case, however, plaintiff was not suing upon the illegal contract but was suing for the replacement of a lost deed.

In *Hertzler v. Geigley,* 196 Pa. 419, 46 Atl. 366 (1900), the court stated that if an illegal agreement has in fact been executed by the parties and the illegal purpose of the contract has been accomplished the court will not invade the transaction to discover its origin. As between fraudulent grantor and fraudulent grantee, title passes and only creditors upon whom the fraud is perpetrated have a right to attack the conveyance to have it set aside. *Solins v. White,* 128 W. Va. 189, 36 S.E.2d 132 (1945). In the principal case the defendant was not a victim of the fraud, and he should not be allowed to point to some prior fraud of plaintiff's as a ground for not making a new deed.

In the instant case the doctrine of "unclean hands" was rightly held inapplicable. The fraud in question did not arise out of the matter in litigation. The plaintiff's cause of action arose out of an occurrence separate and apart from the illegal contract. The plaintiff owned the property absolutely and was not seeking specific performance of a prior agreement. When the defendant delivered the deed to plaintiff in the prior conveyance title passed. The plaintiff was seeking some physical evidence of a title which he already had. The title standing in defendant's name was misleading the public and would continue to mislead them as to the true owner of the property until the record title was corrected.

Fred Adkins

Estate Tax—Marital Deduction Formula Clause

Testator provided by a clause in his will that should his wife survive him, she was to receive a bequest equal to one-half the value of his adjusted gross estate, after deducting all debts, funeral, and administration expenses. His executors deducted the administration expenses on the estate's income tax return, which in turn increased the actual value of the adjusted gross estate for estate tax purposes. Executors computed the wife's share on the basis of the higher adjusted gross estate and accordingly claimed a higher marital deduction in the estate tax return. Commissioner rejected the executor's marital deduction figure and set the amount passing

to the widow at one-half the adjusted gross estate less administration expenses, which in turn lowered the marital deduction allowed to the estate and resulted in an increased estate tax. *Held,* affirmed. The express language of the will limited the widow's share to a sum that was less than the maximum marital deduction available. *Empire Trust Co. v. United States,* 64-1 U.S.T.C. § 12,219 (S.D.N.Y. 1963).

The principal case is an example of the difficulties confronting the estate planner in attempting to obtain the most benefit from the marital deduction which was introduced in 1948 INT. REV. CODE of 1954, § 2056. Briefly, this section has the effect of enabling a decedent to give up to fifty per cent of his adjusted gross estate tax-free, if the gift is to his (or her) surviving spouse. It is important to note that the deduction is not an automatic one-half of adjusted gross estate; it simply may not exceed that amount. Within that limitation, the deduction is equal to the amount of property actually passing to the spouse, with the further qualifications that it must have "passed" within the meaning of the Code, and otherwise qualify as a "deductible" interest. INT. REV. CODE OF 1954, § 2056. Treas. Reg. § 20.2056 (1963).

The problem presented to the estate planner is to find a way to insure the maximum marital deduction will be obtained while retaining other tax advantages—assuming, of course, that the client desired to make a bequest to the spouse at all. If the spouse receives more than the maximum deduction permitted, the excess will be subjected to a second tax at her death to the extent she has retained the excess, whereas if the bequest was less than the maximum allowable, the testator's estate would accordingly lose that much of the deduction benefit. Committee, *Estate Planning and the Marital Deduction,* 102 TRUSTS AND ESTATES 934, (1963). CASNER, ESTATE PLANNING 793-95 (3rd ed. 1961). To take full advantage of the marital deduction and yet maintain most other benefits available, the actual wording of the will must be the guideline. One choice for the drafter is to simply make a "specific dollar" bequest in an amount equal to one-half the qualifying property, but the obvious drawback here is that estates will vary in nature and value during the period between the execution of the will and death of the testator. To prevent the arrangement from becoming unbalanced, periodic reappraisals and changes in the will would be necessary. Sargent, *To Each His Own,* 93 TRUSTS AND

ESTATES 933 (1954); 7 T.C.Q. 214 (1963); Durand, *Planning Lesson of* T.C.Q. 232 (1963); 64 DICK. L. REV. 425 (1960).

Because constant revision is considered impractical by most attorneys in this field, the majority use a formula clause in the will which provides for an automatic adjustment of the property and thus maintains the desired balance, even though the estate changes. The formula clause is worded so that the gift to the spouse is just large enough to achieve the maximum deduction. Cox, *Types of Marital Deduction Formula Clauses,* 15 N.Y.U. INST. ON FED. TAX 911 (1957); Committee, *op. cit. supra.*

The formula clause, although it may be more practical in many cases, also has its disadvantages and critics. Trachtman, *Leaping in the Dark,* 93 TRUSTS AND ESTATES 932 (1954); 7 T.C.Q. 183 (1963). First, if it is to be sound the formula must take into account all foreseeable possibilities, and in the drafter's concern and desire to provide for the future he may say too much. The principal case illustrates a formula clause which, perhaps inadvertently limited the bequest to less than the maximum deduction. Had the will simply provided for an amount equal to one-half the adjusted gross estate as computed for federal tax purposes, the widow would have received more and the corresponding deduction would have been the maximum in this case.

