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Rules of Civil Procedure--Interposing Counterclaim--Effect on Venue and Jurisdiction

Frederick Luther Davis Jr.
West Virginia University College of Law

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technical boundary of the right to issuance. In a strong dissenting opinion to the principal case, Judge Haymond attacks this as a "departure from the doctrine of stare decisis."

Although this is a case of first impression in West Virginia, there is a clear split of authority throughout the United States concerning the use of the writ to compel a negative act. Compare generally, *Brandon v. Adams*, 110 Cal. App. 2d 835, 243 P.2d 26 (1952) and *Smoker v. Bolin*, 85 Ariz. 171, 333 P.2d 977 (1958). For example, the majority opinion in the principal case refers the reader to 55 C.J.S. *Mandamus* § 142 (1948), in support of the majority position, to show the similar use of mandamus in other jurisdictions. However, even a part of the language of that publication illustrates the diversity of opinion: ". . . the writ will not lie to compel the striking out of a name . . . where it is the statutory ministerial duty of the official to include such name. . . ."

The conclusion to be drawn from the instant case is that the limitation on the use of the writ of mandamus, not to compel a negative act, has been broadened through judicial legislation.

James William Sarver

Rules of Civil Procedure — Interposing Counterclaim — Effect on Venue and Jurisdiction

In an action for a declaratory judgment, *P*, a Michigan corporation, claimed it was the sole owner of certain patents. *D*, a resident of Canada, filed a counterclaim, which he thought was compulsory under FED. R. CIV. P. 13(a), with his answer. Later *D* filed a motion to dismiss for lack of personal jurisdiction over him, and lack of jurisdiction over the subject matter. The lower court, Holtzoff, J., held the counterclaim to be permissive under FED. R. Civ. P. 13(b). By asserting it, *D* actually invoked the jurisdiction of the court, thereby waiving any objection to service of process or jurisdiction of the person. However, the court on its own motion invoked the doctrine of *forum non conveniens*. *Held*, on appeal, that the doctrine of *forum non conveniens* was improperly applied. Whether the counterclaim is compulsory or permissive is immaterial, for in either case *D* was not compelled to pursue it unless properly served. FED. R. CIV. P. 12(b) permits challenging the jurisdiction of the person by a motion made prior to the filing of an answer or counter-

claim. Even if the counterclaim were compulsory, it did not have to be asserted immediately, but could wait for the disposition of a motion to dismiss for lack of jurisdiction over the person, and not be lost. If the motion were granted, *D* would not have to file a counterclaim; if it were denied, *D* could have reasserted the objection to service on appeal. If the objection were then sustained, the interim filing of the counterclaim would not have waived it. *North Branch Products, Inc. v. Fisher*, 284 F.2d 611 (D.C. Cir. 1960).

The Federal Rules of Civil Procedure should be as favorably construed as possible "consistent with due recognition of the settled principle that procedural rules cannot be used to extend federal jurisdiction or venue." *Lesnik v. Public Industrials Corp.*, 144 F.2d 968, 973 (2d Cir. 1944). In light of W. VA. R.C.P. 82, the West Virginia courts should be inclined to follow this line of reasoning. However, as demonstrated by the instant case, some jurisdictional and venue problems may arise under the new rules.

While there are few federal cases discussing the effect of interposing a counterclaim on the jurisdiction of the person or the venue of actions, a distinction should be made initially between the effect of a compulsory counterclaim and a permissive one. Essentially, a compulsory counterclaim under FED. R. CIV. P. 13(a) is one that is ancillary to the main claim. It is made compulsory in order that the court may determine in one action all matters related to the asserted claim, and that such matters may be heard without independent jurisdictional grounds. On the other hand, a permissive counterclaim is not ancillary to the main claim; it is unconnected with the transaction out of which the asserted claim arises, and requires independent grounds of jurisdiction.

Unlike the federal courts, most West Virginia courts are courts of general jurisdiction. Thus there will be no problem as to independent jurisdictional grounds. However, there may be problems in this area concerning jurisdiction of the person. It is settled law in West Virginia that personal jurisdiction may be obtained by the consent of the parties, and that lack of such jurisdiction may be waived. *Sidney C. Smith Corp. v. Dailey*, 136 W. Va. 380, 67 S.E.2d 523 (1951). Following this rule, it is possible that the courts will apply the law of the instant case and hold that the assertion of a counterclaim, permissive or compulsory, may constitute a waiver of any objection to personal jurisdiction.

