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Federal Rules of Civil Procedure: Liberal Joinder of Issues and the Sequence of Trial

FEDERAL RULES OF CIVIL PROCEDURE: LIBERAL JOINDER OF ISSUES AND THE SEQUENCE OF TRIAL

Prior to the promulgation of the Federal Rules of Civil Procedure,[1] legal and equitable issues appeared together in a single action only to a limited extent.[2] When the situation did arise, the rule followed in the federal courts was to try the equitable issues first, and then if any legal issues remained for trial, a jury was impaneled.[3] The reasons for this practice were largely historical, stemming from the old rivalry between law and equity when the chancellor might enjoin an action at law pending determination of a related suit in equity.[4]

The Federal Rules, however, have made it possible for all legal and equitable issues pertaining to a claim to appear in a single action; either where the plaintiff joins legal and equitable issues as independent or alternative claims, or where the defendant interposes an equitable counterclaim or defense in a legal action or a legal counterclaim or defense in an equitable action.[5] These liberal joinder provisions, although administratively advantageous, have been attacked as procedural pitfalls which

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1. The Federal Rules of Civil Procedure were promulgated by the Supreme Court on December 20, 1937, and became effective September 16, 1938. The Rules were amended in 1939, 1946, 1948 and 1951.

2. The Law and Equity Act of 1915 authorized the interposition of an equitable defense or counterclaim in an action at law, but it was not until the adoption of the Federal Rules that a legal counterclaim could properly be interposed in a suit in equity. 5 MOORE, FEDERAL PRACTICE § 39.12 (2d ed. 1951) [hereinafter cited as MOORE].

3. Liberty Oil Co. v. Condon National Bank, 260 U.S. 235 (1922).

4. Commentary, *Sequence of Trial of Legal and Equitable Issues,* 7 FED. RULES SERV. 970 (1944).

5. "The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or alternative claims as many claims either legal or equitable or both as he may have against an opposing party. . . ." FED. R. CIV. P. 18(a). See also FED. R. CIV. P. 13(a) which states, "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . ."

may effect a denial of a jury trial to a litigant.[6] For example, in *Beacon Theatres v. Westover*,[7] the issue of substantial competition between the parties was common to both the plaintiff's complaint in equity and the defendant's legal counterclaim. In determining which claim to try first, the court was presented with the following problem: If the issue of substantial competition between the parties were to be tried first and determined by the court sitting in equity, the determination of that issue would operate either by way of res judicata or collateral estoppel to conclude both parties with respect thereto at the subsequent trial of the defendant's legal counterclaim. The court recognized that this procedure would operate in some degree to limit the defendant's opportunity fully to try to a jury every issue which had a bearing on his legal counterclaim.[8]

The drafters of the Federal Rules, however, did not seem to consider that a prior determination of equitable issues would jeopardize a litigant's right to a jury trial. The first draft of the Rules provided: "When certain issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried."[9] Although this provision was omitted from later drafts,[10] it is restated verbatim in the Advisory Committee note to Rule 39[11] as finally adopted.[12]

Orenstein v. United States[13] is the leading case supporting the view that the sequence of trial, where legal and equitable issues are joined, is within the discretion of the trial judge. The United States filed a complaint against the defendant seeking (1) an injunction and restitution to tenants for violation of the Housing and Rent Act of 1947 and (2)

6. For a criticism of the liberal joinder provisions and their impact on the right to trial by jury, see Note, 39 IOWA L. REV. 350 (1950).

7. 252 F.2d 864 (9th Cir. 1958), *cert. granted*, 356 U.S. 956 (1958).

8. *Id.* at 874.

9. FED. R. CIV. P. 46, Preliminary Draft (May, 1936). See also PROCEEDINGS OF THE NEW YORK SYMPOSIUM ON FEDERAL RULES 312 (1938), in which Major Edgar B. Tolman, Secretary of the Advisory Committee, suggested that the matter was "really a mere question of trial convenience and therefore within the discretion of the court."

10. Some commentators view this omission as an implication that the former practice of trying the equitable issues first is to be continued. Ibsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 24 MINN. L. REV. 1 (1939). Professor James W. Moore, however, explains that Rule 46 was deleted because discretion as to the sequence of trial is adequately given by Rule 42(b) (note 26 *infra*). Thus, if the court is to exercise the power there given relative to separate trials of claims and issues, it must of necessity have discretion in determining the sequence thereof. 5 MOORE § 39.12.

