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ESTOPPEL BY RULE: THE COMPULSORY COUNTERCLAIM UNDER MODERN PLEADING*

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Most lawyers are moderately familiar with the doctrine of res judicata, by which a second suit on one cause of action is prohibited. And some lawyers know about collateral estoppel, a doctrine which provides that the decision of a court on an issue actually before it must be taken as final in subsequent litigation between the same parties even though the second suit is on a different cause of action. In recent years attention has been turning to a third type of bar, by which the termination of one suit may prevent a party thereto from ever presenting to a court another claim which he has. This bar is created by the so-called "compulsory counterclaim" rules and statutes. These rules and statutes provide that a party must present certain kinds of claims as counterclaims in litigation against him, on pain of being otherwise precluded from ever having a day in court as to these claims.

The idea of the compulsory counterclaim is not new. Professor Millar traces the origins of the device back to a New Jersey statute of 1722 in relation to set-off.[1] And a number of states followed the lead of an 1875 California statute, still in effect in amended form, which is not greatly dissimilar from the most modern version of a compulsory counterclaim rule. The real stimulus to emphasis on compulsory counterclaims, however, has come from the recent reexamination of procedures which has led ten jurisdictions to fol-

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1. Millar, Civil Procedure of the Trial Court in Historical Perspective 137 (1952)

low the Federal Courts in the adoption of systems of "modern pleading,"[2] systems in which the compulsory counterclaim has been among the most important reforms.

It is my purpose in this paper to examine the actual working of these statutes and rules providing for compulsory counterclaims, after which it will be possible to weigh with some assurance the various comments which have been made about this new kind of estoppel by both friends and critics of this device.

THE RULES AND STATUTES

Rules (and statutes) providing some compulsion on a party, usually the defendant, to plead his claim as a counterclaim in a pending action take many forms. Easily the most popular is that of Federal Rule of Civil Procedure 13(a):

> "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, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Rules which are substantially identical with this are now effective in Alaska,[3] Arizona,[4] Delaware,[5] Florida,[6] Kentucky,[7] Missouri,[8]

2. I regard a state as having adopted "modern pleading" if it enjoys, at least in substantial part, three things: (1) A real and effective merger of the forms of action and of law and equity; (2) Simplified pleading, supplemented by a broad system of pretrial devices for getting at the merits; (3) Unlimited joinder of claim and parties. Wright, *Modern Pleading and the Pennsylvania Rules,* 101 U. of Pa. L. Rev. 909, 913 (1953). By this test, modern pleading has been adopted in Alaska, Arizona, Colorado, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, Puerto Rico, and Utah, as well as in the federal courts. Delaware has adopted rules patterned on the Federal Rules, but has preserved separate systems of law and equity. Many jurisdictions other than those listed have adopted particular features of the modern pleading systems, including, as will be seen, the compulsory counterclaim rule.

3. Fed. R. Civ. P. 13(a) is made applicable to the Alaska courts by 28 U. S. C. § 2072 (Supp. 1952).

4. Ariz. Code § 21-437 (1939).

5. Del. Rules of Superior Court, Rule 13(a); Del. Rules of Court of Chancery, Rule 13a.

6. Fla. Stat. § 52.11(1) (1943). It is something of a puzzle that the counterclaim provisions of § 52.11 were not moved into the 1950 rules of common law procedure adopted by the Florida court. Professor Philip K. Yonge, of the College of Law of the University of Florida, advises me that both the legislature and the Supreme Court of Florida have the power to enunciate procedural law, and thus that no significance need be attached to the failure to promulgate the counterclaim provisions with the rules of court. Professor Yonge is of the opinion that the cited statute is not applicable in equitable proceedings in Florida, as the court has regulated counterclaims in equity by Equity Rule 35, adopted in 1950. A proposed consolidation of the

Nevada,[9] New Mexico,[10] Commonwealth of Puerto Rico,[11] Texas,[12] and Utah.[13] And the Iowa rule is to the same effect, though in different language.[14] Further the Minnesota rule is identical with Federal Rule 13(a) save that it substitutes "transaction" for the possibly more inclusive "transaction or occurrence" of the federal rule;[15] whether this difference in language should produce any change in result will be examined with some care subsequently.

Another popular kind of enactment is that of California:

> "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."[16]

But the California situation is not so straightforward as it appears on the surface, for "counterclaim" is defined by the California Code as that which tends "to diminish or defeat the plaintiff's recovery."[17] If the defendant wishes affirmative relief, not tending to diminish or defeat his adversary's recovery, he must proceed by

law and equity rules, which would leave separate law and equity courts, but provide the same basic rules for both courts, much as in Delaware, note 5 *supra,* drops Equity Rule 35 completely, moves § 52.11 from the statutes to the rules, and makes this single rule applicable to both law and equity.

7. Ky. R. Civ. P. 13.01. Prior to the adoption of the Rules of Civil Procedure in Kentucky in 1953, Kentucky had a statute of the sort discussed at pp. 426-427 *infra,* which forbade the recovery of costs in an independent action on a claim which could have been pleaded as a counterclaim in an earlier suit. Ky. Code, Civ. Prac. § 17 (Carroll 1938).

8. Mo. Rev. Stat. § 509.420 (1949). Though compulsory counterclaims were thus provided for, the Missouri Code made no provision for permissive counterclaims. This omission was cured by the adoption in 1944 of Mo. Sup. Ct. Rule 3.16, which is along the same lines as Fed. R. Civ. P. 13(b).

9. Nev. R. Civ. P. 13(a). Prior to the adoption of the Rules of Civil Procedure in 1953, Nevada had a statute, similar to the California statute discussed at pp. 425-426 *infra,* making certain counterclaims compulsory. Nev. Comp. Laws § 8604 (1929).

10. N. M. R. Civ. P. 13(a), N. M. Stat. § 19-101 (13) (a) (1941).

11. P. R. R. Civ. P. 13(a). The Puerto Rico Rules of Civil Procedure, adopted in 1944, may be found at the rear of volume 60 of the Puetro Rico Reports.

12. Tex. R. Civ. P. 97(a).

13. Utah R. Civ. P. 13(a). Utah had a somewhat similar compulsory counterclaim provision prior to the adoption of the Rules of Civil Procedure in 1950. Utah Code § 104-9-3 (1943).

14. Iowa R. Civ. P. 29.

15. Minn. R. Civ. P. 13.01. The history as to how the Minnesota Rule came to take this form is recounted in Wright, *Joinder of Claims and Parties under Modern Pleading Rules,* 36 Minn. L. Rev. 580, 588-591 (1952).

16. Cal. Code Civ. Proc. § 439 (Deering 1949). It is probable that others may be perplexed, as I have been, by the notation in Deering's edition of the Code that an earlier form of this statute was held unconstitutional in 1901. I find that what happened was that an entire codification of California law was voided because of a defective title, Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901), and thus that the decision does not reflect on the constitutionality of making counterclaims compulsory.

17. Cal. Code Civ. Proc. § 438 (Deering 1949).

way of cross-complaint rather than counterclaim. A cross-complaint may be made on any claim "relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought,"[18] and the filing of such a cross-complaint is always at the option of the pleader, in theory at least, rather than compelled by statute. This rather complex scheme is followed, though with differences of language, in the statutes of Idaho[19] and Montana,[20] and was also in Nevada before its recent adoption of modern pleading.[21]

Other states have chosen to go their own rather strange ways. New Jersey, though it has adopted modern pleading generally, has preferred to make compulsory only those counterclaims which arise from "a liquidated debt or demand, or a debt or demand capable of being ascertained by calculation."[22] West Virginia, though it provides for no compulsion in its ordinary trial courts, does have an intricate statute making certain claims compulsory in suits before justices of the peace.[23] Since these two states vary so far from the usual compulsory counterclaim provisions, they will not be further considered. Nor will further consideration be given to that group of states, in which is included Indiana,[24] Nebraska,[25] Ohio,[26] Okla-

18. Cal. Code Civ. Proc. § 442 (Deering 1949).

19. Idaho Code § 5-614 (1947) compels the pleading of those counterclaims listed in Idaho Rule of Prac. & Proc. R5-613(1). But Idaho Code § 5-617 (1947), dealing with cross-complaints, is less broad, verbally at least, than the similar California statute.

20. By virtue of Mont. Rev. Codes §§ 93-3408, 93-3401(1) (1947), counterclaims must be pleaded if they arise "out of the contract or transaction" sued upon or are connected with "the subject of the action." The scope allotted to cross-complaints, which are not compulsory and need not tend to diminish or defeat plaintiff's recovery, is the same. Mont. Rev. Codes § 93-3415 (1947).

21. See note 9 *supra*

22. N. J. R. R. 4:13-1. This rule was orginally N. J. R. Civ. P. 3:13-1, and as first promulgated made no provision for compelling counterclaims. It was amended Dec. 7, 1950, 5 N. J. 627, to make compulsory those counterclaims listed in the text. The rule was renumbered, and the rather cryptic form of citation set out above required by rules, R. R. 1:1-10, in The Revision of the Rules Governing the Courts of the State of New Jersey effective Sept. 9, 1953.

23. W. Va. Code § 4978 (1949): "If the defendant in an action founded on judgment or contract, express or implied, has, at the time the action is commenced, any counterclaim consisting of a cause of action in his favor which might have been allowed to him in defense or reduction of the plaintiff's demand, upon the trial of the action, as provided by the preceding section, and be personally served with process in the suit or appear and answer the action, he shall set forth the same, with his evidence in support thereof, in the cause, or be forever precluded from maintaining any action for the recovery thereof." This is qualified, however, by W. Va. Code § 4979(a) (1949), which makes the counterclaim optional if it exceeds plaintiff's demand by $300 or more.

24. Ind. Stat. § 2-1019 (Burns 1946 Repl. Vol.).

25. Neb. Rev. Stat. § 25-814 (1943).

26. Ohio Gen. Code § 11624 (Page 1937).

homa,[27] and Wyoming,[28] which prohibit the defendant who fails to counterclaim from recovering costs in a subsequent independent action on his claim.[29]

The final statute which does merit consideration is that of Arkansas:

> "* * * [T]he defendant must set out in his answer as many grounds of defense, counter-claim or set-off, whether legal or equitable, as he shall have."[30]

There are two aspects of this statute worthy of note. One is that "counterclaim" is defined in the Arkansas statutes as "any cause of action in favor of the defendants or some of them against the plaintiffs or some of them."[31] Thus the compulsion may extend to claims which bear no relationship whatever to the plaintiff's claim, a result which is not reached under the more usual rules and statutes. The other interesting thing is that the Arkansas court has held that when the legislature substituted "must" for "may" in the statute quoted above in 1935, it intended to require the pleading of counterclaims on penalty of a subsequent bar.[32] Other jurisdictions have statutes which say defendant "must" plead his counterclaims but, except in Arkansas, such statutes have been construed as leaving it optional with the defendant to assert a claim as a counterclaim or to save it for subsequent suit.[33]

By way of summary, there is a reasonably general compulsion of counterclaims, in either the Federal, California, or Arkansas form, in 17 jurisdictions as well as the federal courts. Two other

27. Okla. Stat. tit. 12, § 275 (1941).
28. Wyo. Comp. Stat. § 3-1314 (1945).
29. Kentucky had such a statute prior to 1953. See note 7 *supra.*
30. Ark. Stat. § 27-1121 (1947).
31. Ark. Stat. § 27-1123 (1947).
32. Corey v. The Mercantile Insurance Co. of America, 207 Ark. 284, 180 S. W. 2d 570 (1944). The substitution of "must" for "may" in the counterclaim statute was made by Ark. Acts 1935, No. 54, § 1, p. 124. Arkansas distinguishes between counterclaims and set-offs. Though both are now compelled by the statute cited note 30 *supra,* an earlier statute remains on the books forbidding costs in independent action on a claim which might have been pleaded as a set-off in an earlier suit. Ark. Stat. § 27-1128 (1947). The presence of this anachronism does not seem to have caused any difficulty in that enlightened jurisdiction.
33. Thus some statutes say: "The answer of the defendant must contain: 1. A general or specific denial. * * * 2. A statement of any new matter constituting a defense or counterclaim." Such statutes have been held to make it optional with the pleader whether or not to assert a counterclaim. Huether v. Baird, 62 N. D. 434, 244 N. W. 125 (1932); Diamond Ice & Storage Co. v. Klock Produce Co., 103 Wash. 369, 174 Pac. 435 (1918); Nehring v. Niemerowicz, 226 Wis. 285, 291, 276 N. W. 325, 328 (1937). The contrary reading of the Wisconsin statute by the Massachusetts court in Liberty Mutual Ins. Co. v. Hathaway Baking Co., 306 Mass. 428, 28 N. E. 2d 425 (1940), finds no support in the Wisconsin cases cited or in Wisconsin law generally. See Advisory Committee Note to Wis. Stat. § 263.14 (1951), which says that all counterclaims are permissive in Wisconsin.

states make counterclaims compulsory in more limited circumstances, while five more states do not require counterclaims but do withhold costs in the second suit from the defendant who has failed to counterclaim.

The Effects of Compulsion

The statutes which follow the California pattern, as has been seen, are quite explicit that if the pleader fails to assert a counterclaim within the compulsory class, "neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." Any inquiry into the nature of the compulsion is an exercise in semantics; the obvious fact is that subsequent suit is prohibited because the legislature says it is prohibited. The answer is not so easy in those jurisdictions which have followed the federal model, for in such jurisdictions, with the exception of Iowa,[34] the rule or statute says that the pleader "shall" assert certain claims as counterclaims, but is silent as to the penalty, if any, for failure to do so.[35] Nonetheless it has never been doubted in any of the jurisdictions which have adopted such a rule that the pleader who fails to comply therewith is prohibited from subsequent assertion of his claim.

Just how this result is reached is a subject on which there is some disagreement, though perhaps it is only on a verbal level. Harvard writers have been agreed that the familiar doctrines of "merger" or "bar" preclude the defendant from his later independent action.[36] In accord with the normal usage of the terms "merger" and "bar,"[37] this would seem to imply that the effect of a compulsory counterclaim rule is to broaden the scope of the cause of action deemed to be determined by the judgment. Thus if the defendant was successful in the first suit he is precluded from suing later on the claim which should have been counterclaimed because that claim, like all others arising from the cause of action, has been merged in the judgment in the first suit. If the defendant

34. Iowa R. Civ. P. 29 concludes: "A final judgment on the merits shall bar such a counterclaim, although not pleaded.

35. In the Preliminary Draft of May, 1936, of the Federal Rules, it was expressly provided that: "If the action proceeds to judgment without such a claim being set up, the claim shall be barred." See note 119 *infra* for the history of this proposal. In the Preliminary Draft of April, 1937, the quoted language was eliminated from the Rule but the seventh paragraph of the Advisory Committee Note to Fed. R. Civ. P. 13 stated, and states, the same thing in slightly different language. See note 51 *infra*.

36. Scott, *Collateral Estoppel By Judgment*, 56 Harv. L. Rev. 1, 27 (1942); *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 832 (1952).

