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Federal Practice -- Sovereign Immunity and Counterclaims Against the Government under the Tucker Act

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never be treated as harmless error and should result in automatic reversal.[29] Harmless-error statutes are designed to stop reversals due to unimportant technicalities. But a violation of *Griffin* is a conscious act on the part of the prosecution or the court. To hold out the possibility that this violation could be harmless would only seem to tempt the unethical and award the ignorant.

The adoption of this harmless-error rule has thus committed the Court to a case-by-case determination of the extent to which unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial; *i.e.*, was the comment "harmless beyond a reasonable doubt?" This substantial burden could have been avoided by placing *Griffin* violations in the category of Constitutional rights so basic that infractions can never be harmless error and will result in automatic reversal. Thus, the most that can be said at present is that *Chapman* has clouded the holding of *Griffin*, a cloud which hopefully will be dispelled in further decisions.[30]

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Federal Practice—Sovereign Immunity and Counterclaims Against the Government under the Tucker Act

A problem that has arisen time and again under the Tucker Act[1] involves the question of whether a defendant who has a claim against the Government, which claim could be the subject of an original suit under the Tucker Act, may assert it as a counterclaim in an action brought by the Government against him in a federal court. Any discussion of this problem must begin with the general proposition that the Government cannot be sued unless it has consented to be sued and then only in the manner in which it has so

[29] 386 U.S. at 45. See also O'Connor v. Ohio, 385 U.S. 92 (1966) where the Court reversed a *Griffin* violation without even mentioning harmless error.

[30] The question remains as to what other constitutional violations will be subject to the harmless-error test. In Cooper v. California, 386 U.S. 58 (1967), a companion case of *Chapman*, the Court did not reach the question of whether the harmless-error test should be applied to Fourth Amendment violations, as it ruled that the search was not a violation of the Fourth Amendment. *Id.* at 59.

[1] 24 Stat. 505 (1887).

consented.[2] The necessary consent for original suits in contract is found in the following section of the present codification of the Tucker Act:

> The district courts shall have original jurisdiction, concurrent with the Court of Claims, of . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States. . . .[3]

The Court of Claims has exclusive jurisdiction over claims exceeding 10,000 dollars in amount.[4] Both the Court of Claims[5] and the district courts[6] have jurisdiction over counterclaims and set-offs asserted by the United States in suits against it. However, there is no provision regarding counterclaims asserted against the United States in actions commenced by it.

It is apparent that the provisions of the Federal Rules governing counterclaims offer no solution to the problem. Rule 13(a) requires the pleading as a counterclaim of any claim arising out of the same transaction or occurrence that is the subject matter of the plaintiff's claim. Rule 13(b) allows the pleading of a claim not arising out of the same transaction. The Rules further provide that a counterclaim may claim relief exceeding in amount or different in kind from that sought by the opposing party.[7] However, the liberal nature of these provisions is seriously diminished for purposes of this discussion by the protective provision of Rule 13(c): "These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."

One of the leading cases fixing those limits is *United States v. Nipissing Mines Co.*[8] The Government brought an action in the district court to recover taxes in excess of 80,000 dollars, and the defendant counterclaimed for a previous overpayment of 5,000 dollars. Although there was consent for an original suit on the claim of the defendant under the Tucker Act, the court held that the juris-

[2] United States v. Shaw, 309 U.S. 495 (1940).
[3] 28 U.S.C. § 1346(a)(2) (1962).
[4] 28 U.S.C. § 1491 (1964).
[5] 28 U.S.C. § 1503 (1950).
[6] 28 U.S.C. § 1346(c) (1962).
[7] FED. R. CIV. P. 13(c).
[8] 206 Fed. 431 (2d Cir. 1913).

diction could not be invoked by way of counterclaim. As construed by the court the statute was simply not broad enough to give the same court jurisdiction to render judgment when the claim was asserted in the form of a counterclaim. Another leading case is *United States v. Shaw*.[9] The United States had obtained a judgment against a contractor and, at the death of the contractor, filed a claim upon the judgment in a Michigan probate court to recover over 49,000 dollars. Under a Michigan statute allowing administrators to set off claims of the estate against creditors' claims, the administrator set up a claim against the Government for slightly more than 73,000 dollars and obtained a judgment against the Government for the difference of approximately 23,000 dollars. The United States Supreme Court held that the state court had no jurisdiction to render an affirmative judgment against the United States, although it could have allowed a set-off in an amount necessary to cancel the Government's claim in the probate court. Had this case been interpreted to stand for the proposition that a state court never has jurisdiction to render an affirmative judgment against the United States, its effect might not have been so confusing. But later language in the case indicated a more restrictive holding:

