *Sliman v. Moore*,[41] would be defeated if applied in this case.[42]

The court moved away from the "mechanical" criteria set forth for refusing to invoke the doctrine in *Sliman*[43] and *Batesville Truck*[44] and applied a balancing test in determining whether to invoke the doctrine in *Henry v. Goodwin*.[45] After the chancellor found for the transferor, the appellate court refused to invoke the doctrine and applied a balancing test of weighing the policy against unjust enrichment of the transferee versus the policy against giving relief to the transferor who entered into a fraudulent conveyance.[46] The court found that it could not say that the transferor's conduct was so reprehensible that she should lose the property which she had apparently occupied as her home since 1913.[47] In its application of the balancing test, the court considered the following factors: the transferor relied on advice given to her by a third person; the transferee was willing to participate in the transaction and helped defraud the Social Security Administration; the transferor did not specifically disclaim ownership to the defrauded third party; and finally, the defrauded third party might have been in a position to recover whatever it had lost by the transfer.[48]

The court again applied the balancing test to determine

38. 219 Ark. 603, 243 S.W.2d 729 (1951) (all capital stock put in transferee's name who refused to reconvey portion to transferor after operating license was obtained from regulatory authority).

39. *Id.* at 609, 243 S.W.2d at 732 (citing 19 AM. JUR. *Equity* § 474 (1939)).

40. Batesville Truck Line, Inc. v. Martin, 219 Ark. 603, 609, 243 S.W.2d 729, 732 (1951) (citing 19 AM. JUR. *Equity* § 475 (1939)).

41. 198 Ark. 734, 131 S.W.2d 1 (1939).

42. *Id.* at 738, 131 S.W.2d at 3. "The purpose of the maxim is to secure justice and equity, and not to aid one in an effort to acquire property to which he has no right."

43. 198 Ark. 734, 131 S.W.2d 1 (1939) (doctrine may not be invoked by one guilty of fraud).

44. 219 Ark. 603, 243 S.W.2d 729 (1951) (doctrine may not be invoked unless transferee is injured and wrong is related to equity sought to be enforced).

45. 266 Ark. 95, 583 S.W.2d 29 (1979) (transfer of property in order that transferor could receive social security benefits).

46. *Id.* at 99, 583 S.W.2d at 31.

47. *Id.*

48. *Id.*

whether to invoke the clean hands doctrine in 1980 in *Bramlett v. Selman*.[49] The transferor, while involved in a divorce proceeding, transferred seven thousand dollars to the transferee who then purchased a residence occupied by the transferor and transferee. The transferor later felt guilty about the concealment and gave his former wife two thousand dollars for her dower interest in the property. When the transferee refused to reconvey subsequent to the divorce as had been previously agreed, the transferor brought suit and got title to the property. The transferee sought to invoke the clean hands doctrine on appeal, but the court refused and stated that since the transferor had abated the fraud on his wife he was in an even better position in the balancing of the equities than the transferor in *Henry*.[50]

A case in which the appellate court did use the clean hands doctrine to prevent recovery by the transferor was *McClure v. McClure*.[51] The chancellor cancelled some deeds which had been transferred from a husband to his wife for the purpose of defrauding his creditors on the grounds that the wife was a party to the attempted fraud. On appeal the court invoked the clean hands doctrine and stated that a husband who conveyed land to his wife in fraud of creditors would not be permitted to seek the aid of equity to set aside the deeds because he had unclean hands.[52] In so holding the court relied on the *Millington*[53] line of cases for support. There was no reference made to *Batesville Truck Line, Inc. v. Martin*,[54] decided only a year earlier, nor to its requirements that the transferee be injured by the fraud.

The next application of the clean hands doctrine by an Arkansas appellate court was in 1980. The Court of Appeals of Arkansas invoked the clean hands doctrine to prevent the transferor from asserting a claim to property transferred in an attempt to defraud his first wife. In *Melvin v. Melvin*[55] Cecil Melvin transferred a Winnebago to Anne Melvin prior to their marriage to prevent his first wife

49. 268 Ark. 457, 597 S.W.2d 80 (1980).

50. *Id.* at 463, 597 S.W.2d at 84.

51. 220 Ark. 312, 247 S.W.2d 466 (1952); *see also* Smith v. Smith, 199 Ark. 660, 135 S.W.2d 679 (1940) (earlier case in which clean hands doctrine invoked).

52. 220 Ark. at 313, 247 S.W.2d at 467.

