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Counterclaims

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resulting in a new trial which could have been prevented by granting the motion to strike. The second exception is the use of the motion to strike to eliminate allegations in the complaint which are not legally relevant and thus prevent a waste of time and effort by the defense in preparation to meet those allegations. Here, then, are two reasons for the motion to strike.

The rules also provide that an insufficient defense shall be the ground for the motion to strike. This ground is here considered separately as it is a replacement for a use of the extinct demurrer. Demurrers, including the demurrer to an answer, have been abolished.³⁰ The effect of such an abolition was to deprive the plaintiff of a means with which to test the legal sufficiency of a defense. The provision that the motion to strike may be used to have insufficient defenses stricken cures this deprivation.

Therefore, the established practice of the courts operating under a system of rules from which the new Wyoming Rules have been formed, shows that there is to be much less reliance on these "dilatory" motions and that they are generally disfavored. True, they are still available to the Wyoming lawyer, but they are to be used only in a narrow and restricted sense. A great deal of time and expense involved in litigation may be saved if these motions are not used unnecessarily but are kept within the established limits. The number of decisions on these motions in the federal courts began decreasing greatly after the rules had been in use for a decade, and there are now considerably fewer decisions on these motions. The Wyoming lawyer will be very much ahead if he looks to the later federal decisions on these motions and plans his course of action in the light of these decisions and the interest of his client in obtaining less expensive and speedier litigation.

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COUNTERCLAIMS

One of the changes in pleading procedure that has resulted from the adoption of the new rules of civil procedure is in the handling of counterclaims.

Prior to the adoption of the new rules, the pleading of counterclaims posed few problems to the Wyoming practitioner. Since 1939, the Wyoming code¹ has provided in effect that the defendant could plead as a counterclaim any cause of action existing in his favor against the plaintiff. There are two things to note about this statute: there were no restrictions as to the kind of relief that could be sought in a counterclaim, and the

30. Wyo. Rules of Civil Procedure, Rule 7 (a).

1. Wyo. Comp. Stat. § 3-1313 (1945).

pleading of a counterclaim was permissive; that is, the defendant had a choice to plead the counterclaim or make it the subject of an independent action. However, the code further provided² that if the defendant failed to set up a counterclaim which existed in his favor, he would be precluded from recovering costs against the plaintiff in a subsequent action. This was the only penalty for failure to plead a counterclaim under the code.

The statute in operation prior to 1939 was somewhat limiting as to the pleading of counterclaims.³ This statute provided in effect that counterclaims must arise out of the same transaction or contract set forth in the plaintiff's petition. The 1939 amendment⁴ liberalized the pleading of counterclaims by removing the requirement that they arise out of the same transaction and went one step further by providing that counterclaims need not diminish or defeat the recovery sought by the plaintiff and could ask for relief different in kind. This amendment should have removed all barriers to the pleading of a counterclaim. However, the idea still persisted after 1939 that a counterclaim in an action for replevin must meet the issue of possession, emphasizing the language of the somewhat restrictive statute in effect prior to 1939.⁵ The pre-1939 rule was reiterated in *Yellowstone Sheep Co. v. Ellis*,⁶ decided after the adoption of the liberalized amendment which supposedly removed all bars to the permissive pleading of counterclaims. The court in this case said that "a counterclaim in order to be such [in replevin] must in some way affect the plaintiff's right and meet the issue of possession."⁷ This decision seems to go directly in the teeth of the statute which provided that the counterclaim need not defeat the recovery sought by the plaintiff and could be different in kind. In any event, the rule which should have been abolished in 1939 should finally be put to rest by the adoption of the new rules. The leading case to illustrate this point is probably *Abraham v. Selig*⁸ in which the court said, "Rule 13 (c) [permissive counterclaims] places no procedural limitations on the type of claim which may be interposed as a counterclaim."⁹

The adoption of the new rules has also changed the handling of counterclaims in other respects. There are now two types of counterclaims where previously there was just one. Rule 13 (a) provides in effect that if the counterclaim arises out of the same transaction or occurrence then

2. Wyo. Comp. Stat. § 3-1314 (1945).

3. Wyo. Rev. Stat. § 89-1016 (1931).

4. Wyo. Comp. Stat. § 3-1313 (1945).

5. *Schlessinger v. Cook*, 9 Wyo. 256, 62 Pac. 152 (1900); *Jones v. Parker*, 39 Wyo. 423, 273 Pac. 687 (1929).

6. 55 Wyo. 63, 96 P.2d 895 (1939).

7. *Id.* at 84, 96 P.2d at 902.

8. 29 F.Supp. 52 (S.D.N.Y. 1939).