37. See Restatement, Judgments §§ 47, 48 (1942), and comments thereto

lost the first action the judgment therein is a bar as to any subsequent suit by him on any claims arising from the cause of action there adjudicated. Professor Moore, with some judicial support, places the prohibition against a second suit on the ground that

> "the principle of res judicata applies to all issues that should have been raised, even though actually omitted."[38]

This is probably saying the same thing as the Harvard people do, for Moore's statement can be correct only on the assumption that there is but one cause of action; otherwise res judicata can have no application, and the relevant doctrine is that of collateral estoppel, which has not customarily applied to unlitigated issues.

Other authorities have preferred to support the bar against later suit by the theory of "waiver."[39] Analysis of the compulsory counterclaim in terms of "waiver," or of actual "estoppel," as I prefer, might offer some advantage.[40] It would afford a means, if such be thought desirable, of extricating from the rigors of the compulsory rule the defendant who has never knowingly refrained from inserting his claim, a situation which is particularly important where an insurance company has controlled the defense of the first action. And analysis in terms of "waiver" or "estoppel" might be a more flexible tool for handling the cases of the default judgment or the consent judgment or the dismissal after a compromise agreement.

A comparatively recent decision may serve to illustrate this idea. The case is that of *Keller v. Keklikian,*[41] now commonly presented as the chief horrible example by those who are critical of the compulsory counterclaim device. Keklikian sued Keller for damages incurred in a collision between their cars. Keller turned the papers over to his insurer as he was required to do by his insurance policy. Before the time for answering the complaint had expired—apparently because of extensions by agreement—Keklikian's lawyer and the lawyer for the insurance company agreed on a settlement of the claim and entered into a stipulation that the

38. 3 Moore, Federal Practice ¶ 13.12 (2d ed. 1948). *See* Switzer Brothers, Inc. v. Locklin, 207 F. 2d 483, 488 (7th Cir. 1953); Biaett v. Phoenix Title & Trust Co., 70 Ariz. 164, 170, 217 P. 2d 923, 926-927 (1950); Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., 154 F. 2d 814, 817 (2d Cir. 1946) (dissenting opinion)

39. *See* State *ex rel.* Mack v. Scott, 235 S. W. 2d 106, 111 (Mo. App. 1950); see Howell, *Counterclaims and Cross-Complaints in California,* 10 So. Calif. L. Rev. 415, 454-458 (1937); 2 St. Louis U. L. J. 195, 197 (1952).

40. I would be the first to agree that it is nonsense to decide cases by labels, and that even a child will realize that there is no reason why a doctrine, such as res judicata, should have the same incidents when applied to counterclaims as it has had in other contexts. But until all judges and lawyers realize this, it is necessary to choose one's labels so that they may be properly used even by conceptualists.

41. 362 Mo. 919, 244 S. W. 2d 1001 (1951).

action should be dismissed with prejudice. Thereupon the court ordered dismissal. Seven weeks later Keller sued Keklikian for injuries from the same collision. The Missouri Supreme Court upheld a judgment on the pleadings for the defendant on the sole ground that Keller's claim was barred by his failure to plead it as a compulsory counterclaim in the first action.[42] If the effect of compulsion of counterclaims is analyzed in terms of the application of usual principles of res judicata, or of merger and bar, to an enlarged cause of action, the result seems inevitable. On this analysis the counterclaim statute is said to require that Keller's claim be regarded as a part of the cause of action on which Keklikian sued, and thus Keller's claim becomes merged in the judgment against Keklikian. And a consent judgment is as much entitled to be regarded as res judicata as is any other.[43] If, on the other hand, the Missouri court had thought here in terms of "waiver," as had an inferior Missouri court,[44] a different result might have been possible. By relying on authorities, to be discussed hereafter, that an insurance company is not the agent of its insured for purposes of binding him by a settlement,[45] it would have been easy for the court to say that Keller had never personally waived his claim and that the insurer cannot waive it for him.[46] Whether such leniency is desirable is, of course, a different question, and one which we will take up later.

There is actually no clear line of authority as to whether the penalties for failure to assert a compulsory counterclaim apply where the first action results in a consent or default judgment, a

42. The court did indicate that this result might have been avoided had Keller moved to have the first judgment set aside, or claimed that he failed to set up his counterclaim through "oversight, inadvertence, or excusable neglect," the language of the omitted counterclaim rule. *Id.* at 825, 244 S. W. 2d at 1004.

43. Restatement, Judgments § 47, comment *a* (1942); Note, *Collateral Estoppel By Judgment*, 52 Col. L. Rev. 647, 654, 657 (1952).

44. State *ex rel.* Mack v. Scott, 235 S. W. 2d 106, 111 (Mo. App. 1950).

45. Burnham v. Williams, 198 Mo. App. 18, 194 S. W. 751 (1917), and cases cited note 167 *infra*.

46. A student commentator says:

> "If the result of the *Keller* case seems harsh it should be remembered that the defendant had ample opportunity to counterclaim and had not availed himself of it and apparently had not indicated any intention of doing so. Moreover, he had by voluntary agreement accepted the defense of the attorneys for the insurance company."

2 St. Louis U. L. J. 195, 199 (1952). Both branches of the argument are unrealistic. Keller was foreclosed before the time allowed him to counterclaim had expired, even if it be assumed that he knew of his rights and duties under the circumstances. Nor had Keller "voluntarily" accepted the defense of the company's attorneys; as a part of the standard contract of insurance, he was compelled to be defended by them whether he liked it or not. At best he could name his own attorney to assist in the defense, but control of the defense would still remain with the company.

result which must be reached if the basis for compulsion is res judicata. The *Keller* case just discussed did reach such a result, as did the Montana court in considering the effect of a default judgment.[47] On the other hand, the Iowa rule is quite clear that only a "final judgment on the merits" can bar the defendant from bringing a second suit[48] and dicta from one federal district court points in the same direction.[49] The only other federal court to consider the question indicated that it believed a dismissal with prejudice of the first action should prevent the non-counterclaiming defendant from bringing a second suit, but in view of the lack of clear federal authority grounded its decision to this effect on state law.[50] The Note of the Federal Advisory Committee is neutral on this question.[51]

Neither can this problem be answered with absolute assurance by resort to principle. The purpose of compelling counterclaims which are related to the principal claim is to reduce the volume of litigation and promote the just, speedy, and inexpensive determination of controversies by barring relitigation of the same set of facts. This purpose can be achieved without applying the usual penalties where the initial suit has been terminated without a decision on its merits, for in this situation, by hypothesis, there has not yet been an actual determination of the facts and so an independent suit would not involve retrial of the same old issues. This reasoning would seem to indicate that the defendant who has failed to counterclaim should not be barred where the first suit has been stillborn. Nevertheless it would be a dangerous rule which would encourage litigants to withhold their counterclaims in the hope that their adversary's action might abort. The result of such a rule would be a flood of applications for leave to file the omitted counterclaim by those defendants who had miscalculated their opponent's intentions; if the court leniently granted such applications, the counterclaim would enter the case at an inconveniently late stage, when it would be likely to delay the proceedings, while if the court should be tough, defendant would have to pay the drastic penalty of losing his unlitigated claim. Since there can rarely, if ever, be any good justification for failure to plead the counterclaim at the outset of

47. Friedrichsen v. Cobb, 84 Mont. 238, 275 Pac. 267 (1929).
48. See note 34 *supra*.
49. *See* Douglas v. Wisconsin Alumni Research Foundation, 81 F. Supp. 167, 170 (N.D. Ill. 1948).
50. Schott v. Colonial Baking Co., 111 F. Supp. 13 (W.D. Ark. 1953).
51. "If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred." This leaves the question as to when a suit has "proceeded to judgment."

the action, the sounder view would seem to be that any termination of the first action without a counterclaim bars the counterclaim forever. But this problem can arise only in terms of the defendant who has failed to counterclaim and who subsequently seeks to bring his own action. Res judicata has never been a popular defense,[52] and courts are likely to be moved to compassion for the unfortunate claimant. If they do wish to strain the quality of mercy, as rational a way as any would be to say that compulsory counterclaim rules do not really involve res judicata at all, but turn instead on notions of waiver or of estoppel, and that the first action was ended before defendant had actually waived his claim.

The examples thus far considered have been of claims being barred by virtue of the compulsory counterclaim rule. Indeed critics of such a rule are accustomed to present it in terms of the deserving widow, a horde of hungry orphans clutching at her tattered shawl, who is euchred out of her just claim against the scheming banker because of her inexperienced lawyer's failure to plead a compulsory counterclaim. The image lacks some elements of realism.

Considering the great number of jurisdictions which compel counterclaims, it is remarkable that there have been so few cases in which a party has actually been found to be barred because of his failure to plead his claim as a counterclaim in a prior action.[53] The reason is obvious: jurisdictions which make some counter-

52. "The defense of res judicata is universally respected, but actually not very well liked." Clark, J., dissenting in Riordan v. Ferguson, 147 F. 2d 983, 988 (2d Cir. 1945).

53. The following are the only cases which have been found in a study which has covered every case decided under compulsory counterclaim rules modelled after the Federal Rule, or under the Arkansas statute, and most of the important cases under statutes following the California model: Schott v. Colonial Baking Co., 111 F. Supp. 13 (W.D. Ark. 1953); Shrieves v. Yarborough, 220 Ark. 256, 247 S. W. 2d 193 (1952); Corey v. The Mercantile Ins. Co. of America, 207 Ark 284, 180 S. W. 2d 570 (1944); Brunswick Drug Co. v. Springer, 55 Cal. App. 2d 444, 130 P. 2d 758 (1942); Newton v. Mitchell, 42 So. 2d 53 (Fla. 1949); Brinkmann v. Common School Dist. No. 27, 255 S. W. 2d 770 (Mo. 1953); Keller v. Keklikian, 362 Mo. 919, 244 S. W. 2d 1001 (1951); Jocie Motor Lines, Inc. v. Johnson, 231 N. C. 367, 57 S. E. 2d 388 (1950); Friedrichsen v. Cobb, 84 Mont. 238, 275 Pac. 267 (1929); Jeremy Fuel & Grain Co. v. Mellen, 50 Utah 49, 165 Pac. 791 (1917).

In the following cases a bar was found, but only as to a small part of the claim: Biaett v. Phoenix Title & Trust Co., 70 Ariz. 164, 217 P. 2d 923 (1950) (counsel fees); Lewis v. Webb, 208 Ark. 1084, 189 S. W. 2d 376 (1945) (item of $100 in controversy over title to real estate); Slim Olson, Inc. v. Winegar, 246 P. 2d 608 (Utah 1952) (item of $11.60 in controversy over much larger sum).

In the following three cases, though the bar is apparently grounded on the compulsory counterclaim rule in truth the party barred had lost the first action and would be barred in any event by collateral estoppel: Snyder v. Betsch, 59 Ariz. 535, 130 P. 2d 510 (1942); Morgan v. Rankin, 197 Ark. 119, 122 S. W. 2d 555 (1938); Hayden v. Yelton, 237 S. W. 2d 249 (Mo. App. 1951).

claims compulsory almost invariably provide that any other counterclaim, not compulsory, may be pleaded; thus the careful attorney can and will plead all his client's claims as counterclaims if there is any reason at all to think that they may be compulsory. By far the great bulk of cases deciding whether a particular claim is compulsory are cases in which the claim has actually been pleaded, and the determination of whether it is compulsory is necessary only because of the consequences that decision may have on questions of jurisdiction,[54] venue,[55] jury trial,[56] right to remove to another court,[57] or appealability.[58] And there are, too, some cases in which the counterclaim has not been pleaded but in which the question arises on a motion to stay the independent action on what should be a counterclaim;[59] in such cases it is not too late for the erring

54. The authoritative rule in the federal courts, which have a limited jurisdiction, is that a compulsory counterclaim needs no independent grounds for jurisdiction, whereas a permissive counterclaim must stand on its own feet with regard to jurisdiction. Moore v. New York Cotton Exchange, 270 U. S. 593 (1926); 3 Moore, Federal Practice ¶ 13.15 (2d ed. 1948). It has, however, been argued recently, in quite a stimulating way, that even permissive counterclaims require no independent jurisdictional grounds. Green, *Federal Jurisdiction over Counterclaims,* 48 Nw. U. L. Rev. 271, 282-285 (1953).

55. Thus defendant may be held to have waived an improper venue by filing a permissive counterclaim, though not by filing a compulsory counterclaim. *Cf.* Baltimore & O. R. R. v. Thompson, 80 F. Supp. 570 (E.D. Mo. 1948).

56. Those states which have held that a defendant waives trial by jury by pleading a "legal" counterclaim in an "equitable" action, *e.g.,* Behrens v. Kruse, 121 Minn. 28, 140 N. W. 118 (1913), surely cannot apply that rule to compulsory counterclaims, Lisle Mills, Inc. v. Arkay Infants Wear, Inc., 90 F. Supp. 676 (E.D. N.Y. 1950), though that precise question was left open in Johnson v. Neel, 123 Colo. 389, 229 P. 2d 945 (1951). In truth the original rule of waiver was at variance with the general policy of code pleading and should now be repudiated. Clark, Code Pleading 120-122 (2d ed. 1947); 5 Moore, Federal Practice ¶ 38.14 (2d ed. 1951).

57. A defendant whose counterclaim in state court was compulsory there has not submitted himself to the jurisdiction of the court so as to waive his right to remove to federal court. Lange v. Chicago, R. I. & P. R. R., 99 F. Supp. 1 (S.D. Iowa 1951); Wheatley v. Martin, 62 F. Supp. 109 (W.D. Ark. 1945). Under some state practices an action in which a counterclaim is inserted in excess of the jurisdiction of the court is to be transferred to a court with jurisdiction if the counterclaim was compulsory but not if it was permissive. Metropolitan Cas. Ins. Co. of N. Y. v. Walker, 151 Fla. 314, 9 So. 2d 361 (1942).

58. Under the original form of Fed. R. Civ. P. 54(b), since changed by amendment, the court could enter final judgment on plaintiff's claim, and an immediate appeal could be taken, though a permissive counterclaim was still pending, but could not do so if the counterclaim were compulsory. *E.g.,* Nachtman v. Crucible Steel Co. of America, 165 F. 2d 997 (3d Cir. 1948); Parmalee v. Chicago Eye Shield Co., 157 F. 2d 582 (8th Cir. 1946).