53. Maupin v. Gains, 125 Ark. 181, 188 S.W. 552 (1916); Johnson v. Johnson, 106 Ark. 9, 152 S.W. 1017 (1912); Bell v. Wilson, 52 Ark. 171, 12 S.W. 328 (1889); Millington v. Hill, Fontaine & Co., 47 Ark. 301, 1 S.W. 547 (1886) (conveyance in fraud of creditors is good between the parties).

54. 219 Ark. 603, 243 S.W.2d 729 (1951).

55. 270 Ark. 522, 606 S.W.2d 90 (Ark. Ct. App. 1980).

from receiving it in their divorce proceeding. In a later divorce proceeding between Anne and Cecil the trial court returned the Winnebago to Cecil. On appeal, Anne contended that the Winnebago should be awarded to her as property belonging to her prior to marriage. The court of appeals agreed that the evidence supported the lower court's finding that Cecil intended no gift of the Winnebago to Anne but held that the clean hands doctrine prevented Cecil from asserting any claim to the property. In support the court cited *McClure v. McClure*[56] and noted that the only person who could attack the conveyance was Cecil's first wife or another defrauded creditor.[57]

In *McCune v. Brown*[58] the daughter sought to invoke the clean hands doctrine on appeal. In alleging that the court erred in finding Mr. Brown was not estopped from asserting any claim to the gold, Mrs. McCune relied on the *Melvin* case.[59] The court agreed that the facts of this case were very similar to the facts in *Melvin*, but found that *Melvin* was in conflict with previous cases decided by the Arkansas Supreme Court in the application of the clean hands doctrine.[60]

The court found this case to be governed by the rule stated in *Batesville Truck Line, Inc. v. Martin*[61] that the complainant's wrong must be related to the equity he seeks to enforce and he must be injured to invoke the clean hands doctrine. The court overruled *Melvin* to the extent it was in conflict with *Batesville Truck*.[62]

Citing the Arkansas Supreme Court,[63] the court in *McCune* referred to balancing the equities between the parties in deciding whether to apply the clean hands doctrine. If the policy against unjust enrichment of the transferee outweighs the policy against giving relief to the transferor who has entered into an illegal transaction then the transferor's conduct is not so reprehensible that he should lose the property.

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56. 220 Ark. 312, 247 S.W.2d 466 (1952) (transferor must come into court with clean hands); *see also* Maupin v. Gains, 125 Ark. 181, 188 S.W. 552 (1916) (fraudulent conveyance good between the parties).

57. Melvin v. Melvin, 270 Ark. 522, 525, 606 S.W.2d 90, 92 (Ark. Ct. App. 1980).

58. 8 Ark. Ct. App. 51, 648 S.W.2d 811 (1983).

59. Melvin v. Melvin, 270 Ark. 522, 606 S.W.2d 90 (Ark. Ct. App. 1980).

60. McCune v. Brown, 8 Ark. Ct. App. 51, 55, 648 S.W.2d 811, 812 (1983).

61. 219 Ark. 603, 243 S.W.2d 729 (1951).

62. McCune v. Brown, 8 Ark. Ct. App. at 56, 648 S.W.2d at 813.

63. McCune v. Brown, 8 Ark. Ct. App. 51, 56, 648 S.W.2d 811, 813 (1983) (citing Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980); and Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979)).

The court also found that there was evidence to support the chancellor's decision which would not be disturbed on appeal unless it was found to be clearly erroneous or against a clear preponderance of the evidence.[64] In order to invoke the clean hands doctrine on appeal, the transferee must show she was somehow injured; and even then, great weight will be given to the chancellor's balancing of the equities in his decision on whether or not to apply the doctrine.[65] The court noted that the evidence strongly suggested that the daughter knew why the gold was transferred to her although she testified to the contrary. The chancellor chose to believe the father.

After a review of the relevant cases, the question arises of what role is played by the clean hands doctrine in Arkansas in a suit by a fraudulent transferor to recover his property. In order to ascertain the role of the doctrine it must be determined who may invoke the doctrine and under what circumstances it will be invoked.