9. *Id.* at 52. One type of claim however may not be the subject of a counterclaim under either rule 13 (a) or 13 (b). Actions which might arise out of bringing the main action or out of allegations in the pleading or proceedings taken in the course of the main action are not the proper subjects of any counterclaim. Examples of this type of claim would be actions for libel contained in the pleadings and actions for malicious prosecution in bringing the main action. See *Slaff v. Slaff*, 151 F.Supp. 124 (S.D.N.Y. 1957).

the counterclaim is compulsory and must be pleaded in the first suit or it is barred.¹⁰ Rule 13 (b) provides in effect that claims not arising out of the same transaction or occurrence shall be permissive and may be pleaded either as a counterclaim or in an independent action. Rule 13 (c), like the code provision it supplants, states that a counterclaim need not defeat the recovery sought by the plaintiff and the relief may be of a different kind.

The chief implication of the new rules is apparent; an attorney must now be very certain about the status of any counterclaim that might exist in his client's favor. It is now possible to be barred from bringing an action on the claim if the court determines the claim was compulsory under 13 (a) and should have been pleaded in a previous action.

Theoretically the pleading of permissive counterclaims should cause little trouble as the language of rules 13 (b) and (c) is substantially that of the statute they replace involving permissive counterclaims. However, the line between what is a permissive counterclaim and what is a compulsory counterclaim is rather ill-defined. The practical effect is that the careful attorney will treat most counterclaims as compulsory in order to insure that rule 13 (a) will not come into operation to bar a subsequent action.

The problem that now confronts the Wyoming attorney who, for his own good reasons, would rather not plead a claim as a counterclaim is whether his claim arises out of the same transaction or occurrence. The term is vague and offers little help in itself. The cases do little to clarify this vagueness. The test used universally in the federal courts is the test of logical relevancy, or, restated: Are the two claims (main claim and counterclaim) logically related?¹¹ Under this test it has been held that "immediateness of connection" is not required¹² and that an absolute identity of facts is not essential.¹³

The following have been held to be compulsory counterclaims under this test: claims arising out of the same automobile accident;¹⁴ a counterclaim alleging the use of confidential information in an action to obtain a patent;¹⁵ a counterclaim for declaration of the validity of the defendant's trade-mark in an action for registration of the plaintiff's trade-mark;¹⁶ a counterclaim for damages to freight in an action for recovery of freight charges;¹⁷ a counterclaim for a penalty for usury in an action to recover on a note.¹⁸

10. Wyo. Rules of Civil Procedure, Rule 13 (a); two qualifications to this are that such a claim need not be pleaded if it requires the presence of third parties over whom the court cannot obtain jurisdiction and if the counterclaim is the subject of another action already pending.

11. *Rosenthal v. Fowler*, 12 F.R.D. 388 (W.D.Mo. 1947), "logical relationship [is] the *sine qua non* of compulsoriness"; *R.F.C. v. First Nat. Bank of Cody*, 17 F.R.D. 397 (D.Wyo. 1955); *E. J. Corvette Co. v. Parker Pen Co.*, 17 F.R.D. 267 (S.D.N.Y. 1955).

12. *Lesnik v. Public Industrials Corp.*, 144 F.2d 968 (2d Cir. 1944).

13. *United Artists v. Masterpiece Productions*, 221 F.2d 213 (2d Cir. 1955).

14. *Sinkbeil v. Handler*, 7 F.R.D. 92 (D.Neb. 1946).

15. *Nachtman v. Crucible Steel*, 165 F.2d 997 (3d Cir. 1948).

16. *Speed Products Inc. v. Tinnerman Products Inc.*, 222 F.2d 61 (2d Cir. 1955).

17. *Pennsylvania R.R. v. Musante-Phillips, Inc.*, 42 F.Supp. 340 (N.D.Cal. 1941).

18. *John R. Alley Co. v. Federal Nat. Bank*, 124 F.2d 995 (10th Cir. 1942).

The following have been held to be permissive counterclaims: a counterclaim for damages to the premises in an action for recovery of rent overcharges;¹⁹ a claim alleging conspiracy under the Clayton Act where the defendant had brought a prior action for patent infringement;²⁰ a counterclaim for infringement of a patent in an action seeking to have another patent declared invalid;²¹ a counterclaim for work done on two wells in an action for negligent work on one of them—the counterclaim was held to be compulsory as to the well that was the subject matter of the plaintiff's suit and permissive as to the other well.²²

It is clear from the case law that no rule can be stated that will show at a glance which are compulsory and which are permissive counterclaims. There is a rationale available however that will help to determine which are and which are not compulsory counterclaims. This rationale is implicit in the cases if not explicit: where two claims are so related that a separate trial of each claim would impose on the parties a duplication of evidence or effort on substantially the same facts, then as a matter of policy it will be required that they be tried in one action. This test, while furnishing a rationale for the distinction between rule 13 (a) and rule 13 (b) does little to dispel the ill-defined line between the two. The practical effect of the vague distinction will be to force an attorney to plead a counterclaim in almost every instance where there is doubt whether the counterclaim is compulsory or permissive. It would not do to draw too fine a distinction between 13 (a) and 13 (b) and risk the possibility of being barred from asserting the claim in a subsequent action.