11. FED. R. CIV. P. 39 provides for the method to determine which issues of fact will be tried by the court and which issues will be tried by the jury.

12. Commentary, *Sequence of Trial of Legal and Equitable Issues*, 7 FED. RULES SERV. 970 (1944).

13. 191 F.2d 184 (1st Cir. 1951).

statutory damages for overcharges of rent. The defendant moved for a jury trial on all the issues,[14] but the trial court sustained the motion of the United States to strike. The defendant appealed, alleging that he was denied a right to jury trial on the legal issues of rent overcharges and statutory damages. The court of appeals affirmed, however, stating that no error had been committed since the sequence was within the discretion of the trial judge.[15] Since the cause of action for injunction and restitution was equitable in nature, in disposing of that claim the district court was entitled to make findings on the amount of overcharges without participation by a jury. The court further stated that the determination of damages, if not "clearly erroneous," is binding on the defendant, who is not entitled to relitigate such issues before a jury in disposition of the legal cause of action.[16]

This "discretion" reposed in the trial judge by the *Orenstein* doctrine appears incapable of being abused. The case indicates that any sequence the judge selects is proper and that there is no right of substance or form to be violated. In this light, the sequence of trial of legal and equitable issues is taken out of the sphere of civil rights and becomes simply a matter of administrative convenience.

Despite the conformity of the *Orenstein* decision with the apparent intent of the Federal Rules, the federal judiciary has not universally accepted its pronouncement. In a few of the early cases arising under the Rules, the courts followed the historical practice of trying the equity issues first.[17] Although these decisions may have been administratively sound,[18] they are unfortunate in their implication that the sequence of trial in all cases is to be determined by the old practice.

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14. FED. R. CIV. P. 38(c) provides that a party in his demand for a jury trial may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable.

15. *Accord,* Beacon Theatres v. Westover, 252 F.2d 864 (9th Cir. 1958); Tanimura v. United States, 195 F.2d 329 (9th Cir. 1952); Russell v. Laurel Music Co., 104 F. Supp. 815 (S.D.N.Y. 1952); Bervocici v. Chapman, 56 F. Supp. 417 (S.D.N.Y. 1946). *Compare* the *Beacon Theatres* case *with* the Ninth's Circuit's prior opinion in Bruckman v. Holzer, 152 F.2d 730 (9th Cir. 1946), where the court held that the trial judge was bound to try the legal issues first.

16. Orenstein v. United States, 191 F.2d 184, 190 (1951).

17. United States Fidelity and Guaranty Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943); Union Central Life Ins. Co. v. Burger, 27 F. Supp. 554 (S.D.N.Y. 1939); Frissell v. Rateau Drug Store, 28 F. Supp. 816 (W.D. La. 1939).

18. For example, in Frissell v. Rateau Drug Store, *supra* note 17, the plaintiff sued the defendant for (1) negligence in filling a prescription and (2) to have the defendant's certificate of dissolution cancelled. The court followed the only practical course by hearing the equity issues concerning the dissolution first, since a successful outcome for the plaintiff on that count was a condition precedent to his being able to sue at law for damages.

The case of *Leimer v. Woods*,[19] however, has created the major controversy in this area. On facts similar to the *Orenstein* case, the Eighth Circuit held:

> 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, unless there exist *special reasons or compelling considerations*[20] for the adoption of such a pre-empting procedural course in the particular situation.[21] (Emphasis added.)

The court stated that to hold otherwise would leave their action subject to the interpretation of a judicial desire to thwart or curb the right of trial by jury.[22]

Although the *Leimer* decision allows the trial court some discretion in determining the sequence of trial, it squarely conflicts with *Orenstein* as to the degree of discretion allowed. The *Orenstein* view allows the court to determine the order of trial at its absolute discretion, regardless of any sound reason to try the equitable claim first; the *Leimer* view cuts down this discretion so that there must first exist some "compelling consideration" for trying the equitable claim first.