> It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by Congress. We, of course, intimate no opinion as to the desirability of further changes. That is immaterial. Against the background of complete immunity we find no Congressional action modifying the immunity role in favor of cross-actions beyond the amount necessary as set-off.[10]

This language was in keeping with the holding in *Nipissing* where the court refused to allow a counterclaim even though the claim could have been asserted in the same court as an original suit. This more restrictive holding is the one accorded the *Shaw* case by some later cases in the lower federal courts.[11]

Such strict construction of the Tucker Act apparently resulted from the fact that the Act expressly grants the Court of Claims and the district courts jurisdiction over counterclaims, set-offs, and other demands by the Government in suits by individuals against the

[9] 309 U.S. 495 (1940).
[10] *Id.* at 502.
[11] See, *e.g.*, United States v. State Bridge Comm'n, 109 F. Supp. 690 (E.D. Mich. 1953); United States v. Biggs, 46 F. Supp. 8 (E.D. Ill. 1942).

Government in those courts.[12] Since no such express jurisdiction is granted in regard to counterclaims by individauls, some courts conclude that there was no intention to consent to suit against the United States by way of counterclaim.[13]

On the other hand there has been some evidence of a changing judicial attitude toward waiver of sovereign immunity. The trend had its beginnings in cases under the Federal Tort Claims Act and has been carried over into contract litigation by some courts. The leading case under the Tort Claims Act is *United States v. Yellow Cab Co.*[14] Yellow Cab was sued by its passenger for injuries resulting from a collision of one of its cabs with a United States mail truck. The company impleaded the United States and demanded contribution from the Government as a joint tortfeasor. The Court here applied a liberal construction of the statutory waiver of immunity in contrast with the stricter construction in *Nipissng* and *Shaw.* The Court held that the Government could be sued for contribution by way of interpleader and cross-claim although the Tort Claims Act by its terms referred to original suits only. The necessary consent was implied from the general purpose of the statute to allow the Government to be sued for its torts.

Subsequent to *Yellow Cab,* the United States Court of Appeals for the First Circuit decided *United States v. Silverton,*[15] a case that has become the important bridge between the tort and contract cases. In that case the Government sued for the purchase price of scrap webbing, and the defendant counterclaimed for loss due to the alleged misrepresentation of the Government's agents as to the character of the webbing. The court summarized the situation as being one in which the defendant could have asserted his claim as an original suit under the Tucker Act and reasoned that if the defendant had done so at the time the Government's action was pending,

[12] See notes 5 and 6, *supra.*

[13] See, *e.g.,* United States v. Wissahickon Tool Works, 84 F. Supp. 896 (S.D. N.Y. 1949).

[14] 340 U.S. 543 (1951). In another leading case under the Federal Tort Claims Act the Court held that the anti-assignment statute did not apply to assignments by operation of law, and that an insurance company could bring a suit in its own name against the United States under the Federal Tort Claims Act where the company had become subrogated to the rights of an insured by payment to the insured who had a claim against the United States under the Act. United States v. Aetna Cas. & Surety Co., 338 U.S. 366 (1949).

[15] 200 F.2d 824 (1st Cir. 1952).

the district court could have consolidated the two cases for trial under Federal Rule 42. The court took the view that it would amount to the "emptiest technicality" to reject jurisdiction over the counterclaim and to require the defendant to institute an original suit. The court was not unaware of the *Nipissing* case which it deemed to be out of harmony with the more liberal view as to the waiving of governmental immunity as expressed in the *Yellow Cab* case.[16]

The United States Court of Appeals for the Fourth Circuit has indicated, by dictum at least, that it would follow *Silverton*. Dismissing an appeal as premature in *Thompson v. United States*,[17] the court, in a more or less advisory opinion to the lower court, stated that it was no reason why the defendant's claim against the United States could not be asserted by way of counterclaim in the action by the Government since the claim of the defendant was such that it could have been the subject of an original suit in the district court. Subsequently the district court decided the counterclaim on its merits.[18]

