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**ILLICIT COHABITATION OF PARTIES AS  
AFFECTING CONTRACTS MADE  
BETWEEN THEM**

***Baxter v. Wilburn***<sup>1</sup>

Plaintiff-appellant brought a bill in equity against his former mistress to enforce a mortgage against certain residential property he had bought for her and had caused to be conveyed to her alone. The mortgage, executed to him by her at the time of the purchase, was left in her custody, and was orally agreed to be recorded and have effect only in the event that she predeceased him. This plan, if successful, was calculated not only to deprive plaintiff's wife of any rights in the property, but also to secure to him a return of his investment in the eventuality of the prior death of the grantee. The parties became estranged, and plaintiff sought to establish and foreclose his lien at once. Plaintiff's bill did not connect the mortgage with the illicit cohabitation of the parties, but he did testify that he would not have put up any money for the property if he had not thought that the woman would associate with him as man and wife, and that the mortgage was to have no effect "provided we lived together and everything was all right." The lower court dismissed the bill, holding the entire transaction to be permeated by the illicit relationship of the parties and therefore not compatible with equitable relief. On appeal, *Held*: Affirmed. Contracts promoting illicit cohabitation are void and unenforceable in equity. Although the factor of immoral sexual relations would not itself necessarily invali-

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<sup>1</sup> 190 Atl. 773 (Md. 1937).

date all contracts made between persons engaged therein, it would have that effect when said contracts were made in pursuance thereof. Here, the meretricious behaviour of the parties gave color to the mortgage transaction and was so closely interrelated with it as to preclude equitable interference.

This case poses a problem not exactly novel in the field of the law, but one which is nevertheless provocative of thought and interest, namely, to what extent will illicit intercourse between persons affect the legal validity of transactions made by them with each other.

In order the better to understand the decisions upon the point, it would seem advisable to present a verbal classification of matters closely related to the instant problem; otherwise, the terminology used is apt to be confusing. Most of the difficulty centers around that somewhat ambiguous term "illegal". It has been suggested that said expression be trisected into certain broad groups,<sup>2</sup> namely:

1. Transactions prohibited by statute.
2. Transactions against public policy.
3. Transactions contrary to good morals.<sup>3</sup>

The problem of illicit cohabitation may be classified as a sub-division of group three. This latter group, designating things "contra bonos mores," has included also in its category the problems of gambling contracts and agreements for the suppression of prosecution. For the most part, where the law is expressed as relating to illegal transactions, the principles enunciated will be applicable to the above-mentioned cognate divisions; and when the broad primary term is used in this note, it is expressly employed with this thought in mind.

As a general rule, illegal contracts are deemed void, no relief being given upon them at law or in equity.<sup>4</sup> However, contracts arising from illicit cohabitation<sup>5</sup> may not be

<sup>2</sup> See Pomeroy, *Specific Performance of Contracts* (3rd Ed.), Sec. 281.

<sup>3</sup> It is obvious that this analysis is not wholly satisfactory by reason of the manifest interrelation of the group headings. For example, an act prohibited by statute may possibly, in the ordinary sense of the terms be against public policy and at the same time be contrary to good morals, etc. The term, public policy, itself, is so broad as to mean almost everything or nothing at all. However, these distinctions made are largely artificial and technical, and serve only as convenient divisions of the still more comprehensive term, illegal transaction.

<sup>4</sup> See 12 *American Jurisprudence* 713-717. 13 C. J. 492. Also, Pomeroy, *Specific Performance of Contracts* (3rd Ed.), Sec. 280.

<sup>5</sup> It would seem that the condemnation of the courts falls not only upon illicit cohabitation that is adulterous in nature, but also upon any meretricious sexual conduct.

enforced in equity not only because they are considered void as against the best interests of public welfare, but also because they may involve that doctrine peculiarly associated with equity, namely, that he who comes into equity must come with clean hands.<sup>6</sup> This latter maxim, founded upon the premise that equity is a court of conscience and good morals, is universally applied in that tribunal. It is exercised not only when the subject matter of the litigation is illegal or void at law, but also where the party seeking relief has been guilty of such misconduct in reference to the particular action that he cannot with propriety and decency ask for aid before such an honorable forum.