59. *E.g.,* Coates v. Ellis, 61 A. 2d 28 (D.C. Mun. App. 1948); Engleman v. Superior Court, 105 Cal. App. 754, 288 Pac. 723 (1930); Holmquist v. Williams, 4th Dist. Minn., April 30, 1953, discussed 37 Minn. L. Rev. 638. A writ of prohibition was granted to restrain an inferior court from trying an action which should have been a compulsory counterclaim in another action in State *ex rel.* Mack v. Scott, 235 S. W. 2d 106 (Mo. App. 1950).

pleader to seek to have the suits consolidated[60] or to ask leave to plead his claim as an omitted counterclaim. Federal Rule 13(f), and its counterparts in the other modern pleading systems, give the court authority to allow the pleading of a counterclaim which has been omitted from the answer because of "oversight, inadvertence, excusable neglect, or when justice requires" and this has been given a liberal application. Only the defendant who has patently been playing dog in the manger is likely to be denied leave to file his counterclaim where the claim is compulsory.[61] It would even seem to be possible, in a deserving case, to reopen the judgment, under Federal Rule 60(b) and its equivalents in other modern pleading jurisdictions, and thus allow pleading of the omitted compulsory counterclaim though the first action has been terminated.[62]

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60. Though upon such a consolidation the action which should have been pleaded as a counterclaim originally will be treated for all purposes as a counterclaim. Dubler v. Gilbert, 10 F. R. D. 530 (S.D. N.Y. 1950); *cf.* Parker Rust Proof Co. v. Detrex Corp., 14 F. R. D. 173 (E.D. Mich. 1953).

61. Courts generally have shown a proper liberality in allowing the pleading of omitted counterclaims, and frequently the fact that the counterclaim is compulsory has been regarded as reason enough by itself to allow its pleading. Yankee Lines, Inc. v. Darling & Co., 13 Fed. Rules Serv. 13f.12, case 2 (N.D. Ohio 1950); Manhattan Fireproofing Co., Inc. v. Vermilya-Brown, Inc., 13 Fed. Rules Serv. 13f.12, case 1 (S.D. N.Y. 1949) (leave granted despite unexplained delay of one year); Gallahar v. George A. Rheman Co., 50 F. Supp. 655 (S.D. Ga. 1943); *cf.* Smith Contracting Corp. v. Trojan Construction Co., Inc., 192 F. 2d 234 (10th Cir. 1951) (leave should have been granted though motion not made until trial had begun); Safeway Trails, Inc. v. Allentown & Reading Transit Co., 185 F. 2d 918 (4th Cir. 1950) (leave properly granted where excuse was that defendant's lawyer had never read Federal Rules!); Dazian's, Inc. v. Switzer Brothers, Inc., 14 F. R. D. 24 (N.D. Ohio 1953); Singer Mfg. Co. v. Shepard, 13 F. R. D. 509 (S.D. N.Y. 1952) (leave granted to plead counterclaim omitted for 2½ years through inexcusable neglect); 3 Moore, Federal Practice ¶ 13.33 (2d ed. 1948).

Leave to file an omitted compulsory counterclaim was refused in Snyder v. Betsch, 59 Ariz. 535, 130 P. 2d 510 (1942), where final judgment had already been entered, and the counterclaim set up the substance of a defense already held not good, and in Meyercheck v. Givens, 186 F. 2d 85 (7th Cir. 1950), where leave to file the counterclaim was asked as the court was drawing judgment pursuant to a mandate from the appellate court, and defendant had pending in the state court an action for the same grievance. And in the following two cases the counterclaim not allowed to be pleaded was probably compulsory, though the court does not say so: Brown-Vintners Co., Inc. v. National Distillers Products Corp., 19 Fed. Rules Serv. 13f.12, case 1 (S.D. N.Y. 1953), where the decision was based on the lack of factual support for the counterclaim; and Newman v. Nursery Plastics, Inc., 15 Fed. Rules Serv. 13f.12, case 2 (S.D. N.Y. 1951). Finally there are two other cases in which leave to file a counterclaim was denied, but in both these cases there is no way to determine whether the counterclaim was compulsory or permissive, and there were good reasons for refusing to allow its assertion: Shepherd v. Wommack, 257 S. W. 2d 172 (Mo. App. 1953); Union National Bank of Youngstown v. Universal-Cyclops Steel Corp., 103 F. Supp. 719 (W.D. Pa. 1952).

62. There seems to be no definite authority on this point. The failure of Keller to ask to have the judgment reopened so that he might plead his counterclaim was counted against him by the Missouri Supreme Court in

The nature of the bar against subsequent suit on the unpleaded compulsory counterclaim is relevant, also, in answering a question of great practical importance: does failure to plead a counterclaim which is compulsory in the jurisdiction where the first suit is tried prevent the pleader from bringing an independent action on his claim in some other jurisdiction that does not recognize compulsory counterclaims. At an Institute on the Federal Rules in 1938, this question was put to the Reporter of the Committee which drafted those Rules, Judge Charles E. Clark. His answer was:

> "I don't suppose that we could govern that finally. I think the answer would be that it should. I don't know what the legal ruling is likely to be. I should think very likely a state court would so rule, but I am not at all sure how it would work out."[63]

Doubt on this point was heightened when the first two state courts to pass on the problem managed to find means of avoiding the penalty and allowing the second suit, though neither court faced up squarely to "the general question of the power of Federal courts by rules for the regulation of their own practice to preclude a party sued in a Federal court from resorting to a State court to establish his own claim."[64] And an early federal decision had held, quite properly, that the federal courts may not enjoin prosecution in the state courts of a suit which would be barred in federal court.[65]

If the compulsory counterclaim rules are mere rules of procedure, then, according to well-understood principles of conflicts of

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Keller v. Keklikian, 362 Mo. 919, 244 S. W. 2d 1001 (1951). On the other hand, a complaint asking, in part, that plaintiffs be relieved, under the Arizona equivalent of Fed. R. Civ. P. 60(b), from any penalty for failure to plead a counterclaim in an earlier suit was held properly dismissed in Snyder v. Betsch, 59 Ariz. 535, 130 P. 2d 510 (1942), though the decision can be explained, as in note 61 *supra*, on other grounds. But the language of Fed. R. Civ. P. 60(b)(1) lists as a ground for reopening a judgment the very same factors of "inadvertence" and "excusable neglect" which are grounds, under Fed. R. Civ. P. 13(f), for allowing an omitted counterclaim.

63. Proceedings of Cleveland Institute on the Federal Rules of Civil Procedure 248 (A.B.A. 1938).

64. Campbell v. Ashler, 320 Mass. 475, 480, 70 N. E. 2d 302, 305 (1946), criticized 15 U. of Chi. L. Rev. 446 (1948); Detroit, T. & I. R. R. v. Pitzer, 42 Ohio L. Abs. 494, 61 N. E. 2d 93 (1943). The tone of the *Campbell* case implied that, if forced to it, the court would not enforce the federal counterclaim rule, while in the *Pitzer* case there is dicta that if a proper case were before it, the court would refuse to entertain a suit by a party who should have counterclaimed in federal court. *Id.* at 497, 61 N. E. 2d at 95. Perhaps it is not mere coincidence that the distinction relied upon by the court in the *Campbell* case to find the counterclaim not compulsory was unsound—compare Morgan v. Rankin, 197 Ark. 119, 122 S. W. 2d 555 (1938), and discussion pp. 451-453 *infra*—while the reason the counterclaim in the *Pitzer* case was found not compulsory is quite sound. Diggs v. Kansas City Southern Ry., 207 Ark. 111, 179 S. W. 2d 860 (1944); and authorities cited note 106 *infra*.

65. Red Top Trucking Corp. v. Seaboard Freight Lines, Inc., 35 F. Supp. 740 (S.D. N.Y. 1940).

laws, they should have no extra-territorial effect. But if these rules define the scope of the cause of action to which res judicata will apply, or if they create a conclusive presumption of waiver against the defendant who does not counterclaim, then such a defendant should be barred no matter where he attempts to sue. The effect of a judgment as res judicata is "substantive" and other jurisdictions, under the full-faith-and-credit doctrine, must regard it as being as broad and conclusive as it would be in the jurisdiction in which it was rendered.[66] So too, if a party waives a claim which he has, or so conducts himself as to erect an estoppel against prosecution of his claim, his waiver or the estoppel are personal to him and may be asserted against him no matter where he sues.

These principles now have the weight of authority behind them, for two later state court cases have held a claim barred for failure to plead it as a counterclaim in a federal action.[67] Can a neater example be imagined of the impossibility of sensible distinctions between "substance" and "procedure"? Compulsory counterclaim provisions are enacted as a regulation of "procedure," and indeed if, as in most jurisdictions, they have been made by rule of court, they are valid only as a regulation of "procedure" which must leave rights of "substance" unimpaired.[68] Yet their effects are held to be extra-territorial on the explicit ground that these effects are "substantive"!

We have examined now the mechanism by which a penalty is exacted for failure to plead a compulsory counterclaim. It is next necessary to see which counterclaims are compulsory.

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66. Restatement, Judgments § 47, comment *c* (1942); *Failure to Plead Federal Compulsory Counterclaim As Bar to State Suit*, 15 U. of Chi. L. Rev. 446 (1948). For examples of this thesis, consult Schott v. Colonial Baking Co., 111 F. Supp. 13 (W.D. Ark. 1953); A. B. C. Truck Lines, Inc. v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946); Liberty Mutual Ins. Co. v. Hathaway Baking Co., 306 Mass. 428, 28 N. E. 2d 425 (1940); Mitchell v. Federal Intermediate Credit Bank of Columbus, 165 S. C. 457, 164 S. E. 136 (1932).

67. Jocie Motor Lines, Inc. v. Johnson, 231 N. C. 367, 57 S. E. 2d 388 (1950); Conrad v. West, 98 Cal. App. 2d 116, 219 P. 2d 477 (1950). See also the bewildering case of Grodsky v. Sipe, 30 F. Supp. 656 (E.D. Ill. 1940), where the court held that a claim could be sued on in federal court even though it might have been the subject of a counterclaim in a prior Illinois action. Such a result would be sound enough, but the case cannot be regarded as authority for it, since the claim would not have been a counterclaim at all, in Illinois or elsewhere, but only a cross-claim, and cross-claims are never made compulsory by rule. This failure to distinguish between counterclaims and cross-claims is not uncommon. Thus in Greenspan v. Green, 255 S. W. 2d 917 (Tex. Civ. App. 1953) there is the remarkable pronouncement that claims by one defendant tortfeasor against another for contribution are "permissive rather than compulsory counterclaims!"

68. *E.g.*, 48 Stat. 1064 (1934), 28 U. S. C. § 2072 (Supp. 1952); Minn. Stat. § 480.051 (1953).

WHICH COUNTERCLAIMS ARE COMPULSORY?

In Arkansas every claim that the defendants, or any of them, have against the plaintiffs, or any of them, is a compulsory counterclaim.[69] Thus Arkansas pleaders are faced with no hard decisions in determining whether a particular claim must be pleaded. In the other jurisdictions with compulsory counterclaim rules or statutes, the problem is not so easy, for the class of counterclaims which are compulsory is delimited by terms which have no fixed meaning. In the modern pleading jurisdictions, except for Minnesota, a claim is compulsory—subject to specific exceptions which need not concern us—"if it arises out of the *transaction or occurrence* that is the subject matter of the opposing party's claim."[70] In Minnesota, California, and Idaho those claims are compulsory which arise "out of the *transaction*" that is the subject matter, or the foundation, of the opposing party's claim,[71] and Montana is not significantly different.[72] To determine, then, which counterclaims are compulsory, it is necessary to know what is meant by the concept "transaction or occurrence" or the concept "transaction."

"Transaction or occurrence"

Courts and commentators have, quite sensibly, refrained from any very serious attempts at definition of the phrase "transaction or occurrence." The wisdom of this course is evidenced by the one pure definition which can be found:

> "It seems apt to say that the words 'transaction' and 'occurrence' as used in Rule 13a include the facts and circumstances out of which a cause of action may arise. * * * The words 'transaction' and 'occurrence' probably mean, whatever may be done by one person which affects another's rights and out of which a cause of action may arise."[73]

This definition is probably sound enough, but it shows the futility of all definitions: after studying the definition we have no more idea whether a particular counterclaim is compulsory than we had before we started. Thus it is that most courts, rather than try to define the terms of the rule, have preferred instead to suggest tests by which the compulsory or permissive nature of a specific counter-

69. See p. 427 *supra.*
70. See pp. 424-425 *supra.*
71. See pp. 425-426 *supra.*
72. Though the Montana statute refers to "contract or transaction," note 20 *supra,* the broad reading given the word "transaction" by the Montana court has made other niceties of language of no importance. See Mason, *Counterclaim in Montana,* 3 Mont. L. Rev. 33 (1942), and especially p. 62 thereof.
73. Williams v. Robinson, 3 Fed. Rules Serv. 13a.11, case 1 (D.D.C. 1940).

claim can be determined. Four such tests have been suggested by different courts:

1. Will substantially the same evidence support or refute both the plaintiff's claim and the counterclaim?[74]
2. Are the issues of fact and law on the claim and counterclaim largely the same?[75]
3. Would res judicata bar a subsequent suit on the defendant's claim absent the compulsory counterclaim rule?[76]
4. Is there any logical relation between the plaintiff's claim and the counterclaim?[77]

In each instance an affirmative answer to the question posed would mean that the counterclaim is compulsory.

The second of these tests, identity of issues, is plainly unsound. The defendant ought to be able to determine before answering whether his claim must be pleaded as a counterclaim, yet no one can know what the issues will be at best until after the plaintiff has replied to the counterclaim, and more likely, not until the pre-trial conference. And this test would require discarding many authoritative decisions as wrongly decided; indeed in the leading case on compulsory counterclaims, *Moore v. New York Cotton Exchange*,[78] the issue on plaintiff's claim was whether defendants were violating the anti-trust laws by refusing to give him ticker service, while the issue on the counterclaim was whether plaintiff was purloining

74. *Ibid;* Kuster Laboratories, Inc. v. Lee, 10 F. R. D. 350, 351 (N.D. Cal. 1950); American Samac Corp. v. Florian, 9 F. R. D. 718, 719 (D. Conn. 1949) (alternative holding); *cf.* Hoosier Cas. Co. v. Fox, 102 F. Supp. 214, 227 (N.D. Iowa 1952) (similar test for "transaction or occurrence" in cross-claim rule).

75. *See* Nachtman v. Crucible Steel Co. of America, 165 F. 2d 997, 999 (3d Cir. 1948).

76. "Everyone agrees, too, that, if a counterclaim is not 'compulsory,' it is permissive and that the following is the acid test in distinguishing the two: If a defendant fails to set up a 'compulsory' counterclaim, he cannot in a later suit assert it against the plaintiff, since it is barred by *res judicata;* but if it is 'permissive,' then it is not thus barred. To put it differently, if a counterclaim is the kind not thus barred, it is 'permissive.'" Frank, J., dissenting in Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., 154 F. 2d 814, 817 (2d Cir. 1946); Big Cola Corp. v. World Bottling Co., 134 F. 2d 718 (6th Cir. 1943). This test was also used as an alternative ground for decision in American Samac Corp. v. Florian, 9 F. R. D. 718, 719 (D. Conn. 1949). It should be noted, more in sorrow than in anger, that a great court has recently claimed to have found a counterclaim which is neither compulsory nor permissive. Switzer Brothers, Inc. v. Locklin, 207 F. 2d 483, 487 (7th Cir. 1953). There ain't no such animal.