Other circuit and district courts have joined in the adoption of the liberal view on the basis of either *Yellow Cab* or *Silverton*.[19] One notable exception to this trend is the Second Circuit where the strict construction was introduced by the *Nipissing* case in 1913. The courts there have at times expressed a preference for the liberal view,[20] yet they considered themselves bound by the earlier decisions.[21] These courts have adhered to this reverence for *Nipissing* and the strict view despite the fact that, since *Yellow Cab*, they operate under the liberal view in regard to the tort cases.[22]

A defendant encounters even more difficulty where his *compulsory* counterclaim against the Government exceeds 10,000 dollars. Under the Federal Rules he must plead the compulsory counter-

[16] *Id.* at 827.
[17] 250 F.2d 43 (4th Cir. 1957).
[18] Thompson v. United States, 168 F. Supp. 281 (N.D. W. Va. 1958).
[19] See, *e.g.*, United States v. Springfield, 276 F.2d 798 (5th Cir. 1960); United States v. Martin, 267 F.2d 764 (10th Cir. 1959); United States v. Buffalo Mining Co., 170 F. Supp. 727 (D. Alaska 1959); United States v. Petaschnick, 143 F. Supp. 206 (E.D. Wis. 1956).
[20] See United States v. Ameco Electronic Corp., 224 F. Supp. 783, 785 (E.D. N.Y. 1963).
[21] *Ibid.*
[22] See United States v. New York Omnibus Corp., 128 F. Supp. 86 (S.D. N.Y. 1955).

claim[23] or he will be precluded from bringing a subsequent suit on his claim.[24] Yet, even in the liberal jurisdictions, the district courts are without jurisdiction over counterclaims exceeding 10,000 dollars in amount.[25] Thus it has been suggested that the best course for the defendant is to plead the counterclaim since its dismissal for lack of jurisdiction does not operate as an adjudication on the merits.[26] But if the counterclaim were in fact compulsory, *i.e.*, arising out of the same transaction, it is probable that the issues in the principal claim and the counterclaim would be the same. If, after the dismissal of the counterclaim, the Government obtained a judgment on its principal claim, it would seem that the judgment would bar any retrial of those issues under general principles of res judicata.[27]

On the other hand, it is possible that, after dimissal of the counterclaim, the issues in the case would be determined in favor of the defendant. Apparently he would not be precluded from asserting his claim for affirmative relief in a new suit on general principles of res judicata in this situation.[28] However, the question of whether he would now be barred for failure to assert his claim as a compulsory counterclaim would clearly be presented.[29]

[23] FED. R. CIV. P. 13(a).

[24] See Pennsylvania R.R. v. Musante-Phillips, Inc., 42 F. Supp. 340, 341 (N.D. Cal. 1941).

[25] 28 U.S.C. § 1346(a)(2) (1962). This section was applied to counterclaims in United States v. Buffalo Mining Co., 170 F. Supp. 727 (D. Alaska 1959).

[26] See 25 GEO. WASH. L. REV. 315, 336 n.93 (1957).

[27] Suppose the United States sued a defendant alleging a breach of contract, and the defendant counterclaimed that the United States had committed the breach. Even if the defendant's counterclaim were dismissed for lack of jurisdiction, the defendant probably would have asserted the breach by the United States as a bar to recovery against him even though he could get no affirmative relief in the case. Thus, if after the dismissal of the counterclaim, the United States obtained a judgment the issue of its performance would have been litigated and could not be retried in a subsequent action. There are, however, two reasons why the result in this particular situation would not be very prejudicial to the defendant. First, it is quite possible, if not probable, that since the issues were resolved against him in this case, they would have been resolved against him even if he had been the plaintiff in a later suit. Secondly, there may be cases where the particular issues in the counterclaim and the principal claim are not the same so that the defendant could assert his claim in a subsequent suit.

[28] Even if the court finds that the particular issues had been litigated in the first case, so that they could not be retried in the subsequent case, the defendant (plaintiff in the second case) should be entitled to a judgment on the pleadings in the second case since these issues were resolved in his favor in the first case.

[29] Apparently the question is not resolved by Rule 41(b), (c) which pro-

The most a defendant could do to avoid this possibility of a plea in bar would be to file his original suit in the Court of Claims immediately after the dismissal of his counterclaim and hope to win the race to judgment. An equally unsatisfactory alternative was offered by the court in *United States v. Buffalo Mining Co.*[30] After dismissing the counterclaim, the court gave the defendant leave to amend by reducing his claim to less than 10,000 dollars.