What particular kind of misconduct will justify the Court of equity in refusing assistance depends largely upon the facts of the individual case and the judicial discretion of the Court. In many cases in equity involving illicit cohabitation as an operative factor, it would not be necessary for the Court to rely upon the clean hands doctrine. The invalidity of transactions arising from such conduct as recognized by courts of law in general would ordinarily be a sufficient bar, but it is not difficult to imagine that cases of such a nature might emerge where the unclean hands rule, because of its larger scope, might serve to exclude equitable relief, although upon the same facts, the general rules of law would not preclude a remedy.

The legal effect of contracts connected with illicit cohabitation, and of illegal contracts in general, is such that the courts will ordinarily leave the parties as they find them, neither enforcing executory transactions nor setting aside those which have been completed. This seemingly negative action by the courts is supposed to exert an affirmative influence upon the public. It is thought that judicial non-interference in such instances will tend to discourage the undertaking or continuance of such unsocial behaviour.<sup>7</sup>

A short review of several Maryland cases will serve to show that these principles have been followed to an appreciable extent in this state. In *Gotwalt v. Neal*,<sup>8</sup> involving a bill in equity to set aside certain deeds of property executed to compound a threatened prosecution, the court, in refusing relief, said:

“The law is well settled that contracts made in violation of law<sup>9</sup> cannot be enforced. When, however,

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<sup>6</sup> See *Roman v. Mall*, 42 Md. 513 (1875). Also, 21 C. J. 192.

<sup>7</sup> 6 R. C. L. 816.

<sup>8</sup> 25 Md. 434 (1866).

<sup>9</sup> I. e., those transactions contrary to statute, public policy, and good morals.

such contracts have been executed by payment of money thereon, or the conveyance and delivery of property, the rule, which seems to be best established both by the weight of authority and reason, is to refuse to grant relief and leave the parties where they have placed themselves."<sup>10</sup>

In *Lester v. The Howard Bank*,<sup>11</sup> concerning the enforcement in equity of a contract made in violation of a statute, the court stated:

"Public policy . . . lies at the basis of the law in regard to illegal contracts, and the rule is adopted not for the benefit of the parties, but for the public."<sup>12</sup>

There are certain important exceptions to the general rule of non-enforceability of illegal contracts, including those arising *ex turpi causa*.<sup>13</sup> Plaintiff in the principal case relied upon two of these:

1. Where the parties are not in *pari delicto*.
2. Where the transaction is separate from the illegal or immoral aspects of the case.

The first exception is found where the parties to an otherwise illegal agreement are not equally at fault in the eyes of the law, by reason of factors of fraud, duress or undue influence. In such cases, if the interests of public welfare would be better served by granting relief to the one comparatively more innocent, he may be given aid.<sup>14</sup> This distinction was recognized in Maryland in *Roman v. Mali*,<sup>15</sup> where it was held that:

"There may be different degrees of guilt as between the parties to the fraudulent or illegal transaction; and if one party act under circumstances of oppression, imposition, undue influence, or at a great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court, in such case, will relieve."

<sup>10</sup> Accord: *Brown v. Reilly*, 72 Md. 489, 20 Atl. 239 (1890); *Baxter v. Deneen*, 98 Md. 181, 57 Atl. 601 (1904); *Snyder v. Snyder*, 51 Md. 80 (1879); *Baker v. Couch*, 74 Colo. 380, 221 Pac. 108 (1924); *Benson v. Georglan Co.*, 21 Ga. App. 448, 94 S. E. 644 (1917).

<sup>11</sup> 33 Md. 558 (1871).

<sup>12</sup> See in this connection, *McConnon v. Holden*, 35 Idaho 75, 204 Pac. 656 (1922).

<sup>13</sup> "Ex turpi causa non oritur actio", i. e., No action arises from an immoral consideration.

<sup>14</sup> See *Berman v. Coohley*, 243 Mass. 348, 137 N. E. 667 (1923). Also, *Pomeroy*, *Equity Jurisprudence*, Vol. 2, Sec. 941; 12 *American Jurisprudence*, 734-735; 13 C. J. 498.

<sup>15</sup> 42 Md. 513 (1875).

