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Discretionary Jury Trial Under The Federal Rules

only,[24] leaving without remedy those whose difficulties have already arisen.

Courts are better qualified than the legislature to deal with such "sporadic and transitory circumstances," for rules of law regarding situations such as this should have a high degree of flexibility not found in legislative enactment. This desirable flexibility has since been conclusively taken from the Illinois courts. Immediately after the *O'Callaghan* decision, the Illinois legislature passed a law declaring exculpatory clauses in leases to be absolutely void as against public policy.[25] It is submitted that such a blanket invalidation of a device which is sometimes desirable is not the answer to this problem. The answer lies rather in the approach taken by the New Jersey and District of Columbia courts.[26] The facts before the court should be carefully scrutinized, and if unequal bargaining power or a public interest is found to exist, liability should be imposed notwithstanding the exculpatory contract. If these factors are found not to exist, the contractual avoidance of liability should be given effect.

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DISCRETIONARY JURY TRIAL UNDER THE FEDERAL RULES

Since 1938 and the merger of law and equity in the federal courts a number of varied problems have arisen concerning the right to jury trial in particular situations. One of the more difficult of these problems appears in cases involving an equitable claim and a legal counterclaim, when a common issue exists between the claim and counterclaim.

This perplexing situation is vividly illustrated in the recent case of *Beacon Theatres, Inc. v. Westover*.[1] Fox West Coast Theatres, Inc. filed a "Complaint for Declaratory Relief" against Beacon in the Federal District Court for the Southern District of California. Fox operated a movie theatre in San Bernadino, California, and had for some time been exhibiting films under contracts with distributors

[24]Statutes in Massachusetts and New York declaring exculpatory clauses in leases to be void as against public policy have been construed to operate prospectively only. Mass. Ann. Laws ch. 186, § 15 (1945), construed in Levins v. Theopold, 326 Mass. 511, 95 N.E.2d 554 (1950); N.Y. Real Prop. Law § 234, construed in Weiler v. Drydock Sav. Inst., 258 App. Div. 581, 17 N.Y.S.2d 192 (1st Dep't 1940).

[25]Ill. Ann. Stat. ch. 80, § 15(a) (1959).

[26]See notes 13-16 supra.

[1]359 U.S. 500 (1959).

which provided for "clearances"[2] and granted it the exclusive right to show "first runs"[3] in the San Bernadino competitive area. According to Fox, Beacon built a drive-in theatre eleven miles from San Bernadino and notified Fox that it considered Fox's distributor contracts to be overt acts violative of the anti-trust laws.[4] Alleging that this notification, together with threats of treble damage suits, deprived it of the valuable property right to negotiate for exclusive first run contarcts, Fox prayed for a declaration that a grant of clearance between the Fox and Beacon theatres was not in violation of the anti-trust laws, and for an injunction to prevent Beacon from instituting any anti-trust action. Beacon filed an answer and a counterclaim against Fox, putting in issue the allegations of the complaint and asking for treble damages because of a conspiracy by Fox and its distributors to restrain trade. Whether competition existed between the two theatres was an issue common to the complaint and counterclaim. On Beacon's demand for jury trial, the District Court, acting under Rule 42(b) of the Federal Rules of Civil Procedure, directed a trial of the complaint to the court first, including any and all common issues, before jury determination of the counterclaim.

Beacon sought a writ of mandamus requiring the district judge to vacate the orders denying a jury trial, but the Court of Appeals for the Ninth Circuit refused the writ.[5] However, the United States Supreme Court granted certiorari on the ground that " 'maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' "[6]

In a five-to-three decision,[7] the Supreme Court reversed the decision of the Court of Appeals and held that Beacon was entitled to a jury trial. The majority opinion, written by Mr. Justice Black, stated that the flexibility of the Federal Rules of Civil Procedure and the Federal Declaratory Judgment Act resulted in an expansion of legal remedies necessarily affecting the scope of equity, and that traditional equity distinctions must be re-examined in light of the remedies

[2]This refers to the period of time which must elapse between exhibitions of the same picture within a particular area or by specific theatres.

[3]This signifies the first exhibition of a motion picture in a given area.