77. "If there be one compelling test of compulsoriness, it seems clearly to be that of the logical relationship of all claims in any given litigation." Rosenthal v. Fowler, 12 F. R. D. 388, 391 (S.D. N.Y. 1952). *E.g.,* Moore v. New York Cotton Exchange, 270 U. S. 593, 610 (1926); Lesnik v. Public Industrials Corp., 144 F. 2d 968, 975 (2d Cir. 1944); Douglas v. Wisconsin Alumni Research Foundation, 81 F. Supp. 167, 170 (N.D. Ill. 1948); 3 Moore, Federal Practice ¶ 13.13 (2d ed. 1948).

78. 270 U. S. 593 (1926).

quotations from defendant's exchange and using them for a "bucket shop" operation. Yet the counterclaim was held to be compulsory.

Nor is the third test, that the counterclaim is compulsory if it would be barred by res judicata absent the compulsory rule, an apt one, even though when it was propounded it was said that "everyone agrees" that it is "the acid test" in distinguishing compulsory from permissive counterclaims.[79] If this is "the acid test," then the compulsory counterclaim rules are not the important advance in judicial administration which their backers have supposed, but are merely a declaration, for the convenience of the pleader, of what has always been the rule. But the authoritative doctrine is that a pleader is never barred from suing independently on a claim which he refrained from pleading as a counterclaim in a prior action.[80] If this test is correct, then practically every decision which has held a particular counterclaim to be compulsory is erroneous.

The first test, substantial identity of evidence, is appropriate enough if it is used with caution. It is hard to imagine a case where such an identity exists in which the counterclaim should not be held to be compulsory; indeed the purpose of compelling counterclaims, to prevent relitigation of the same set of facts, requires that the counterclaim be held compulsory where it does turn on the same evidence as plaintiff's claim. But the converse proposition is not equally obvious. The authorities have been clear that a counterclaim is compulsory where it arises from the same events as does plaintiff's claim, even though the evidence needed to prove the opposing claims may be greatly different. In the very simplest situation, a suit to void an insurance policy for fraud with a counterclaim for the amount of the loss, the evidence of fraud is likely to be entirely different from the evidence as to the loss and amount, yet there can be no sound reason why two suits should be needed, or permitted, to settle this one controversy between the parties.[81] Examples can easily be multiplied: in an action by one railroad against another for an accounting on shipments from east to west on which defendant was the settling carrier, a counterclaim for an accounting on different shipments from west to east which passed over defendant's lines;[82] in an action for earned freight, counter-

79. Note 76 *supra.*

80. Restatement, Judgments § 58 (1942). That this doctrine is not everywhere accepted, see cases cited note 174 *infra,* and text thereto. And everyone agrees that the independent action will be barred if the matter relied on for the claim has been used defensively in the earlier action. Note 175 *infra.*

81. Such a counterclaim was held compulsory in Mercury Insurance Co. v. Verea, 12 Fed. Rules Serv. 13a.11, case 2 (S.D. N.Y. 1949).

82. As in Baltimore & O. R. R. v. Thompson, 80 F. Supp. 570 (E.D. Mo. 1948).

claims for cargo damage, demurrage, and expenses due to unseaworthiness of the vessel;[83] in an action to compel issuance of a patent, a counterclaim for an injunction restraining plaintiff from exercising his rights under certain other patents in the same field which he had obtained on the basis of confidential information procured from defendant;[84] in an action for damages for negligent installation of a piece of equipment, a counterclaim for the value of certain parts used in the installation.[85] All of these counterclaims were held to be compulsory though they must be proved by evidence different from that needed by plaintiff to prove his claim.

By this process of elimination we are left with the test originally propounded by the United States Supreme Court and now championed by Professor Moore. Subject to the specific exceptions of the counterclaim rule,

> "any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim; only claims that are unrelated or are related, but within the exceptions, need not be pleaded."[86]

The proposed test can be best understood by looking to the cases. In an action for the proceeds of a note which defendant has collected for plaintiff, a counterclaim for an unpaid balance on the purchase of some goods is not compulsory where, so far as appears, the note had nothing to do with the goods.[87] A counterclaim charging fraud, violence, and boycott in violation of the anti-trust laws is not compulsory where the opposing party's claim is for damages for the prior erroneous issue of an injunction, since vacated, against it.[88] In an action to declare a patent invalid and not infringed, a counterclaim seeking transfer to defendant of a different patent issued to plaintiff as transferee of the inventor is not compulsory.[89] A counterclaim for taxes improperly collected in 1943 is not compulsory in an action to recover unpaid taxes for 1941 and 1942.[90] In all of these cases it is probable that the claim

83. As in Eastern Transportation Co. v. United States, 159 F. 2d 349 (2d Cir. 1947).
84. As in Nachtman v. Crucible Steel Co. of America, 165 F. 2d 997 (3d Cir. 1948).
85. As in Slim Olson, Inc. v. Winegar, 246 P. 2d 608 (Utah 1952).
86. 3 Moore, Federal Practice, ¶ 13.13 (2d ed. 1948).
87. Kaufman v. Cooper, 39 Mont. 146, 101 Pac. 969 (1909).
88. Donnelly Garment Co. v. International Ladies' Garment Workers Union, 47 F. Supp. 67 (W.D. Mo. 1942).
89. Measurements Corp. v. Ferris Instrument Corp., 159 F. 2d 590 (3d Cir. 1947); *cf.* Clair v. Kastar, Inc., 138 F. 2d 828 (2d Cir. 1943).
90. Louisville Trust Co. v. Glenn, 66 F. Supp. 872 (W.D. Ky. 1946). In Robinson Bros. & Co. v. Tygart Steel Products Co., 9 F. R. D. 468 (W.D. Pa. 1949), a vendee was suing for non-delivery of part of an order dated Jan. 8th. A counterclaim for failure to pay part of an amount due on a sepa-

and counterclaim were entirely unrelated, and that the decisions that the counterclaims were not compulsory were sound. But if there were any logical relationship of any kind, the opposite result should have been reached.

It cannot, of course, be contended that the test of "logical relationship" here advocated will reconcile all the cases. Judges, like other mortals, make mistakes—and they do so in matters of procedure more often than elsewhere.[91] But the very fewness of cases, and these from inferior courts, where counterclaims which meet the test of logical relation have been held not compulsory is itself instructive.[92] Indeed the only really troublesome case is a United States Supreme Court decision in which the Court interjected a casual dictum that a claim for misuse of a patent in violation of the anti-trust laws is only a permissive counterclaim in an action for infringement of the patent.[93] The Court could have reached the same result quite simply, since the company now sought to be barred had not been a party to the prior suit, and thus could not possibly have run afoul of the compulsory counterclaim rule.[94] The dictum is squarely opposed to an earlier holding by the Ninth Circuit,[95] and the senselessness of saying that such a counterclaim is only permissive has been persuasively set forth by a district judge in a later decision, in which, however, he felt bound by what the

rate contract dated Jan. 26th was held not to be compulsory. The soundness of this decision is not obvious, though on the scanty facts stated it is hard to be sure.

91. This phenomenon is a result of what may be called "procedural particularism": "the resort to a rule of procedure, often subconsciously created or inflated for the occasion, as a short cut to doing justice in a particular case." Clark, Code Pleading 71 (2d ed. 1947).

92. Big Cola Corp. v. World Bottling Co., 134 F. 2d 718 (6th Cir. 1943), held that in an action to declare a contract void, any claim which the defendant might have had to recover on an implied contract for work done and expenditures made was at most a permissive counterclaim. Moore comments succinctly, "This holding is unsound." 3 Moore, Federal Practice ¶ 13.13 n. 18 (2d ed. 1948). Unsound, also, are the holdings in: Kuster Laboratories, Inc. v. Lee, 10 F. R. D. 350 (N.D. Cal. 1950) (counterclaim for breach of an agreement permitting defendant to distribute plaintiff's products under plaintiff's label not compulsory in action for infringement of plaintiff's label); Marks v. Spitz, 8 Fed. Rules Serv. 13.62, case 1 (D. Mass. 1945) (counterclaim for damage to rented premises not compulsory in suit for overcharge of rent); and Williams v. Robinson, 3 Fed. Rules Serv. 13a.11, case 1 (D.D.C. 1940) (counterclaim for libelous accusation that person was an adulterer not compulsory in suit for divorce on grounds of adultery in which said person was named as co-respondent). The result in the case last cited is justifiable, note 104 *infra*, but the finding of more than one "transaction or occurrence" is not.

93. *See* Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661, 671 (1944).

94. See the acute criticism to this effect at 3 Moore, Federal Practice ¶ 13.12 n. 4 (1952 Cum. Supp.).

95. Hancock Oil Co. v. Universal Oil Products Co., 115 F. 2d 45 (9th Cir. 1940).

Supreme Court had said.[96] Perhaps the only moral is that the greater the judge, the less likely that he will trouble to answer correctly a question of "mere procedure."[97]

Some may think, from the examples which have been discussed, that the "logical relationship" test is too broad, and that it will compel defendant to plead his counterclaims under circumstances where two actions would be every bit as satisfactory. Probably it will. But is there any harm in that? The judge has ample power to order a separate trial if this seems the wiser course.[98] In the absence of any showing that a defendant is ever harmed by pleading his claim—and it is my judgment that the literature contains no

96. Douglas v. Wisconsin Alumni Research Foundation, 81 F. Supp. 167, 170 (N.D. Ill. 1948): "A consideration of the nature of a compulsory counterclaim would appear to indicate certain inherent weaknesses in the rationale of the Mercoid decision. A compulsory counterclaim, by definition, is one that 'arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.' In an action for patent infringement, the subject matter is the patent, its use, and its infringement. And since it is recognized as a valid affirmative defense, misuse by the patentee must also be included as a necessary ingredient of the subject matter. It is logically related to, and intimately interwoven with, the other elements so as to render it indispensable to the whole. Nor does the mere fact that a separate right of action is granted by statute for misuse by the patentee, alter its character. * * * Although this court may not concur with the conclusion reached by the Supreme Court, it is, nevertheless, bound by the rule declared therein. The statement contained in the Mercoid case that 'The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment res judicata as respects it,' appears almost too casually interjected; but its presence still results in the establishment of a rule of law. Apparently, it was the intention of the Supreme Court to remove this particular type of counterclaim from the dictates of Rule 13(a) in the interest of public policy." Moore has pointed out that if the *Mercoid* case had been correctly analyzed, the statement about the counterclaim would have been seen to be a gratuitous dictum, and thus the case could have been distinguished in the *Douglas* case, just quoted from, where the plaintiff had in fact been a party to the prior suit. See note 94 *supra* and text thereto.

97. "A real difficulty with our subject is that it is thought beneath the notice of those whose gaze is fixed on justice alone, but who nevertheless may stumble without ever seeing the lowly obstruction at their feet." Clark, Code Pleading 71 (2d ed. 1947). The classic example of a very great judge whose procedural opinions were nonsensical is Justice Brandeis. *E.g.*, Willing v. Chicago Auditorium Assn., 277 U. S. 274 (1928), and—for the manner of decision rather than the result—Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938).

98. Fed. R. Civ. P. 42(b), Tex. R. Civ. P. 174(b), and equivalent rules in other modern pleading jurisdictions. The holding in Ulmer v. Mackey, 242 S. W. 2d 679 (Tex. Civ. App. 1951, error ref'd) that the trial court committed reversible error in granting a separate trial as to the counterclaim may be correct, since if, as is said by the reviewing court, the claim and counterclaim turned on "identical facts and issues," the grant of a separate trial might well have been an abuse of discretion. But the stated ground for decision, that the trial court lacks power to grant separate trial as to a compulsory counterclaim, reads a limitation into the rule on separate trials which it does not contain and should not contain. That the trial court does have such power was held, in an opinion which is a masterpiece of judicial confusion, in Leon v. Noble, 234 S. W. 2d 454 (Tex. Civ. App. 1950).

such showing—the sound policy is to require the pleading of defendant's claims whenever there is any possibility that it may be advantageous to have them tried with plaintiff's claim. Then the determination of whether there should be separate trials can be made shortly before trial, when it is possible to gauge more accurately what issues are contested, rather than at the outset of the action. And this determination will be made, too, by the judge, who presumably is more likely than the defendant to ground his decision entirely on considerations of sound judicial administration.

There are some judge-made exceptions to the broad scope of compulsory counterclaims thus outlined. On grounds of a public policy in having certain special types of proceedings decided swiftly, and without becoming ensnarled with counterclaims, various courts have prohibited counterclaims in replevin actions,[99] or in actions under the Informers' Act,[100] or in forcible detainer actions.[101] And there has been a variance of view as to whether a counterclaim, otherwise compulsory, must be pleaded where it is a type claim which is usually required to be asserted in an independent action.[102] All such decisions as these add to the confusion of

99. Seven Seas Frozen Products, Inc. v. Fast Frozen Foods, Inc., 43 So. 2d 181 (Fla. 1949), relying on a statute prohibiting the joining of replevin or ejectment with any other action, though one would think the statute had been repealed *pro tanto* by the all-inclusive language of the counterclaim statute. A counterclaim was allowed in a replevin action in McCluskey v. DeLong, 239 Mo. App. 1026, 198 S. W. 2d 673 (1946). Iowa has a statute expressly prohibiting counterclaims in replevin actions, Iowa Code § 643.2 (1950), and the court there has carried the statute to absurd lengths. Holoman v. Marsh, 116 Iowa 483, 94 N. W. 82 (1902). Whether the counterclaim rule in Iowa has superseded the statute has not been decided; it should be held that it has.

100. United States *ex rel.* Rodriguez v. Weekly Publications, Inc., 74 F. Supp. 763 (S.D. N.Y. 1947).

101. Hinton v. Hotchkiss, 65 Ariz. 110, 174 P. 2d 749 (1946). This case distinguishes Snyder v. Betsch, 59 Ariz. 535, 130 P. 2d 510 (1942), where a statutory prohibition against counterclaims in possessory actions was held superseded by the counterclaim rules, on the ground that that case, and the similar case of Keystone Copper Mining Co. v. Miller, 63 Ariz. 544, 164 P. 2d 603 (1945), involved common law actions for the possession of land, while forcible detainer is a purely statutory action. And the court said: "To hold that the forcible entry and detainer statutes have been superseded would preclude a speedy determination of a landlord's claim to possession." Hinton v. Hotchkiss, *supra* at 116, 174 P. 2d at 754.

102. *Compare* Jewish Consumptives Relief Society v. Rothfeld, 13 Fed. Rules Serv. 13.211, case 1 (S.D. N.Y. 1949) (action to test title to office is a special proceeding and may not be raised by counterclaim), *with* John R. Alley & Co. v. Federal National Bank of Shawnee, 124 F. 2d 995 (10th Cir. 1942) (counterclaim for usury proper though usury statute provides that right granted thereunder must be asserted in an independent action). See also State *ex rel.* Fawkes v. Bland, 357 Mo. 634, 210 S. W. 2d 31 (1948), holding that a wife's claim for separate maintenance is a compulsory counterclaim in a divorce action, though this destroys wife's previous option merely to defend against a divorce petition without pleading or forfeiting her right to separate maintenance, and Stockman v. McKee, 6 Ter. 275, 71 A. 2d 876 (Del. Super. 1950), holding that compulsory counterclaims must be pleaded in mechanic's

the lawyer in understanding an essentially simple rule. And they would not be necessary if the courts would remember that the counterclaim rule affects only the pleadings; whatever advantages there may be in independent actions can be retained through the power of the courts to order separate trials, and, if need be, to enter a final judgment on the plaintiff's claim before proceeding to consider the counterclaim.[103] Here, as elsewhere, it is dangerous to push to the pleading stage a question which properly has to do only with the method of trial if the action should be the rare one which actually proceeds that far.