An example of this judicial leniency may be found in those decisions allowing the recovery of an usurious rate of interest by the borrower whose distress through lack of money presumably puts him at a disadvantage with the lender.<sup>16</sup> It is thought that such unlawful conduct will more likely be discouraged if relief be given in such instances, aside from the fact of the individual equity of the borrower derived from his financial embarrassment. Somewhat the same policy lies behind those statutes in several jurisdictions which allow the recovery of satisfied gambling debts.<sup>17</sup>

Some courts, in considering the question of equal fault between the parties, have declined to apply the exception where the transaction involves moral turpitude.<sup>18</sup> In those jurisdictions, the defense or extenuation would not be open where the contract sought to be enforced arose from illicit cohabitation of the parties. In the principal case, no mention was made of this distinction;<sup>19</sup> for the court found that both parties were equally guilty in the moral misconduct, and there was no necessity to make any discrimination. In this connection it is interesting to note the New York case of *Vincent v. Moriarity*,<sup>20</sup> where the Court of equity, in refusing to enforce a contract connected with illicit cohabitation, intimated that where a woman had been deceived and betrayed into an illicit union, the Court might be more apt to find a way of giving relief in order to avoid an injustice.

The second exception to the general rule which Plaintiff in the instant case contended for is well recognized but not always easy of application. It is stated that where the agreement sought to be enforced is only remotely connected with an illegal or immoral transaction, and rests upon an independent and valid consideration, and plaintiff can prove his case without basing it upon such illegality, it will be upheld.<sup>21</sup> This exception is not inconsistent with the clean hands doctrine in equity, for that maxim is confined, as al-

<sup>16</sup> See *Gotwalt v. Neal*, 25 Md. 434, 448 (1866).

<sup>17</sup> See Md. Code, Art. 27, Sec. 254.

<sup>18</sup> *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132 (1856).

<sup>19</sup> In connection with the problem of unenforceability of illegal contracts, some jurisdictions seem to draw a distinction between contracts *malum in se* (those immoral or wrong in themselves) and contracts involving *malum prohibitum* (things prohibited by statutory law), no action lying to enforce the former agreements. Maryland recognized this distinction in *Lester v. Howard Bank*, 33 Md. 558 (1871). The more modern view seems to reject this discrimination, and holds that the force and effect to be given to illegal contracts, regardless of their origin or the differential fault of the parties, should be determined solely by their functional nature and their relation to the interests of public welfare. See Williston, *Contracts*, Vol. 3, Sec. 1764.

<sup>20</sup> 52 N. Y. S. 519, 31 App. Div. 484 (1898).

<sup>21</sup> See Williston, *Contracts*, Vol. 3, Sec. 1752.

ready noted, to misconduct connected with the transaction in litigation only. One who has been guilty of the greatest depravity may come into the Court of equity so long as his cause, itself, is not tainted therewith.<sup>22</sup> Applying this principle to the illicit cohabitation of the parties in the instant case, the court stated that the mere fact that persons were maintaining an illicit sexual relationship would not prevent them from making enforceable agreements with each other where said agreements could be supported independently of their unlawful relation. Plaintiff in the principal case tried to come within this exception by contending that even if the conveyance of the property was done for an immoral consideration, yet the mortgage transaction was separate therefrom and was valid notwithstanding the other agreement. The court was of a different opinion, however, and in refusing to separate the two transactions, held, first, that the conveyance of the house was not a gift disconnected from the illicit relations of the parties, but a provision for the habitation of it, and second, that the mortgage was inseparably tied up with the whole arrangement. The court took cognizance of the fact that Plaintiff was not seeking the enforcement of the actually expressed agreement of the parties, which referred only to the effect of the mortgage as conditioned by the prior death of defendant, but that Plaintiff was attempting to give the lien a present effect. The court thought this to be ample evidence of an attempt to use the mortgage as a remedy for the failure of the continuation of the immoral arrangement, and that Plaintiff was endeavoring to use the lien to escape the results of an unprofitable bargain.<sup>23</sup> In his testimony, Plaintiff significantly stated "Of course she could not kick me out, and then try to take the home away from me."

There are fairly numerous decisions of courts outside Maryland where a distinction is drawn between agreements directly connected with illicit cohabitation and those only

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<sup>22</sup> See A. L. R. 65 for a good discussion and annotation upon the doctrine of unclean hands in equity. See also, *Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co.*, 65 Md. 84, 3 Atl. 108 (1880), holding: "The maxim that he who comes into a court of equity must come with clean hands, is confined to his conduct in the matter before the Court, and not to matters aliunde."