A more specific criticism of the use of a formula clause, and which is also involved in the principal case, arises from the possibility that the amount of the widow's share can be affected by certain elections available to the executor. Trachtman, *op. cit. supra;* STEPHENS & MARR FEDERAL ESTATE AND GIFT TAX (1959); LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAX (2nd ed. 1962).

To understand how the executor could cause the bequest to fluctuate requires first an explanation of the term "adjusted gross estate." Briefly, it is gross estate minus deductions for administration expenses, debts, taxes and certain losses. INT. REV. CODE OF 1954, § § 2053, 2054. However, section 642(g) of the Code gives the executor the option to deduct administration expenses and casualty losses from the estate's income tax return instead of from the gross estate. If the executor takes this option, the adjusted gross estate is accordingly increased, and one-half of the increment, in turn, would be added to the bequest. Committee, *op. cit. supra;* Tracht-

man, *op. cit. supra;* 35 ST. JOHN'S L. REV. 158 (1960). In the principal case, the executor contended that his election to claim the expenses as an income tax deduction increased the adjusted gross estate and in turn increased the widow's gift and the marital deduction. The court admitted that this reasoning was correct but the express language of the will prevented its application, because the testator provided that the wife was to receive one-half of the adjusted gross estate "after deducting . . . administration expenses." This case and others before it have well established that the executor can affect the bequest by his election. *In re McTarnahan,* 202 N.Y.S.2d 618 (Surr.Ct. 1960); *In re Inman,* 196 N.Y.S.2d 369 (Surr.Ct. 1959); *Matter of Levy,* 9 Misc.2d 561, 167 N.Y.S.2d 16 (Surr.Ct. 1957); REV. RUL. 55-643, 1955-2 C.B. 386.

Another objection raised against the formula clause, by Trachtman, *op. cit. supra,* was that the formula could give rise to construction proceedings, and courts might construe the clause in a different manner than the draftsman intended. It could be said that construction was a factor in the instant case; the court declared that it refused to read the clause as if the words "after deducting . . . administration expenses" did not exist. It was emphasized that deductions would be strictly construed against the taxpayer, even though the testator probably intended to claim the full deduction.

In the controversy between non-formula versus formula clauses, it is admitted that neither method will produce the desired tax results unless through estate planning is behind the final draft of the will. To use a non-formula provision creates the risks and impracticalities involved in maintaining close watch over the estate, and making necessary adjustments in the will to allow for subsequent changes. Durand, *op. cit. supra;* Trachtman, *op. cit. supra;* Sargent, *op. cit. supra.* Reliance on a formula clause also has its risks. In addition to pitfalls previously mentioned, Trachtman and Durand suggest others of importance: the formula could be left with nothing to adjust if more than the desired deduction passes through non-testamentary means; the clause must consider possible effects of the widow's right to renounce the will; and, of course, a subsequent change in the law could affect the formula.

Sargent, although an exponent of the formula, suggests that if the situation permits, the formula should not be used. Such a situation would exist when the attorney is given ample time to write the will, and the client has an exact inventory of all assets, is familiar with

tax problems, and will be available for later conferences. However, if the attorney has little time for periodic reviews of his clients' estates, or if the occasion demands that a will be drawn up immediately and the client is vague on property values, then Sargent sees the formula as the appropriate solution.

Victor Alfred Barone

Federal Jurisdiction—Citizenship in a Class or Entity Action

D, United Mine Workers of America, entered into an agreement with *X,* Anthracite Mine Operators. *D* was to collect royalty payments on each ton of coal produced by *X* and place it in a health fund for anthracite coal miners. *P,* representing 23,000 of these miners, brought an action demanding judgment for all the delinquent royalty payments not collected. The class of persons *P* represented lived mostly in Pennsylvania. The principal office of *D* was in Washington, D.C. The action was based on diversity of citizenship. *D* moved to dismiss for lack of jurisdiction. *Held,* motion granted. For jurisdictional purposes the citizenship of an unincorporated association is determined by the citizenship of its members. Almost one-fourth of the members of the United Mine Workers lived in Pennsylvania. The representatives of the class lived in Pennsylvania. Because some of the parties plaintiff and defendant were citizens of the same state there was no diversity of citizenship. *Nedd v. UMW,* 225 F. Supp. 750 (E.D. Penn. 1963).

Some states allow union members to bring a class suit. West Virginia is one of these. *Milan v. Settle,* 127 W. Va. 271, 32 S.E.2d 269 (1944). Other states allow unions to bring a suit as an entity. This is the situation in the principal case. PA. R. CIV. P. 2153(a). The federal courts have apparently adopted the view that the citizenship status of the union is dependent on whether a class or entity action is brought. When a union is sued in a federal court the citizenship of the union is that of the individual members of the union if the union is sued as an entity. *Hettenbaugh v. Airline Pilots Ass'n,* 189 F.2d 319 (5th Cir. 1951). Thus if *X,* a citizen of Pennsylvania, sues *Z* union as an entity and *Z* union has 99 members that are citizens of West Virginia and one that is a citizen of Pennsylvania there is no diversity of citizenship because one of the parties plaintiff