Buffalo Law Review

Volume 1 | Number 3 Article 17

4-1-1952

Equity: The Clean Hands Maxim and the New Federal Gambler's Tax

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op. cit. pp 38-39. For a study of the areas of conflict and conflicting court attitudes and decisions, see Inbau, Self-Incrimination, (1950).

The majority of the Court properly reaffirmed the *Adamson* doctrine, supra, pp 50-51, that "it is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights." In view of the fact that the privilege against self-incrimination and freedom from an illegal search and seizure are not applicable to the states through the Fourteenth Amendment, the majority of the Court in order to overthrow the state court conviction had to find that the acts complained of were a denial of due process of law in that they violated, as Mr. Justice Cardozo said in *Palko v. Connecticut, supra,* p 328 "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

In cases where the defendant was denied counsel in a trial involving capital punishment, *Powell v. Alabama,* 287 U. S. 45 (1932); where the defendant's confession was coerced, *Watts v. State of Indiana* 338 U. S. 49 (1949); where the defendant was denied a fair trial due to the lack of an impartial judge, *Tumey v. State of Ohio,* 273 U. S. 510 (1927); and where the trial was dominated by a mob, *Moore v. Dempsey,* 261 U. S. 86 (1923), the convictions were reversed because there had been a denial of due process of law. The instant case is a further illustration that it is a denial of due process of law when in the administration of criminal justice the means of obtaining a conviction are so revolting as to shock our fundamental concepts of justice and ordered liberty.

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EQUITY: THE CLEAN HANDS MAXIM AND THE NEW FEDERAL GAMBLER'S TAX

As a gambler, petitioner was subject to Chapter 27A of the Internal Revenue Code, (Int. Rev. Code, Sec. 471), imposing a ten per cent excise tax on all wagers, and an occupational stamp tax of fifty dollars on all persons subject to the excise tax. Failure to acquire the stamp exposes the violator of the Act to criminal penalties. Petitioner declined to make some of the required disclosures, and so was unable to acquire the stamp. He subsequently brought an action against the Sec'y. of the Treasury, claiming that the act was violative of the Federal Constitution, (U. S. Const. Art 1, Sec. 8; and Amend. V), in that the Act

was wholly regulatory; and the required disclosures amounted to a self-incrimination. The District Court, while holding the plaintiff's constitutional arguments sufficient to give the three-judge court jurisdiction, ruled a discussion of them unnecessary; holding that a plaintiff who sought protection via the court for conduct which he conceded to be criminal had unclean hands within the meaning of the maxim, "he who comes into equity, must come with clean hands," and dismissed plaintiff's complaint. *Combs v. Snyder,* 101 F. Supp. 531 (D. C. 1951), *aff'd. without opinion,* 20 U. S. L. Week 3224 (U. S. Feb. 19, 1952).

The suit in a federal equity court for an injunction against enforcement of a statute is well established as an instrument for testing its constitutionality, its use dating as far back as *Osborne v. Bank of U. S.,* 9 Wheat. 738 (U. S. 1824). Even though the complainant must show that there is no adequate remedy at law, *Mathews v. Rodgers,* 284 U. S. 521, 526 (1932), and that direct injury will occur to him as a result of enforcement of the allegedly invalid statute, *Stearns v. Wood,* 236 U. S. 75 (1915), the Supreme Court has proven itself willing to discover bases for federal equity jurisdiction, especially in situations involving constitutional questions, 46 Mich. L. Rev. 840, 841 (1948). This method has been used extensively in the federal courts in regards to state, as well as federal enactments. *Shafer v. Farmers Grain Co.,* 268 U. S. 189 (1925), *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), *Near v. Minnesota,* 283 U. S. 697 (1931) *Hammer v. Dagenhart,* 247 U. S. 251 (1918), *Keller v. Potomac Electric Co.,* 261 U. S. 428 (1923), *Panama Refining Co. v. Ryan,* 293 U. S. 388 (1935). Development of the injunction in the federal courts as "preventative constitutional adjudication" stands as one of primary import in the history of American equity. Simpson, *Fifty Years of American Equity,* 50 Harv. L. Rev. 171, 236 (1936).

One of the general principles of equity is the maxim propounding the necessity of plaintiff entering the court with "clean hands." See Chafee, *Coming Into Equity With Clean Hands,* 47 Mich. L. Rev. 877, 880 (1949). The maxim is regarded by some as "one of the elementary and fundamental conceptions of equity jurisprudence," 2 Pomeroy, Equity Jurisprudence, Sec. 398 (5th Ed. 1941). and by others as "the most amusing maxim in equity," Chafee, *supra,* p. 877. Regardless of any judgment as to the maxim's ultimate practicability, it remains in force today, being used to close the doors of the court to a complainant adjudged guilty of iniquitous conduct. *Primeau v. Granfield,* 193 Fed. 911, 114 C. C. A. 549 (2d Cir. 1911), *cert. denied,* 225 U. S. 708 (1912).

Because of the maxim's somewhat discretionary character, some very necessary limitations have been imposed upon its use; one of the most important being the rule that the litigant's misconduct must have been in regard to the subject-matter of the present action in such a way as to affect the equitable relationships between the two parties. *Keystone Driller Co. v. General Excavator Co.,* 290 U. S.