The doctrine in the *Leimer* case, that legal issues should always be tried first unless there exist some compelling consideration to do otherwise, has a strong emotional appeal to those dedicated to the sanctity of a jury trial.[23] The seventh amendment to the Constitution of the United

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19. 196 F.2d 828 (8th Cir. 1952). This case was cited as controlling authority in Sablosky v. Paramount Film Distributing Corp., 137 F. Supp. 929 (E.D. Pa. 1952) and Chappell v. Cavalier Cafe, 130 F. Supp. 913 (E.D. Mass. 1952).

20. The court does not, however, give any examples of what constitutes a "special reason or compelling consideration."

21. Leimer v. Woods, 196 F.2d 828, 836 (8th Cir. 1952).

22. Judge Johnson commented that "in professional evaluation, it could not be regarded as reflecting any high mark of judicial respect for the inviolateness of jury trial, if permission to join causes granted by the Rule [18(a)] should be allowed to become simply an instrument for cutting off the right which a defendant otherwise would possess. . . ." *Id.* at 834.

23. The efficacy of the jury trial system may be argued *ad infinitum*. For example, Blackstone thought the jury to be the "principal criterion of truth in the law of England" and the right to trial by jury to be the "most transcendent privilege which any subject can enjoy or wish for." 5 MOORE § 38.02(1). Compare, on the other hand, the view of Judge Frank, the outstanding modern jurist who believed that the jury system could not be justified, at least in civil legislation. *Ibid.*

States[24] guarantees the right of trial by jury in suits at common law, and Federal Rule 38(a)[25] preserves this right to parties "inviolate." Those who advocate the *Leimer* view insist that the Federal Rules must be administered in such a manner as to keep faith with these guarantees.[26] Thus, it is argued that Rule 38(a) qualifies Rule 42(b),[27] which empowers the court to order a separate trial of legal and equitable claims, and Rule 42(a),[28] which empowers the court to consolidate separate legal and equitable claims that are pending simultaneously. Where causes are separated under Rule 42(b) or where the court consolidates separate legal and equitable claims under Rule 42(a), it is contended that the court must proceed to the prior disposition of the legal claim so that any issue of fact common to both the legal and equitable actions may first be tried by a jury.[29] The advocates of the *Leimer* view reason that any other sequence would impose an indirect limitation on the right to jury trial. The contention is that the Federal Rules were not intended to produce any such impingement on the right of trial by jury.[30]

The opinion in *Leimer v. Woods,* however, does not flatly declare that there is a constitutional right to proceed to a prior disposition of legal issues before a court may determine a related cause in equity. Indeed, it could not take such a position while concurrently recognizing that there may be "compelling considerations" for trying the equity issues first. It is merely asserted that any other disposition would not preserve

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24. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

25. "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." FED. R. CIV. P. 38(a).

26. See generally Note, 39 IOWA L. REV. 350 (1950).

27. "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). For an excellent collection of cases that have arisen under Rule 42(b), see Note, 39 MINN. L. REV. 743 (1955).

In regard to a separate trial of legal and equitable claims, it has been held that the mere fact that one claim is legal while the other is equitable is not of itself reason enough to order separate trials under Rule 42(b). Elkins v. Nobel, 1 F.R.D. 357 (E.D.N.Y. 1940).

28. "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays." FED. R. CIV. P. 42(a).

Despite Rule 42(a), the court in Gabrielson v. Public Industrials Corp., 8 FED. RULES SERV. 42a.311, Case 1 (S.D.N.Y. 1944), stated that jury and non-jury claims should not ordinarily be consolidated.

29. Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952).

30. *Id.* at 836.

"inviolate" the right to jury trial as required by Rule 38(a). It must be kept in mind, however, that Rule 38(a) preserves "inviolate" only that right to jury trial as provided by the seventh amendment. In turn, the seventh amendment only guarantees trial by jury as it existed in suits at common law. Since the practice at common law was to try equitable issues prior to any determination of legal issues, it is in the light of this practice that the seventh amendment is to be construed. Thus, it has been suggested that when a court proceeds to a prior disposition of the equitable issues, the right of trial by jury is preserved exactly as it was at common law.[31] Therefore, if we analyze the problem of trial sequence in its historical context, it follows that no constitutional "right" is impinged when a court proceeds to a prior disposition of equitable issues.

