1993

The Maxims of Equity

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Unlike the maxims of Solomon, the maxims of equity do not span millenia, are not traceable to a single author or Author, and do not promise eternal rewards. Unlike statutes, they lack the precision and clarity necessary to resolve specific issues, do not specify any sanctions, and are not invalid for vagueness. Some maxims are merely pretext or justification for the decisions of chancery; some are inconsistent or contradictory; some are consumed by their exceptions. One treatise suggests their only role is to provide "some utility as memory aids."[1] On the other hand, equally extreme is the statement that the maxims are "the fruitful germs" and the "judicial principles of morality which thus constitute the ultimate sources of equitable doctrines. . . ."[2] If nothing else, the maxims, developed over the centuries, offer an insight into equitable discretion and provide the opportunity for creative lawyering.

1. Equity Will Not Suffer a Wrong To Be Without a Remedy

Equity courts originated to provide a remedy which justice demanded, but which the law courts did not offer. The maxim "equity will not suffer a wrong to be without a remedy" arose out of the same premise. Still today, this equitable theory encourages chancellors to create remedies when equity demands relief for the injured or wronged party, even if rights are not specifically defined. Generally, "where there is a right which the common law . . . cannot enforce, it is the province and duty of a court of equity to supply the defect and furnish the remedy."[3]

This creativity has allowed equity courts to grant relief not otherwise supported by precedent. Accordingly, an equity court may reform contracts, enforce future crop liens,[4] order the sale of land for reinvestment purposes,[5] compel an accounting and impound the proceeds for damages to property that will pass to a remainderman,[6] establish constructive trusts, mandate signatures on documents,[7] order the enactment of taxes,[8] and decree structural changes in governmental institutions.[9] Indeed, this equitable inventiveness is enshrined at least in part in the Arkansas Constitution, which provides that "every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character. . . ."[10]

In *Renn v. Renn*,[11] it was concluded that courts can always carve out new equitable remedies that have not been previously stated. *Renn* involved a land dispute that arose out of a divorce decree and an apparent scheme between the husband and his brother to prevent the wife from receiving the property. The court said: "A court of conscience must keep the granted relief abreast of the current forms of iniquity. We should never naively refuse relief against fraud simply because there is no similar instance of such fraud in any of the books."[12] Although the court did not articulate the idea that

"equity will not suffer a wrong to be without a remedy," certainly it was attempting to further the purpose of the maxim.

In *Arkansas Foundry Co. v. Farrell*,[13] the court reluctantly rejected the unjust enrichment claim of workers who had improved land. However, the dissent, resting firmly on the maxim, criticized the result of the majority for recognizing the owner's unjust enrichment but failing to provide an equitable remedy for the plaintiffs. Despite precedent, the dissenter was ready to "break new ground" and carve out a remedy for the workers, as suggested by the equitable theory.[14]

The maxim promotes the important objective of awarding relief when there is no precedent. Regardless of the situation, equity courts may always create equitable remedies for injured parties.

2. Equity Acts *In Personam*, Not *In Rem*

From their inception, equity courts operated differently from law courts. While law courts issued orders that actually transferred legal titles, interests, or rights, equity courts acted directly against individuals by compelling them to act or not to act.[15] The courts, however, were permitted to assert such power only if they had *in personam* jurisdiction.

For example, a court can enjoin an individual from continuing a nuisance only if it has properly acquired *in personam* jurisdiction over the person. Absent this jurisdiction, the complaint will be dismissed at the earliest stage of the proceedings. Similarly, imposition of a constructive trust, reformation of an instrument, and rescission of a contract require jurisdictional power to decree such specific commands against a defendant.

The maxim "equity acts *in personam*, not *in rem*" is best illustrated by actions involving land in other states. For example, a sister court that grants a divorce to a wife whose husband is neither present in the state nor subject to its *in personam* power cannot directly adjudicate title to Arkansas land.[16] A direct transfer of the land would violate the sovereignty of Arkansas. In contrast, a husband present within a foreign jurisdiction may be cited for contempt and threatened with imprisonment for failure to execute a deed to Arkansas land. If executed, the deed is valid and entitled to recognition in Arkansas.[17] Despite coercion or intimidation posed by the contempt order, the underlying *in personam* jurisdiction over the defendant in the divorce proceeding supports the execution of the deed.[18] Likewise, an Arkansas court with *in personam* jurisdiction over an individual could order that person to convey title to land outside the State.[19]

The principle that equity can only act after the acquisition of *in personam* jurisdiction is modified slightly in the area of real property. Ever since an 1890 decision of the United States Supreme Court,[20] state legislatures have been authorized to give courts jurisdictional power over real property within the State. Moreover, the power exists even though the court cannot obtain *in personam* jurisdiction over some of the interested parties or claimants. State interests, such as clarifying titles, collecting taxes, and condemning State lands, necessitated the modification. In this limited fashion, therefore, the power of equity transforms "*in rem*" actions into *in personam* actions.[21] The mechanics of equitable involvement are further enhanced by Arkansas Rule of Civil Procedure 70, which permits a chancellor to appoint a person to execute a conveyance, deliver a deed, or perform other acts.[22]

In recent decades, particularly since *International Shoe Co. v. State of Washington*[23] in 1945, the state's ability to reach non-resident defendants through long-arm statutes has expanded markedly. Accordingly, the focus of equity has shifted away from an equitable court acting *in personam* and to the issue of the appropriate exercise of discretionary equitable power.

3. Equity Delights in Doing Justice and Not Just by Halves

This expansive maxim serves as the basis for the "clean-up" doctrine. Although the primary civil function of the circuit court is to award monetary damages in actions at law, the Arkansas courts have recognized that a court of equity may also grant damages.[24] In theory, the clean-up doctrine says that once equity properly acquires jurisdiction over a matter, it acquires jurisdiction for all purposes.[25]

The allegations of a complaint primarily determine whether a court of equity has jurisdiction over the subject matter of an action.[26] However, if the complaint does not establish equitable jurisdiction, it may be raised by the defendant's equitable defenses or prayer for equitable relief.[27] The allegation of one equitable theory or the prayer for one equitable

remedy may bring the entire case into chancery court under the clean-up doctrine.[28]

Chancery may exercise jurisdiction over the legal issues only when "the decision of the legal questions is incidental or essential to the determination of the equitable questions."[29] The clean-up doctrine affords complete relief,[30] does justice between the parties,[31] and avoids multiplicity of suits.[32] The legal relief, in the form of damages or other remedies, may accompany the equitable relief. Further, provided a proper jurisdictional basis for equity existed at the commencement of the case,[33] legal relief may be granted if the equitable relief was denied.[34] If the primary purpose of the lawsuit is legal in nature, however, the addition of ancillary or subsidiary equitable issues will not allow the entire action to be heard in equity.[35]

Under the clean-up doctrine, a chancellor whose equitable jurisdiction rested upon the prayer for the appointment of a receiver was authorized to award damages after the receivership was dissolved.[36] Similarly, when the chancery court had subject matter jurisdiction by virtue of a prayer for reformation of a contract, it was thereby empowered to award contract damages.[37]

In *Liles v. Liles*,[38] the Arkansas Supreme Court held that in a domestic relations action to set aside a property settlement, the chancellor had subject matter jurisdiction to hear a fraud claim for damages between the parties. The opposing party failed to make a motion to transfer; therefore, the issue was whether, in the absence of such a motion, chancery had the power to hear the tort claim. The supreme court held that there was such power because the tort claim was incidental to the issues that gave equity its subject matter jurisdiction. The unanswered question remained whether, if the opponent had timely moved to transfer the tort claim, the chancellor was obligated to grant the motion. In dicta, the court stated that "unless the chancery court has no tenable nexus whatever to the claim in question we will consider the matter of whether the claim should have been heard there to be one of propriety rather than one of subject matter jurisdiction."[39]

Limits, which admittedly are somewhat unclear, exist as to the extent of the clean-up doctrine. Courts have held that it is better to disallow equity jurisdiction in condemnation[40] and personal injury cases.[41] In other instances, however, chancery courts have heard cases involving trade libel[42] and defamation.[43]

If a party objects to the jurisdiction of the court of equity because an adequate remedy at law exists, the objection challenges the propriety of equitable jurisdiction, but not subject matter jurisdiction. This objection can be raised properly with a motion to transfer;[44] but, a motion to dismiss or a demurrer is insufficient.[45] The failure to timely file a motion to transfer waives any objection to the assertion of equity jurisdiction that is based on the inadequacy of a legal remedy.[46] Although the motions must be timely, the courts have displayed considerable latitude in accepting them.[47]

On the other hand, a party who joins in a motion to transfer to equity cannot later challenge equitable power,[48] at least when equitable jurisdiction is not wholly incompetent. In much the same matter, a defendant who files an answer seeking equitable relief may waive any objection to the plaintiff's assertion of equitable jurisdiction.[49] Finally, a party who fails completely to object to a transfer to equity tacitly accepts equity power.[50]

By failing to move for a transfer to circuit court, the defendant may lose the constitutional right to a jury trial.[51] Absent the motion, the chancellor lacks any authority to transfer the legal issues or claims and instead must retain them under the clean-up doctrine.[52] Although Arkansas Rule of Civil Procedure 18(b) permits the chancellor to transfer on "appropriate jurisdictional grounds," if power exists under the clean-up doctrine, no "appropriate jurisdictional grounds" for transfer exist.[53] However, if the equity court is wholly incompetent to grant the relief, the appropriate procedural step is to seek dismissal for lack of subject matter jurisdiction.[54]

When an action has been properly commenced in a court of law, either party can have any issue that was "exclusively cognizable in chancery" under the prior practice transferred to equity for determination.[55] When a defendant in a contract action raised the defense of equitable setoff, the circuit judge erroneously refused to transfer the case to chancery court.[56] Even though the plaintiff sought legal relief and a jury trial, the defendant's right to have exclusively equitable issues tried in equity outweighed the plaintiff's interests. On the other hand, a trial judge properly retained a case when the defense of laches was raised because laches is an invalid defense to a claim for money damages.[57] Similarly, when a plaintiff sought damages for slander in circuit court, the entire action should not have been transferred to equity simply because the defendant sought an accounting.[58] In such cases, the Arkansas Supreme

Court has expressed concerns that the constitutional guarantee of a jury trial would be undermined if a defendant could interpose defenses and consequently transfer a matter to equity.