240 (1933), *Kaufman v. Meyberg,* 59 Cal. App. 2d 730, 140 P. 2d 210 (1943). Pomeroy, *supra,* Sec. 399. Anno., 4 A. L. R. 46, 65 (1919). Note, 32 Boston L. Rev. 66, 71 (1952). In most instances, the courts have shown themselves to be very lenient to plaintiff, by ruling that no connection exists, (as to warrant application of the maxim), even in those cases where the malfeasance of plaintiff was admittedly the direct cause of the present litigation. E.g., *McCarthy v. City of Oakland,* 60 Cal. App. 2d 546, 141 P. 2d 4 (1943). However, in many of the cases, the limitation has been forgotten, even the general moral character of the plaintiff being brought into play. *Dilly v. Barnard,* 8 Gill & J. 170 (Md. 1836). In these instances, the rule that no right of action could arise out of an immoral cause has been interpolated into meaning that no immoral party could maintain any cause (in a court of equity). *Cf., Neubeck v. Neubeck,* 94 N. J. Eq. 167, 119 Atl. 26 (1922). Such an interpretation seems improper. This maxim does not repel all sinners from the courts of equity. *Neubeck v. Neubeck, supra.* A court of equity is neither a trier of the general morals of the parties, *Boericke v. Weise,* 68 Cal. App. 2d 407, 156 P. 2d 781, 788 (1945), nor "an avenger of wrongs committed at large by those who resort to it for relief." *Kinner v. Lake Shore & M. S. Ry. Co.,* 69 Ohio St. 339, 69 N. E. 614 (1904). The maxim applies to the cleanliness of the action—not the morality of the individual. *Liverpool & London & Globe Ins. Co. v. Clunie et al.,* 88 Fed. 160 (C. C. N. D. Cal. 1898). *West v. Washburn,* 153 App. Div. 460, 138 N. Y. Supp. 230 (3d Dept. 1912). Immorality is not sufficient to justify a denial of an action, *unless connected with the actual matter of the suit. Swartzlander v. Swartzlander,* 219 App. Div. 682, 221 N. Y. Supp. 75 (4th Dept. 1927). *Woodward v. Woodward,* 41 N. J. Eq. 224, 4 Atl. 424 (1886).

Far different results than the one reached in the instant case may be found in cases having analogous legal situations. In *Toomer et al., v. Witsell et al.,* 73 F. Supp. 371 (E. D. So. Car. 1947), plaintiffs, comprising a foreign corporation, brought action against the members of the South Carolina State Board of Fisheries, for an interlocutory injunction to restrain enforcement of the penally-sanctioned state statute, on constitutional grounds. The defendants contended that plaintiff could not be heard by a court of equity, having unclean hands, since some of the individual plaintiffs had previously been convicted of violating the statute. In rejecting this contention, the District Court held that this previous misconduct, not having any relation to the subject matter of the present action, (the constitutionality of the challenged statute), did not call for an application of the clean hands maxim. This point was affirmed on appeal, 334 U. S. 385, 393 (1948). See further *Englander v. Apfelbaum,* 56 Pa. Super. Ct. 145 (D. Minn. 1914). *Gen. Elec. Co. v. Minn. Elec. Lamp Co.,* 10 F. 2d 851, 855 (1924). *Trico Products Corp. v. E. A. Laboratories, Inc.,* 49 F. 2d 404, 406 (E. D. N. Y. 1931). In *American Sugar Refining Co. v. McFarland et al.,* 229 Fed. 284, 287 (E. D. La. 1916), the same contention as to the uncleanliness of plaintiff's hands was

made, (some of the provisions of the anti-trust statutes having been breached). The court's dismissal of this defense was affirmed on appeal, *McFarland v. Amer. Sugar Refining Co.*, 241 U. S. 79, 85 (1916), Holmes, J., holding,

> "We deem it sufficient to say that neither that supposed connection nor the general intimation of plaintiff's wickedness deprive it of its Constitutional rights *or prevent it from asserting them in the only practicable and adequate way.*" (Italics added).

Compare *Johnson v. Yellow Cab Co.*, 321 U. S. 383, 392 (1943). *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465 (1887).

It has been held that equity will not aid in the perpetration or continuance of a wrong. Pomeroy, *supra*, Sec. 400a. If that is the result of the issuance of the injunction, it should be denied. *Loughran v. Loughran*, 292 U. S. 216, 219 (1934), *Humphreys-Mexia Co. v. Arseneaux*, 116 Tex. 603, 297 S. W. 225 (1927). But in the instant case, since the Act has no operational effect upon any of the existing federal or state gambling legislation, it is obvious that the granting of an injunction could not save the plaintiff harmless from the consequences of any prior illegalities, or allow him to do anything not normally open to him, *McFarland v. Amer. Sugar Refining Co., supra.* Injunctions should not be refused where clear legal rights exist in complainant "merely because the complainant might have been actuated by motives which the court might not approve." *Cityco Realty v. Slaysman et al.*, 160 Md. 357, 153 Atl. 278, 282 (1931).

In disregarding any limitations upon the applicability of the maxim, it would appear that the court in the instant case allowed the legal issues involved to be overshadowed by the moral character of complainants in petitioner's category. The result thus reached was unfortunate, in that it closed the courts to an action to test the constitutionality of the Act before an actual breach occurred; but even more so in that this result impliedly asserted the proposition that the constitutional right of access to the courts inured to the benefit of only those citizens whose standing in the community was above reproach.

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