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APPEAL AND ERROR-UNION OF LAW AND EQUITY-APPEALABILITY OF ORDER DENYING DEMAND FOR JURY TRIAL

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RECENT DECISIONS

APPEAL AND ERROR—UNION OF LAW AND EQUITY—APPEALABILITY OF ORDER DENYING DEMAND FOR JURY TRIAL—Defendant held an insurance policy written by plaintiff which by its terms covered a hangar against loss by fire. After the hangar had been destroyed by fire, plaintiff instituted this suit for reformation on the ground that the contract had been written as a fire policy through mutual mistake. Defendant denied the mistake, filed a counterclaim to recover on the policy as written, and demanded a jury trial. Plaintiff moved to strike the demand, and the motion was granted. The court of appeals dismissed the defendant's appeal.[1] On certiorari, *held*, affirmed. Not being a final decision, the order denying the motion is appealable, if at all, only as an interlocutory decree granting or refusing an injunction under §129 of the Judicial Code.[2] But §129 is not applicable because the denial of a demand for jury trial is simply a determination as to the manner in which the court will try one issue in a civil action pending before it. *City of Morgantown, West Virginia v. Royal Insurance Co. Ltd.*, 337 U.S. 254, 69 S.Ct. 1067 (1949).

The Rules of Civil Procedure provide for only one form of civil action, but the constitutional requirements of jury trial force the court to determine if the action before it is equitable, legal, or a combination of both.[3] In the principal case the latter situation is present with a legal counterclaim interposed to an equitable claim. The order of the judge directing trial of the equity issue first should not occasion any controversy.[4] However, it was seriously contended that when the judge refused the jury trial he in effect enjoined trial on the law issue by using his power as a chancellor on the equity side of the court. This argument stems from the traditional concept of the separation of law and equity which has been a formidable block to attempts to replace the dual procedural system with one unified practice.[5] In a direct attack on the separation doctrine the majority

[1] City of Morgantown, W. Va. v. Royal Insurance Co. Ltd., (C.C.A. 4th, 1948) 169 F. (2d) 713.

[2] Judicial Code, §129, 28 U.S.C. (1946) §227: "Where . . . an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, . . . an appeal may be taken from such interlocutory order or decree. . . ." The substance of this provision has been retained in 62 Stat. L. 869, 28 U.S.C. (1948) §1292.

[3] Ring v. Spina, (C.C.A. 2d, 1948) 166 F. (2d) 546; 3 MOORE, FEDERAL PRACTICE, §38.01 (1938); 28 U.S.C., Federal Rules of Civil Procedure 38 and 39.

[4] Liberty Oil Co. v. Condon Nat. Bank, 260 U.S. 235, 43 S.Ct. 118 (1922); Fitzpatrick v. Sun Life Assurance Co. of Canada, (D.C. N.J., 1941) 1 F.R.D. 713; Fiorito v. Clyde Equipment Co., (C.C.A. 9th, 1924) 2 F. (2d) 807; Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Assn., (C.C.A. 9th, 1925) 8 F. (2d) 922.

[5] Gatliff Coal Co. v. Cox, (C.C.A. 6th, 1944) 142 F. (2d) 876 where at 879 the court states, "The provisions of Rule 1 of the Rules of Civil Procedure, 28 U.S.C.A. following

considered whether the Rules of Civil Procedure had so far united law and equity that, "The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed."[6] Framing the question in this manner permitted the Court to take another step in the direction of a more complete fusion of law and equity. Justice Murphy, speaking for the majority, relies upon the purpose of the Rules, ". . . to secure the just, speedy and inexpensive determination of every action...,"[7] as the basis for the decision. However, the cases, almost without exception, take a contrary view.[8] They consistently uphold the separation doctrine in which equity enjoins the law side but the law side merely grants stays in the process of trial. This approach is upheld by the concurring opinion of Justice Frankfurter, who feels the real question is one of determining whether this is a court of equity enjoining a legal claim or a court of law staying a legal claim.[9] By using this analysis the Court could have reached an identical result and its method would have been strongly supported by authority. Has the Court actually gone farther than this? The dissenting judges seem to think so,[10] although there is language in the opinion to support Justice Frankfurter's limited interpretation.[11] It is submitted that the majority did not intend to permit fine procedural distinctions

section 723c, and of Rule 2 that 'there shall be one form of civil action to be known as "civil action" ' does not obliterate the distinction between law and equity in the application of the section of the Code." And see 3 MOORE, FEDERAL PRACTICE (1948 Supp.) §39.01 which is critical of the courts for upholding an anachronism which is at odds with the new federal procedure.

[6] Principal case at 257-258.

[7] Id. at 257.

[8] Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 63 S.Ct. 163 (1942) where at 191 the Court states, "As in the Enelow case, so here, the result of the District Judge's order is the postponement of trial of the jury action based upon the policies; and it may, in practical effect terminate that action. It is as effective in these respects as an injunction issued by a chancellor. If the order be found to be erroneous, it will have to be set aside and the plaintiffs permitted to pursue their action to judgment. The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action." Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310 (1935); Stark v. Texas Co., (C.C.A. 5th, 1937) 88 F. (2d) 182; United States v. Horns, (C.C.A. 3rd, 1944) 147 F. (2d) 57; Shanferoke Coal and Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 55 S.Ct. 313 (1935). But see Beaunit Mills, Inc. v. Eday Fabric Sales Corp., (C.C.A. 2d, 1942) 124 F. (2d) 563, noted in 55 HARV. L. REV. 861 (1942).

[9] Concurring in principal case at 259.

[10] Principal case at 262. Justice Black said—and Justice Rutledge concurred: "Today the Court brushes aside the Enelow and Ettelson cases, implying that this, unlike either of the other two, is 'a case of a judge making a ruling as to the manner in which he will try a civil action pending before himself.' "

[11] Where, at 258 in the principal case, the Court states, "Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from commonlaw practice which supported our conclusions in the Enelow and Ettelson cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one."

to qualify their concept of the unified system contemplated by the Rules.[12] The thread of unity throughout the decision indicates that the scope of the unified procedure was construed broadly in order to foster simplicity and directness in the administration of justice.

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[12] Beckhardt v. Nat. Power and Light Co., (C.C.A. 2d, 1947) 164 F. (2d) 199; Cohen v. Globe Indemnity Co., (C.C.A. 3rd, 1941) 120 F. (2d) 791 at 792 where Judge Goodrich says, "Many attempts at procedural improvement during the 19th century were only partially successful because both courts and lawyers trying cases carried into the new practice the technical niceties of the old. A better fate should await the present rules."