The holding of the instant case is supported by *Beaunit Mills, Inc. v. Industrias Reunidas F. Matarazzo, S.A.*, 23 F.R.D. 654 (S.D.N.Y. 1959). There the complaint was for damages for breach of contract. The defendant asserted the defenses of lack of personal jurisdiction and improper venue, and filed a counterclaim for damages resulting from the plaintiff's fraudulent inducement of the defendant to enter into the same contract. It was held that it made no difference whether the counterclaim interposed was permissive or compulsory. The defendant waived these defenses by joining them in his answer with a counterclaim thereby affirmatively invoking the jurisdiction of the court. As in the instant case, the theory of this ruling is that the defendant could have raised his objections to personal jurisdiction and venue by a motion under FED. R. CIV. P. 12(b). By so raising the defenses before assertion of his counterclaim, he could avoid waiver of these defenses. The court further reasons that a hearing could be held on these motions before the answer is filed. If the court, in its sound discretion, refuses to determine these issues pre-trial, the assertion of a compulsory counterclaim would not be a voluntary submission to the jurisdiction of the court. Thus the defenses, seasonably raised before the assertion of the counterclaim, would be preserved.

Two distinctions should be noted between the *Beaunit Mills, Inc.* case, *supra*, and the instant case. In the former, the counterclaim was filed with the answer setting forth the defenses of improper venue and lack of personal jurisdiction. In the latter, a motion to dismiss for lack of personal jurisdiction was made months after the counterclaim was filed. Also the *Beaunit Mills, Inc.* case, *supra*, concerned both personal jurisdiction and venue, while the instant case was dealing only with personal jurisdiction. These facts taken together make the former case much stronger than the latter.

Another view of the personal jurisdiction problem is set forth in *Keil Lock Co., Inc. v. Earle Hardware Mfg. Co.*, 16 F.R.D. 388 (S.D.N.Y. 1954), an action for damages for patent infringement. The defendant's answer contained defenses on the merits, a counterclaim, and a defense of lack of personal jurisdiction. The court, in determining the defense of want of jurisdiction raised by the answer in favor of the defendant before the trial, stated that this defense was not waived because it was joined with a counterclaim. FED. R. CIV. P. 12(b) expressly provides that every available defense, including a counterclaim, shall be asserted in a responsive pleading, and that no objection or defense is waived by

joinder with another. The court then concluded that the distinction between general and special appearances no longer exists under the Federal Rules of Civil Procedure. Presumably the rule applies to both permissive and compulsory counterclaims since the court did not distinguish between them.

Waiver of venue may also be a problem, as shown by the *Beaunit Mills, Inc.* case, *supra*. It has been held that the filing of a compulsory counterclaim does not constitute waiver of venue, while there is such a waiver if a permissive counterclaim is filed. *Baltimore & O. Ry. Co. v. Thompson*, 80 F. Supp. 570 (E.D. Mo. 1948).

In discussing the effect on venue and personal jurisdiction of interposing a permissive or compulsory counterclaim, Professor Moore takes a view that seems to follow the spirit of the rules. He states that pleading jurisdiction, venue, and an answer to the merits and counterclaims or cross-claims together does not amount to waiver of the defenses of jurisdiction and venue. However the defendant may, if he chooses, present the defenses under FED. R. Civ. P. 12(b) by a motion prior to the filing of the answer; any or all of these defenses must be contained in one motion, not in a series of motions. 2 MOORE, FEDERAL PRACTICE 2260 (2d ed. 1948). Thus, while some courts compel the defendant to file a motion prior to his answer or lose his defenses of lack of jurisdiction and venue, Professor Moore accords the defendant a more liberal course of action.

As seen by the federal cases, a defendant, by interposing either a permissive or a compulsory counterclaim, may affect his defenses of lack of personal jurisdiction and venue. This problem may well arise under the new West Virginia Rules of Civil Procedure; if and when it does, the courts will be at liberty to follow any of the holdings of the federal courts. In view of the fact that the rules should be liberally construed to permit justice, perhaps the liberal interpretation of Professor Moore should be followed. However, the careful lawyer will probably prefer to act in a more conservative manner and proceed by motion under W. VA. R.C.P. 12(b) in order to prevent judicial determination of this problem in favor of his opposing counsel.

Frederick Luther Davis, Jr.