The courts require the issue to be "exclusively cognizable" in equity. While an equitable setoff and a foreclosure prayer[59] are exclusively equitable, the defense of mistake in a contract action is not.[60] If the legal claims of the plaintiff and the equitable claims or defenses of the defendant are related and largely dependent on each other, the entire matter should transfer to chancery court.[61] If the claims or defenses are separable, however, the circuit judge has discretion to transfer only the equitable issues, retaining jurisdiction of the legal aspects of the case.[62] If no party moves to transfer, the circuit court as the ultimate repository of power hears the case,[63] unless the threshold issue of subject matter jurisdiction assigns the case to equity.

The Seventh Amendment to the United States Constitution is not binding on state courts; thus, federal decisions on law, equity, and the right to a jury trial are merely persuasive authority.[64] Nonetheless, the clean-up doctrine is fully compatible with the constitutional right to a jury trial.[65] Appellate decisions have occasionally discussed the impact on the constitutional right to a jury caused by motions to transfer actions to equity[66] or away from equity.[67]

4. Equity Follows the Law

Chancery courts developed to fill in the gaps where the law and its remedies were inadequate. Equity did not develop to undermine or subvert the law. Accordingly, "equity follows the law." For example, in a breach of contract action against a seller who failed to convey, the buyer has two remedies available: damages or specific performance. Regardless of whether the buyer seeks the legal or equitable remedy, the substantive law of contract remains the same.[68] Similarly, courts of equity are obligated to follow governing statutory and constitutional principles.

The maxim is "'strictly applicable whenever the rights of the parties are clearly defined and established by law. . . .'"[69] Accordingly, courts of equity have followed the statute of limitations[70] and the rules on lien priorities,[71] as well as statutes on school consolidation,[72] contractor's bonds,[73] regulation of dentists,[74] and the authority of an executor.[75]

However, the breadth of the maxim can be misleading. Returning to the opening example, while the inadequacy of the consideration given for the contract may be a basis for avoiding specific performance, that same fact might be insufficient for refusing damages.[76] Further, even though the court of equity may be deciding legal issues under the clean-up doctrine, the maxim does not mandate that the court is restricted to legal remedies.[77] To some extent, such exceptions are understandable and consistent with the very nature of equity, which is to correct inadequacies, gaps, and inappropriate treatments in the law. A narrower reading of the maxim, which avoids these exceptions, provides that equity follows the law where statutory mandates require specific action or treatment.[78]

Illustrating the narrow scope of the maxim, Justice Cardozo wrote that "[e]quity follows the law, but not slavishly nor always."[79] To do otherwise would undermine and subvert both the purpose and the tradition of equity, which are to freely ignore or disregard, or even oppose, the law, as justice mandates.[80]

5. Equality is Equity

Generally, the maxim "equality is equity" stands for the proposition that parties who are members of a certain class share equally in an obligation or burden. By the same token, those parties have an equal claim in rights, benefits, and profits stemming from a transaction. Most courts enforce this doctrine on the parties, unless the individuals have expressed an opposite intent.[81]

This maxim finds expression in the law of contribution. Contribution actions, which originated in equity courts, first presumed that each tort-feasor would pay an equal share absent additional circumstances, such as an agreement between the parties.[82] Although modern contribution statutes provide that each tort-feasor will pay a pro-rata share,[83] the maxim remains the foundation for the action.[84]

The maxim has been utilized to support distribution of a common fund, decree ownership in common of real property, establish equitable mortgages, enforce joint contracts, settle estates, abate legacies, and marshall assets.[85] The statutory codifications of many of these actions rest upon the idea of "equity is equality." The maxim also, in a general sense,

forms the basis for the property distribution scheme of modern divorce law.[86]

The doctrine has also been applied to the detriment of some claimants. In *Rainwater v. Wildman*,[87] the plaintiff purchased bank notes. When the bank shut down, she demanded repayment of the notes; however, the bank neither returned the notes nor paid her the proceeds. The court found for the bank and stated, "as between creditors equality is equity,"[88] absent specific circumstances, such as a direct assignment of particular funds to a debt. As a result, the purchaser stood on equal ground with the bank's other creditors.

6. Equity Regards That As Done Which Ought To Be Done

Courts of equity generally treat actions that were promised, intended, or agreed upon between parties as done, if in good conscience the actions should have been done and there was a duty to perform the actions.[89] For instance, if an individual agrees to convey property in exchange for payment of an outstanding debt, a court of equity will deem the property transferred once the third party makes payment to the holder of the debt.[90] Likewise, if a person promises to be jointly liable on a note but never actually signs the note, the court will permit the obligee to look to that person for relief.[91]

The maxim that "equity regards that as done which ought to be done" is often discussed in the context of the doctrine of equitable conversion. In relations between a seller and an installment buyer of real property, the doctrine of equitable conversion treats the legal ownership of property as vesting in the installment buyer and thus determines the rights and obligations of the parties in areas such as risk of loss, rights of creditors, and devolution on death.[92]

The maxim has been cited to defeat the fraudulent acquisition of property in violation of an obligation and to support an incomplete attempt to carry out an act.[93] Indeed this maxim is sometimes stated as providing the basis for all kinds of equitable property interests.[94] Once equity determines what effect performance would have had on the parties, equity can use its contempt and remedial powers to accomplish those goals.

The maxim has been utilized to uphold statutory requirements[95] as well as support a party's expectations for title to real property under a legislative Act.[96] Equity has also created subrogation rights under the maxim. In *Walker v. Mathis*,[97] a purchaser in good faith paid cash for a tract of land that was originally subject to a mortgage that had never been paid by the mortgagor. The court held that the purchaser was entitled to be subrogated to the rights of the mortgagor because the purchaser "was not a volunteer but discharged the mortgage debt in order to protect his own interest. . . ."[98]

Parties who intend to rely on the rule should not expect it to overcome established principles of law. In *Veazey v. Stewart*,[99] a grandmother argued that the maxim entitled her to visitation rights with her deceased son's daughter; the granddaughter was in the custody of her natural mother and step-father. Because it was long held that there are no visitation rights when a natural parent has custody over a minor, the court would not look to the old equity rule and subsequently denied the grandmother's request for privileges.

7. Equity Looks to the Substance and Not Merely the Form

In accord with its broader focus upon justice rather than technicalities, "[e]quity looks beyond the mere form in which the transaction is clothed and shapes its relief in such way as to carry out the true intent of the parties to the agreement, and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their relations to one another and to the subject-matter, are subjects for consideration."[100] Stated somewhat differently, equity ensures that the rights of the parties are not sacrificed to the mere letter of a document[101] by looking beyond "words of description to see what was in fact ordered to be done."[102] For example, a deed which appears absolute on its face but is in reality a mortgage will be treated by equity as a mortgage.[103]

In practice, courts of equity use this maxim to enforce an act abortive at law because of a defect[104] or merely to eliminate the necessity of a superfluous act.[105] Primarily, however, they employ the maxim to "impose a liability as against an evasion by a formal concealment of its true character."[106] Illustrative of this is *Pratt v. Ballman-Cummings Furniture Company*,[107] where minority stockholders of Ballman-Cummings Corporation brought suit seek-

ing payment of the fair market value of their stock as authorized by statute. The defendant corporation contended that instead of merging with another entity, it merely entered into a partnership as evidenced by the partnership agreement. The supreme court examined a number of factors[108] and noted that merely calling the agreement a partnership did not change its essential character. Looking behind the form to the substance of the transaction, it, therefore, found that a de facto merger had taken place.

8. He Who Comes into Equity Must Come with Clean Hands

This maxim is simply stated in its essential requirements: a party may be barred from equitable relief if he intentionally engaged in illegal, fraudulent, or unconscionable conduct directly related to the transaction that is the subject of the controversy and which was of such magnitude that it persuades the chancellor in his equitable discretion to deny relief. However, more significant than a simple definition are the remaining questions. How close of a relationship must exist between the conduct and the transaction? Who may raise the defense? How much discretion does the chancellor possess? In an era of merged legal systems, is the maxim significant to an action in a court of law? Can the knowledge or conduct of the defendant preclude the applicability of the doctrine? Are there instances in which the doctrine, even though appropriate, is not applied because of some countervailing policy? Has the doctrine of unclean hands become passe with changing societal and judicial views of morality?

A. The Purpose of Unclean Hands. The purpose of the unclean hands doctrine is neither to protect the defendant nor to favor the complainant.[109] On the contrary, the objective of the doctrine is to protect the court from groveling in the gutters with litigants with filthy hands.[110] Public policy also supports this hands-off approach. As a user of public resources, the chancery court should be reluctant to expend energy to unravel the affairs of those parties whose confused state or unfortunate position arises from their own improper activities.[111]

Once a court emphasizes or concludes that the purpose of the doctrine is to protect the court and the public, several consequences naturally follow. The court can freely raise the defense sua sponte. Further, the doctrine can be applied even absent harm to the defendant because its purpose is not to rectify a wrong but to prevent the court from deeper entanglement in the unseemly mess. Similarly, the doctrine may apply, thus barring the plaintiff from relief, regardless of whether the defendant acted in concert to the illegal or improper scheme. Finally, even though the conduct is legal and nonfraudulent, the doctrine of unclean hands may bar equitable relief if the conduct is unconscionable in the eyes of the chancellor.