Another important exception to compulsion, not stated in the rules, is that the defendant need not—and indeed may not—insert a claim which is based on the wrongful act of the plaintiff in bringing the instant suit.[104] This now seems so well settled in the cases that it may be fruitless to express hesitation about its soundness. It does seem that prohibiting counterclaims here will mean a second trial of what are likely to be the very same facts, but perhaps the dangerous potentialities of counterclaims for malicious prosecution as a defensive strategem justify the rule. In any event the rule can

lien proceedings, but that permissive counterclaims may not be pleaded, as to allow them would alter the substantial statutory right of not having independent matters, on which a personal judgment might be based, entered in mechanic's lien actions.

103. Fed. R. Civ. P. 54(b) and equivalent state rules. 3 Moore, Federal Practice ¶ 13.17 (2d ed. 1948).

104. Malicious prosecution: Park Bridge Corp. v. Elias, 3 F. R. D. 94 (S.D. N.Y. 1943); Goodyear Tire & Rubber Co. v. Marbon Corp., 32 F. Supp. 279 (D.Del. 1940); Zickel v. Knell, 357 Mo. 678, 210 S. W. 2d 59 (1948); *cf.* Union National Bank of Youngstown v. Universal-Cyclops Steel Corp., 103 F. Supp. 719 (W.D. Pa. 1952). *Contra:* Herendeen v. Ley Realty Co., 75 N. Y. S. 2d 836 (Sup. Ct. 1947), criticized Note, *Counterclaim for Malicious Prosecution in the Action Alleged to be Malicious,* 58 Yale L. J. 490 (1949); *cf.* Carrier Corp. v. Sims Motor Transport Lines, Inc., 15 F. R. D. 142 (N.D. Ill. 1953). Wrongful sequestration: Capetillo v. Burress & Rodgers, 203 S. W. 2d 953 (Tex. Civ. App. 1947). Malicious abuse of process: Bach v. Quigan, 5 F. R. D. 34 (E.D. N.Y. 1945). *But cf.* Carrier Corp. v. Sims Motor Transport Lines, Inc., 15 F. R. D. 142 (N.D. Ill. 1953). Libel in complaint: Fidelity & Casualty Co. of New York v. Coffelt, 11 F. R. D. 443 (S.D. Iowa 1951); Williams v. Robinson, 3 Fed. Rules Serv. 13a.11, case 1 (D.D.C. 1940).

A nice problem is posed by Iowa Code § 639.14 (1950), which provides that one whose property has been maliciously attached "need not wait until the principal suit is determined before suing on the bond" required for attachment by § 639.11 of the Code. This statute would seem to mean that termination of the principal suit in favor of the owner of the property is not an essential element of the cause of action against the bond. And a counterclaim for wrongful attachment against the bond has been said to be proper in Thielen v. Schechlinger, 210 Iowa 224, 230 N. W. 516 (1930), and Crom v. Henderson, 188 Iowa 227, 175 N. W. 983 (1920). The argument that this is only a contingent claim and thus runs afoul of the rule that only matured claims can be counterclaimed, note 106 *infra,* is met on a verbal level by a rationale that "[t]he terms of the bond are broken as soon as the wrongful levy is made and the wrong done. Then the right of action is complete upon the bond." *Id.* at 237, 175 N. W. at 987. Presumably, therefore, the counterclaim against the bond is now compelled by Iowa R. Civ. P. 29.

be explained either on the substantive ground that termination of the first action is a necessary element of the cause of action for malicious prosecution,[105] or on the procedural ground that only those claims which have matured may be pleaded as counterclaims.[106]

"Transaction" alone

This extensive discussion has looked to the import of the phrase "transaction or occurrence." What now of the simpler reference to "transaction" alone which is to be found in the Minnesota Rules as well as in the statutes of those states which have followed the lead of California? Since the word "occurrence" presumably must mean something, does its absence in the rules and statutes now to be considered indicate that the scope of compulsion in those states is less broad than in jurisdictions which have used both words?

The problem arises in this context. The Minnesota compulsory counterclaim rule turns on "transaction."[107] A famous Minnesota case, construing an earlier statute which had spoken of "contract or transaction," defined the word "transaction" in extremely broad terms, and specifically as including both tort and contract.[108] But the apparent intent of the Minnesota Advisory Committee which drafted the rules was to exclude tort claims from the compulsory counterclaim rule.[109] Usual canons of construction would, of course,

105. Restatement, Torts § 674(b) (1938).

106. That only matured claims may be pleaded as counterclaims is not expressly stated in usual rules, but is to be implied from Fed. R. Civ. P. 13(e), and its equivalents in other modern pleading jurisdictions, which creates a procedure by which a pleader may obtain leave to assert a counterclaim which has matured after the filing of the pleader's original pleading. In addition to the cases cited in note 104 *supra*, in many of which this has been given as a ground of decision, the following cases have held that an unmatured or contingent claim may not be asserted even as a permissive counterclaim: Gold Metal Process Co. v. United Engineering & Foundry Co., 190 F. 2d 217 (3d Cir. 1951); Cyclotherm Corp. v. Miller, 11 F. R. D. 88 (W.D. Pa. 1950); Diggs v. Kansas City Southern Ry. Co., 207 Ark. 111, 179 S. W. 2d 860 (1944); Detroit T. & I. R. R. v. Pitzer, 42 Ohio L. Abs. 494, 61 N. E. 2d 93 (1943).

107. Minn. R. Civ. P. 13.01. See Wright, *Joinder of Claims and Parties under Modern Pleading Rules*, 36 Minn. L. Rev. 580, 588-591 (1952).

108. "That causes of action in tort are included within the meaning of this statute is quite obvious. The word 'transaction,' as there used, embraces something more than contractual relations. It includes any occurrences or affairs the result of which vests in a party the right to maintain an action, whether the occurrences be in the nature of tort or otherwise." Mayberry v. Northern Pacific Ry., 100 Minn. 79, 84, 110 N. W. 356, 358 (1907).

109. The Tentative Draft of the Minnesota Rules used the phrase "transaction or occurrence" without limitation. Subsequently proposed Rule 13.01 was changed and the phrase "contract or transaction" substituted, with a note implying, but not saying, that tort claims would thus be excluded. 7 Bench and Bar of Minnesota 18 (Sept. 1950). The Rule was adopted by the court in this form. 232 Minn., Appendix p. 18. Less than a month before the Minnesota Rules were to become effective, the court made an *ex parte* order

say that when a court promulgates rules of procedure which use a term that very court has previously defined quite carefully, the court intended the term to be understood in the sense theretofore given it. Such reasoning would lead one to conclude that tort counterclaims are compulsory in Minnesota, and indeed that the scope of compulsion in that state is probably just as great as under the rules previously considered.[110]

A two-fold attack is made on this conclusion. First, lay dictionaries are resorted to for the proposition that "transaction" inherently has reference to business negotiations. Second, by way of application of the famous statement that " 'Transaction' is a word of flexible meaning,"[111] it is argued that while "transaction" may well have a broad meaning when used in conjunction with "con-

"correcting" the Rules. One of these "corrections" struck "contract or" from Rule 13.01, 233 Minn. vii, leaving the simple word "transaction" as the test of compulsoriness.

Even ignoring the touchy question of whether the intention of a committee which advises a court as to rulemaking is to be taken as the intent of the court itself—see Commentary, 2 Fed. Rules Serv. 632 (1940), 3 *id.* 663 (1940)—several difficulties suggest themselves in determining whether there was ever any intent to exclude tort actions from the compulsory counterclaim rule. First, the Chairman of the Minnesota Advisory Committee now tells us that the notes commonly referred to as the Advisory Committee notes "were prepared by the reporters for the information and guidance of the Committee and are not necessarily to be taken as expressions of the views of the Committee." 1 Youngquist and Blacik, Minnesota Rules Practice vi (1953). Second, when the court originally adopted the Rule, at which time it spoke of "contract or transaction," it had in its hands a memorandum from the present writer pointing out that the phrase in question had been defined by the court in the *Mayberry* case, note 108 *supra*, as including tort claims. Is it not reasonable, then, to suppose that the court intended to make tort claims compulsory, and that the subsequent change from "contract or transaction" to "transaction," described by the court itself as a mere "correction" was not intended to produce a changed result? Third, if it be thought that the Committee or the court suddenly realized that "contract or transaction" included tort claims, and that the "correcting" change was made to exclude such claims, one would have to contend that where "contract or transaction" includes contracts and torts, the way to eliminate torts is to strike out "contract." This would be a truly marvelous piece of dialectic. Compare Carroll, Through the Looking Glass 120 (1920): " 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' "

110. The two Minnesota district courts that have passed on this question have adopted the reasoning suggested, though in the case first cited the court ventured an untenable dictum that a counterclaim for personal injuries might require a different result than one for property damage. Holmquist v. Williams, 4th Dist., Minn., April 30, 1953, approved 37 Minn. L. Rev. 638; Bax v. Miller, 7th Dist., Minn., April 1, 1953. And there is a very suggestive dictum from the Minnesota Supreme Court: "The present trend is to follow procedures which will simplify litigation and avoid a multiplicity of suits, particularly where actions arise out of one *occurrence, accident,* or transaction, and to dispose of all questions, both of law and fact, in one suit for such purpose. Rule 13.01." State *ex rel.* Hierl v. District Court, 237 Minn. 456, 458, 54 N. W. 2d 5, 7 (1952) (emphasis supplied).

111. Moore v. New York Cotton Exchange, 270 U. S. 593, 610 (1926).

tract," it has a narrow meaning when it appears by itself in a set of rules which in other places refer to "transaction or occurrence."[112] The first argument is easily refuted. Though there have been two cases—one of which was subsequently repudiated—holding that "transaction" refers to business or contractual matters,[113] most courts, including most pertinently the Minnesota court, have held to the contrary.[114]

The second argument may be answered both on authority and by history. The authoritative answer is found in California decisions construing that state's statutory scheme. California, it will be recalled, distinguishes between counterclaims, which are compulsory, and cross-complaints, which are not. Suppose defendant has a claim for his injuries from the same collision for which plaintiff sues. Defendant's claim clearly could be a cross-complaint, since it arises from "the contract, transaction, matter, happening or accident upon which the action is brought."[115] But if it also might be asserted as a counterclaim, then it is compulsory and defendant's failure to plead it as such will bar a subsequent suit. A claim is a counterclaim if it arises "out of the transaction set forth in the complaint."[116] Here is surely an even stronger case than in Minnesota for holding that a collision is not a "transaction," since here "accident" is one of the terms used in conjunction with "transaction" to describe non-compulsory claims. Yet the California courts have been quite clear in going the other way, and in holding that an automobile accident is a "transaction" within the meaning of the compulsory counterclaim statute.[117]

The appeal to history proceeds in this vein: some writers and judges have speculated that the draftsmen of the Federal Rules must have had some purpose in adding "or occurrence" in their

112. 1 Youngquist and Blacik, Minnesota Rules Practice 428 (1953).

113. Commercial Credit Co. v. Peak, 195 Cal. 27, 231 Pac. 340 (1924); Hooven v. Meyer, 74 Ind. App. 9, 128 N. E. 614 (1920). The first case must be considered overruled *sub silentio* by the cases cited note 117 *infra*. The latter case actually says nothing on the point and may only be understood as holding the point for which it is here cited by reference to a discussion of it at 6 Cornell L. Q. 318 (1921).

114. See Pomeroy, Code Remedies § 650 *774 (5th ed. 1929); Wheaton, *A Study of the Statutes which contain the Term "Subject of the Action" and Which Relate to Joinder of Actions and Plaintiffs and to Counterclaims*, 18 Cornell L. Q. 20, 232, 242 (1932-1933).

115. Cal. Code Civ. Proc. § 442 (Deering 1949).

116. Cal. Code Civ. Proc. § 439 (Deering 1949).

117. "* * * [I]t is established that all causes of action arising out of an automobile accident are part of one 'transaction' within the meaning of the code sections relating to cross-complaint and counterclaim." Schrader v. Neville, 34 Cal. 2d 112, 114-115, 207 P. 2d 1057, 1058 (1949); *accord*, Engleman v. Superior Court, 105 Cal. App. 754, 288 Pac. 723 (1930); *see* Todhunter v. Smith, 219 Cal. 690, 693, 28 P. 2d 916, 918 (1934); Note, *Counterclaims, Cross-Complaints, and Confusion*, 3 Stan. L. Rev. 99, 106 (1950).

compulsory counterclaim rule, when previous rules of this sort had spoken only of "transaction"; they suggest, therefore, the argument just considered, that "transaction" has particular application to contract actions while "occurrence" has particular applicability to tort actions.[118] If the federal rulemakers thought that they were broadening the scope of compulsion by adding "or occurrence," then it is fair to conclude that state rules which reject "or occurrence" in the compulsory counterclaim rule, while employing the full phrase in other rules, are meant to limit compulsory counterclaims to the less broad area covered by "transaction."

The actual history of the draftsmanship of Federal Rule 13(a) is inconsistent with this line of argument. Though the details of this history may be relegated to a footnote,[119] its broad outlines are

118. Commentary, *The "Compulsory" Counterclaim,* 5 Fed. Rules Serv. 807, 808 (1942); *see* Sinkbeil v. Handler, 7 F. R. D. 92, 97 (D. Neb. 1946). The dictum in the case last cited was relied on for a similar assertion in Keller v. Keklikian, 362 Mo. 919, 927, 244 S. W. 2d 1001, 1005 (1951), and Blackmar, *Some Problems Regarding Compulsory Counter-claims Under the Federal Rules and the Missouri Code,* 19 Kan. City L. Rev. 38, 47 (1950). The most important claim that "transaction" is "more appropriate to describe a business arrangement" is at Hiaasen, *The Counterclaim Statute,* 17 Fla. L. J. 215, 221-223 (1943), where it is attributed to a letter from the Hon. William D. Mitchell, Chairman of the United States Supreme Court's Advisory Committee on Rules of Civil Procedure, in which Mr. Mitchell undertook to explain why "or occurrence" was added to Fed. R. Civ. P. 13(a). According to the author's description of Mr. Mitchell's letter, the latter explained that he did not have the materials on the formulation of Fed. R. Civ. P. 13(a) available, and was relying on his recollection five years or more after the event. With much deference, I suggest that the actual history, detailed in note 119 *infra,* indicates that the factor suggested by Mr. Mitchell was not present in the Committee's decision.

