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Chapter 5: Equity and Equity Practice

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§5.1. Right to a jury trial in equity. In suits in equity, involving cases and matters arising under the general principles of equity jurisprudence, the parties are not entitled as of right to a trial by jury. Article XV of the Massachusetts Declaration of Rights has been construed as preserving the right to a trial by jury only in those cases where such right existed at the time the article was adopted in 1780.¹

In cases where the plaintiff has an election to bring an action at law or a suit in equity and commences a suit in equity, for the purpose of obtaining an equitable remedy, there exists no absolute right to a trial by jury by the plaintiff. If the plaintiff desires a trial by jury it becomes a matter of discretion with the trial court.²

In some cases the defendant may assert a constitutional right to a trial by jury. Thus where the plaintiff’s cause of suit is based upon a legal cause of action and the plaintiff comes into equity for the purpose of obtaining an equitable remedy, such as one provided by the so-called “reach and apply” statutes, now found in G.L., c. 214, §§, cls. (7)-(10), the defendant has a constitutional right to a trial by jury as to his indebtedness.³

The question of the plaintiff’s right to a trial by jury was re-examined in the case of McAdams v. Milk.⁴ The plaintiff instituted an action at law based upon the alleged alienation of the affections of the plaintiff’s wife. Both parties claimed trial by jury. Thereafter the plaintiff was permitted to amend the action at law into a suit in equity for the purpose of reaching and applying certain shares of stock or interests of the defendant in a named corporation.⁵ The plaintiff

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       ⁴ 392 Mass. 564, 125 N.E.2d 122 (1955).
       ⁵ See G.L., c. 214, §5(8).
thereupon filed a motion for jury issues as to the liability of the defendant to the plaintiff. This motion was denied by the trial court "as a matter of discretion." The plaintiff thereupon claimed an exception to the denial of the motion and the action of the court in disposing of certain requests for rulings of law. A bill of exceptions properly presented the disposition of the motion and the requests for rulings.

In view of the final decision, the ruling of the trial court on the requests for rulings needs no discussion. The main contention asserted by the plaintiff was that by amending into a suit in equity he had not waived the right to trial by jury, claimed when the cause of action was pending on the law side of the court. This point was decided against the plaintiff. The general principle was followed that a plaintiff coming into equity has no absolute right to a trial by jury. This principle applies whether the suit in the first instance is commenced in equity or having been instituted as an action at law is amended into equity.

The Court further stated that if the question of the plaintiff's right to a trial by jury were one of first impression the Court would be constrained to inquire more deeply into the reasons which led to a difference in the application of the constitutional right to a jury as between a plaintiff and defendant.

§5.2. "Clean hands" doctrine. An unusual application of the well-known "clean hands" doctrine determined the case of Weintraub v. L. & F. Realty Co.¹ The action was brought by a landowner to compel the owner of an adjoining lot to remove a fence which blocked off an alleyway in which both parties had a common easement.² The defendant brought a cross-bill to compel the plaintiff to remove a stairway it was maintaining in the same alleyway. The defendant was maintaining a similar stairway, which fact was pleaded in defense by the plaintiff in a move to invoke the clean hands doctrine. The plaintiff prevailed in both actions in the Superior Court, receiving, among other relief, a decree that the parties both had the right to maintain their stairways.³

The defendant appealed only from the latter part of the decree. The fence, which had been the cause of the entire litigation, was completely forgotten when the case reached the Supreme Judicial Court. That Court assumed that the plaintiff's stairway interfered with the defendant's easement, but held that "... in the circumstances the realty company is in no position to invoke the aid of a court of equity, for it is maintaining a similar structure on its side

§5.2. ¹ 331 Mass. 711, 122 N.E.2d 379 (1954).
² Record, Exhibits 1 and 2.
³ The basis for this finding seems at least worth noting. The Superior Court judge decided that the parties had acquired the right to maintain their stairways by adverse possession, despite the fact that the two lots had been under a common ownership only sixteen years prior to the commencement of this action.
of the passageway which interferes at least as much with Weintraub's easement."  

The clean hands doctrine, therefore, was made the determining factor, although neither party had relied heavily on it and the Superior Court judge had completely ignored it.

The decision, so far as it holds that one who is violating the terms of an easement has no standing to complain against one who violates the same easement in the same manner, is consistent with the prior Massachusetts clean hands decisions. The case is unusual, however, in that the clean hands doctrine is brought into play after an affirmative decree in favor of the plaintiff to prevent the defendant from questioning the decree on appeal. The past decisions have all involved the use of clean hands as a defense to an action.

No appeal was taken by the defendant from that part of the decree compelling him to remove his fence, defendant apparently feeling that appeal would be futile. It probably would have been, for it is extremely doubtful that the clean hands doctrine could have been pleaded by defendant based on plaintiff's maintenance of the stairway. The cases have limited use of the defense to those cases where the plaintiff's conduct was almost identical with that of defendant. Relief has been granted where plaintiff's conduct has differed. Thus, one who was polluting a stream was allowed relief against one who was obstructing it, one who had violated an equitable servitude by building too close to the street line could prevail over one who violated the same restriction by using her property for commercial uses; and it was not available to the defendant to show that the plaintiff had been guilty of fraud on a third party, or of violating a statute.

The rule of clean hands, it has been said, "does not have reference to 'a general depravity' of the plaintiff unrelated to the subject matter."