B. The Nature of the Misconduct. The plaintiff is barred from a court of equity when he acts in an illegal, fraudulent, or unconscionable manner. Although the cases are relatively few in number, illegal conduct charges are the easiest basis for excluding a party. For example, a partner who handled transactions on a cash basis to avoid reporting income on taxes might be barred from seeking an accounting of partnership proceeds.[112] Similarly, a lending institution that notarized a signature on a promissory note in violation of a statute would be barred from an equitable action seeking foreclosure on the note.[113] Far more frequent are instances in which the conduct of the plaintiff is fraudulent, and perhaps the most common example involves the fraudulent conveyance of property. An individual who transfers property to a third party to conceal it from creditors may be barred from subsequently seeking to cancel that conveyance.[114]

Unconscionable conduct is the broadest ground that could consequently bar the plaintiff from court. For instance, a widow's attempt to cancel a deed executed by her late husband to a third party was rejected because the court concluded that she married the decedent not in good faith, but merely to obtain his property. The evidence demonstrated that she lived with the decedent, who was forty years older than she, for only a few days before departing the marital home. While her conduct did not constitute illegality or fraud in a traditional sense, the court found that it violated "conscience or good faith or other equitable principle."[115] Likewise, a mother's interference with the father's visitation rights barred her from seeking accumulated back child support.[116] Similarly, a manufacturer who sought to enjoin a retailer from selling products in violation of a fair trade agreement would be denied equitable relief if it failed to enforce the same pricing guidelines toward all its retailers.[117]

The plaintiff must have carried out his conduct with wrongful intent or wilful misconduct. Further,

the misconduct must either have been committed by the plaintiff or, to use the phrase of Learned Hand, "taint the plaintiff personally."[118] For example, the activities of a predecessor corporation will not taint the successor corporation so as to bar the latter from equity.[119]

C. The Immediacy of the Misconduct. The allegedly unclean conduct must directly relate to the subject matter of the litigation or the matter in controversy.[120] A mere collateral relationship to the controversy in question is insufficient.[121] It follows, therefore, that a court of equity does not demand that its applicants live sinless lives.[122] While one sin, standing alone, may be sufficient to bar one from eternal rewards, a single transgression of a statutory pronouncement or the requirements of a judicial conscience is insufficient to bar a party from the doors of equity. A party seeking specific performance of a land contract is not barred from relief because he received a driving ticket, engaged in tax evasion, or committed assorted acts of battery and mayhem upon his spouse and friends. In contrast, he may be barred from an equitable remedy if he misstated his financial position while entering into the contract, conspired with a real estate broker to take advantage of the seller, or violated zoning ordinances regarding the tract of land. The latter examples have the necessary and close relationship so that, if serious enough, they might be sufficient for a chancellor to justify barring an applicant from a court of equity.

D. The Harm to the Defendant. A controversial aspect of the doctrine is whether the misconduct of the plaintiff must have been directed against the defendant who raises the defense. In Arkansas, only a defendant who has been injured by the conduct may raise the defense.[123] The leading case supporting this position is *Batesville Truck Line, Inc. v. Martin*,[124] which involved an action for specific performance of a contract for the sale of corporate stock. The defendant contended that the parties had intentionally defrauded the Public Service Commission as to the ownership of the corporation so that the PSC would issue a common carrier operating permit. The court, however, rejected the unclean hands defense, stating "the maxim may not be successfully invoked if the alleged wrongful conduct of the plaintiff appears not to have injured or prejudiced the defendant."[125] Even though both parties had engaged in a wrong upon a third party, namely the public, the court would not restrain itself from examining and rectifying the relationship between the parties.

Similarly, in *Sliman v. Moore*[126] the plaintiff sought cancellation of a trust deed executed by him to the defendant. In response, the defendant contended that the plaintiff transferred the deed to him solely to defraud creditors. Finding that only the creditors, not the defendant, were harmed, the court rejected the unclean hands defense and cancelled the deed. The maxim will not enrich one villain against another.

Admittedly, some Arkansas cases allow a guilty defendant to raise the defense of unclean hands and thereby deny the plaintiff's equitable request. Typically, the husband transfers property to his wife to avoid his judgment creditors, and the wife knowingly acquires title. Sometime later, perhaps in the context of a divorce, he seeks to cancel the deed and she argues unclean hands.[127] Though the wife is neither innocent nor harmed, she ultimately retains the land.

The most recent attempt to reconcile these two strands of cases is *McCune v. Brown*.[128] A father, facing divorce proceedings, entrusted his adult daughter with $250,000 worth of gold Kreugerrands which she put into her safety deposit box. With the divorce apparently concluded, the father asked for the return of the gold, but the daughter refused. When the father sued for recovery and possession, the daughter claimed unclean hands as an equitable defense: the father hid the coins to defraud his wife; his conduct related directly to the property in litigation; and equity should not soil its hands in helping such a despicable character. His response was: "Wait a minute, you can't even raise that defense. You can't claim that you were innocent, because you actually participated in the fraud. Not only have you not been injured, as required by *Batesville Truck Line*, but you would be enriched if you were permitted to keep the coins. And that would be unjust."

After balancing the conflicting policies of unclean hands of the father and unjust enrichment accruing to the daughter, the Arkansas Court of Appeals overruled earlier precedent and ruled for the father by reasoning that his unclean hands should be ignored to prevent her unjust enrichment. However, the balancing of the equities might have been different if the defendant transferee had lacked knowledge of the fraud and had not sought to benefit, or if the plaintiff transferor's conduct had been particularly reprehensible.[129]

In contrast, other jurisdictions have permitted the defendant to raise the defense of unclean hands even though he has not been harmed or injured by the activity of the plaintiff.[130] This approach emphasizes that unclean hands primarily focuses on protecting the integrity of the court. It allows the court to consider wrongs that were clearly connected with the same transaction, and that resulted in harm to the public, the court, the government, or third parties. For example, where the buyer and the seller conspired to deprive a broker of a sales commission, the buyer was denied specific performance even though the seller was not injured; only the third party, the broker, had been injured.[131] Despite the broker's absence from the litigation, unclean hands was an appropriate defense to the equitable claim.

E. Raising and Proving the Defense. As an affirmative defense[132] that confesses the allegations of the plaintiff in the complaint and then seeks to avoid them by introducing new matter, the unclean hands argument must be affirmatively pleaded and proven by the party opposing the request for equitable relief. However, even if the defendant does not raise the defense, the court may raise the unclean hands doctrine sua sponte.

The Arkansas courts have taken the view that wrongdoing effectively bars a party from invoking the defense.[133] Suppose though that both the plaintiff and the defendant are equally at fault. May the guilty defendant bar the plaintiff from relief? Alternatively, what if the plaintiff is more at fault than the defendant?

In *Baker v. Bellows*,[134] equity was asked to resolve an employment dispute between two individuals, both of whom had been convicted of operating a nationwide fraudulent cancer cure scheme out of Eureka Springs. The manager sought $25,000 as promised in an oral agreement; the promoter replied that since the manager had been an integral part of the scheme for 15 years he should be barred from equity because of his unclean hands.

Finding that the manager was "an ignorant country barber" when first hired and possibly ignorant of the fraud being practiced upon patients, the court concluded that his hands were not unclean and thus he should prevail. However, this decision could have been reached upon two other bases. First, the defendant was clearly guilty and should not have been permitted to even raise the defense. Alternatively, a comparison of the degrees of fault of the two individuals would have indicated that the parties were not "in pari delicto" and that the promoter was more at fault. Either basis would have been preferable to simply stating that the manager was spotless in the eyes of equity.

Typically, the defendant demonstrates by a mere preponderance of the evidence that the plaintiff has unclean hands, but the court has stated on at least one occasion that the conduct must be demonstrated "by a preponderance of evidence which is clear and convincing."[135] This higher standard may be appropriate if the conduct is allegedly fraudulent, since allegations of fraud in chancery court require such proof.[136]

F. The Exceptions. As already suggested, some courts do not apply the doctrine if the defendant himself has not been injured or is a party to the misconduct, if the wrong is only a collateral issue, if the defendant fails to raise it as an affirmative defense, or if the illegal, immoral, or fraudulent activity is not significant enough to bar the plaintiff from court altogether. Moreover, beyond these limitations, the chancellor still has equitable discretion to deny application of the defense.

Public policy may override the unclean hands doctrine. For example, annulment of a marriage is granted even though the under-aged petitioner falsely swore to his age in seeking a marriage license.[137] Another illustration is *Levy v. Meyere*,[138] where a mother transferred property to her son so he could resist the draft by reason of having to support her. When the son broke his promise to his mother and recorded the warranty deed, she sued in equity to cancel the deed, arguing undue influence and fraud. His defense of her unclean hands was rejected, partly because she had done nothing to deceive the draft board. In addition, the Arkansas Supreme Court pointed to the strong policy factors of her age, her health, and her status as a loyal and loving mother. Public policy would be violated if the son, who was the motivating force in this conspiracy, were to keep the property and take advantage of his mother.[139]

The cases emphasize that the court of equity must consider the public interest, as well as the private interest of the litigants. In anti-trust,[140] copyright,[141] communication,[142] and patent cases,[143] the courts have concluded that legislative policy and public interest demand that the action be heard despite the actions of the plaintiff. The doctrine should not be invoked when the only party losing is the public.

Of course, the chancellor may disallow the defense of unclean hands for the reasons traditionally associated with equitable discretion, such as the failure to timely raise the defense during the trial, or prior sufficient punishment that absolves the plaintiff of the wrongfulness of his conduct. Finally, the chancellor may refuse to apply the doctrine if applying it would result in absurd consequences. If dismissing the plaintiff from a court of equity would consequently create a unique and intolerable situation, the preferable approach would be to allow the plaintiff, even though a wrongdoer under any definition of the unclean hands doctrine, to come into equity and seek relief.