There is a dearth of cases that have actually barred a claim under rule 13 (a).²³ Most federal cases that have had to decide whether a claim is compulsory or permissive are cases in which the question arose in connection with jurisdiction, venue, or jury trials. The decisions are still very much in point however in cases where the question might arise in connection with the possible barring of an action under 13 (a). The reason so few claims have been barred is undoubtedly due to the caution imposed on attorneys by 13 (a) and also to the fact that courts are probably reluctant to bar a claim if they can sustain it under rule 13 (b) as a permissive counterclaim.

The fact that the possibility of being precluded from bringing an action exists can be best illustrated by the case of *Keller v. Keklikian*,²⁴ a

19. *Marks v. Spitz*, 4 F.R.D. 348 (D.Mass. 1945).

20. *Douglas v. Wisconsin Alumni Research Foundation*, 81 F.Supp. 167 (N.D.Ill. 1948). In this case the court felt bound, reluctantly to hold that a counterclaim alleging misuse of a patent could not be barred under rule 13 (a). It felt that the Supreme Court removed this type of counterclaim from rule 13 (a) on public policy grounds in *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 64 S.Ct. 268, 88 L.Ed. 376 (1944).

21. *Measurements Corp. v. Ferris Instruments Corp.*, 159 F.2d 590 (3d Cir. 1946).

22. *McKnight v. Halliburton Oil Well Cementing Co.*, 20 F.R.D. 563 (N.D.W.Va. 1957).

23. See *Wright, Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 Minn. L. Rev. 423 (1954). Professor Wright has collected the cases where claims have been barred at page 432.

24. 362 Mo. 919, 244 S.W.2d 1001 (1952).

comparatively recent Missouri decision which is one of the few cases that has barred a subsequent action because of failure to file a counterclaim under 13 (a). In this case, Keklikian filed a suit arising out of an automobile accident. Keller, the defendant, turned the complaint over to his insurer who entered a stipulation of settlement and the action was dismissed before trial. Keller then filed a suit arising out of the accident. The court held that the failure to counterclaim in the first action precluded an independent action by Keller. This case should serve as a warning not only to insurance company lawyers, but also to any attorney who would ignore the changes wrought by the new rules concerning counterclaims.

Another change which will probably result is the effect on the right to a jury trial where a legal counterclaim is filed in an equitable action. The law before the adoption of the compulsory counterclaim rule was that the defendant waived his right to a jury trial by interposing such a counterclaim.²⁵ The rationale was that the defendant had a choice between counterclaiming or bringing a separate action, and by choosing to counterclaim he waived the right to a jury trial on the legal issue. The concept of a compulsory counterclaim upset this rationale which was necessarily predicated on a voluntary act of the defendant. It is now the rule that where the counterclaim is compulsory under rule 13(a) the defendant does not waive his right to a jury trial by filing a legal counterclaim in an equitable action.²⁶ Presumably the waiver rule will still apply to bar a jury trial where the counterclaim is permissive. This then is one more instance where Wyoming lawyers and judges will have to enter the jungle of logical relevancy to determine whether the counterclaim arises out of the same transaction or occurrence.

The final change to be noted relates to the allowance of a counterclaim by the plaintiff in proper situations. The 1939 statute specifically limited counterclaims to those existing in favor of the defendant.²⁷ The new rules impose no such limitation; the language of rules 13(a) and (b) employ the words pleader and pleading. Thus it has been held under this rule that a plaintiff may counterclaim to a counterclaim.²⁸

In summary it must be stated that the effect of the new rules concerning counterclaims will be to place a burden of greater vigilance on the Wyoming attorney. The existence of compulsory counterclaims and the difficulty of determining which are compulsory necessarily calls for this result. However such a result, which in some cases may be harsh, is necessary if the desirable policy of avoiding duplication of trials is to be effectuated in cases where one hearing could just as easily determine both issues and thus avoid unnecessary and expensive litigation.²⁹

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25. *Horwitz v. New York Life Ins. Co.*, 80 F.2d 295 (9th Cir. 1935); *Burns v. Corn Exchange Nat. Bank*, 33 Wyo. 474, 240 Pac. 683 (1925).
26. *Morrison-Knudson Co. v. Wiggins*, 13 F.R.D. 304 (D.Alaska 1952); *Union Central Life Ins. Co. v. Burger*, 27 F.Supp. 554 (S.D.N.Y. 1939).
27. Wyo. Comp. Stat. § 3-1313 (1945).
28. *Warren v. Indian Refining Co.*, 30 F.Supp. 281 (N.D.Ind. 1939); *Bethlehem Fabricators Inc. v. John Bowen Co.*, 1 F.R.D. 274 (D.Mass. 1940).
29. *Marks v. Spitz*, 4 F.R.D. 348 (D.Mass. 1945).