§5.3. Fraudulent conveyance: Bill to reach and apply. The execution of an otherwise unenforceable trust was assailed as a fraudulent conveyance in Metropolitan Life Insurance Co. v. Pollock. A judgment creditor brought a bill to reach and apply certain shares of corporate stock which the defendant allegedly owned, in order to sat-

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isfy a New York judgment. The defendant's wife was joined as a party defendant and it was claimed that the transfer of stock to her was a fraud on the creditors.

The lower court found that the husband had never held more than the bare legal title, concluded that the transfer was not fraudulent, and dismissed the bill. The evidence showed that shares of stock had been paid for by the wife and others and title taken in the husband's name. On these facts, the Supreme Judicial Court concluded that the husband held the stock in trust for the persons who had advanced the money and this transfer was not a fraud on the creditors, since it did not diminish his estate.2

The decision is consistent with prior cases in Massachusetts and elsewhere which hold that a creditor cannot attach the res of an unenforceable trust held by the debtor as a trustee once the trust has been fully executed. The rationale of all these cases is that equity will not undertake to prevent one from doing voluntarily that which he should in good conscience do, even though it could not, because of the Statute of Frauds or for other reasons, enforce the trust. An earlier Massachusetts case holding the opposite view3 has long since been overruled and the later cases are in harmony with the universal holding elsewhere.

Despite the failure of the action as a bill to reach and apply, the plaintiff was still held entitled to a decree establishing the debt and ordering the defendant to pay the plaintiff.

§5.4. Masters in equity. Several cases decided during the Survey year involved the powers and duties of masters and the procedure followed by courts in reviewing their actions.

Shaw v. United Cape Cod Cranberry Co.1 was an action for an accounting of sums claimed to be due from the defendant for the plaintiff under a contract between the parties. The case was referred to a master who heard the evidence and made his report. The trial judge denied motions by the plaintiffs to recommit, overruled the plaintiff's exceptions and entered a final decree from which the plaintiff appealed.

One of the plaintiff's exceptions was to the failure of the master to report the evidence, but in the absence of such a direction in the rule appointing him the master is not required to report evidence at the request of either party.2 Reports of evidence are to be distinguished from the summaries of evidence provided for in Rule 90 of the Supe-


4 http://lawdigitalcommons.bc.edu/asml/vol1955/iss1/9

Annual Survey of Massachusetts Law, Vol. 1955 [1955], Art. 9

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rior Court Rules of 1954. The summaries of evidence provided for in Rule 90 are not for the purpose of reviewing the findings of fact made by the master but are solely for the purpose of enabling the court to determine the questions of law raised by the exceptions to the report. Consequently, the Supreme Judicial Court concluded that in the absence of an objection filed with the master as to a ruling of law made by him and a request for a summary as provided for in Rule 90, the motion to recommit was addressed to the discretion of the judge and his denial of the motion to recommit the matter to the master for a report of the evidence was affirmed.

A similar problem was presented by Stone v. Malcolm, another suit for an accounting. This case was also referred to a master, before whom the plaintiffs made some fifty-nine requests for findings and rulings. Thirty-five exceptions were taken to the master's report, which was confirmed by the Superior Court, and the plaintiff appealed. The Supreme Judicial Court held that a master may receive requests of findings of fact and rulings of law as an aid in coming to a correct decision. However, the master is not required to make the findings requested or to give his reasons for not doing so.

A master in a suit in equity is required to be as impartial as a judge, and it is a rare occasion when a master's impartiality is questioned. Such a case was Mulcahy & Dean, Inc. v. Hanley. This was an action by the lessee of certain real property against the lessor who had repossessed the premises. The case was referred to a master, who had first been suggested by the defendant's attorney, and to whose appointment all parties agreed. After the master found for the plaintiff, the defendant moved that his report be discharged for alleged bias. It appeared that a cousin of the master was one of the trustees of the Pratt estate, the beneficiary of which is the wife of the owner of half the stock of the plaintiff corporation. The Court held such facts insufficient to establish bias on the part of the master and the decree confirming his report was affirmed.

§5.5. Unfair competition. A purported non-competition agreement was before the Court in Horvitz v. Zalkind. The plaintiffs and the defendant were stockholders in a corporation selling furniture in and around Fall River. In 1951, the plaintiffs bought out the defendant and he agreed that he would not, for ten years thereafter, open any store or be employed by any store selling furniture whose physical location should be within twenty miles of Fall River except in Providence, Rhode Island. He also agreed not to use the corporation’s name in connection with any furniture store owned or operated by

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him. Soon after the sale the defendant opened an office in Fall River and started selling furniture from catalogues or by taking his customers to the Boston wholesale houses. Plaintiffs sought an injunction, relying on the settled Massachusetts cases holding that for the seller of a business to go into competition with his purchaser derogates from the grant made by the sale.\(^2\)

The Supreme Judicial Court, affirming a decree dismissing the bill, held that where what the defendant could do and what he could not do were so expressly stated in the agreement, no promise respecting future competition with the corporation can reasonably be implied.

"The emphasis of the agreement," wrote Mr. Justice Williams, "was upon the restriction of the defendant's right to open a store within the Fall River area or to accept employment by a store therein located. These restrictions did not purport to restrain the defendant from all activities in connection with the furniture business in the Fall River area . . ." It appears that the plaintiffs were the victim of their own predilection for minute detail in the agreement. A general agreement not to compete would probably have been construed to include the defendant's conduct.