Michigan Law Review

Volume 58 | Issue 3

1960

Federal Procedure - Trial Practice - Right to Jury Trial on Common Question of Law and Fact

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FEDERAL PROCEDURE—TRIAL PRACTICE—RIGHT TO JURY TRIAL ON COMMON QUESTION OF LAW AND FACT—Fox West Coast Theatres instituted an action for declaratory judgment and injunctive relief against petitioner, Beacon Theatres, to determine the reasonableness of motion picture distribution clearance agreements to which it was a party and to enjoin petitioner, pending final decision, from instituting or threatening antitrust suits against Fox or its distributors. Petitioners filed a counterclaim for treble damages, alleging that Fox and its distributors were engaged in a conspiracy in violation of the antitrust laws. Petitioner demanded jury trial[1] of the fact questions in the complaint and counterclaim, since both raised the issues of competition between the theatres and reasonableness of the contract provisions. The district court granted Fox's motion to try separately the issues of the complaint,[2] and, on the ground that the complaint was "essentially equitable," granted Fox's motion to strike petitioner's demand for jury trial of the common issues. Relying on the discretion impliedly granted by rule 42 (b), the court ordered prior trial of the equitable claim. Petitioner sought mandamus to compel respondent district judge to vacate the orders; the petition was denied by the court of appeals.[3] On certiorari to the United States Supreme Court, *held,* reversed, three justices dissenting.[4] When an equitable claimant can be protected in all respects from irreparable harm by use of procedures available under the Federal Rules of Civil Procedure and the Declaratory Judgments Act,[5] there is no discretion in the trial judge under rule 42 (b) to deny counterclaimant's right to jury trial of common fact issues by ordering prior trial of an equitable claim. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

Where legal and equitable claims with a common issue of fact are joined, jury trial of the common issue will be prevented by operation of res judicata if prior trial of the equitable claim is scheduled.[6] It is in this setting that the Court in the principal case sought to resolve the conflict between the right to trial by jury and the discretionary power of the trial judge to set the order of trial when both legal and equitable claims are presented. In accordance with the plan of the Federal Rules to preserve the right to

1 Under rule 38 (b), Federal Rules of Civil Procedure, 28 U.S.C. (1958).

2 Id., rule 42 (b).

3 Beacon Theatres v. Westover, (9th Cir. 1958) 252 F. (2d) 864.

4 Justices Stewart, Harlan, and Whittaker, dissenting, agreed with the court of appeals that a court taking jurisdiction of an equitable claim could determine all issues presented by that claim. In countering the majority's reasoning that modern procedures eliminate the need for such a rule by effecting an expansion of adequate legal remedies, the dissenters argued that the procedural rules were not intended to create new legal remedies. Justice Frankfurter did not participate.

5 Further relief based on a declaratory judgment may be granted; 28 U.S.C. (1958) §§2201, 2202. Rule 57, Fed. Rules Civ. Proc. requires that the declaratory relief proceedings be in accordance with Federal Rules.

6 See, e.g., Tanimura v. United States, (9th Cir. 1952) 195 F. (2d) 329.

jury trial while accomplishing substantial procedural reform,[7] a party's joinder of legal and equitable claims is not held to operate as a waiver of jury trial.[8] In addition, rule 42 gives wide discretion to the trial judge for the arrangement of claims or issues for joint or separate trial.[9] But in the absence of a rule expressly governing sequence of trial when the judge orders separate trial of issues, authorities prior to the principal case were in conflict as to whether the trial judge had complete or limited discretion in setting sequence when a prior trial of equitable issues would cut off jury trial on common issues.[10] The usual argument for the complete discretion theory rested on an implication from rule 42 (b)—that the grant of discretion to order separate trials included an implied discretion to schedule the order of these separate trials.[11] Another argument, advanced by the court of appeals in the principal case, found such complete discretion in existence prior to the Federal Rules and unchanged by them.[12] On the other hand, advocates of the limited discretion theory reasoned that since rule 38 (a) requires the preservation of the right of jury trial, discretion should not be exercised so as to cut off jury trial of the common issue unless there was a compelling reason to do so.[13] In the principal case, the Court held the right to jury trial paramount, interpreting the rules as leaving *no*

7 "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Rule 38 (a), Fed. Rules Civ. Proc.

8 See, e.g., Russell v. Laurel Music Corp., (S.D. N.Y. 1952) 104 F. Supp. 815; Ring v. Spina, (2d Cir. 1948) 166 F. (2d) 546. See, generally, 5 MOORE, FEDERAL PRACTICE, 2d ed., §38.13 (1951). Compare Fitzpatrick v. Sun Life Assurance Co. of Canada, (D.C. N.J. 1941) 1 F.R.D. 713, which suggests that the right to trial by jury could be lost if a trial judge determines that a legal claim joined with an equitable claim could be dealt with as incidental to equity jurisdiction.