[4]Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

[5]Beacon Theatres, Inc. v. Westover, 252 F.2d 864 (9th Cir. 1958).

[6]359 U.S. at 501, citing Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

[7]Justice Frankfurter took no part in the decision.

available under the Act and in light of the fact that under the Rules the same court tries both equitable and legal claims.[8]

The dissent, written by Mr. Justice Stewart, which began with an interpretation of Rule 42(b), said that there was no right to a jury trial and that the district judge had permissibly exercised his discretion in scheduling a trial of an equitable claim before a legal claim.[9] The minority opinion followed the traditional view that Fox, by alleging an inadequate remedy at law, irreparable harm, and violation of a property right, stated a claim originally cognizable in equity and was therefore entitled to a trial by the court. By citing the equitable principle that original equity jurisdiction is not destroyel by a subsequently accruing adequate legal remedy, the dissent summarily disposed of Beacon's counterclaim.

While the majority and dissent apparently agree as to the purpose and effect of the Federal Declaratory Judgment Act and the Federal Rules,[10] this is the only common ground between the two opinions. The majority seems reluctant to venture forth without clearcut authority—of which there is a noticeable absence in this field—and therefore creates a "strawman" by retreating to the safety of a mystical discussion involving modernization of the traditional equity distinctions and principles. This discussion only clouds the real issue, and results in an opinion which cannot be cited as a precedent for a single fundamental proposition.

If the watchword of the majority is caution, that of the dissent is custom. The minority reiterates the reasoning of the Cort of Appeals, adding only an unconstructive criticism of the "strawman" created by the majority. Although the majority of the Supreme Court reached a correct and desirable result, there are clearer, more valid, and more convincing grounds upon which to rest this result.

If the Court had desired to follow the traditional trail, a valid ground would seem to be that Fox's complaint as a bill in equity would have been dismissed prior to merger in the federal courts because it failed to show that Beacon did not intend to pursue its threats of treble damage suits with a test of its rights in court. In support of this position, the Court could have looked to a case such as *A. B. Farquhar Co. v. National Harrow Co.*,[11] which established that it is not an actionable wrong when one in good faith makes a complaint to whom-

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[8]359 U.S. at 504-11 (1959).
[9]Id. at 511.
[10]Id. at 508-09, 514.
[11]102 Fed. 714 (3d Cir. 1900).

ever he will that it is his purpose to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are.[12] A strong analogy could have been drawn between the principal case and the numerous patent cases[13] which have held that a patentee may notify infringers of its claims and warn them that suits will be brought to protect its rights if necessary.[14] Therefore, since prior to merger equity would not have taken jurisdiction over Fox's complaint, Beacon could have brought its counterclaim as an action at law and would have been entitled by right to a jury trial.[15]

Had the Court desired to proceed in a more modern fashion, it could have utilized the line of reasoning that Fox's complaint for declaratory relief was filed in anticipation of, and as a substitute for a defense to, a suit by Beacon for damages under the Sherman Anti-Trust Act. Thus even though the incipient defendant, Fox, reached court first by filing suit for declaratory relief, the right to trial by jury would continue to exist because Fox's suit was in anticipation of a suit for damages in which Beacon would have had the right to a jury trial.[16]

The courts have generally agreed that a prospective defendant, in an effort to anticipate actions for which a jury would have been proper, may not employ declaratory judgment as a procedural device by filing a suit for such relief and then arguing that the action is essentially an equitable one, thereby destroying the right to trial by jury.[17] The majority would have had little trouble in finding

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[12]Id. at 715.

[13]Virtue v. Creamery Package Mfg. Co., 179 Fed. 115 (8th Cir. 1910); Mitchell v. International Tailoring Co., 169 Fed. 145 (C.C.S.D.N.Y. 1909); Adriance, Platt & Co., v. National Harrow Co., 121 Fed. 827 (2d Cir. 1903); Warren Featherbone Co. v. Landauer, 151 Fed. 130 (C.C.E.D. Wis. 1903); Computing Scale Co. v. National Computing Scale Co., 79 Fed. 962 (C.C.N.D. Ohio 1897); Kelley v. Ypsilanti Dress-Stay Mfg. Co., 44 Fed. 19 (C.C.E.D. Mich. 1890); Chase v. Tuttle, 27 Fed. 110 (C.C.N.D.N.Y. 1886); Kidd v. Horry, 28 Fed. 773 (C.C.E.D. Pa. 1886).