119. For this history I am indebted to the Reporter of the United States Supreme Court's Advisory Committee on Rules of Civil Procedure, Judge Charles E. Clark, who has been good enough to go through the collection of early documents on the history of the Federal Rules which are collected in the Yale Law Library and to the Secretary of the Committee, Leland L. Tolman, Esq., who has provided me with material from the files of the Committee. The earliest form of what is now Fed. R. Civ. P. 13(a) was Rule 28 in the Tentative Draft of October 15, 1935, prepared by the Reporter. This rule provided that the

> "answer must state any counterclaim arising out of the [transaction which is] [acts or occurrences which are] the subject matter of the action or else the claim is deemed waived."

The first alternative was patterned directly on the existing Equity Rule 30, while the second alternative was consistent with the Reporter's proposal, in that draft, that the complaint should contain

> "a short and [simple] [direct, etc.] statement of the acts [omissions] and occurrences upon which the plaintiff bases his claim or claims for relief."

At its meeting of Nov. 14-20, 1935, the Committee chose the first alternative, "transaction which is," for the counterclaim rule, and also substituted "is barred" for "deemed waived." This course was consistent with the Committee's decision not to use "acts and occurrences" as the criterion for the complaint, and reflects also a natural reaction to accept the smooth working equity rule, with the broad construction the Court had given that rule. Thus in the transcript of the meeting it appears that the Reporter explained his alternative proposals as follows: "I might say that one suggestion was that

easily stated. The direct antecedent of Federal Rule 13(a) was old Equity Rule 30, which made compulsory counterclaims arising out of the "transaction." The Equity Rule had been authoritatively construed as including all claims logically related, whether they arose from tort or contract.[120] For reasons having nothing to do with the supposed distinction between tort and contract, the joinder of parties rule, which stems from a quite different historical background, was framed in terms of "transaction or occurrence."[121] Since the word "transaction" is normally defined in terms of "oc-

we use both 'transactions' and 'occurrences.' I was not sure all of those things added very much, and I put in the two alternatives. Where this requirement of compulsory filing is adopted it is usual to have the term 'transaction.'" Somewhat later Mr. Warren Olney summarized the trend of the discussion by saying: "Gentlemen, we have the rule and a very broad construction put upon it by the Supreme Court. Why change the rule under those circumstances?" So prodded the Committee voted unanimously to accept the Reporter's first alternative. In the form thus chosen the rule appeared as Rule 18 in the published Preliminary Draft of May, 1936.

Subsequently, at the meeting of Feb. 1-4, 1937, the Committee voted to amend the rule on joinder of parties—now Fed. R. Civ. P. 20 (a) but then referred to as Rule 27(a) — to add the words "occurrence" and "occurrences" substantially as now appears. The reasons for this change are discussed in note 121 *infra*. After that meeting the Reporter prepared a draft, for circulation among the Committee, embodying the changes made at the meeting. This draft, under date of Feb. 20, 1937, had not only the change stated in the then Rule 27(a), but also in Rule 18(a), the then counterclaim rule, the Reporter inserted in brackets after the word "transaction" the words "or occurrence," together with this in the margin:

"Note: — Should not the bracketed words be added to conform to Rule 27(a)?"

At this time the Committee had determined to have no more meetings of its full membership, but to refer questions of style to its Style Committee which consisted of Judge Clark, Professor Edmund Morgan, and, as chairman, Senator George Wharton Pepper. On March 3, 1937, the Reporter wrote the Style Committee, urging many changes of detail including the desirability of conforming the language of the counterclaim rule to that used in the rule on joinder of parties. The Style Committee met on April 12-17, 1937, and decided to strike out the brackets in the counterclaim rule to produce such a conformity. The Style Committee's report was the basis for the published Preliminary Draft of April, 1937, in which the rule, as thus cast, appears as Rule 13(a). It was in this form that the rule was finally adopted by the Supreme Court.

120. Moore v. New York Cotton Exchange, 270 U. S. 593 (1926).

121. The compulsory counterclaim rule is a lineal descendant of Federal Equity Rule 30 and of American statutes going back to 1875. The joinder of parties rule, Fed. R. Civ. P. 20(a), on the other hand, is based on the English rule governing that subject, as it was amended in 1896. Annual Practice 1953, Order XVI, rule 1. This rule had worked smoothly in England. But its adoption in 1920 in New York, in what was then N. Y. Civ. Prac. Act §§ 209, 211, was not equally happy, for in the notorious case of Ader v. Blau, 241 N. Y. 7, 148 N. E. 771 (1925), the New York court managed to emasculate the rule. One of the steps in the process of emasculation was a very narrow construction of the concept "same transaction," albeit even this construction admitted that tort claims arise from a "transaction." Thus it seems clear that the purpose of the Federal Advisory Committee in adding "occurrence" to the joinder of parties rule was to prevent the New York construction from being put on the rule by adopting a phrase different from that which was critical in New York.

currences,"[122] the Style Committee which put the Federal Rules into final form felt free to conform the language of the compulsory counterclaim rule to that of the joinder of parties rule.[123] But the decision was treated as one of style, and there is no evidence in the history of the rule that anyone supposed that "occurrence" had to be added to Rule 13(a) in order to broaden that rule to include tort claims.[124] Thus the federal history confirms what the California courts have held: counterclaim rules in terms of "transaction" include all logically related claims, whether tort or contract, even though other rules in the same jurisdiction talk of "transaction or occurrence."[125]

122. " 'Transaction' is a word of flexible meaning. It may comprehend a series of many *occurrences* * * *." Moore v. New York Cotton Exchange, 270 U. S. 593, 610 (1926). "The word 'transaction,' * * * includes any *occurrences* or affairs the result of which vests in a party the right to maintain an action, whether the *occurrences* be in the nature of tort or otherwise." Mayberry v. Northern Pacific Ry., 100 Minn. 79, 84, 110 N. W. 356, 358 (1907). " 'Transaction' refers to any *occurrence* between two or more persons which may become the foundation of an action." Wheaton, *A Study of the Statutes which contain the Term "Subject of the Action" and Which Relate to Joinder of Actions and Plaintiffs and to Counterclaims,* 18 Cornell L. Q. 20, 232, 242 (1932-1933). In each case, of course, the italicization of "occurrence" is mine.

123. See note 119 *supra.*

124. "The use of the word 'occurrence' in the rule in connection with the word 'transaction' can serve no other purpose than to make clear the meaning of the word 'transaction.' An 'occurrence' is defined to be a happening; an incident; or event. The word 'transaction' is somewhat broader in its scope than the word 'occurrence.' The word 'transaction' commonly indicates an act of transacting or conducting business but in the rule under consideration it is not restricted to such sense. It is broad enough to include an occurrence." Williams v. Robinson, 3 Fed. Rules Serv. 13a. 11, case 1 (D.D.C. 1940).

125. To take the opposite view, as urged by those who advocate a limited construction of the Minnesota rule, would pose new problems. The rules on relation back of amendments, Fed. R. Civ. P. 15(c), Minn. R. Civ. P. 15.03, and the similar rules in other jurisdictions, say that an amendment relates back if it arises out of "the conduct, transaction, or occurrence" set forth in the original pleading. If "transaction" means less, standing by itself, than it does when used in conjunction with "occurrence," then rules which speak in one place of "transaction or occurrence" and elsewhere of "conduct, transaction or occurrence" must be construed so that the former rule has a narrower scope than the latter. But no one has ever suggested such a result, nor, quite wisely, has anyone ever attempted to say when a claim arises out of the "conduct" relied on in another claim but not out of the "transaction or occurrence." Again the rules on supplemental pleadings, Fed. R. Civ. P. 15 (d), Minn. R. Civ. P. 15.04, speak of "transactions or occurrences or events". What "events" are not "conduct"? What "events" are not "transactions or occurrences"? Compare 1 Youngquist and Blacik, Minnesota Rules Practice 428 (1953): "It is difficult to imagine a claim the subject of which is neither a 'transaction' nor an 'occurrence'."

The real reason for the reference to "conduct" in Fed. R. Civ. P. 15 (c) and to "events" in Rule 15 (d) is that the rulemakers were excessively cautious and wished to give the courts no possible loophole through which to reach a harsh result on the specific problems covered by those specific rules. This is exactly the same reason that "occurrence" was added to the joinder of parties rule, see note 121 *supra,* and the addition should be of no more significance in the one case than in the other.

To recapitulate, the Minnesota Rules speak variously of: "transaction", Rules 13.01, 13.02; "transaction or occurrence", Rules 13.07, 14.01, 20.01:

The last problem to be considered in deciding which counterclaims are compulsory is one which arises under both types of compulsory counterclaim rules, as indeed is to be expected in view of the conclusion just reached that rules and statutes which speak only of "transaction" have precisely the same scope as those which refer to "transaction or occurrence." This problem is that posed by persons who may be involved in an event in more than one capacity. If a defendant is sued in one capacity, must he plead a claim which he has in another capacity? Or if plaintiff sues in one capacity, is the defendant required to assert as a counterclaim a claim, otherwise compulsory, which he has against the plaintiff in a different capacity?

The cases are hopelessly at odds. On the one hand it has been held that in a suit by members of a partnership upon an obligation owed the firm, defendant is required to assert such claims as he may have against the individual plaintiffs arising from the transaction sued upon.[126] And where an insurer sues as subrogee of the rights of its insured, defendant has been required to plead any counterclaims he may have against the insured.[127] On the other hand, it has been decided that in an action brought by plaintiffs as trustees, counterclaims against the plaintiffs as individuals are not only not required, but are not permissible.[128] Again a city tax official has not even been allowed to counterclaim on behalf of the city for the recovery of taxes in an action against the official in his personal capacity for violation of the Civil Rights Act.[129]

The most important instance of the problem of capacities has to do with collisions that result in the death of one or both parties. In a suit against an administrator for negligence of his intestate, must the administrator counterclaim for wrongful death? Arkansas says "Yes"; Massachusetts says "No."[130] The Massachusetts reasoning

"conduct, transaction, or occurrence", Rule 15.03; and "transactions or occurrences or events", Rule 15.04. No one has ever suggested that these four different phrases have four different meanings; indeed it seems agreed that the last three all mean exactly the same thing. To hold that the first phrase differs from the last three in meaning merely because it differs from the second phrase in form cannot be justified by logic, and, as has been shown, it is flatly refuted by history and previous judicial construction.

126. Abraham v. Selig, 29 F. Supp. 52 (S.D.N.Y. 1939), approved 7 U. of Chi. L. Rev. 394 (1940).

127. General Cas. Co. of America v. Fedoff, 11 F. R. D. 177 (S.D.N.Y. 1951).

128. Chambers v. Cameron, 29 F. Supp. 742 (N.D.Ill. 1939). *Cf.* Cravatts v. Klozo Fastener Corp., 15 F. R. D. 12 (S.D. N.Y. 1953) (corporate defendant in stockholder's suit may not counterclaim against plaintiff in his individual capacity).

129. Durham v. Bunn, 85 F. Supp. 530 (E.D.Pa. 1949).

130. *Compare* Morgan v. Rankin, 197 Ark. 119, 122 S. W. 2d 555 (1938), *with* Campbell v. Ashler, 320 Mass. 475, 70 N. E. 2d 302 (1946).

is that the administrator is sued in his capacity as the representative of the estate for the benefit of creditors, while he sues on the wrongful death claim for the benefit of the statutory beneficiaries of such a claim. All this is true, and can easily be taken care of in shaping the form of the judgment. But to reason from this to the conclusion that the administrator when sued is not the same person as the administrator when prosecuting a wrongful death claim, and to close with ringing declarations against "depriving of his cause of action a person who was never a party to litigation"[131] is, in the words of a commentator, "to pursue a legal fiction to an absurd extreme."[132]

A more realistic approach was demonstrated by the Florida court. Mitchell's employee, Hardin, was killed in a collision with Newton. Mitchell, suing as assignee under the Workmen's Compensation Act of Mrs. Hardin's claim for her husband's death, recovered a judgment against Newton. Subsequently Newton sued Mitchell, claiming that Newton's injuries in the collision were produced by the negligence of Mitchell's employee. The court held that this claim was barred by failure to assert it as a counterclaim in the first suit.

> "True, their capacities as plaintiffs on the one hand and defendants on the other would not have been the same, but from a practical standpoint we do not see where any insuperable difficulty would have been met had Newton's claim been presented in a cross action. * * * Had the Mitchells lost, they would have paid Newton; had they won, they would have reimbursed themselves, * * * and paid the remainder of the recovery to the representative of the person entitled to the money. * * * After all, the fundamental issue was the one of negligence, and there could be no complication, or confusion even, from the fact that certain persons on the one hand were suing instead of Hardin's widow and on the other hand were defending as Hardin's employer."[133]

This sensible and practical approach is that which should be taken to the problem of capacities. Usually the different capacities will not be confusing to the jury and requiring the counterclaim will permit disposition by one trial of claims which would otherwise take two trials. Thus the counterclaims should be required, with the court free to order separate trials or separate judgments in the exceptional case which calls for such a procedure.[134] The

131. *Id.* at 481, 70 N. E. 2d at 305.
132. 15 U. of Chi. L. Rev. 446, 447 (1948).
133. Newton v. Mitchell, 42 So. 2d 53, 54-55 (Fla. 1949), approved 4 Miami L. Q. 251 (1950).
134. This is the general approach urged at 7 U. of Chi. L. Rev. 394 (1940).

alternative will be that a legal fiction may permit inconsistent judgments on the same facts,[135] since if the capacities are said to be so different that the compulsory counterclaim rule does not apply, it is to be expected that the doctrines of res judicata and of collateral estoppel will be held equally inapplicable. Perhaps it goes too far to say that differing capacities should never take a claim out of the area of compulsion,[136] since the differing capacities may cause problems of jurisdiction, venue, and service of process. But where these difficulties are not present, it should be held that defendant is required to assert all the claims which he has against the plaintiff in any capacity.

We have now completed our examination of compulsory counterclaims. We know which claims are compulsory, and we have seen, by study of the actual cases as well as by excursions into legal theory, how the compulsion is brought to bear on the reluctant pleader. We are now prepared to weigh intelligently the criticisms which some commentators have directed at the device of the compulsory counterclaim.

Evaluating the Desirability of Compelling Counterclaims

It will surprise no one to learn that the critics of compulsory counterclaims may be divided into two classes: (1) those who think the typical rules do not go far enough; and (2) those who think such rules go too far.

Principal exponent of the position that the rules do not go far enough is a Missouri lawyer and teacher who argues as follows:

> "On the basis of the decisions discussed above, it may be concluded that the language of Rule 13(a) leaves much to be desired and does not reflect very well the policy which is desired to be accomplished. The term 'transaction' can be given a broad meaning but in numerous instances a claim closely related to the plaintiff's claim may exist without arising out of the same transaction, and without the presence of anything which could properly be called an occurrence. * * * In further opinions construing the scope of Rule 13(a) the courts should probably take the language of the Rule as a guidepost rather than as a rigid standard and should seek to compel the adjudication together of claims bearing a close and substantial relationship to each other. Perhaps the purpose of the Rule could be more nearly accomplished if it were amended to require the pleading

135. As in Moss v. Taylor, 73 Utah 277, 273 Pac. 515 (1928), where the court held that a party need not counterclaim a claim which he has previously assigned, nor is his assignee bound by the determination of the first suit against his assignor.