It appears, therefore, that the *Leimer* view is based on values and not on positive legal principles. It implies that a body of laymen, the jury, is a more just trier of fact than a court sitting in equity. This attitude, although righteous in its defense of the felt need of our society for trial by jury,[32] can be unduly burdensome to effective judicial administration. For example, in a case where the plaintiff brings a legal action and the defendant raises an equitable defense, it would seem that efficient judicial administration would demand that the equitable issues be tried first. If the equitable defense were sustained, there would be no need to proceed to the trial of the legal issues. Such a procedure would be a saving in both time and expense. Perhaps under the *Leimer* view such a set of facts would be considered a "special reason" for not trying the legal issues first. It seems, however, that the advocates of the *Leimer* view are willing to sacrifice economic administration in order to avoid any indirect limitations on the right to jury trial.

In this respect, the *Orenstein* view has merit. By giving the trial court judge absolute discretion in determining the sequence of trial of legal and equitable issues, it enables him to weigh such factors as: (1) the condition of the court calendar,[33] (2) whether plaintiff was precipitate or defendant dilatory,[34] (3) and whether the plaintiff's success on the equitable issues is a condition precedent to maintaining his legal claims[35] or vice versa.[36] Such a rule is a valuable aid in promoting ef-

31. Liberty Oil Co. v. Condon National Bank, 260 U.S. 235 (1922).

32. "The jury is like swing music. Classical theory frowns; the masses applaud. And in a democracy the felt need of the masses has a claim upon law." 5 MOORE § 38.02.

33. American Life Ins. Co. v. Stewart, 300 U.S. 203 (1951); *cf.* Beacon Theatres v. Westover, 252 F.2d 864 (9th Cir. 1958), *cert. granted,* 356 U.S. 956 (1958).

34. Beacon Theatres v. Westover, *supra* note 33.

35. See note 18 *supra.*

36. In Ford v. C. E. Wilson & Co., 30 F. Supp. 163 (D.C. Conn. 1939), the plaintiff in his first count sought recovery of damages on the grounds that the defendant

ficient administration. It suffers, however, in its total disregard for the spirit of the right to trial by jury.

Professor James W. Moore suggests a third alternative as the proper method for determining the sequence of trial. According to Moore, the Federal Rules of Civil Procedure abolished the procedural distinction between law and equity, but a distinction still remains between legal and equitable "issues."[37] Thus, although the history of the rules makes it clear that the problem of trial sequence is left to the discretion of the trial judge, such a determination must be guided by the "basic nature of the issue" as formulated.[38]

In *Bendix Aviation Corp. v. Glass*,[39] plaintiff sued for specific performance of an alleged contract to assign a pending patent application. As a defense, and also as a basis for a legal counterclaim, defendant set up the breach of an alleged implied agreement that if the invention in question proved patentable and of commercial value, plaintiff would pay reasonable compensation for its commercial exploitation. Under these facts, Moore would consider the basic nature of the issue to be equitable, *i.e.*, whether or not the plaintiff has a valid contract which is entitled to specific performance.[40] He argues that if this issue is determined in favor of the plaintiff, the case is at an end since such a determination would have to deny the existence or the breach of the implied agreement. Only if the defendant prevailed as to the factual basis of his defense, would issus remain for jury trial.

It is difficult, however, to determine what formula Moore intends be used to determine the so-called basic nature of the issue. He merely sets out various fact situations and arbitrarily labels them as being either basically legal or equitable in character.[41] This arbitrary labeling is con-

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Wilson had breached his contract and that the defendant bank had induced the breach; in his second count the plaintiff sought damages for actionable fraud allegedly committed by the defendant bank and asked that certain fraudulent assignments from the defendant Wilson to the defendant bank be set aside. It is obvious that in such cases the equitable issues should normally not be tried first, for unless the plaintiff is in fact a creditor of the defendant Wilson, he has no standing to complain of the alleged fraudulent conveyance.

37. 5 MOORE § 38.04. See also Judge Clark's opinion in Beaunit Mills v. Eday Fabric Sales Corp., 124 F.2d 563, 565-66 (2d Cir. 1942), where he stated that "there are no longer equity cases and law cases, and it is the issues, not the form of the case, which now determine the method of trial."