[14]The only limitation to the issuance of such warnings is good faith, which is shown in the present case by Beacon's filing its counterclaim. Emack v. Kane, 34 Fed. 46 (C.C.N.D. Ill. 1888). See note 11 supra.

[15]See notes 23 and 24 infra and accompanying text.

[16]Dickinson v. General Acc. Fire & Life Assur. Corp., 147 F.2d 396 (9th Cir. 1945); Hargrove v. American Cent. Ins. Co., 125 F.2d 225 (10th Cir. 1942); Pacific Indem. v. McDonald, 107 F.2d 446 (9th Cir. 1939); United States Fid. & Guar. Co. v. Koch, 102 F.2d 288 (3d Cir. 1939); Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321 (4th Cir. 1937).

[17]Schaefer v. Gunzburg, 246 F.2d 11 (9th Cir. 1957); Sanders v. Louisville & N. Ry., 144 F. 2d 485 (6th Cir. 1944); Hargrove v. American Cent. Ins. Co., 125 F.2d 225 (10th Cir. 1942); Great No. Life Ins. Co. v. Vince, 118 F.2d 232 (6th Cir. 1941); Mutual Life Ins. Co. v. Krejci, 123 F.2d 594 (7th Cir. 1941); Pacific Indem. v. McDonald, 107 F.2d 446 (9th Cir. 1939); Buromin v. National Aluminate Corp., 70

authority supporting the right to jury trial in declaratory relief actions as to those issues in regard to which either party could have claimed a jury in any action for which the declaratory relief action may be regarded as a substitute.[18]

Perhaps the strongest and most feasible ground upon which to rest the majority result—and one the majority comes closest to adopting[19]—is that the district judge abused his discretion under Federal Rule 42(b)[20] by ordering a court trial of Fox's so-called "equitable" claim before jury trial of Beacon's legal counterclaim.

Since the basic nature of Beacon's counterclaim for damages under the Sherman Act was of a common law right, and was therefore a claim triable by jury, Beacon was in fact entitled to a jury trial on its counterclaim.[21] An extremely close analogy can be drawn to the patent cases wherein this pattern of raising a legal counterclaim as an affirmative answer to a complaint for declaratory relief (including an injunctive prayer) frequently appears. An illustrative situation appears in *General Motors Corp. v. California Research Corp.*,[22] which was a suit for a declaration that patents owned by defendant were invalid and that plaintiff was not infringing such patents, and, as in the principal case, for an injunction restraining defendant from suing plaintiff for any alleged infringement. California Research filed an answer and a counterclaim, which was a claim for damages, averring the validity of the patents and alleging infringement by General Motors. As in the *Beacon* case, defendant demanded a jury trial and plaintiff moved to strike the demand. The Federal District Court for the District of

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F. Supp. 214 (D. Del. 1947); Bakelite Corp. v. Lubri-Zol Dev. Corp., 34 F. Supp. 142 (D. Del. 1940); Lumbermen's Mut. Cas. Co. v. McIver, 27 F. Supp. 702 (S.D. Cal. 1939).

[18]Dickinson v. General Acc. Fire & Life Assur. Corp., 147 F.2d 396 (9th Cir. 1945); General Acc. Fire & Life Assur. Corp. v. Schero, 151 F.2d 825 (5th Cir. 1945); Piedmont Fire Ins. Co. v. Aaron, 138 F.2d 732 (4th Cir. 1943); Beaunit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d 563 (2d Cir. 1942); Williams v. Employers Mut. Liab. Ins. Co., 131 F.2d 601 (5th Cir. 1942); Lumbermen's Mut. Cas. Co. v. Timms & Howard, 108 F.2d 497 (2d Cir. 1939); Maryland Cas. Co. v. Sammons, 99 F.2d 323 (5th Cir. 1938); Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321 (4th Cir. 1937); North American Philips Co. v. Brownshield, 9 F.R.D. 132 (S.D.N.Y. 1949); Eastman Kodak Co. v. McAuley, 2 F.R.D. 21 (S.D.N.Y. 1941); United States Fid. & Guar. v. Nauer, 1 F.R.D. 547 (D. Mass. 1941).

