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FEDERAL COURTS-REMOVAL JURISDICTION-COUNTERCLAIM AS THE SOLE BASIS FOR REMOVAL

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FEDERAL COURTS—REMOVAL JURISDICTION—COUNTERCLAIM AS THE SOLE BASIS FOR REMOVAL—Plaintiff brought an action for damages in a state court. Defendant filed pleas to the declaration, and also filed a counterclaim arising out of the same cause of action. On this date defendant also filed a motion with the Federal District Court asking removal of the case based solely upon his counterclaim. On plaintiff's motion, *held,* case remanded to the state court. Defendant has no right under the United States Judicial Code to have a case

removed from the state court to the federal court when his motion is based upon his own counterclaim.[1] *Collins v. Faucett*, (D.C. Fla. 1949) 87 F. Supp. 254.

The Judicial Code, prior to the 1948 revision, allowed removal of a case from a state court to a federal court by the following provision: ". . . when in any suit . . . there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit . . . ."[2] Under this rule the federal courts were in conflict as to whether a defendant might remove a case when his motion was based upon his own counterclaim.[3] Courts allowing removal reasoned that the counterclaim should be construed as part of the "controversy" between the parties and therefore should be included in determining whether the defendant might remove.[4] The language of the Code in reference to removal was changed by the 1948 revision, and it is now provided: "(a) . . . any civil action brought in a State court . . . may be removed by the defendant or the defendants . . .; (c) whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed . . . ."[5] The significant changes in language are the use of the word "joined" and the omission of the word "controversy." A problem arises as to whether the word "joined" refers only to a joinder of claims by the plaintiff or is broad enough to include the use of cross-claims and counterclaims.[6] Professor Moore suggests that removal under the revised code is limited to the situation where there has been a joinder of claims by the plaintiff.[7] This construction seems sound, especially in view of the reviser's comment that the revision should limit the volume of

[1] The principal case was confined to a discussion of removal based upon a counterclaim and the other requirements for removal were not considered. Consequently, this note will proceed on the assumption that such requirements have been met.

[2] 36 Stat. L. 1094 (1911), 28 U.S.C.A. (1940) § 71. This provision substantially follows the 1887-1888 Judiciary Act. 25 Stat. L. 433 (1888).

[3] "It is true also that there has been, particularly among the older cases, much conflict and confusion on this question; so much so that many of the opinions refer to the conflict." Haney v. Wilcheck, (D.C. Va. 1941) 38 F. Supp. 345 at 349. Refusing removal: McKown v. Kansas & T. Coal Co., (C.C. Ark. 1901) 105 F. 657; LaMontagne v. T. W. Harvey Lumber Co., (C. C. Wis. 1891) 44 F. 645. Allowing removal: Lee v. Continental Ins. Co., (C.C. Utah 1896) 74 F. 424. The defendant in the principal case argued that the majority view prior to revision allowed removal, but the court expressed no opinion on the point as it felt that it was not necessary to the decision.

[4] This was particularly true when the counterclaim was one that had to be entered under a compulsory counterclaim statute. Lee v. Continental Insurance Co., supra note 3.

[5] 62 Stat. L. 937 (1948), 28 U.S.C.A. (1950) § 1441. A general discussion of the change in the code may be found in 44 ILL. L. REV. 401 (1949).

[6] The broader use of the term "joined" to include a case where a defendant has set up a counterclaim is illustrated in an article by Professor Blume, "Required Joinder of Claims," 45 MICH. L. REV. 797 (1947). In this article the writer discussed the situations in which joinder of claims is or may be required, and among such groupings of claims were counterclaim. See also, Professor Blume's discussion of the maximum affirmative scope of a civil action, 42 MICH. L. REV. 262 et seq. (1943).

[7] MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 252 (1949).

federal litigation.[8] On principle alone, it would seem that a defendant having a claim of a nature which could be prosecuted as a separate cause of action in the federal court, but who elects to enter it as a counterclaim in the state court, has invoked the jurisdiction of the state court and should not be allowed to remove the entire case to the federal courts. When the defendant returns to the Florida state court, however, he may be faced with a pleading dilemma. If he dismisses his counterclaim and brings it as a separate claim in a federal court, that court may refuse to hear the claim on the ground that it had to be entered as a compulsory counterclaim in the state court.[9] Res judicata would then serve as a bar to the claim in either the state or federal court. On the other hand, by continuing to plead his counterclaim in the state court, the result of the principal case prevents the removal of the entire case and the defendant is involuntarily deprived of federal adjudication of his admittedly federal claim. It is submitted, however, that the likelihood of the federal courts' refusing jurisdiction to the defendant's claim when brought as a separate cause of action is remote.[10] The court in the principal case remanded solely on the reasoning that the revisers of the code knew of the conflict on this question under the prior removal statute and if they had intended to give a right to remove to the defendant they would have done so explicitly. Although the ultimate decision rendered by the court appears to be the correct one, it would seem far better to reach that result by looking at the actual changes made in the statute rather than to what was not included therein.

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[8] The reviser's note to §1441 may be found in 28 U.S.C.A. 2 (1950). Some doubt has been expressed as to whether the revision in truth restricted removal. See, Strichter, "Some Observations on the New Federal Removal Statute," 16 INS. COUN. J. 103 (1949); 33 MINN. L. REV. 738 (1949). These articles based their conclusions primarily on two federal cases: Bentley v. Halliburton Oil Well Cementing Co., (D.C. Tex. 1948) 81 F. Supp. 323; Buckholt v. Dow Chemical Co., (D.C. Tex. 1948) 81 F. Supp. 463. The Bentley decision has since been overruled by Bentley v. Halliburton Oil Well Cementing Co., (5th Cir. 1949) 174 F (2d) 788, and the Buckholt case relied on the decision of the district court in the Bentley case. It is questionable, therefore, whether the criticism of the two articles is still valid. Butler Mfg. Co. v. Wallace & Tierman Sales, (D.C. Mo. 1949) 82 F. Supp. 635 indicates some limitation on removal under the revised code.

[9] Florida has such a statute. Fla. Stat. Ann. (Harrison-West, 1943) §52.11. See CLARK, CODE PLEADING 646 (1947) for citation of other states with similar statutes.

[10] The difficult pleading position in which the defendant would be placed is probably the strongest argument against the refusal to give jurisdiction. As yet, there does not appear to be a decision on the point of whether a federal court would refuse jurisdiction in this situation. In Red Top Trucking Corp. v. Seaboard Freight Line, (D.C. N.Y. 1940) 35 F. Supp. 740, the court refused to enjoin action in a state court on a claim which arose out of the same transaction as the claim sued upon in the federal court and therefore should have been entered as a counterclaim under the federal rules. The case was considered controlling in Maryland Casualty Co. v. Quality Foods, Inc., (D.C. Tenn. 1948) 8 F.R.D. 359. The court in Campbell v. Ashler, 320 Mass. 475, 70 N.E. (2d) 302 (1946), was confronted with the question of whether a person could sue in the state court on a claim which should have been presented as a compulsory counterclaim in the federal court. However, no direct decision on the point was rendered as the court held that the plaintiff in the state action was suing in a different capacity from that in which he was being sued in the federal court.