38. 5 MOORE § 39.12.

39. 81 F. Supp. 645 (E.D. Pa. 1948).

40. 5 MOORE § 39.12.

41. (1) Plaintiff seeks damages for infringement of copyright and an injunction against future violations; basic nature is legal, (2) Plaintiff seeks damages for violation of the anti-trust laws and also injunctive relief against the alleged wrongful acts; basic nature is legal, (3) Plaintiff seeks an injunction against trespass to his property and also damages; basic nature is equitable, (4) Plaintiff seeks to reform an existing

fusing to some federal courts; in others it is simply ignored. For example, Moore contends that where the claim is for the recission of an insurance policy because of fraud or misrepresentation and the counterclaim is for recovery thereunder, the basic nature of the issue is legal and hence a jury action.[42] The cases, however, indicate that the recission claim frequently is tried first without a jury before any determination is made of the defendant's counterclaim.[43] A similar split of authority arises in cases where the claim is for infringement of a copyright and the claimant seeks both damages and an injunction. Moore suggests that the legal issues should be tried to a jury first,[44] but in *Forstman Woolen Co. v. Murray Sales Corp.*,[45] the court ordered a prior determination of the equitable issues.

Furthermore, the problem of whether an issue is legal or equitable can often be determined only in context with the proceeding in which it is brought.[46] The legal right of a person to be in possession of real property may be a legal issue when brought in an action for trespass and thus is properly triable by a jury. In a suit by one in possession of real property to quiet title, however, a court of equity may determine the rightful possessor of the land and thereby transform the question into an equitable issue.[47] It is difficult, therefore, to label a particular question of fact as always being legal or always being equitable in nature.

In the recent *Beacon Theatres v. Westover*[48] case, this was the very problem that confronted the court. The defendant and the plaintiff both owned motion picture theaters in the San Bernardino, California, area. The two theaters were located eleven miles apart. The plaintiff filed a complaint against the defendant entitled "Complaint for Declaratory Relief" in which he alleged that he had received licenses from major film

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contract and the defendant counterclaims on the instrument; basic nature is equitable. For further examples, see 5 MOORE § 39.16.

42. 5 MOORE § 39.12. See also Reliance Life Ins. Co. v. Everglades Discount, 204 F.2d 937 (5th Cir. 1953); Prudential Ins. Co. of America v. Saxe, 138 F.2d 16 (1943).

43. In Travelers Insurance Co. v. Lupin, 18 F.R.D. 67 (E.D. Pa. 1955), the court stated that "courts of equity have through the centuries been the forum for the trial of causes involving fraud or seeking certain forms of equitable relief . . . [therefore] the priority of rights, so far as jurisdiction is concerned, is in the plaintiff company." *Cf.* New England Mutual Life Ins. Co. v. Barnet, 39 F. Supp. 761 (S.D. Ala. 1941); Union Central Life Ins. Co. v. Burger, 27 F. Supp. 554 (S.D.N.Y. 1939).

44. 5 MOORE § 39.16. See also Chappell & Co. v. Cavalier Cafe, 130 F. Supp. 913 (D.C. Mass. 1952); Berlin v. Club 100, 12 F.R.D. 129 (D.C. Mass. 1951).

45. 10 F.R.D. 367 (S.D.N.Y. 1950). *Cf.* Russell v. Laurel Music Corp., 104 F. Supp. 815 (S.D.N.Y. 1952).

46. See McCaskill, *Jury Demands in the New Federal Procedure*, 88 U. PA. L. REV. 315 (1940).

46. See generally POMEROY, EQUITY JURISPRUDENCE §§ 138-221, 221a, 221b, 221d, 250 (5th ed. 1941).

48. 252 F.2d 864 (9th Cir. 1958), *cert. granted*, 356 U.S. 956 (1958).

distributors to exhibit first-run motion pictures in the "San Bernardino competitive area"; that the defendant had threatened the distributors with an anti-trust action if they did not allow him to show films on a first-run basis also; that these threats deprived the plaintiff of his right to negotiate with the distributors for first-run motion pictures; and that he was without an adequate remedy at law. The plaintiff asked that the defendant be restrained from instituting his anti-trust action until the court adjudicated the right of the plaintiff and the distributors to enter into a "first-run" agreement without violating the anti-trust laws.