G. Unclean Hands in a Court of Law. As a general rule, the doctrine of unclean hands bars a party from equity, but not from seeking relief in a court of law. Nevertheless, while the defense is described as exclusively cognizable in equity, the court has permitted it to be heard in a court of law when the action bears some relationship to equity and no objection or motion to transfer is raised.[144]

In the event the equitable defense cannot be raised in a legal court, the comparable legal defense that might be considered is illegality.[145] If two individuals are involved in a gambling transaction and the losing partner refuses to pay, the plaintiff's lawsuit for the gambling proceeds will be rejected because the plaintiff is attempting to enforce an illegal contract. In this instance the result is the same as unclean hands. However, the concept of an illegal contract is narrower than unclean hands; it does not leave as much discretion to the judge and requires illegal as opposed to merely fraudulent conduct.

9. Equity Favors the Vigilant, Not Those Who Slumber on Their Rights

This pungent maxim embodies the doctrine of laches, equity's counterpart to the statute of limitation. To assert this defense, and thereby bar the plaintiff from equitable relief, the defendant must establish that the plaintiff unreasonably delayed seeking equitable relief and that the delay prejudiced the defendant.[146] The underlying policy is that a plaintiff who waits before asserting his rights is barred from asserting them against an adverse party who innocently and peaceably relied upon the silence and delay and was thereby prejudiced.[147]

For example, a landowner who discovers that a neighbor is on the verge of constructing an encroaching building must act promptly if he seeks to enlist the assistance of the court of equity in preventing the encroachment. To allow the neighbor to complete the encroachment and then to be subject to an action for a mandatory injunction for removal would not be consistent with the purposes and spirit of equity.[148]

The first part of the test—an unreasonable delay—is determined by an examination of the facts in a particular case.[149] An action commenced after the expiration of a comparable or analogous statute of limitation is certainly barred.[150] Moreover, actions commenced within the statutory period may be likewise barred. The statute of limitation focuses only upon the passage of time, whereas laches focuses also upon the effect of the passage of time. Whether a delay is unreasonable is ordinarily a question of fact.[151]

The amount of time obviously varies with individual cases. For example, a court has held that twelve months was not an unreasonable delay in an action by a fire fighter challenging the action of a civil service commission.[152] Similarly, owners of subdivision lots sought an injunction against a developer who put a roadway across his lot to connect to an adjacent apartment complex. In response to the allegation that the roadway violated restrictive covenants, the developer argued that the action was barred by laches. The owners, however, had administratively objected to the roadway, thus putting the developer on notice of their claim, and commenced their action twenty-four days after the permanent access was undertaken. Because the owners had acted in a timely fashion, the developer could not assert ignorance of their claims and rights.[153]

The plaintiff's promptness in bringing an action is evaluated in light of both his knowledge and the facts that a person of ordinary intelligence would have discovered upon a reasonable inquiry.[154] In other words, delay may be measured from the date of constructive knowledge, not just actual knowledge.[155]

Even if the plaintiff's delay in commencing the action is unreasonable, the delay may be excusable. The plaintiff bears the burden of demonstrating a valid excuse, such as an inability to obtain legal counsel, a personal disability, an agreement between the parties, on-going settlement negotiations, or the plaintiff's lack of knowledge of the facts due to concealment or fraud by the defendant.[156] Indeed, even

the plaintiff's lack of knowledge of all the facts may be considered in excusing a plaintiff's delay.[157] However, a mistake of law or ignorance as to the rights of the plaintiffs to sue is not generally accepted as an excuse.[158]

Mere delay in commencing an equitable action does not support the defense of laches.[159] The second part of the test is that the delay must have prejudiced the defendant in such a way that it would be inequitable to allow the plaintiff to assert his claim.[160] The prejudice may be evidentiary, in the loss of witnesses or documents,[161] the obscuring of the original transactions, or the failure of memories,[162] each of which occurs through the passage of time. The prejudice may be financial, in the expenses incurred completing the construction of an encroaching building,[163] or in the promotion of one individual over another who later challenges the process.[164] The prejudice may result from change of title, improvements to land, intervention of third parties,[165] or change in relationships and circumstances.[166] The inability to return parties to the status quo ante may likewise be prejudice that requires the application of laches.[167]

The degree of prejudice required to invoke laches may reflect the length of the delay or the nature of the excuse. A particularly long delay in commencing an action and a relatively small amount of prejudice may support laches. Likewise, a relatively short delay accompanied by more grievous or oppressive prejudice may support laches.[168]

Although both elements of the defense are satisfied, the chancellor, who possesses virtually unlimited discretion, may still refuse to bar the plaintiff from equity.[169] For example, courts have been reluctant to apply laches in actions involving family members.[170] In an effort to avoid bitter litigation, family members are likely to delay even longer before suing relatives. Public policy should tolerate such extended delays in an attempt to encourage reconciliation and settlement. Likewise the doctrine is typically not applied against minors[171] or against the government.[172] Ultimately the chancery court may refuse equitable relief where injustice would be done by granting the relief.[173]

Laches is unavailable as a defense if the plaintiff seeks only legal relief.[174] The issue then is whether the action was commenced within the appropriate statute of limitations. However, as a further demonstration of the broad ranging scope of equity, laches has been raised by the government to dismiss tardy petitions for post-conviction relief in the criminal area.[175] The defense has also been applied against a plaintiff who delayed unreasonably in the prosecution of a suit that was timely commenced.[176]

10. He Who Seeks Equity Must Do Equity

This maxim is described as the very foundation of equity jurisprudence.[177] A party seeking the assistance of equity submits itself to the court's resolution of what is necessary to afford a fair and just result between the parties.[178] As a practical matter, the maxim requires a party, as a condition of obtaining the relief sought, to accord the opposing party all the equitable rights, claims, and demands growing out of the subject matter of the controversy to which the opposing party is entitled.[179]

To this end, courts allow no obstacles to stand in their way,[180] and therefore the maxim applies equally to plaintiffs and defendants, regardless of the type of complaint or remedy sought. However, courts do not possess unbridled discretion, thereby subjecting a party seeking relief to every equitable claim that may have emanated between the parties in the past. Rather, pursuant to this maxim, the party must afford only those equities that arose from or were incidental to the subject matter of the controversy.[181]

For example, a buyer seeking specific performance of a contract must be prepared to carry out its obligation of tendering the purchase price. A party seeking the cancellation of a tax deed must pay the taxes and costs that were discharged by the issuance of the tax deed to the purchaser.[182] Similarly, upon rescinding a contract for the purchase of land and returning the parties to the status quo ante, the court will order repayment by the seller of the purchase price, but it will also require the buyer seeking the equitable remedy to do equity by paying an amount equal to the fair rental value of the property during the time of possession.[183] In resolving a partnership dispute, the maxim served as the rationale for adjusting the settlement to compensate those individuals who successfully managed the partnership.[184]

This maxim has also been used to deny a complainant the relief sought. In *Byars v Byars*,[185] a son brought suit in equity asking the court to treat a warranty deed conveyed to his mother as an equitable mortgage. The mother originally accepted the

deed in return for paying the son's outstanding mortgage. The agreement further provided that if the son repaid the debt owed and the taxes on the property, the mother would reconvey the property. When the property appreciated in value, the son brought this action. The court, though acknowledging that this transaction contained all the earmarks for an equitable mortgage, refused to award the relief sought because the son never paid the taxes or the monthly payments on the property. Its rationale was that equity requires he who seeks equity to do equity, and here the son failed to "do equity."

11. Where Equities Are Equal, the First in Time Will Prevail

Chancery courts have long held that as between two parties who stand on equal ground the party who acts or establishes an equity first is entitled as a matter of right to prevail over the other. The threshold requirement for relying on the rule is that the dispute must involve equitable interests; legal interests are generally governed by statutory authority that defines priority between two equal parties.[186]

For example, the rule was applied in *Miller v. Mattison*[187] to protect an equitable interest in land that arose out of a lien. The court held that even though one party executed a mortgage lien during the litigation of the cause, the original vendor had priority in the land because he sold the property some time before the action arose and acquired an equitable lien based on the unpaid purchase price.

Likewise, in *First American National Bank v. Christian Foundation Life Insurance Co.*,[188] the rule protected certain bondholders in the event of a foreclosure on the issuer of the bonds. The court held that the bank was entitled to priority on any lien against the church that issued the bonds, as opposed to other holders of duplicate bonds, because the bank acquired a security interest in the bonds six months before the other holders.

The maxim provides a foundation for developments in the law concerning priorities, notice, and subsequent purchasers.[189] Like other maxims, the first in time rule is inconsistently followed and may indeed conflict with other maxims. The first in time rule may not give equality, despite that companion maxim. Similarly, if equity is to follow the law, the result may be neither equality nor priority.[190]

12. Equity Abhors Forfeitures

This maxim expresses the view that, in general, forfeiture clauses in contractual documents are disfavored by the law, and especially by equity.[191] Courts rationalize that the enforcement of a forfeiture clause may produce great hardships on the defaulting parties,[192] and in most cases, redress may be realized through less drastic means. However, the maxim does not bar a court of equity from ever enforcing a forfeiture provision.