136. As is contended at 4 Miami L. Q. 251, 252 (1950).

> of all counterclaims arising out of the subject matter of the opposing claim, without speaking of transactions or occurrences. Already some courts have practically construed the rule in this manner."[137]

This argument would cause concern if the facts supported it. They do not. Where are the "numerous instances" of closely related claims which have been held not to arise out of the same transaction or occurrence? The present study has covered every case decided under the compulsory counterclaim rules of the Federal courts and of the fourteen other jurisdictions with rules modelled on the Federal. It has covered as well every case decided under the Arkansas statute, and a substantial sampling of the cases from California, Montana, and Idaho. On the basis of such a study it was concluded that "the very fewness of cases, and these from inferior courts, where counterclaims which meet the test of logical relation have been held not compulsory is itself instructive."[138] I consider this quite a striking showing that the courts generally—not merely "some courts"—have been construing the rule in the very sound fashion urged by the Missouri critic.

Perhaps a criticism is implied in the Arkansas statute which requires all counterclaims to be pleaded, whether they are related to plaintiff's claim or not.[139] Professor Moore has undertaken to answer such a position by saying that this might complicate the pleadings where a party has many such claims, and would force defendant to submit claims to the forum of his opponent's choosing which he might prefer to litigate elsewhere. Further, he says, defendant may be in doubt as to the existence or advisability of litigating certain claims at the time suit is brought. For these reasons Moore concludes that defendant should be allowed to use his own judgment as to whether unrelated claims should be pleaded.[140] The objection may be urged that all of these arguments are equally applicable to the class of counterclaims which now are made compulsory. And so they are. But in the case of counterclaims arising from the "same transaction or occurrence," the public interest in having only one lawsuit to settle an entire controversy outweighs the difficulties noted by Professor Moore. Extension of the class of counterclaims which is to be compulsory would carry with it these same difficulties but would offer no countervailing benefits.

137. Blackmar, *supra* note 118, at 51-52.
138. P. 441 *supra.*
139. P. 427 *supra.*
140. 3 Moore, Federal Practice ¶ 13.12 (2d ed. 1948). And see Millar, *op. cit. supra* note 1, at 138: "Certainly a rule of compulsion extended to every allowable counterclaim cannot be regarded as defensible."

By hypothesis the counterclaims which are compulsory in Arkansas and not compulsory elsewhere are entirely independent of the claims of the opposing party. There is, then, no improvement in judicial administration by requiring the claim and the counterclaim to be tried at the same time. I am bound to say that I see no harm in thus extending the scope of compulsion, and feel that the Arkansas rule may have the advantage of simplicity. But the choice between compulsion in every case and compulsion in most cases is not presently a problem of practical importance.

Several of the criticisms which claim that even the usual type of compulsory counterclaim rule goes too far are easily dealt with. An early commentator on the Federal Rules bewailed the fact that

> "the mandatory provision, subject to court discretion, forces an individual to sacrifice his own judgment as to the desirability of pleading a certain claim and to accept the judgment of the trial court."[141]

That is exactly what it does, and exactly what it is intended to do. The day has long since passed in civil procedure when litigation was thought of as a game in which each side was free to adopt whatever strategem it deemed to its advantage, while the judge was expected to sit like a benign Buddha, calling a penalty only for the most flagrant gouging, kneeing, or biting. Today it is well recognized that there is an important public interest in efficient conduct of the courts, and in adjudications on the merits rather than on the cleverness of counsel. Compulsory counterclaim rules are an attempt to implement this public interest.

Closely connected with the criticism just considered is the fantastic argument that compulsory counterclaim rules discriminate against defendants, since they require defendants to plead all their claims arising from the transaction sued upon, while plaintiffs are free to choose which of their claims arising from that transaction they will join.[142] A first answer to this, as student writers have noted, is that even if plaintiffs are sometimes able to protract litigation, it hardly follows that we must therefore allow defendants to do so.[143] A better answer is that the criticism is based on a premise which is largely false. It is true that we have not yet followed the advice of judges and professors that plaintiffs should be

141. Legislation, *Recent Trends in Joinder of Parties, Causes, and Counterclaims*, 37 Col. L. Rev. 462, 463 n. 8 (1937). See also Millar, *op. cit. supra* note 1, at 137-138, where the "liberty of assertion" is described in such ponderous terms as to make one think it must be protected by the Bill of Rights, or at least mentioned in Magna Charta.

142. *E.g.* Scott, *supra* note 36, at 26; Blackmar, *supra* note 118, at 42.

143. *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 832 (1952).

compelled by rule to join all of their claims.[144] Perhaps one of the reasons that no such rules have been enacted is that they are unnecessary, that essentially this result has already been achieved by the operation of established doctrines.

The particular manifestation of res judicata which goes under the name of "splitting a cause of action" requires that a plaintiff must get in one lawsuit all the relief he is entitled to from one cause of action, for the doctrine of merger will prevent him from bringing a second suit on the same cause. The plaintiff has a choice whether or not to join claims arising from one transaction or occurrence only if it can be said that he has more than one cause of action. Probably a single transaction or occurrence could have given rise to more than one cause of action by the older theories of Pomeroy, McCaskill, and Gavit.[145] But these theories are now of interest only to antiquarians. Today it is commonly accepted that a "cause of action" is that aggregate of operative facts which may conveniently be dealt with in one lawsuit.[146] Since the whole notion of compelling counterclaims rests on a belief that trial convenience and judicial economy will be served by treating at one time the claims of both parties which arise out of the one transaction, it can hardly be contended that the group of operative facts which can conveniently be treated at one time, and which constitute therefore a single cause of action, is less than all the facts which make up the transaction or occurrence. By this reasoning plaintiffs must usually, if not invariably, join all their claims arising from the one transaction or be barred from subsequent suit just as much as defendants must. Thus analyzed, the supposed discrimination against defendants is seen to be non-existent.

Still another criticism comes from the pen of one of the most productive and able scholars working in the field of procedure:

> "Certainly a rule of compulsion extended to every allowable counterclaim cannot be regarded as defensible. If a compulsory rule is ever justifiable it is only when the counterclaim operates by way of defense to the principal claim. Just as a defendant may not with impunity withhold a defense, so we may without violence to the traditional maxim deny him the right to withhold a counterclaim if this in whole or part is of a defensive nature. This would appear to indicate the proper line of divi-

144. Hyde, J., in Chamberlain v. Mo.-Ark. Coach Lines, Inc., 354 Mo. 461, 467, 189 S. W. 2d 538, 540 (1945); Blume, *Required Joinder of Claims,* 45 Mich. L. Rev. 797, 812 (1947); Note, *Joinder of Actions,* 40 Ky. L. J. 105, 112 (1951)

145. As to which see Clark, Code Pleading 129-136 (2d ed. 1947).

146. *Id.* at 137-146. *E.g.,* United States v. Memphis Cotton Oil Co., 288 U. S. 62 (1933); Elliott v. Mosgrove, 162 Ore. 540, 93 P. 2d 1070 (1939).

sion between compulsory and permissive counterclaims. But it is not the line of division adopted by the Federal Rules under which the distinction is between counterdemands which arise out of 'the transaction or occurrence' on which the plaintiff rests his claim and those which do not. Suppose on the one hand, the ordinary case of set-off: B, let us say, is indebted to A in the sum of $500 upon a promissory note, and A is indebted to B in the sum of $1000 for goods sold and delivered. One would imagine that if we are to have a compulsory rule this would be the very case to which it would be appropriate, for recovery by B would here as part of its effect wholly cancel A's claim. Yet under such a rule as the federal one, B would be perfectly free to reserve his counterdemand for a separate action. Suppose, on the other hand, that A and B have engaged in the exchange of properties, each giving to the other as part of the transaction, a mortgage on the property conveyed to the mortgagor, and that in each case the mortgaged property is so ample a security for the mortgage indebtedness that no question of a deficiency will arise. Suppose, further, that after the maturity of both mortgages, each remaining unpaid, A sues to foreclose the mortgage executed by B on property X, not asking for any personal judgment against B. Under the principle thus accepted by the Federal Rule, B would be compelled, through the medium of a counterclaim, to seek foreclosure of the mortgage executed by A on property Y, although he might have excellent reasons for not wanting to do so until a later time, and simply because both claims, affecting entirely different pieces of property arose out of the same transaction. Clearly, then, there should be no compulsion where the two claims thus aim at unconnected relief."[147]

Rarely has an argument marched so inexorably from false premise to unsound conclusion. This whole house of cards is stacked on the proposition that only those counterclaims should be compulsory which are defensive in whole or in part. Why? If counterclaims are to be compelled at all, it must be because some public purpose is served thereby. The compulsory counterclaim rule was not promulgated to save litigants from their own stupidity. A counterclaim may be of a defensive nature, and yet be completely unrelated to plaintiff's claim. In such a case it will probably be to defendant's advantage to plead it, and thus avoid the risk that plaintiff will get a judgment on his claim, squander the proceeds in riotous living, and go bankrupt before defendant gets around to prosecuting his own claim. But if the claims are unrelated, there is no gain to the public in having them brought in one action, and no reason, therefore, for the public to take the extraordinary step of requiring defendant to plead his claim in the first suit .The example

147. Millar, *op. cit. supra* note 1, at 138-139.

given in the quoted passage of what the learned author calls "the very case" to which a compulsory rule is appropriate, demonstrates this. There is no economy of litigation in requiring *B* to assert his claim for goods sold and delivered in an unrelated action by *A* on a promissory note. This can be regarded as an appropriate case for compulsion only by reasoning from the faulty premise that those claims which are defensive should be compelled.

It is not true that all defensive claims should be compelled. Nor is it true that only defensive claims should be compelled, or, as otherwise stated, that there should be no compulsion where the two claims aim at unconnected relief. We can revert again to the classic case of *Moore v. New York Cotton Exchange*.[148] There, it will be remembered, plaintiff's claim was that defendants' refusal to furnish ticker service from the exchange was a violation of the anti-trust laws, while the counterclaim sought to enjoin the use of purloined quotations in a "bucket shop" operation. The relief sought is unconnected, and defendants' claim, far from being defensive, is a rather powerful counterattack. Yet here is a case where requiring the counterclaim means that one suit will dispose of matters which otherwise might be presented in two suits. Relitigation of the same facts is prevented by requiring the counterclaim, and an important public interest thus protected. Other examples can be easily imagined: in an action to declare a contract void, a counterclaim for the reasonable value of work done;[149] in an action to replevy a chattel, a counterclaim for repairs or improvements made to the chattel.[150] If counterclaims are to be compelled when it is in the public interest to do so, these counterclaims must be compelled, though they would not be if the view of the critical author were to prevail. I shed no tears for the hypothetical *B* who is compelled to foreclose a mortgage he doesn't want to foreclose. This kind of imaginary horrible has never come up in the cases.

Negligence Cases

The last criticism of compulsory counterclaim rules which must be studied is perhaps the weightiest of all, for it is urged by the distinguished Advisory Committee which drafted the Minnesota Rules. Further there is at least an implication that it represents a view shared by the rulemakers in New Jersey, whose labors in

148. 270 U. S. 593 (1926).

149. As was indicated in note 92 *supra*, the holding in one case that such a counterclaim is not compulsory was unsound.

150. That such a counterclaim would not be compulsory if there were a requirement that compulsory counterclaims must tend to diminish or defeat plaintiff's recovery, see Clark, Code Pleading 651 (2d ed. 1947).

bringing that state out of the depths of procedural reaction have won them so much acclaim. The argument is, quite simply, that counterclaims *should* not be compelled in tort cases, or, since this is what these critics really have in mind, in negligence cases. We have earlier studied the contention that tort claims *are* not compulsory in Minnesota, and found it to be unsound.[151] The inquiry now is directed at the quite different question, is it desirable to compel counterclaims in negligence cases.

We turn first to the authorities—since we are accustomed to look to them to see what is the law, it is natural to ascertain their views as to what should be the law. The Supreme Courts of Florida and of Arkansas have had occasion to comment on this question in the course of opinions holding that counterclaims in accident litigation must be pleaded:

> "In arriving at this conclusion we are not uninfluenced by the knowledge of the vast amount of litigation now appearing in the courts growing out of the collisions of motor vehicles and the great importance of determining such controversies as speedily, economically, and accurately as possible. The circuit judge's decision that Newton should not be allowed to present his claim independently harmonizes with our view that application of the statute in this fashion will ultimately benefit litigant and court."[152]

> "If one participant in an automobile collision may, when sued by the other, waive the right to assert his own damages as a result of the collision and later sue for such damages in a separate suit we may reasonably expect two suits in many of such cases, and a more prolific and profitable field of litigation will be opened up than existed in the case of suits by guests against their hosts, before the passage of our guest statute on that subject."[153]

These statements merely emphasize what should be obvious from the outset: since accident cases make up the bulk of litigation today, there would be precious little purpose in a compulsory counterclaim rule which did not have such cases within its orbit.

Two arguments are advanced by the Minnesota rulemakers against compelling counterclaims in accident cases.[154] It is said, first, that often the defendant will not know that his injuries are

151. Pp. 445-450 *supra*.
152. Newton v. Mitchell, 42 So. 2d 53, 55 (Fla. 1949).
153. Morgan v. Rankin, 197 Ark. 119, 124, 122 S. W. 2d 555, 558 (1938).
154. 7 Bench and Bar of Minnesota 18 (Sept. 1950). It should be noted that the Court Rules Committee of the Minnesota State Bar Association has recently determined that the arguments against compelling counterclaims in tort cases are unsound, and has unanimously recommended that the words "or occurrence" be restored to Minn. R. Civ. P. 13.01 in order to eliminate any doubt on this point.

sufficiently grievous to justify a claim at the time suit is brought against him. Surely this must be only a makeweight argument, for congested court calendars in Minnesota, as elsewhere, give the injuries ample time to develop before final judgment, and this is exactly the kind of case in which leave to file an omitted counterclaim would be granted as a matter of course. The second argument is more serious. It is that defendant will usually be represented by an insurance company lawyer who will have no interest in prosecuting the counterclaim. The case thought to justify this dire prediction is *Keller v. Keklikian,* the Missouri case discussed earlier,[155] in which the insurer settled plaintiff's claim and had a judgment of dismissal entered before the defendant had an opportunity to assert his counterclaim. There, it is true, the defendant was held barred from later action, though the court pointed out various procedures by which the harsh result could have been avoided had defendant availed himself of them, and it threw out a broad hint that he might still have a remedy against his insurer.[156]

Keller v. Keklikian is the only case in which a compulsory counterclaim rule has led to a harsh result in an accident situation. The rule is applied, as a matter of course, to collision cases every day without, so far as appears, any difficulty.[157] Yet the kind of problem which did arise in the *Keller* case comes up just as much in states without compulsory counterclaim provisions.