[19]359 U.S. at 508.

[20]"The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." Fed. R. Civ. P. 42(b).

[21]That an action for damages under the Sherman Act is triable by jury has long been established. Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27 (1916).

[22]9 F.D.R. 565 (Del. 1949).

Delaware held that the defendant was entitled to a trial by jury on the issues raised by the counterclaim, which included the common issue of infringement.[23] Other courts support this result.[24] It would seem to follow that Beacon should at least be entitled to a jury trial upon the issues raised by its legal counterclaim, which would necessarily include the common issue of competition.

Having determined that Beacon's counterclaim was legal, thus establishing the presence of legal and equitable issues, the court's discretionary power to try one "claim" before the other under Rule 42(b) must next be examined. In determining the order and mode of trial and in exercising discretion under Rule 42(b), the substantive rights of the parties cannot be overlooked.[25] It would seem that one of the more important substantive rights to be considered is the constitutionally protected right to trial by jury.[26] The Ninth Circuit itself, in expressing its endorsement of the constitutional guarantee, stated that "this court is firmly committed to the doctrine that the constitutional right to jury trial should not be eroded by a flow of decisions giving force to dubious waivers and *rationalized construction of the Federal Rules of Civil Procedure.*"[27] In exercising discretion under Rule 42(b), a court should strive to preserve the Constitution. Thus when the right to jury trial is involved, the exercise of discretion under 42(b) should be narrowly limited because jury trial is a constitutionally guaranteed right whereas the alternative, court trial, is not.[28]

Moreover, Rule 42(b) expressly provides that a court may order a separate trial "to avoid prejudice,"[29] and this phrase is of particular significance in the *Beacon* case. Since at least the issue of competition was common to the complaint and counterclaim, this provision could only be complied with, and the substantive right to jury trial could only be preserved, by requiring the court to try the common law issues to a jury first.[30] Otherwise their determination would be precluded by the doctrine of res judicata or collateral estoppel. This fact is clearly

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[23]Id. at 568.

[24]Oklahoma Contracting Co. v. Magnolia Pipeline Co., 195 F.2d 391 (5th Cir. 1952); Lisle Mills, Inc. v. Arkay Infants Wear, Inc., 90 F. Supp. 676 (E.D.N.Y. 1950); Ryan Distrib. Corp. v. Caley, 51 F. Supp. 377 (E.D. Pa. 1943).

[25]"The exercise of discretion does not permit the court to disregard the substantive principles of law established for the protection of litigants." Cohen v. Young, 127 F.2d 721, 726 (6th Cir. 1942).

[26]Bowie v. Sorrell, 209 F.2d 49, 51 (4th Cir. 1953).

[27]Schafer v. Gunzburg, 246 F.2d 11, 15 (9th Cir. 1957). (Emphasis added.)

[28]Hurwitz v. Hurwitz, 136 F.2d 796 (D.C. Cir. 1943); Great American Ins. Co. v. Johnson, 25 F.2d 847, cert. denied, 278 U.S. 629 (1928).

[29]See note 20 supra.

[30]Bruckman v. Hollzer, 152 F.2d 730 (9th Cir. 1946).

illustrated in *Sabolsky v. Paramount Film Distributing Corp.*,[31] an anti-trust suit for an accounting, an injuntion, and treble damages, in which the legal claim (damages) and the equitable claim (injunction) involved a common question of fact. The court stated that if it made "a disposition of the equitable cause of action previous to a jury trial on the legal cause of action, the common controlling question of fact would be foreclosed from jury determination as a matter of res judicata."[32]

To the same effect is *Leimer v. Woods*,[33] where, in a suit for violations of rent regulations in which plaintiff was seeking an injunction, restitution, and damages, the United States District Court for the Western District of Missouri denied a jury trial, and the Court of Appeals for the Eighth Circuit reversed. In speaking of the right to jury trial as set out by Federal Rule 38(a), the court said:

> "In the long range, if the right of trial by jury is actually to be preserved thus inviolate to the parties, its proclamation in legal letter can only be kept from becoming an artificiality by the accompaniment of a sympathetic judicial attitude. And such a hospitable spirit on the part of a court would seem naturally to suggest that, where joinder has been made of coordinate equitable and legal causes of action and some of such causes of action, as here, involve a common, controlling issue of fact, on which there normally is a right to a jury trial as to the legal cause of action, the question ordinarily should be deferenitally allowed to be determined by a jury, rather than for the court, without some special reason or impelling circumstance in the situation, to undertake to foreclose it as a matter of res judicata by designedly proceeding to make a previous disposition of the equitable cause of action."[34]

The court, speaking with less equivocation, held that "a federal court may not under the Rules of Civil Procedure, in a situation of joined or consolidated equitable and legal causes of action, involving a common substantial question of fact, deprive either party of a properly demanded jury trial upon that question by proceeding to a previous disposition of the equitable cause of action and so causing the fact to become res judicata...."[35] Thus it can be seen that in order to "avoid prejudice," when the right to jury trial exists in a case involving a common issue, the court must order a trial by jury of such

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[31]13 F.R.D. 138 (E.D. Pa. 1952).
[32]Id. at 140.
[33]196 F.2d 828 (8th Cir. 1952).
[34]Id. at 833-34.
[35]Id. at 836.

issue first, for otherwise any later jury determination of the issue will be precluded.

In an interpretation of Rule 42(b), reference should be made to the general intent of the Federal Rules and to specific provisions of other rules therein. From such reference it can be seen that in many instances the rules either require or encourage all claims for relief—whether historically legal or equitable, or whether available as a claim, counterclaim or cross-claim—to be filed in the same action.[36] The penalty for noncompliance is permanent loss of the claim. In the principal case Beacon's counterclaim qualified under Rule 13(a)[37] as compulsory, and consequently Beacon was forced to assert it or lose it forever. That by being forced to assert its claim Beacon cannot be held to have waived its right to jury trial is a fact recognized even by the dissent.[38] Certainly the Federal Rules were not intended to undermine one of the cornerstones of the American judicial system—jury trial—nor to punish a party for obeying their provisions.[39]

In an action involving issues triable to the court as well as issues triable by a jury, the order of trial has been shown to be within the sound discretion of the court. However, it has also been shown that the exercise of such discretion is dependent upon the promotion of efficient administration without curtailing the parties' substantive rights. By first allowing trial to the court of Fox's complaint the District Court may have promoted efficient administration, but it certainly did not protect Beacon's established right to trial by jury. Therefore, the failure of the District Court to schedule trial of Beacon's

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[36]Fed. R. Civ. P. 8(a), 12(b), 13(a), 13(b), 13(g), 13(h).

[37]"A pleading shall state as a counterclaim, any claim ... if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim ...." Fed. R. Civ. P. 13(a).

[38]"Since Beacon's counterclaim was compulsory under the Rules ... it is apparent that by filing it Beacon could not be held to have waived its jury rights." 359 U.S. at 519. See Holtzoff, Equitable and Legal Rights and Remedies Under the New Federal Procedure, 31 Calif. L. Rev. 127, 141 (1943).

[39]With the above reasoning in mind, the only opportunity for the exercise of discretion under Rule 42(b) that presents itself is that of joint trial practiced by some courts where both "legal" and "equitable" issues are present in an action. Munkascy v. Warner Bros. Pictures, Inc., 2 F.R.D. 380 (E.D.N.Y. 1942). The usual procedure is to take "as much evidence as possible before the jury even though it may relate to both legal and equitable issues, and taking such additional evidence as may be necessary outside the presence of the jury." 2 Barron & Holtzoff, Federal Practice and Procedure § 894 (1950). From this it will readily be seen that, in the situation under discussion, a joint trial is procedually impossible as a solution because of the existence of a common issue. But see 73 Harv. L. Rev. 186, 188-89 (1959). Is the common issue "legal" or "equitable"? Which will determine the common issue, the jury or the court?" "[T]he trial judge cannot escape an express ruling on priority of trial." 20 Tex. L. Rev. 427, 434 (1942).