Whether a court will relieve a defaulting party from forfeiture depends upon a balancing of "comparative and relative equities"[193] in the light of the particular circumstances of the case. Further, the following general questions must be addressed: (1) Is the failure to perform capable of being fully compensated, and is the defaulting party willing and able to tender the compensation? (2) Is the forfeiture clause a mere incidental provision to secure the performance of the agreement?[194] (3) Has the party seeking to enforce the forfeiture formerly waived or acquiesced in late performance? (4) Was the breach of a condition precedent or subsequent?[195] and (5) Was the violation of the contractual terms wilful or persistent, or merely negligent?[196]

For example, in *Watson v. Stout Lumber Co.*,[197] Watson brought suit to cancel a timber deed entered into with Stout Lumber Co. and declare a forfeiture of the timber conveyed in that deed. The deed existed for three years and contained an extension provision which could be exercised by paying a sum of money in advance. When Watson received payment five days after the expiration of the lease, he declared a forfeiture. At trial, Stout Lumber Co. renewed its tender of payment plus interest. The court, finding in favor of the defaulting Lumber Co., held that because the doctrine of equity was compensation and not forfeiture, the applicable rule for determining whether equity relieves against a forfeiture is whether the defaulting party is willing and able to tender payment.[198] However, in addition to the compensability of the wrong, the court also emphasized the fact that Watson failed to notify his intent to declare a forfeiture until after payment was offered, some five days following the expiration of the lease.

In *Berry v. Crawford*,[199] the buyer tendered payment fourteen days late, and the seller brought a suit seeking forfeiture. The court ruled in favor of the buyer and stated, "before a forfeiture will be de-

cleared the law will require that a strict compliance with every important prerequisite must be shown, even in such contracts where forfeiture is provided for by express terms."[200] The court found that an implied waiver of forfeiture existed based upon a subsequent conversation between the two parties and the fact that the seller never demanded payment after the due date. Since the seller did not strictly comply with the contract terms, the court awarded specific performance of the contract even though it provided that time was of the essence.

However, in *Bollen v. McCarty*,[201] the court dealt with a sale of land contract that contained a right of withdrawal clause. When the buyer attempted to exercise the withdrawal option, the seller refused to honor it because the buyer exercised it a day late. The purchaser brought suit seeking specific performance of the contract and return of his $5000 down payment. In upholding the chancellor's denial of relief, the court found that the contract was an option contract, in which time is usually of the essence. Further, this court emphasized the withdrawal provision was unambiguous.

Though circumstances warranting equity's jurisdiction may be present, that fact alone does not assure a complainant of equitable relief. For instance, a court of equity may uphold a forfeiture because the defaulting party committed a breach that was willful, grossly negligent, or merely negligent.[202] A court of equity may likewise uphold a forfeiture provision if it would be inequitable to the party seeking forfeiture to deny the relief sought.

A leading case demonstrating these views is *Vaughan v. Doss*,[203] where the parties entered into a lease for the purpose of oil exploration. The agreement stipulated that if drilling was not commenced by a certain date, the lease period would terminate unless the lessee tendered a deferral payment to the lessor at the First National Bank of Magnolia. Deferral payments were made for three years as specified in the contract. However, in the fourth year the lessee mistakenly mailed the deferral payment to the First National Bank of El Dorado. Since neither the bank nor the lessor had knowledge of the mistake, the bank simply deposited the check under the lessor's name, and the lessor declared a forfeiture and filed suit to enforce the action. The court ruled in favor of lessor, for two reasons: first, the lessee was at fault for sending the check to the wrong bank, and second, in oil and gas leases, it would be inequitable not to strictly enforce the forfeiture provision. The court noted that the balancing of equity and justice required the enforcement of the forfeiture provision because neighboring wells of land tracts can easily and quickly drain all oil reserves on the land. Interestingly, in rationalizing the enforcement, this court went so far as to state, "Oil and gas are such fugitive substances, that the rule has grown up that equity demands of the lessee strict compliance, and favors 'forfeiture' in order to accomplish justice for the lessor."[204]

NOTES

* *The author gratefully acknowledges the research assistance of Jeffrey W. Puryear, Class of 1993, and Russell T. Sanders, Class of 1993.*

1. McCLINTOCK ON EQUITY 52 (2d ed. 1948).

2. POMEROY'S EQUITY JURISPRUDENCE § 360 (5th ed. 1941).

3. 27 AM. JUR. 2d *Equity* § 120, at 647 n.15 (1966). The Arkansas Supreme Court has stated the general rule that "a court of equity may fashion any reasonable remedy justified by the proof." Smith v. Eastgate Properties, Inc., 312 Ark. 355, 361, 849 S.W.2d 504 (1993).

4. Driver v. Jenkins, 30 Ark. 120 (1875).

5. Bedford v. Bedford, 105 Ark. 587, 152 S.W. 129 (1912).

6. Watson v. Wolff-Goldman Realty Co., 95 Ark. 18, 128 S.W. 581 (1910).

7. Cox v. Cox, 17 Ark. App. 93, 704 S.W.2d 171 (1986) (*dicta*).

8. Missouri v. Jenkins, 495 U.S. 33 (1990). *See* Killenbeck, *Resources, Rhetoric, and Rights: Perspectives on Missouri v. Jenkins*, 1991 ARK. L. NOTES 39.

9. Hutto v. Finney, 437 U.S. 678 (1978) (Arkansas prison litigation); Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 839 F.2d 1296 (8th Cir. 1988); Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 778 F.2d 404 (8th Cir. 1985) (Little Rock school consolidation litigation). *See* Note, *Modifications of Consent Decrees—More Flexibility Standard for Modifications in Institutional Reform Litigation*, 15 U.A.L.R. L.J. 95, 99-101 (1992).

10. ARK. CONST. art. 2, § 13. *See* McFarlin v. Kelly, 246 Ark. 1237, 442 S.W.2d 183 (1969) (guarantee protects personal and property rights, but not political rights).

11. 207 Ark. 147, 179 S.W.2d 657 (1944).

12. *Id.* at 154, 179 S.W.2d at 661.

13. 238 Ark. 757, 385 S.W.2d 26 (1964). The majority stated that:

It is with reluctance that we affirm this decree.

> Farrell, as the owner of the lots, is alone in being in a position to bid in the property without having to substantially destroy the value of the warehouse by removing it from the land. *It appears that [Farrell] is using his advantage to reap a windfall at the expense of the [builders].* All that can be said is that his conduct is within his strict legal rights.

Id. at 761, 385 S.W.2d at 29 (emphasis added).

14. *Farrell*, 238 Ark. at 763-68, 385 S.W.2d at 30-33 (McFaddin, J., dissenting).

15. *See* 27 AM. JUR. 2d *Equity* § 122, at 649 (1966).

16. Tolley v. Tolley, 210 Ark. 144, 194 S.W.2d 687 (1946) (Kansas divorce decree had no effect upon husband's title to Arkansas lands).

17. Phillips v. Phillips, 224 Ark. 225, 272 S.W.2d 433 (1954).

18. Knighton v. Knighton, 259 Ark. 399, 533 S.W.2d 215 (1976).

19. Strang v. Strang, 258 Ark. 139, 523 S.W.2d 887 (1975).

20. Arndt v. Griggs, 134 U.S. 316 (1890).

21. *See, e.g.*, ARK. CODE ANN. §§ 18-60-401 (partition); 18-60-501 (quiet title).

22. If the real property is within the jurisdiction of the court, the court may enter a judgment directly vesting title to the property in another. *See* ARK. CODE ANN. § 16-66-116.

23. 326 U.S. 310 (1945).

24. McMillan Feeder Finance Corp. v. Stephens, 240 Ark. 167, 398 S.W.2d 535 (1966); Askew v. Murdock Acceptance Corp., 225 Ark. 68, 279 S.W.2d 557 (1955). This section is based in part on BRILL, ARKANSAS LAW OF DAMAGES § 2-2 (2nd ed. 1990).

25. First Arkansas Leasing Corp. v. Munson, 282 Ark. 359, 668 S.W.2d 543 (1984); Bierbaum v. City of Hamburg, 262 Ark. 532, 559 S.W.2d 20 (1977).

26. Hesser v. Johns, 288 Ark. 264, 704 S.W.2d 165 (1986).

27. Nottingham v. Knight, 238 Ark. 307, 379 S.W.2d 260 (1964); Spikes v. Hibbard, 225 Ark. 939, 286 S.W.2d 477 (1956); Williams v. Westinghouse Credit Corporation, 250 Ark. 1065, 468 S.W.2d 761 (1971) (defendant argued usury and sought reformation).

28. Stobaugh v. Twin City Bank, 299 Ark. 117, 771 S.W.2d 282 (1989).

29. Towell v. Shepherd, 286 Ark. 143, 146, 689 S.W.2d 564, 565 (1985). *See* Colclasure v. Kansas City Life Ins. Co., 290 Ark. 585, 720 S.W.2d 916 (1986) (clean-up doctrine permits chancellor hearing foreclosure action to award money damages).

30. Tyler v. Morgan, 214 Ark. 667, 217 S.W.2d 606 (1949).

31. Security Bank v. Davis, 215 Ark. 874, 224 S.W.2d 25 (1949).

32. Crumbley v. Guthrie, 207 Ark. 875, 183 S.W.2d 47 (1944).

33. Chamberlain v. Newton County, 266 Ark. 516, 587 S.W.2d 4 (1979) (petition for injunction against road without merit because road was complete; clean-up doctrine will not cover prayer for damages).

34. Import Motors, Inc. v. Luker, 268 Ark. 1045, 599 S.W.2d 398 (Ark. App. 1980) (restitution in the form of assumpsit granted; injunction denied). *See* Foster v. Whitlow, 4 Ark. App. 319, 630 S.W.2d 559 (1982) (appellate court divided on whether equity retained power over ejectment counterclaim).

35. *See* Simmons v. Turner, 171 Ark. 96, 283 S.W. 47 (1926).