The clean hands doctrine is invoked by the court at its discretion.[66] It is an instrument which the court may use to achieve what it finds to be the most equitable result in a given case. While a party to the suit may urge the court to invoke the doctrine, it is clear the court will not allow the doctrine to be forced upon it. In all the Arkansas cases discussed in which the transferor was allowed to recover, the transferee sought to invoke the doctrine on appeal and failed.[67] Conversely in the cases in which the transferor was not allowed to recover, the court, not the transferee, invoked the doctrine.[68] It is also apparent that the courts are very reluctant to invoke the doctrine for the first time at the appellate level. This reluctance may be explained on various rationales. The appellate court will give great deference to the chancellor's decision in balancing the equities. Because the main use of the doctrine is to bar the suit, once it has been heard and decided on its merits the doctrine has limited utility. The restrictions in *Sliman* and *Batesville Truck*

64. *Id.* at 56-57, 648 S.W.2d at 813.

65. *Id.* at 56, 648 S.W.2d at 813.

66. *Id.* at 56-57, 648 S.W.2d at 813.

67. McCune v. Brown, 8 Ark. Ct. App. 51, 648 S.W.2d 811 (1983); Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980); Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979); Batesville Truck Line, Inc. v. Martin, 219 Ark. 603, 243 S.W.2d 729 (1951); Sliman v. Moore, 198 Ark. 734, 131 S.W.2d 1 (1939) (transferee sought to invoke clean hands doctrine on appeal, transferor allowed to recover).

68. Melvin v. Melvin, 270 Ark. 522, 606 S.W.2d 90 (Ark. Ct. App. 1980); McClure v. McClure, 220 Ark. 312, 247 S.W.2d 466 (1952) (doctrine invoked by appellate court); Smith v. Smith, 199 Ark. 660, 135 S.W.2d 679 (1940) (doctrine invoked by chancellor).

are examples of the compelling justifications needed before an appealate court will grant a transferee's request to invoke the doctrine.

It appears that the Arkansas courts are more inclined to allow recovery by the transferor where the fraud is not considered extremely reprehensible, where the fraud is against an entity which may be in a position to recover if the transferor prevails,[69] or where the transferor has cleansed his hands by abating the fraud.[70] The courts seem more willing to invoke the clean hands doctrine and prevent recovery if the transferor's conduct is very reprehensible, involves moral turpitude, or if the defrauded party is not in a position to recover. As to the seriousness of the fraud and its effect on third persons, *McCune v. Brown*[71] may be somewhat of an anomaly. The fraud was similar to that in *Bramlett*, but in *McCune* there was no voluntary restitution made nor does the case indicate that the ex-wife may have been in a position to recover.

In the cases in which the doctrine was applied, the transferors' conduct could be thought of as very serious and against public policy.[72] There was also no evidence in these cases that the transferors had made restitution or that the defrauded third parties were in a position to recover.

Since the purpose of the clean hands doctrine is to promote public policy and protect the integrity of the court, the effect of the court's decision on public policy should be an integral part of the balancing test for determining the application of the doctrine. In fraudulent conveyance cases there will usually be a conflict between the policy against unjust enrichment and the policy against giving relief to the fraudulent transferor. If the transferor is the more likely party to instigate such transactions, great care should be exercised in favoring the policy against unjust enrichment and allowing the transferor to recover the property. The question arises whether

69. Batesville Truck Line, Inc. v. Martin, 219 Ark. 603, 243 S.W.2d 729 (1951); Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979) (concealment of information from governmental agencies which were more likely than defrauded individuals to have means available by which they could abate their injuries, if any).

70. Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980) (attempt to defraud ex-wife of certain property is reprehensible conduct against public policy but fraud abated by voluntary restitution to ex-wife).

71. 8 Ark. Ct. App. 51, 648 S.W.2d 811 (1983).

72. Melvin v. Melvin, 270 Ark. 522, 606 S.W.2d 90 (Ark. Ct. App. 1980) (fraudulent conveyance to defeat ex-wife's property rights); McClure v. McClure, 220 Ark. 312, 247 S.W.2d 466 (1952) (fraudulent conveyance while transferor was defendant in serious criminal and civil litigation); Smith v. Smith, 199 Ark. 660, 135 S.W.2d 679 (1940) (conveyance in anticipation of challenge to will).

such a result will encourage other fraudulent conveyances or will serve as a deterrent. One might question which result *McCune* will have on public policy. It will not serve as a deterrent to future fraudulent conveyances and may even encourage such transfers. *McCune* may give added assurance to the fraudulent transferor that he will not be estopped by the clean hands doctrine from recovering his property from the transferee and thus encourage a fraudulent transfer. The balancing of the equities seems to be the most appropriate means for determining whether to invoke the clean hands doctrine but care should be taken to see that all the equities are balanced: the transferor's, the transferee's, and the *public*'s equity.

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