It seems clear that the interest of efficient litigation requires a solution to the problem of counterclaims under the Tucker Act. That the *Silverton* decision offers only a partial solution is illustrated by the *Buffalo Mining Co.* case. Thus it appears that a desirable solution can be obtained only by an amendment to the Tucker Act. Of two possibilities that have been advanced,[31] the proposal that defendants with counterclaims in excess of 10,000 dollars be allowed to remove the entire case to the Court of Claims seems the least desirable since it apparently would create more problems than it would solve.[32] It seems that the better solution would be to amend the Act to expressly give the district courts jurisdiction over counterclaims against the United States regardless of the

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vides that dismissal of a counterclaim for lack of jurisdiction does not operate as an ajudication on the merits. It seems that this rule relates to the broad notion of res judicata and not the type of bar imposed for failure to assert a compulsory counterclaim in an earlier suit. However, an argument could be made in favor of the defendant under Rule 13(a). Under this Rule a pleading need not state a counterclaim that requires the presence of third parties of whom the court cannot acquire jurisdiction for a personal judgment. On the basis of that exception it could be argued that the intention was to except from the definition of "compulsory" any counterclaim met by jurisdictional problems. Thus a counterclaim dismissed for lack of jurisdiction under the Tucker Act should not be termed "compulsory" at all.

Another, but perhaps weaker, argument under 13(a) would be that once the defendant has included the counterclaim in his pleadings, he has complied with 13(a) which requires only the *pleading* of the counterclaim, and that it was never intended that a claim, although termed "compulsory" should be barred where it had been pleaded but dismissed for lack of jurisdiction over the subject matter.

[30] 170 F. Supp. 727 (D. Alaska 1959).

[31] See 73 HARV. L. REV. 602, 604 (1960).

[32] The threshold problem here would be jurisdictional. The Court of Claims presently has jurisdiction over suits *against* the United States. 28 U.S.C. § 1491 (1964). Therefore, the removal provision proposed would require expanding the jurisdiction of the Court of Claims to cover suits *by* the United States, at least in this specific situation. The probable result of such expansion would be an undesirable increase in the work load of that court.

amount of the counterclaim.[33] This solution would not only bring uniformity to the treatment of such counterclaims but would also serve the interest of efficient litigation by allowing all the rights and liabilities of the parties to be determined in a single suit in the district court.

JERRY M. TRAMMELL

Habeas Corpus—Waiver of Constitutional Guarantees

In *Stem v. Turner*[1] the appellant, a prisoner, appealed the denial of habeas corpus relief by a federal district court. The district judge after a thorough review of most of the records of the appellant's trial in a North Carolina state court and of his attempts at state post-conviction relief, refused to grant a plenary hearing and dismissed the writ. The district court found as to some of Stem's allegations that the findings of facts in state hearings were correct and concluded as to other allegations that the appellant had failed to exhaust his state remedy under the post-conviction statute. The Court of Appeals for the 4th Circuit interpreted a section of the North Carolina Post-Conviction Act[2] such that the appellant's state remedy had been exhausted and as a result the appellant was entitled to a plenary hearing in a federal district court.

In November of 1958, Thomas Stem was convicted in a North Carolina court of assault on a female with intent to rape and sentenced to a term of fifteen years. At his trial the two arresting police officers introduced illegally obtained evidence and testimony that was extremely prejudicial to him.[3] Stem's privately retained

[33] It appears that such a provision should allow the litigation of permissive as well as compulsory counterclaims. Where neither claim requires a long and complicated trial, apparently there would be no unreasonable delay. If a long or complicated trial be anticipated the court can always in "futherance of convenience" order separate trials. FED. R. CIV. P. 42(b).

[1] 370 F.2d 895 (4th Cir. 1966).

[2] N.C. GEN. STAT. § 15-218 (Supp. 1965).

[3] Stem was arrested without a warrant at his home. No search was made of the house at that time, but the police officers returned to the house later that afternoon to search it. Nowhere in the record did it appear that the officers had a search warrant, or that Stem had consented to the search. As a result of the search, the officers found the girl's underpants which were introduced into evidence, made certain observations they testified about at the trial, and took photographs of parts of the house. All of this illegally obtained evidence corroborated the story of the girl. 370 F.2d at 898.