36. Thomason v. Hester Mobile Home Mfg., 235 Ark. 529, 361 S.W.2d 94 (1962).

37. Williams v. Westinghouse Credit Corp., 250 Ark. 1065, 468 S.W.2d 761 (1971). An action for removal of a cloud on a title creates chancery jurisdiction and under the clean-up doctrine the chancery court may grant compensation for damages to the real property. Pryor v. Hot Spring County Chancery Court, 303 Ark. 630, 799 S.W.2d 524 (1990). In hearing a claim for specific performance, the chancery court also has power to hear a third party complaint alleging fraud and seeking damages in the same transaction. Nichols Brothers Investments v. Rector-Phillips-Morse, Inc., 33 Ark. App. 47, 801 S.W.2d 308 (1990).

38. 289 Ark. 159, 711 S.W.2d 447 (1986).

39. Liles v. Liles, 289 Ark. 159, 175-76, 711 S.W.2d 447, 456 (1986). *See* Brill, *Law and Equity in Arkansas: Will Liles v. Liles Lead Us Out of the Morass?*, 1987 ARK. L. NOTES 1. *See* McCoy v. Munson, 294 Ark. 488, 744 S.W.2d 708 (1988) (claim for damages had tenable nexus to claim for equitable relief).

40. Ark. State Hwy. Comm. v. Rice, 259 Ark. 190, 532 S.W.2d 398 (1980).

41. Spitzer v. Barnhill, 237 Ark. 525, 374 S.W.2d 811 (1964), noted at 18 ARK. L. REV. 172 (1964).

42. Aclin Ford Co. v. Cordell, 274 Ark. 341, 625 S.W.2d 459 (1981) (equitable jurisdiction to cancel a contract permitted chancery court to hear tort claims on trade libel).

43. Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc., 280 Ark. 425, 658 S.W.2d 397 (1983) (quiet title action developed into defamation action).

44. Stolz v. Franklin, 258 Ark. 999, 531 S.W.2d 1 (1975). The statutory authorization for a transfer from equity to law is ARK. CODE ANN. § 16-57-104(c)(1). The motion is to be made at the time of filing the answer.

45. Whitten Developments, Inc. v. Agge, 256 Ark. 968, 511 S.W.2d 466 (1974). *See* ARK. R. CIV. P. 12(b) and notes.

46. J.W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 836 S.W.2d 853 (1992) (allegation of

express trust allowed equity to decide issues of bailment and embezzlement); Horne Brothers, Inc. v. Ray Lewis Corp., 292 Ark. 477, 731 S.W.2d 190 (1987) (equity not wholly incompetent to hear actions by creditors to set aside corporate transfers; defendant did not move to transfer or timely question propriety of chancery hearing the case); Chapin v. Stuckey, 286 Ark. 859, 692 S.W.2d 609 (1985).

47. Crittenden County v. Williford, 283 Ark. 289, 675 S.W.2d 631 (1984). *See* Smith v. Ferguson, 302 Ark. 388, 790 S.W.2d 162 (1990) (after issuance of a directed verdict in favor of the defendant, circuit court transferred the counterclaim for foreclosure to chancery court).

48. American Ins. Co. v. Mountain Home School Dist. No. 9, 300 Ark. 547, 780 S.W.2d 557 (1989) (motion to transfer rescission action from law to equity filed sixteen months after complaint).

49. Liggett v. Church of Nazarene, 291 Ark. 298, 724 S.W.2d 170 (1987).

50. Towell v. Shepherd, 286 Ark. 143, 689 S.W.2d 564 (1985).

51. McIlvenny v. Horton, 227 Ark. 826, 302 S.W.2d 70 (1957).

52. Bierbaum v. City of Hamburg, 262 Ark. 532, 559 S.W.2d 20 (1977). But see Stolz v. Franklin, 258 Ark. 999, 531 S.W.2d 1, 6 (1975) ("[i]n the absence of such a motion, the chancery court may, in its discretion, transfer the case on its own motion or proceed to trial on the merits").

53. Carter v. Phillips, 291 Ark. 94, 722 S.W.2d 590 (1987) (plaintiff sued in chancery to quiet title and for ejectment; upon failure of defendant to seek transfer, equity could grant ejectment relief because equity was not "wholly incompetent" to grant relief).

54. Towell v. Shepherd, 286 Ark. 143, 689 S.W.2d 564 (1985); McIlvenny v. Horton, 227 Ark. 826, 302 S.W.2d 70 (1957); Goodwin v. Hampton, 11 Ark. App. 205, 669 S.W.2d 12 (1984) (equity not wholly incompetent to decide issues involving fraud).

55. ARK. CODE ANN. § 16-57-106. If the action were improperly commenced in a court of law, the authority for a motion to transfer from law to equity is ARK. CODE ANN. § 16-57-104(c)(2). A motion to transfer from law to equity must be made with, or prior to, the answer.

56. Poultry Growers, Inc. v. Westark Prod. Credit Ass'n, 246 Ark. 995, 440 S.W.2d 531 (1969).

57. Rogers Iron & Metal Corp. v. K & M, Inc., 22 Ark. App. 228, 738 S.W.2d 110 (1987).

58. Axley v. Hammock, 185 Ark. 993, 50 S.W.2d 606 (1932).

59. Toney v. Haskins, 271 Ark. 190, 608 S.W.2d 28 (Ark. App. 1980).

60. Mott v. First Nat'l Bank, 171 Ark. 7, 283 S.W.2d 3 (1926).

61. Toney v. Haskins, 271 Ark. 190, 608 S.W.2d 28 (Ark. App. 1980).

62. ARK. R. CIV. P. 18(b).

63. Palmer v. Sanders, 233 Ark. 1, 342 S.W.2d 300 (1961).

64. Jones v. Reed, 267 Ark. 237, 590 S.W.2d 6 (1979).

65. Colclasure v. Kansas City Life Ins. Co., 290 Ark. 585, 720 S.W.2d 916 (1986).

66. Axley v. Hammock, 185 Ark. 939, 50 S.W.2d 606 (1932).

67. Foster v. Whitlow, 4 Ark. App. 319, 630 S.W.2d 559 (1982) (ejectment counterclaim pending in chancery court after dismissal of complaint for equitable relief).

68. MCCLINTOCK ON EQUITY 130 (2d ed. 1948).

69. Beebe School Dist. v. National Supply Co., 280 Ark. 340, 344, 658 S.W.2d 372, 374 (1983).

70. Vance v. White, 180 Ark. 470, 21 S.W.2d 853 (1929).

71. Doster v. Masinta Nat'l Bank, 67 Ark. 325, 55 S.W. 137 (1900).

72. Brown v. Gardner, 232 Ark. 197, 334 S.W.2d 889 (1960) (no statutory authority allows enforcement of an agreement to maintain a school in a community).

73. Beebe School Dist. v. National Supply Co., 280 Ark. 340, 658 S.W.2d 372 (1983).

74. Missionary Supporters, Inc. v. Arkansas State Bd. of Dental Examiners, 231 Ark. 38, 328 S.W.2d 139 (1959).

75. Acker v. Watkins, 199 Ark. 573, 134 S.W.2d 523 (1939).

76. MCCLINTOCK ON EQUITY 131-32 (2d ed. 1948).

77. Smith v. Eastgate Properties, Inc., 312 Ark. 355, 849 S.W.2d 504 (1993).

78. Brooks v. McSpadden, 219 Ark. 718, 244 S.W.2d 144 (1951).

79. Graf v. Hope Building Corp., 254 N.Y. 1, 9, 171 N.E. 884, 887 (1930) (Cardozo, J., dissenting).

80. POMEROY'S EQUITY JURISPRUDENCE § 427 (5th ed. 1941).

81. 27 AM. JUR. 2d *Equity* § 125, at 652 (1966).

82. Risor v. Brown, 244 Ark. 663, 666 n. 1, 426 S.W.2d 810, 812 (1968) (noting that contribution actions originated in equity courts based on the idea that "equality among those in *aequali jure* is deemed to be equity").

83. ARK. CODE ANN. § 16-61-202(2).

84. W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 50, at 340 (5th ed. 1984) (stating that equity ultimately requires each tortfeasor to pay his pro-rata share, or an equal division among all wrongdoers).

85. POMEROY'S EQUITY JURISPRUDENCE §§ 405-11 (5th ed. 1941).

86. *See* ARK. CODE ANN. § 9-12-315(a)(1)(A) ("All marital property shall be distributed or half (1/2) to each party unless the court finds such a division to be inequitable."); *see also* Richardson v. Richardson, 280 Ark. 498, 669 S.W.2d 510 (1983).

87. 172 Ark. 521, 289 S.W. 488 (1927).

88. *Id.* at 524, 289 S.W. at 489.

89. 27 AM. JUR. 2d *Equity* § 126, at 653-54 (1966).

90. Lowe v. Walker, 77 Ark. 103, 91 S.W. 22 (1905). *See also* Slinkard v. Caldwell, 208 Ark. 398, 186 S.W.2d 431 (1945) (applying maxim to find lessee redeemed property from State as required).

91. Petty v. Gacking, 97 Ark. 217, 133 S.W. 832 (1911). *See also* Fulk v. Gay, 216 Ark. 462, 226 S.W.2d 69 (1950) (trustee's duty required him to apply all rents and monies to an obligation before transferring deeds to real property).

92. *See* Smith v. MRCC Partnership, 302 Ark. 547, 792 S.W.2d 301 (1990). Equitable conversion of real property to personalty, and vice versa, can also occur through the operation of a will or trust. *See* Nowak v. Martin, 243 Ark. 238, 419 S.W.2d 300 (1967); Atkinson v. Echaute, 236 Ark. 423, 366 S.W.2d 273 (1963).

93. MCCLINTOCK ON EQUITY 54 (2d ed. 1948).

94. POMEROY'S EQUITY JURISPRUDENCE § 366 (5th ed. 1941).

95. In City of Malvern v. Young, 205 Ark. 886, 171 S.W.2d 470 (1943), the court required water works commissioners to return excess revenues to the district and property holders and not the city because the statute merely required a return of "water works" to the city when bonds were paid in full; the statute never mentioned that excess revenues belonged to the city.