<sup>23</sup> The court refused to comment to any extent upon a possible source of relief to plaintiff through a cancellation of the whole arrangement, but it is submitted that no relief would be available by this means. Some jurisdictions allow a cancellation of certain types of illegal agreements where they are entirely executory. Here, the immoral arrangement was not only partly executed, but the element of moral turpitude involved would no doubt preclude equitable relief to the same extent as shown in the principal case.

remotely associated therewith. In several cases arising from a claim for housekeeper services where the parties were living in a state of concubinage, the courts enforced the claim if it was supported by an express agreement, and if the services were not rendered in contemplation of the illicit relationship.<sup>24</sup> However, under the same circumstances, where there was a claim for such services based upon an implied contract only, some courts refused relief because of the presumption of an illegal inducement to the transaction.<sup>25</sup>

It is worthwhile to observe that the cases involving the subject matter of this note seem to make a distinction between contracts supported by a consideration of past unlawful cohabitation, and those stipulating for future illicit intercourse. Where the transaction is based entirely upon past cohabitation, and there is no intent to continue it in the future, the courts are disinclined to bar relief because of the immoral aspects of the case, although the agreement itself may not be enforceable for another distinct reason, namely, insufficient consideration because of past performance.<sup>26</sup> The rationale of this discrimination is that the law ought not to bar a person, on moral grounds, from compensating for what may have been an injustice done to the other party. Where it is a question of the commencement or continuation of future illicit cohabitation, the cases are unanimous in applying the general rule of non-enforceability. It is not certain whether the Maryland courts would follow the above distinction. In the principal case, the precise point was not directly involved, for an intended continuation of the unlawful cohabitation was shown; but the court quoted from a prominent authority<sup>27</sup> in the field of equity jurisprudence to the effect that "contracts based upon the consideration either *past* or future, of illicit sexual intercourse" were void and unenforceable in equity. This same authority intimated that equity differed from law in this respect, probably because of equity's emphasis upon the clean hands of parties coming into its courts.

In conclusion it would seem fitting to call attention once again to the underlying principle of the non-enforceability of illegal contracts in general, and those connected with

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<sup>24</sup> Cf. *Stewart v. Waterman*, 97 Vt. 408, 123 Atl. 524 (1924); *Emerson v. Botkin*, 26 Okl. 218, 109 Pac. 531 (1910). The above cases were actions at law, but the general principles for which they are cited would no doubt be applicable in equity.

<sup>25</sup> Cf. *Ann. Cas.* 1916 B 114; also, 28 R. C. L. 679.

<sup>26</sup> Cf. 17 A. L. R. 1311; 12 *American Jurisprudence* 675.

<sup>27</sup> *Pomeroy, Equity Jurisprudence*, Sec. 936.

illicit cohabitation in particular, namely, public policy. At first glance, this negative behaviour of the courts faced by the problem of an illegal contract might appear somewhat unjust in aiding one malefactor by allowing him to set up his own wrongdoing as a defense in a suit against him by his opponent, who has the misfortune to be on the wrong side of the legal fence, perhaps purposely placed there by his adversary. It is true, however, that the unintended assistance given by the courts to one party in such cases is only an incidental result of the maintenance of a more ultimate policy, and this is a sufficient excuse for such left-handed aid if said policy is sound in theory and practice. Through its application it is claimed that the individual equities, or rather inequities, of the parties are subordinated to the more important considerations of public welfare in general. It is contended that, by refusing any affirmative judicial relief, and by putting the parties upon their own honor, as it were, there will be less of an incentive to engage in such socially reprehensible conduct. It is suspected that there is no honor among thieves and other moral aberrants; therefore, the mutual suspicion of the miscreants should make them very cautious before leaping into what may be a hopeless position, presuming, of course, that they have knowledge of the fact that the courts will not help them out of any embarrassment. The only alternative course for the law to take upon such a problem, outside of some scheme of forfeiture involving both parties, would seem to be a restoration of the status quo where possible. Such action would hardly tend to discourage illegal transactions between parties. As the law now stands, unfortunately, it furnishes a good opportunity for an especially unscrupulous person with a superior knowledge of legal principles to gain a decided advantage; however, the exceptions to the general rule ordinarily furnish the courts with sufficient discretion to protect the interests of public welfare, and at the same time to forestall the perpetration of any gross individual injustice.