The defendant counterclaimed for violation of the anti-trust laws and asked for a jury trial on both the complaint and the counterclaim. However, the trial judge granted the plaintiff's motion to strike the jury demand as to the complaint and ordered a prior determination of the equitable issues. From this order, the defendant petitioned for a writ of mandamus[49] to compel the judge to direct a jury trial on all issues.

The defendant placed considerable reliance on *General Motors Corp.*

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49. The problem of the proper method of reviewing the trial court's determination of the sequence of trial has created considerable controversy. In Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942), the court held that a district court order granting the defendant's motion to try the equity issues in advance was tantamount to a preliminary injunction against the law action and therefore appealable prior to final judgment. Similar reasoning was followed in Ring v. Spina, 166 F.2d 546 (1948).

On the other hand, it has been held that the following orders do not constitute an interlocutory injunction for purposes of appeal: (1) An order striking plaintiff's demand for jury immediately after he had amended his complaint from the statement of an equitable claim to a claim at law. Bereslavsky v. Caffey, 161 F.2d 449 (2d Cir. 1947), *cert. denied*, 332 U.S. 770 (1947). The order, however, was held reviewable by mandamus; (2) An order denying plaintiff's motion to transfer his law action to the jury calendar where plaintiff had not made a timely demand for jury. Abbe v. New York, W.H., & H.R.R. Co., 171 F.2d 387 (2d Cir. 1948); (3) An order denying defendant's claim to jury on the issues raised by his legal counterclaim interposed in plaintiff's equitable action. Beaunit Mills v. Eday Fabric Sales Corp., 124 F.2d 563 (2d Cir. 1942).

However, City of Morgantown v. Royal Insurance Co., 337 U.S. 254 (1949), has shaken—perhaps overruled—the *Ettelson* doctrine. In a rather confusing decision, the Supreme Court affirmed a court of appeals refusal to treat the interlocutory order granting plaintiff's motion to strike a jury demand as an order granting or denying an injunction. Such an order was held to be a mere stay of the legal proceedings and therefore not reviewable until final judgment. Although this decision squarely conflicts with the *Ettelson* doctrine, the court did not specifically state that the decision overruled its prior ruling.

Professor Moore favors the decision of the *City of Morgantown* case. He states that to hold an order determining the sequence of trial to be an interlocutory injunction is undesirable because: (1) such interlocutory appeals would tend to delay unduly the final disposition of the action; (2) often times the interlocutory determination as to the sequence of trial, which seems so important at the moment, ceases to have any significance because of subsequent developments in the litigation; and (3) the prerogative writes allow a review of the interlocutory determination in the unusual and important situation, without giving review as a routine matter which an appeal would do. 5 MOORE § 39.13.

v. California Research Corp.[50] In that case the court, apparently influenced by Moore's language, said that in a suit for a declaratory judgment the trial judge must determine the basic nature of the issue; and if it is legal in nature, a demand for a jury trial must be granted. The defendant urged that the basic issue involved in this litigation was whether the parties were in "substantial competition" which is legal in nature. The court of appeals, however, rejected this contention. It asserted that the case at hand was distinguishable from the *General Motors* case in that here the complaint was more than just a claim for declaratory relief;[51] it was rather in and of itself a statement of a claim for an injunction within the exclusive jurisdiction of a court of equity. The court concluded: "If basically the nature of the plaintiff's complaint is one which alleges facts appropriate to a suit in equity . . . the court is presented with a claim the basic nature of which is equitable, and it is of no consequence that some of the fact issues might under different circumstances be appropriate fact issues in an action at law."[52]

Both Moore and this court would agree that the sequence of trial is within the discretion of the trial judge. Nevertheless, under the facts of the *Beacon Theatres* case, they would apparently reach different results. Moore's theory would look to the basic "issue" involved, while this court indicated that the basic "remedy" sought controls the sequence of trial.

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50. 9 F.R.D. 565 (1949).

51. The defendant here had claimed that plaintiff's suit for declaratory judgment was merely an attempt to defeat defendant's right to jury trial and that such a course would violate the seventh amendment. For authority, he cited Dickinson v. General Accident Fire and Life Assur. Corp., 147 F.2d 396 (9th Cir. 1945) and Pacific Indemnity Co. v. McDonald, 107 F.2d 446 (9th Cir. 1939).