A recent Ohio decision concerned a defendant who had actually counterclaimed in a collision case. The jury found for plaintiff on the claim and counterclaim. The insurer promptly satisfied the judgment, the insurer's attorney withdrew, and defendant's lawyer got the satisfaction of judgment amended to show that it had been made by the insurer without the consent of the defendant, after which defendant appealed. An intermediate appellate court found that there had, in fact, been errors of law, and that defendant was entitled to a new trial. But the Ohio Supreme Court reversed the order for a new trial, saying that when the insurer had paid the judgment against defendant on plaintiff's claim it established for all time that defendant had been negligent and plaintiff had been

155. Pp. 429-432 *supra.*

156. "This is not to be understood as delimiting the rights, duties or actions of an assured and his liability insurance carrier under the terms of their policy * * *." 362 Mo. 919, 925, 244 S. W. 2d 1001, 1004 (1951).

157. I have found twelve reported cases in which a counterclaim was held compulsory in a collision case, without any difficulty appearing except in *Keller v. Keklikian.* I do not think it worthwhile to set out the citations of these cases. In sum they vindicate the claim of a commentator that application of the compulsory rule to automobile cases should cause "little difficulty." Blackmar, *supra* note 118, at 47.

free from negligence, and thus that defendant was estopped by the action of his insurer from getting the new trial on his counterclaim to which he was otherwise perfectly entitled.[158]

Or consider the controversial New Jersey case of *Kelleher v. Lozzi*.[159] Lozzi's suit against Kelleher for injuries from an intersection collision was settled and dismissed after the pre-trial conference. Subsequently Kelleher brought suit against Lozzi for damages suffered in the same collision. Counterclaims are not compulsory in tort cases in New Jersey. Nevertheless the New Jersey Supreme Court found that Kelleher was barred by the settlement of Lozzi's suit:

> "By her own act in surrendering the contest, making her settlement and as a part thereof taking from her adversary his undertaking to release her from further liability she conceded that she, and she alone, was the wrongdoer. * * * By every fair expectation the question of Lozzi's negligence as between him and Kelleher was settled in the negative by the parties *inter sese*. * * * It is logically and factually impossible to reconcile a valid claim by Kelleher with a valid claim by Lozzi. * * * [S]he was not at liberty so to pursue her elective courses that she could lead the plaintiff into a settlement and the giving of a release with the reasonable and logical expectation that by this joint undertaking of the parties their litigable differences were ended and then, on the finely spun distinction that she was about to litigate her claim, not his, revive an issue which she had resolved against herself."[160]

The *Kelleher* case has been distinguished in several later decisions by inferior New Jersey courts on the grounds that the settlement in that case was made by Kelleher herself, rather than by her insurer.[161] Though this may appear to be true from a mere reading of the opinion, it is not actually the fact. Kelleher sought a rehearing to show that the settlement with Lozzi was entered into by her insurer without her consent, but rehearing was denied.[162]

The cases just considered are not unique. A consent judgment for plaintiff in Georgia, agreed to by defendant's insurer, bars defendant from suing for his own injuries in Alabama.[163] A losing defendant in Minnesota is precluded by collateral estoppel from

158. Ross v. Stricker, 153 Ohio St. 153, 91 N. E. 2d 18 (1950).
159. 7 N. J. 17, 80 A. 2d 196 (1951), approved 6 Rutgers L. Rev. 474 (1952), criticized 51 Col. L. Rev. 1062 (1951), 52 Col. L. Rev. 647, 657 n. 55 (1952).
160. 7 N. J. at 23-24, 29, 80 A. 2d at 199, 202.
161. Isaacson v. Boswell, 18 N. J. Super. 95, 86 A 2d 695 (1952); De Carlucci v. Brasley, 16 N. J. Super. 48, 83 A. 2d 823 (1951).
162. Kelleher v. Lozzi, Docket No. 765, N. J. Sup. Ct., May 14, 1951.
163. A. B. C. Truck Lines, Inc. v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946).

bringing his own action even though his insurer paid the verdict in the first action, rather than letting judgment be entered and appealing therefrom, against the wishes of the insured.[164] In Massachusetts a consent judgment agreed to by defendant's insurer was held to bar subsequent suit by the insured[165] until the legislature intervened to require a different result.[166]

It is true that a number of cases hold that an insurer and its attorney are not the agents of the insured, and thus can neither bind nor estop the insured by any agreement they make with the opposing party.[167] And it is equally true that some authorities would hold that a settlement made by the defendant personally should not bar him from subsequent suit,[168] or at worst that the intent of the parties in making the settlement should be a jury question.[169] We need not weigh the merits of the opposing positions on these points. This discussion has been presented only to show that even without a compulsory counterclaim rule, there are ample opportunities in many jurisdictions for an insurer to affect adversely the claim of its insured.

These are all applications of the rule that res judicata is a trap for the unwary. Suppose we have no compulsory counterclaim rule, and plaintiff's claim, in a typical collision case, is tried without a counterclaim being imposed. Suppose further that the jury finds for plaintiff, either because of an incompetent defense by the attorney for defendant's insurer, or because, in the absence of a counterclaim, the jury does not know of defendant's injuries and claim, and is carried away by the usual sympathy of jurors for claimants.

164. Miller v. Simons, 59 N. W. 2d 837 (Minn. 1953).

165. Biggio v. Magee, 272 Mass. 185, 172 N. E. 336 (1930). And in Long v. Union Indemnity Co., 277 Mass. 428, 178 N. E. 737 (1931), it was held that the insured thus deprived of his claim has no remedy against his insurer.

166. Mass. Ann. Laws c. 231, § 140A (Supp. 1952). This law was originally enacted in 1932 on the recommendation of the Judicial Council. 7 Ann. Rep. Mass. Jud. Coun. 32-33 (1931).

167. Fikes v. Johnson, 220 Ark. 448, 248 S. W. 2d 362 (1953); Foremost Dairies Inc. v. Campbell Coal Co., 57 Ga. App. 500, 196 S. E. 279 (1938); Burnham v. Williams, 198 Mo. App. 18, 194 S. W. 751 (1917); Countryman v. Breen, 241 App. Div. 392, 271 N. Y. Supp. 744 (4th Dep't 1934), *aff'd*, 268 N. Y. 643, 198 N. E. 536 (1935); Emery v. Litchard, 137 Misc. 885, 245 N. Y. Supp. 209 (Sup. Ct. 1930); Haluka v. Baker, 66 Ohio App. 308, 34 N. E. 2d 68 (1941); Jetton v. Polk, 17 Tenn. App. 395, 68 S. W. 2d 127 (1933), *cert. denied*, Tenn. Sup. Ct., Feb. 24, 1934; *cf.* U. S. A. C. Transport, Inc. v. Corley, 202 F. 2d 8 (5th Cir. 1953) (court bound by declaration of Georgia law in *Foremost Dairies* case *supra*); 51 Col. L. Rev. 1062 (1951).

168. Ross v. Fishtine, 277 Mass. 87, 177 N. E. 811 (1931). *Contra*: Giles v. Smith, 80 Ga. App. 540, 56 S. E. 2d 860 (1949); 6 Rutgers L. Rev. 474 (1952).

169. Hellstrom v. McCollum, 324 Ill. App. 385, 58 N. E. 2d 295 (1944); Hayhurst v. Embrey, 46 Ohio Abs. 357, 65 N. E. 2d 660 (1946); Note, 52 Col. L. Rev. 647, 657 (1952).

Everyone agrees that under these circumstances the verdict in the first action will be held to have established conclusively defendant's negligence and plaintiff's freedom from negligence. Thus defendant will be estopped from presenting his own claim just as effectively as if there had been a compulsory counterclaim rule.[170] Indeed the stated reason for the adoption of the compulsory counterclaim rule in Florida was to put an end to the practice by which the party to a collision who had only minor injuries rushed to a justice of the peace and got an adjudication of liability before the other party, who had serious injuries, could get to issue in a court of general jurisdiction.[171] Then the judgment by the J.P. became a bar to the second suit.

The stated rule is that the defendant is free to sue on his independent claim if his defense in the action against him is successful.[172] But even this is far from certain. A New York commentator, after examining the case law of that state, concludes that attorneys for defendant cannot overlook any possible claim which their clients may have for affirmative relief; although there is no provision as such for compulsory counterclaims in New York, the doctrine of res judicata may so operate as to compel the counterclaim.[173] Because of frequent judicial statements that in actions between the same parties the judgment is res judicata as to all points which might properly have been raised and adjudicated, the defendant withholds his counterclaim at his peril.[174] Indeed it is quite well settled that where the defendant has used the matter on which he relies for his own claim as a defense to an earlier claim by the other party, his own suit is barred by the rule against splitting a cause of

170. *E.g.* A. B. C. Truck Lines, Inc. v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946); Ross v. Stricker, 153 Ohio St. 153, 91 N. E. 2d 18 (1950); Restatement, Judgments § 58, comment *c* (1942); Scott, *supra* note 36, at 26-28; Note, 52 Col. L. Rev. 647, 648 (1952).

171. Fabisinski, *Counterclaim Under Florida Statutes,* 17 Fla. L. J. 160, 161 (1943). For example of this kind of evil, see Allamong v. Falkenhof, 30 Ohio App. 515, 177 N. E. 789 (1930), where the municipal court judgment for *F's* property damage was held to bar *A's* suit in district court for personal injuries. See cases to the same effect in 2 Moore, Federal Practice ¶ 2.06 [6] n. 88 (2d ed. 1948).

172. *E.g.,* Seager v. Foster, 185 Iowa 32, 169 N. W. 681 (1918); Restatement, Judgments § 58, comment *d* (1942); Scott, *supra* note 36, at 26-28; Note, 8 A. L. R. 694 (1920).

173. Note, *Effect in New York of Non-Assertion of Counterclaim,* 3 Syracuse L. Rev. 307, 315 (1952).

174. *E.g.,* Holman v. Tjosevig, 136 Wash. 261, 239 Pac. 545 (1925), criticized 39 Harv. L. Rev. 658 (1926); *see* Brunswick Drug Co. v. Springer, 55 Cal. App. 2d 444, 449-450, 130 P. 2d 758 (1942); Liberty Mutual Ins. Co. v. Hathaway Baking Co., 306 Mass. 428, 434, 28 N. E. 2d 425, 429 (1940); Paccalona v. Peninsula Bank & Lumber Co., 171 Mich. 605, 607, 137 N. W. 518, 519 (1912); Paulson v. Oregon Surety & Casualty Co., 70 Ore. 175, 180, 138 Pac. 838, 839 (1914); Commentary, *The "Compulsory" Counterclaim,* 5 Fed. Rules Serv. 807, 808 (1942).

action,[175] though I have not seen any application of this rule to negligence actions. This is an example of the famous statement of Chief Justice Shaw:

> "He cannot use the same defence, first as a shield, and then as a sword."[176]

What does this rather rambling discussion as to the perils of res judicata add up to? It adds up, I think, to a conclusion that even without a rule making counterclaims compulsory, defendants are in considerable danger of having their claims barred if they fail to plead them as counterclaims. Further it indicates that there are already ample opportunities for insurers to jeopardize their insured's claim by ignoring his interest and looking only to their own.

The cure for the difficulties some see in applying the compulsory counterclaim rule to cases defended by an insurer is not to exempt insurers from the operation of a device otherwise thought to be in the public interest.[177] It is to demand of insurers a good faith concern in the welfare of their policyholders. No one asks the insurer to bear the expense of prosecuting the insured's counterclaim. But is it too much to require that the insurer's attorney advise the defendant that his rights may be foreclosed by a failure to counterclaim, and that he should consult an attorney of his own, just as similar advice is now given when a suit exceeds the policy limits? Is it asking too much of the insurer to require him to notify the insured of his intention to settle plaintiff's claim, so that the insured may commence his own action or assert his counterclaim before he is barred by an agreement to which he is not a party? It is true that this latter policy will cost insurance companies money, for claimants may properly settle for a small sum in compromise of an entire controversy, but demand more when they know suit against them by the opposite party will still go on. Yet when the insurer makes the settlement for the low figure, without the knowledge or consent of its insured, and thus bars the insured's action, the company is actually saving money at the expense of its policy holder. Though the company is properly entitled to protect its own interest in minimizing its liability, it should not be entitled to do

175. *E.g.*, Mitchell v. Federal Intermediate Credit Bank of Columbia, 165 S. C. 457, 164 S. E. 136 (1932); Leslie v. Mollica, 236 Mich. 610, 211 N. W. 267 (1926); Note, 83 A. L. R. 642 (1933).

176. O'Connor v. Varney, 10 Gray 231 (Mass. 1857).

177. This had been the recommendation of the Court Rules Committee of the Minnesota State Bar Association, 10 Bench and Bar of Minnesota 35 (May 1953), but as pointed out at note 154 *supra*, the Committee has now rescinded its earlier action and recommended that tort cases be regarded as within the compulsory counterclaim rule whether or not an insurer is involved.

so at the cost of its insured.[178] This duty of good faith on insurers would, of course, have to be enforced by giving policy holders a remedy for its breach, but such a remedy should not be difficult to work out.[179]

The course outlined would provide a sound and workable solution to the problem of the insured defendant. With this problem disposed of, the arguments previously presented for compelling counterclaims in collision cases, and in negligence cases generally, seem unanswerable.

Conclusion

Compulsory counterclaim rules may at first blush appear harsh. On their face they are opposed to the dominant trend in procedure today which is to get away from penalizing a party's procedural errors by an adverse judgment against an otherwise meritorious claim. Yet such rules are an important part of the movement to end a multiplicity of litigation, and thus are in the interest of both litigants and the public. Since there is never any need for a party to incur the penalty for failure to counterclaim, and since there are ample remedies for the party who has so acted through inadvertence, the actual working of the rules has not been harsh. Their salutary effect has been had with comparatively little injustice, even during the period when such rules have been new and unfamiliar.

Courts have almost uniformly given compulsory rules a liberal construction. This trend should continue, as should the trend for more and more states to adopt such rules.

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178. The case of O'Morrow v. Borad, 27 Cal. 2d 794, 167 P. 2d 483 (1946), holding that where one company insures both parties to a collision, it is not entitled to represent or to control the defense of either, is suggestive. If insurers are free to minimize their own liability, without regard to the interests of their insureds, one would suppose that the company would be free in the situation presented to control both parties and get out without paying anything.

179. A similar remedy has been invented for bad faith in refusing to settle a claim within the policy limits. Note, 34 Minn. L. Rev. 150 (1950); see also Note, 60 Yale L. J. 1037 (1951). Such a remedy was denied in the circumstances with which the present article has been concerned in the case of Long v. Union Indemnity Co., 277 Mass. 428, 178 N. E. 737 (1931), where the court looked only for negligence rather than bad faith. That this case may not be conclusive is indicated by the hints now frequently appearing that such a remedy may be available. Miller v. Simons, 59 N. W. 2d 837, 840 (Minn. 1953); Keller v. Keklikian, 362 Mo. 919, 925, 244 S. W. 2d 1001, 1004 (1951); 51 Col. L. Rev. 1062, 1063 (1951). Might there not also be a malpractice action against the attorney provided by the insurer, since when an attorney is allowed to represent conflicting interests, as here, it is said to be essential that he deal fairly with both interests? Note, *The Bases of the Attorney's Liability to His Client for Malpractice*, 37 Va. L. Rev. 429, 435 (1951).