96. The court in Waldon v. Holland, 206 Ark. 401, 175 S.W.2d 570 (1943), held that equity deemed a purchaser entitled to land because he met the statutory requirements that were effective when he pursued the title; the subsequent changes made by the legislature that would have permitted a previous landowner to redeem the forfeited property were inapplicable.

97. 128 Ark. 317, 194 S.W. 702 (1917).

98. *Id.* at 320, 194 S.W. at 703. *See* Brill, *Equity and the Restitutionary Remedies: Constructive Trust, Equitable Liens, and Subrogation*, 1992 ARK. L. NOTES 1.

99. 251 Ark. 334, 472 S.W.2d 102 (1971).

100 Maners v. Walsh, 180 Ark. 355, 363, 22 S.W.2d 12, 14-15 (1929).

101. In the case of a written instrument, the form is not always controlling. 27 AM. JUR. 2d *Equity* § 127, at 656 (1966). "There is no magic in words." Pratt v. Ballman-Cummings Furniture Co., 261 Ark. 396, 402, 549 S.W.2d 270, 274 (1977). This maxim, and its corollary that "Equity looks to the intent and not to the form," underlies the equitable remedy of reformation.

102. Kneeland v. American Loan & Trust Co., 138 U.S. 509, 512 (1891).

103. Pratt v. Ballman-Cummings Furniture Co., 261 Ark. 396, 402, 549 S.W.2d 270, 274 (1977) (dicta). *See* Coleman v. Volentine, 211 Ark. 594, 597, 201 S.W.2d 592, 593 (1947), where the Supreme Court of Arkansas stated, "We have frequently held ... that where a deed or other contract, in form an absolute conveyance, is shown to have been intended by the parties thereto as mere security for debt, it will be so treated by a court of equity...."

104. Lowe v. Walker, 77 Ark. 103, 91 S.W. 22 (1905) (although promissory note was unenforceable because of usury, equity would treat transaction as a mortgage to carry out intention of the parties).

105. McEntire v. McEntire's Estate, 267 Ark. 169, 590 S.W.2d 241 (1979) (change of authority on bank account would be accomplished without withdrawal of funds and establishment of new account because the latter would be superfluous).

106. Lowe v. Walker, 77 Ark. 103, 108, 91 S.W. 22, 24 (1905).

107. 261 Ark. 396, 549 S.W.2d 270 (1977).

108. Some factors relied upon by the court were: though regular board meetings were held, no important decisions were made; all important decisions were made by the partnership; all marketing and advertising was done under the partnership name; and on sales lists and invoices the individual corporate names were inconspicuously printed.

109. Estate of Houston v. Houston, 31 Ark. App. 218, 792 S.W.2d 342 (1990). *See generally*, Chafee, *Coming Into Equity With Clean Hands*, 47 MICH. L. REV. 877, 1065 (1949).

110. Roark v. Roark, 34 Ark. App. 250, 809 S.W.2d 822 (1991).

111. "No court, and certainly no court which considers itself a court of conscience, can spend its time and the public money in determining how the proceeds of an inequitable transaction should be divided between the parties to it." MCCLINTOCK ON EQUITY 60 (2d ed. 1948).

112. *See, e.g.*, Dinerstein v. Dinerstein, 300 N.Y.S.2d 677 (1969) (reversing trial court dismissal of action because tax evasion was collateral to the partnership agreement).

113. Merchants & Planters Bank & Trust Co. v. Massey, 302 Ark. 421, 790 S.W.2d 889 (1990) (*dicta*).

114. Fullerton v. Fullerton, 233 Ark. 656, 348 S.W.2d 689 (1961); Marshall v. Marshall, 227 Ark. 582, 300 S.W.2d 933 (1957) (plaintiff's fraud barred him from asserting that deed was in reality a mortgage); McClure v. McClure, 220 Ark. 312, 247 S.W.2d 466 (1952).

115. O'Connor v. Patton, 171 Ark. 626, 286 S.W. 822 (1926).

116. Roark v. Roark, 34 Ark. App. 250, 809 S.W.2d 822 (1991).

117. Union Carbide & Carbon Corp. v. White River Distrib., Inc., 118 F. Supp. 541 (E.D. Ark. 1954) (*dicta*). The manufacturer's action would be unconscionable by violating the maxim that "he who seeks equity must do equity."

118. Art Metal Works, Inc. v. Abraham & Straus, Inc., 70 F.2d 641, 646 (2d Cir. 1934) (L. Hand, J., dissenting).

119. Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193 (N.D. Cal.), *aff'd*, 419 F.2d 472 (9th Cir. 1969).

120. Moore v. Moore, 21 Ark. App. 165, 731 S.W.2d 215 (1987).

121. Anthony v. First Nat'l Bank of Magnolia, 244 Ark. 1015, 431 S.W.2d 267 (1968) (actions of bank president in deceiving bank examiners were collateral to bank's action on promissory notes).

122. In Bramlet v. Selman, 268 Ark. 457, 465, 597 S.W.2d 80, 85 (1980), the court granted a constructive trust in a land dispute between two homosexual companions, saying "a court of equity should not deny relief to a person merely because he is a homosexual."

123. Sandusky v. First National Bank, 299 Ark. 465, 773 S.W.2d 95 (1989); Arkansas Teacher Retirement System v. Coronado Properties, Ltd., 33 Ark. App. 17, 801 S.W.2d 50 (1990).

124. 219 Ark. 603, 243 S.W.2d 729 (1951).

125. *Id.* at 609, 243 S.W.2d at 732.

126. 198 Ark. 734, 131 S.W.2d 1 (1939).

127. McClure v. McClure, 220 Ark. 312, 247 S.W.2d 466 (1952); Melvin v. Melvin, 270 Ark. 522, 606 S.W.2d 90 (Ark. App. 1980).

128. 8 Ark. App. 51, 648 S.W.2d 811 (1983).

129. *See* Williams, Case Note, *McCune v. Brown: Allowing a Fraudulent Conveyor to Revoke a "Gift" Despite Unclean Hands*, 38 ARK. L. REV. 446, 461 (1984); Wolff, Note: *Equity—Clean Hands Doctrine—Not Automatically Invoked Against Fraudulent Transferor—McCune v. Brown*, 6 U.A.L.R. L.J. 559, 568 (1983).

130. MCCLINTOCK ON EQUITY 65 (2d ed. 1948).

131. Green v. Higgins, 217 Kan. 217, 535 P.2d 446 (1975).

132. *See* ARK. R. CIV. PRO. 8(c). Unclean hands is not a tort and does not constitute the basis for a cause of action. Echo, Inc. v. Stafford, 21 Ark. App. 201, 730 S.W.2d 913 (1987).

133. Anthony v. First Nat'l Bank of Magnolia, 244 Ark. 1015, 431 S.W.2d 267 (1968); Rice v. Moore, 194 Ark. 585, 109 S.W.2d 148 (1937) (party's participation in fraudulent procurement of divorce constituted unclean hands); Sliman v. Moore, 198 Ark. 734, 131 S.W.2d 1 (1939); Moore v. Moore, 21 Ark. App. 165, 731 S.W.2d 215 (1987) (defendant as an active participant in fraudulent conduct not permitted to raise unclean hands defense).

134. 205 Ark. 448, 170 S.W.2d 75, *cert. denied*, 320 U.S. 786 (1943).

135. Robinson v. Williams, 231 Ark. 166, 328 S.W.2d 494 (1959).

136. To support the rescission of a written contract in equity, the elements of fraud must be established with clear and convincing evidence. Strout Realty, Inc. v. Burghoff, 19 Ark. App. 176, 718 S.W.2d 469 (1986). An action for damages requires only proof by a preponderance of evidence. Grendall v. Kiehl, 291 Ark. 228, 723 S.W.2d 830 (1987).

137. Hood v. Hood, 206 Ark. 1057, 178 S.W.2d 670 (1944).

138. 208 Ark. 389, 186 S.W.2d 427 (1945).

139. *See also* Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979) (83 year old woman who upon the advice of others executed a deed to her land so she would be eligible for government benefits not barred from quieting title to the land).

140. *E.g.*, Skil Corp. v. Black and Decker Mfg. Co., 351 F. Supp. 65 (N.D. Ill. 1972).

141. *E.g.*, Belcher v. Tarbox, 486 F.2d 1087 (9th Cir. 1973) (unclean hands would not bar suit for copyright protection by publication with allegedly fraudulent scheme for handicapping horse races).

142. *E.g.*, United States v. McIntire, 370 F. Supp. 1301, 1303 (D. N.J. 1974) ("the equitable doctrine of 'unclean hands' will not be permitted to frustrate or thwart the purposes and policies of the laws of the United States").

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

144. Hill v. Kavanaugh, 118 Ark. 134, 176 S.W. 336 (1915) (public official who persuaded bank employee to convert government funds to an individual account was barred from seeking advantage of statute protecting government funds).

145. BRILL, ARKANSAS LAW OF DAMAGES § 19-9 (2d Ed. 1990).

146. Davenport v. Pack, 35 Ark. App. 40, 812 S.W.2d 487 (1991).

147. "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant, that he make known his claims. . . . It is a doctrine received with favor, because its proper application works out justice and equity. . . ." Grimes v. Carroll, 217 Ark. 210, 214, 229 S.W.2d 668, 671 (1950).

"[T]he doctrine of laches which is a species of estoppel rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent." Hudson v. Hudson, 219 Ark. 211, 216, 242 S.W.2d 154, 156 (1951).

"[T]he law wisely holds that there shall come a time when even the wrongful possessor shall have peace; and that it is better that ancient wrongs should go unredressed than that ancient strife should be renewed." Norfleet v. Hampson, 137 Ark. 600, 613, 209 S.W. 651, 654 (1919).