In *McDonald* an insurance company sought a declaratory judgment as to its liability on an automobile insurance policy, alleging that it was relieved of its liability on the policy because of the insured's fraudulent collusion with the injured party. The court held that the entire case should have been heard by the jury. "[W]e simply have a situation herein where a party who has issued a policy of insurance anticipates a suit thereon by the insured . . . and to avoid delay brings the matter before the court by petition for declaratory relief. In such a proceeding, although the parties are reversed in their position before the court, that is, the defendant has become the plaintiff, and vice versa, the issues are ones which in the absence of the statute for declaratory relief would be tried at law by a court and jury. In such a case we hold that there is an absolute right to a jury trial unless a jury has been waived." Pacific Indemnity Co. v. McDonald, *supra,* at 448. Similar facts and reasoning were involved in the *Dickinson* Case.

The court in the *Beacon Theatres* case, however, stated that the facts involved differed from those in the cases cited by the defendant. The court asserted that here the complaint seeking declaratory relief contained not merly th allegations of the circumstances between the parties, but it also showed that the plaintiff was entitled to equitable relief against defendant's threatened conduct. Since the complaint stated a cause in equity, the problem here was entirely foreign to that in the *McDonald* and *Dickinson* cases.

52. Beacon Theatres v. Westover, 252 F.2d 864, 877 (9th Cir. 1958), *cert. granted,* 356 U.S. 956 (1958).

Neither view seems sufficiently well defined to be of sound judicial value.

The so-called "remedy" theory has received some support in the federal courts as a means of determining the sequence of trial.[53] In *Tanimura v. United States*,[54] the government brought suit against the defendant for violation of the Housing and Rent Act of 1947 and sought an injunction and treble damages. The court determined that restraint against future violations was the primary remedy sought by the plaintiff, and thus it was proper to hear the equitable claim first. The theory becomes totally inadequate, however, when the defendant interposes an equitable counterclaim to the plaintiff's action at law. The problem then becomes whose "remedy" is to be considered basic.

The *Beacon Theatres* case indicated that the plaintiff's remedy must be considered basic since he was the first party to file a claim. Similar reasoning was applied in *New England Mutual Life Ins. Co. v. Barnett*.[55] The plaintiff sought to cancel two life insurance policies for misrepresentations and the defendant interposed a counterclaim on the policies. The court concluded that the plaintiff was entitled to have its petition seeking equitable relief disposed of before proceeding further since its bill of complaint was filed prior to a commencement of a suit on the policies.[56] Such reasoning, however, would condition the right to jury trial on the relative swiftness of opposing counsel in filing claims. If, under facts similar to those in the *New England Mutual* case, the insurer has knowledge that the defendant was preparing his claim for a suit on the policies, it could rush its own prior filing of its equitable claim for recission and forestall the defendant in securing a jury trial. Thus the defendant's counterclaim, if arising out of the same transaction as the plaintiff's complaint and thereby rendered compulsory by Federal Rule 13(a), would approximate a forced waiver of the right to jury trial.[57] Such a result obviously is unwarranted, and it illustrates the basic fallacy of the remedy theory.

The intent of the Federal Rules of Civil Procedure seems to be that the determination of the sequence of trial of legal and equitable issues is within the discretion of the trial judge. This discretion is apparently absolute and immune from appellate review. Such unrestrained authority

53. Bercovici v. Chaplin, 3 F.R.D. 409 (S.D.N.Y. 1943); New England Life Ins. Co. v. Barnett, 39 F. Supp. 761 (S.D. Ala. 1941).

54. 195 F.2d 329 (9th Cir. 1952).

55. 39 F. Supp. 761 (S.D. Ala. 1941).

56. *Id.* at 763. See also Travelers Ins. Co. v. Lupin, 18 F.R.D. 67 (E.D. Pa. 1955). There the court stated that since the plaintiff's claim for recission was filed before the defendant's legal counterclaim, the priority of rights was in the plaintiff and his equitable cause was to be determined first.

57. Prudential v. Saxe, 134 F.2d 16 (D.D.C. 1943).