9 Rule 42 (a) provides for joint trial of any or all matters in issue in actions involving a common question of law or fact. Rule 42 (b) provides for separate trial of claims or issues thereof in furtherance of convenience or to avoid prejudice. See, e.g., Drake v. Ming Chi Shek, (D.C. N.J. 1957) 155 F. Supp. 345; Miller v. Sammarco, Schrock v. Sammarco, (E.D. Ohio 1949) 9 F.R.D. 215.

10 *Complete discretion:* Institutional Drug Distributors v. Yankwich, (9th Cir. 1957) 249 F. (2d) 566 (dictum); Tanimura v. United States, note 6 supra; Orenstein v. United States, (1st Cir. 1951) 191 F. (2d) 184 (dictum). *Limited discretion:* Leimer v. Woods, (8th Cir. 1952) 196 F. (2d) 828; Bruckman v. Hollzer, (9th Cir. 1946) 152 F. (2d) 730 (characterized as dictum in later cases in the Ninth Circuit); Sablosky v. Paramount Film Distributing Corp., (E.D. Pa. 1952) 13 F.R.D. 138 (dictum); Chappel and Co. v. Cavalier Cafe, (D.C. Mass. 1952) 13 F.R.D. 321 (dictum).

11 Rule 46 of the May, 1936, Preliminary Draft of the Rules expressly authorized the trial judge to schedule the sequence of trial of issues, but was omitted from the rules as promulgated. Professor Moore reasons that the deletion is explainable in that rule 42 (b) impliedly grants the same power. This argument is supported by the fact that the substance of proposed rule 46 has been entered as a note to rule 39 by the Advisory Committee on Rules. See 5 MOORE, FEDERAL PRACTICE, 2d ed., §39.12, n. 8 (1951). Many of the statements approving discretionary power are dictum. See, e.g., Black v. Boyd, (6th Cir. 1958) 251 F. (2d) 843; Blechman v. Kleinert Rubber Co., (S.D. N.Y. 1951) 98 F. Supp. 1005 (dictum). See also cases approving complete discretion, note 10 supra.

12 Beacon Theatres v. Westover, note 3 supra, at 875-876.

13 See, e.g., Leimer v. Woods, note 10 supra, at 836.

discretion in the trial judge to set prior trial of equitable issues unless the equitable claimant cannot otherwise be protected; thus, in future cases, the approach will be to examine the prospective position of the equitable claimant as if jury trial were to be had on all fact issues raised. In theory it would seem that the Court's holding could leave the equitable claimant unprotected in some cases, for the discretion allowed the trial judge when the claimant would not be fully protected by a prior scheduling of jury trial may still be exercised to provide jury trial. When an equitable claimant seeks to prevent irreparable harm to his interests, the relative slowness of jury trial allows more time for the infliction of harm before an injunction can be obtained. However, liberal use of the temporary injunction, as suggested by the Court,[14] should enable the courts to follow the mandate of the principal case while affording the equitable claimant adequate protection.

While the Court has eliminated use of the "basic nature of the issue" test[15] to determine order of trial under rule 42 (b), the question remains whether the principal case will be applied to require jury trial of those legal claims heretofore treated as "equitable incidents."[16] Since there is a right to jury trial of a tort or breach of contract claim when viewed alone, it would seem that the Court's emphasis on rule 38 (a) would also require jury trial of these damage claims when appended to equitable claims. However, the principal case can be distinguished to avoid this result. First, the Court ruled solely on the effect of the right to jury trial on sequence of trial; there is no "sequence" involved when a court considers a legal claim as incidental to an equitable claim. Second, it can be argued that there is no historical right to jury trial within the purview of the Seventh Amendment and rule 38 (a) when the legal claim is an incident to the main equitable remedy sought.

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[14] Principal case at 508. But when a commercial relationship is threatened, not even a temporary injunction will eliminate all harm occurring during the trial period, for persons will hesitate to deal with the equitable claimant, being fearful that he will lose in the antitrust suit. See note, 108 UNIV. PA. L. REV. 125 at 129 (1959).

[15] That test called for prior trial of equitable issues if the trial judge decided that the pleadings considered as a whole presented basically equitable issues. See, e.g., Rosanna Knitted Sportswear v. Lass O'Scotland, (S.D. N.Y. 1952) 13 F.R.D. 325; General Motors Corp. v. California Research Corp., (D.C. Del. 1949) 9 F.R.D. 565. See, generally, 5 MOORE, FEDERAL PRACTICE, 2d ed., §38.16 (1951).

[16] Typical cases are where a party seeks both an injunction against tort and damages, or equitable relief on a contract and damages. See BLUME, AMERICAN CIVIL PROCEDURE §§9-03, 9-05 (1955). See, e.g., Young v. Loew's, (S.D. N.Y. 1942) 2 F.R.D. 350; Fitzpatrick v. Sun Life Assurance Co. of Canada, note 8 supra.