148. Hamilton v. Smith, 212 Ark. 893, 208 S.W.2d 425 (1948) (mandatory injunction against construction of house refused when plaintiff had delayed three months in seeking equitable relief and defendant had constructed 40% of building).

149. Gaston's White River Resort v. Rush, 701 F. Supp. 1431 (W.D. Ark. 1988) (four and one-half year delay in commencing action was not an unreasonable delay in a seasonal fishing business when defendant's infringement was gradual and progressive in nature); Briarwood Apartments v. Lieblong, 12 Ark. App. 94, 671 S.W.2d 207 (1984).

150. Under the maxim of "equity follows the law", equity applies the statute of limitations. Vance v. White, 180 Ark. 470, 21 S.W.2d 853 (1929); Hogue v. Pellerin Laundry Machinery Sales Co., 353 F.2d 772 (8th Cir. 1965).

151. Freeman v. King, 10 Ark. App. 220, 662 S.W.2d 479 (1984). For example, because the nature of oil and gas properties place a burden of diligence on those asserting an interest, the courts have "relentlessly enforced" laches in such disputes. Pope v. Pennzoil Producing Co., 288 Ark. 10, 701 S.W.2d 366 (1986).

152. Worth v. Civil Serv. Commission, 294 Ark. 643, 746 S.W.2d 364 (1988).

153. Briarwood Apartments v. Lieblong, 12 Ark. App. 94, 671 S.W.2d 207 (1984).

154. Mitchell v. Hammons, 31 Ark. App. 180, 792 S.W.2d 333 (1990) (plaintiff was justified in not inquiring about her rights at an earlier time; laches not appropriate).

155. Schultz v. Rector-Phillips-Morse, Inc., 261 Ark. 769, 552 S.W.2d 4 (1977).

156. Bradley Lumber Co. of Arkansas v. Burbridge, 213 Ark. 165, 210 S.W.2d 284 (1948).

157. Cullins v. Webb, 207 Ark. 407, 180 S.W.2d 835 (1944).

158. Selig v. Powell, 253 Ark. 555, 489 S.W.2d 484 (1972); McCLINTOCK ON EQUITY 73 (2d ed. 1948).

159. McKim v. McLiney, 250 Ark. 423, 465 S.W.2d 911 (1971); Mitchell v. Hammons, 31 Ark. App. 180, 792 S.W.2d 333 (1990). However, delay that exceeded an analogous statute of limitation would bar the action.

160. J. W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 836 S.W.2d 853 (1992) (action against bank for negligence barred by customer's failure to examine duplicative deposit slips over a 12 year period); Padgett v. Bank of Eureka Springs, 279 Ark. 367, 651 S.W.2d 460 (1983) (assertion of partition claim to real property not barred by laches).

161. *See* Womack v. Newman Fixture Co., 27 Ark. App. 117, 766 S.W.2d 949 (1989) (no evidence to support allegation that witness was now unavailable); George v. Serrett, 207 Ark. 568, 182 S.W.2d 198 (1944) (allegations of fraud in probate matter made four and one-half years after death of crucial witness; action barred by laches).

162. *See* Gordon v. Wellman, 265 Ark. 914, 582 S.W.2d 22 (1979).

163. Richards v. Ferguson, 252 Ark. 484, 479 S.W.2d 852 (1972) (challenge to zoning ordinance barred by laches when plaintiffs had delayed 20 months in suing, while landowner completed purchase of land, incurred additional expenses for surveys and plans, and sought a building permit).

164. Worth v. Civil Service Commission, 294 Ark. 643, 647, 746 S.W.2d 364, 366 (1988) (Hays, J., dissenting).

165. Mitchell v. Hammons, 31 Ark. App. 180, 792 S.W.2d 333 (1990).

166. Stone v. Williams, 873 F.2d 620 (2d Cir. 1989) (contracts and transactions while plaintiffs delayed assertion of claim), *rev'd on reh'g*, 891 F.2d 401 (2d Cir. 1989), *cert. denied*, 496 U.S. 937, 110 S. Ct. 5205 (1990); Grimes v. Carroll, 217 Ark. 210, 214, 229 S.W.2d 668, 671 (1950) ("change in condition or relations of the property and parties").

167. These decisions are reached on the related doctrines of waiver, laches, estoppel, and election of remedies. *See* Brill, *The Election of Remedies Doctrine in Arkansas*, 37 ARK. L. REV. 385, 386-389 (1983). *See* Ratliff v. Bank of New Orleans & Trust Co., 266 Ark. 492, 586 S.W.2d 237 (1979) (buyer of land who failed to act promptly upon discovering fraud barred from rescission); Tatum v. Arkansas Lumber Co., 103 Ark. 251, 146 S.W. 135 (1912).

168. Stone v. Williams, 873 F.2d 620 (2d Cir.) (laches asserted in defense to claim by illegitimate daughter against the estate of Hank Williams, Sr. for royalties), *rev'd on reh'g*, 891 F.2d 401 (2d Cir. 1989), *cert. denied*, 496 U.S. 3215, 110 S. Ct. 3215 (1990).

169. Mitchell v. Hammons, 31 Ark. App. 180, 792 S.W.2d 333 (1990) (defendant's involvement in collusive deed was another factor weighing against the application of laches).

170. Hendrix v. Hendrix, 256 Ark. 289, 506 S.W.2d 848 (1974) (laches should be applied against family member with "extreme leniency").

171. Avera v. Banks, 168 Ark. 718, 271 S.W. 970 (1925).

172. McCLINTOCK ON EQUITY 74 (2d ed. 1948).

173. Neal v. Stuckey, 202 Ark. 1119, 155 S.W.2d 683 (1941) (claimants to land barred when they idly sat by while others invested considerable sums in oil exploration); Jackson v. Becktold Printing & Book Mfg. Co., 86 Ark. 591, 112 S.W. 161 (1908).

174. "The equitable doctrine of laches is not applied in actions for damages, for accounting, for the recovery of money or property fraudulently obtained, and the like." Anadarko Petroleum Co. v. Venable, 312 Ark. 330, 341, 850 S.W.2d 302 (1993). *See also* Rogers Iron & Metal Corp v. K & M, Inc., 22 Ark. App. 228, 738 S.W.2d 110 (1987) (laches could not be asserted against suit for money judgment).

175. *See* Brenner & Galanti, *The Chancellor's Foot: A Proposal for Using a Judicial Presumption to Structure Discretionary Dismissals of Dilatory Post-Conviction Relief Petitions*, 37 ARK. L. REV. 325, 360-365 (1983).

176. Gordon v. Wellman, 265 Ark. 914, 582 S.W.2d 22 (1979) (partition action filed in 1958; motion to dismiss argued in 1977). ARK. R. CIV. PRO. 41(b) permits a court to dismiss an action if no action has been taken on the record in 12 months. But that dismissal is without prejudice, whereas laches permits the court to dismiss with prejudice.

177. Flanagan v. Drainage Dist. No. 17, 176 Ark. 31, 2 S.W.2d 70 (1928).

178. *Id.*

179. Sample v. Sample, 250 Ark. 731, 466 S.W.2d 935 (1971).

180. *See* 27 AM. JUR. 2d *Equity* § 132, at 662 (1966).

181. *See* 27 AM. JUR. 2d *Equity* § 133, at 663 (1966).

182. MCCLINTOCK ON EQUITY 55 (2d ed. 1948).

183. *E.g.*, Cardiac Thoracic and Vascular Surgery, P.A. Profit Sharing Trust v. Bond, 310 Ark. 798, 840 S.W.2d 188 (1992).

184. Drummond v. Batson, 162 Ark. 407, 258 S.W. 616 (1924).

185. 270 Ark. 874, 606 S.W.2d 595 (1980).

186. 27 AM. JUR. 2d *Equity* § 150, at 684-85 (1966).

187. 105 Ark. 201, 150 S.W. 710 (1912).

188. 242 Ark. 678, 420 S.W.2d 912 (1967).

189. ARK. CODE ANN. § 4-9-312(5); POMEROY'S EQUITY JURISPRUDENCE § 415 (5th ed. 1941).

190. MCCLINTOCK ON EQUITY 54 (2d ed. 1948).

191. Gregg Burial Ass'n v. Emerson, 289 Ark. 47, 709 S.W.2d 401 (1986). This maxim provided the basis for the equity of redemption and thus the modern law of mortgages. MCCLINTOCK ON EQUITY 83 (2d ed. 1948).

192. Berry v. Crawford, 237 Ark. 380, 373 S.W.2d 129 (1963).

193. Griffin v. J.E. Speer Lumber Co., 219 Ark. 1, 4, 239 S.W.2d 587, 589 (1951).

194. *See* Duncan v. Malcomb, 234 Ark. 146, 351 S.W.2d 419 (1961).

195. Traditionally, a court of equity would not prevent a forfeiture if the breach was of a condition precedent. However, in modern times, this distinction has been clouded. 27 AM. JUR. 2d *Equity* § 81, at 604 (1966).

196. Robinson v. Cline, 255 Ark. 571, 501 S.W.2d 244 (1973).

197. 175 Ark. 240, 298 S.W. 1010 (1927).

198. "[W]here compensation can be made, and in the absence of circumstances making such action clearly inequitable, relief (that is, relief against forfeiture) will be granted almost as a matter of course." *Id.* at 244, 298 S.W. at 1011.

199. 237 Ark. 380, 373 S.W.2d 129 (1963).

200. *Id.* at 383, 373 S.W.2d at 131.

201. 252 Ark. 442, 479 S.W.2d 568 (1972).

202. 27 AM. JUR. 2d *Equity* § 82, at 605 (1966).

203. 219 Ark. 963, 245 S.W.2d 826 (1952).

204. *Id.* at 968, 245 S.W.2d at 828.