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A Victim of Permissive Counterclaims

Frank Swancara

A Victim of "Permissive Counterclaims"

(Under the New Colorado Code)

By FRANK SWANCARA*

John Decent was an old man, but still industrious. During past years he had many business losses, including worthless debts. He was often a personal surety or accommodation maker on notes of persons who never paid. He became liable on many obligations. His moral sense compelled him to acknowledge an indebtedness, whenever it was suggested, so that statutes of limitation meant nothing to him. He would not defeat creditors by invoking bankruptcy laws. He was not sued, because poor. Then came April 6, 1941, a dark day for this honest but impecunious John, for the Supreme Court liberated a swarm of legal hornets known as "permissive counterclaims." Many of these came to sting, and mortally, this good-intentioned citizen.

On May 6, 1941, John Decent was totally and permanently disabled as a result of the negligence of Jeff Rekless. After four months of confinement and pain this injured party filed a complaint, using "Form 9" against the tortfeasor. Many weeks prior to this, Jeff employed a lawyer reputed, in cigar stores, to be "astute," and who did not fail to consider the plaintiff-killing potentialities of Rule 13 (b):

> "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

He also noticed that Rule 13 (c) permits counterclaims "exceeding in amount" the plaintiff's claims, and that under Rule 18 (a) a defendant may join "as many claims * * * as he may have."

There is nothing in any of our Rules corresponding to a provision of the New Jersey Practice Act of 1912 which authorized a court to strike out any counterclaim that "cannot be conveniently disposed of in the pending action,"[1] nor have we any rule corresponding to that section of the New York Civil Practice Act which provides that the court "may in its discretion, whenever the interests of justice require, * * * strike out a counterclaim without prejudice to the bringing of another action."[2] Even under that provision, the courts claim no discretion to deny pleading and trial of counterclaims which a defendant obtained by assignment. Our Rule 13 (b) is, in effect, the same as Section 266 of the Civil Practice

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*Of the Denver Bar.

[1]Kelley v. Faitoute, etc. Co., 87 N. J. L. 567, 94 Atl. 802.

[2]Smyth v. McDonogh, 22 N. Y. S. 2d 631.

Act of New York, as amended in 1936, and it was said in a recent case that a counterclaim "though obviously acquired by the defendant for the purpose of set-off, * * * was properly interposed."[3] In an earlier case it was said that a defendant may "procure the sale of assignment to himself of causes of action against a plaintiff for the purpose of interposing them as counterclaims."[4]

Counsel for Jeff Rekless knew the situation of John Decent, plaintiff, and that claims against him could be purchased at 10 cents on the dollar. Encouraged by the New York decisions, he advised defendant to buy up as many claims as possible. Knowing that an action was impending, Jeff acquired some of the claims before complaint was filed, and some afterwards and prior to the time for service of defendant's pleading. Defendant then had all he could obtain by assignment from stores, physicians, and payees of notes on which plaintiff was indorser or accommodation maker. Rule 13 (e) did not concern him.

Rule 13 (e) provides:

> "A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading."

Since a defendant guilty of a harmful tort has reason to believe that he will be sued, if not already sued, he can acquire counterclaims at any time between the date of the tort and the date of his own pleading. Since an assignee is a real party in interest, if the assignment was not merely colorable, a claim, even if unliquidated,[5] obtained by assignment can be used as a counterclaim, and Rule 13 (b) permits this even if plaintiff sues in tort.

Not only may counterclaims result in a final judgment for defendant, as for an excess over plaintiff's claims, but if a plaintiff sues for his own wages, by the use of assigned claims a defendant can deprive the plaintiff of the benefits of the statute intended to save to him *60%* of his wages. That 60% is protected from execution, garnishment, etc., but not from counterclaims.[6]

Coming back to the hypothetical case of *Decent v. Rekless*, the plaintiff could have, before bringing any action for damages for personal injuries, become a voluntary bankrupt and obtained a discharge as to all obligations acquired or which could be acquired by defendant, or held by others. He would not have been compelled to surrender to the trustee in bankruptcy his cause of action for tort, because the same is not such a

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[3]Scientific, etc. Corp. v. Bd., 16 N. Y. S. 2d 91, 93.
[4]Bricken Corp. v. Cushman, 297 N. Y. S. 194, 195.
[5]Michigan Co. v. Pueblo Co., 51 Colo. 160, 164.
[6]Rutter v. Shumway, 16 Colo. 95.

"chose in action" as is subject to garnishment.[7] The bankruptcy act provides: "That rights of action ex delicto for * * * injuries to the person of the bankrupt * * * shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, * * * or other judicial process."[8] But John Decent continued to shun the bankruptcy court.

After all or many interrogatories, propounded under Rule 33, were answered, it was predictable that Decent would be able to prove himself entitled to $10,000 as compensation for his injuries and disability, but at the same time it seemed that Rekless, if careful, would be able to have it adjudged that plaintiff owes him $15,000 on the counterclaims. These cost $1,500, if purchased at 10 cents on the dollar, and so defendant would profit to the extent of $13,500, if execution could be satisfied on a judgment for $5,000 in his favor, that being the excess of the counterclaims over plaintiff's claim. If John had no property, defendant could still obtain $10,000 from his liability insurer. This assumes that the insurance contract provided that the insurer would pay judgments against the insured, and here, so far as the insurer was concerned, there would be a judgment against Rekless, the insured, in the sum of $10,000, notwithstanding that as between the parties litigant themselves there would be but one final judgment,[9] and that for defendant, according to the usual practice.[10] So it seems that a potential bandit may ignore banks and discard his gun. He can take out liability insurance, then strike down, with an automobile, the chosen victim. He can then advertise for and buy up claims against the prospective plaintiff, and be ready with "permissive counterclaims." Though the litigation might leave the injured party a pauper, he himself might depart from court with a swag.

John Decent, plaintiff, was much depressed by the thought that ultimately he would get nothing. If all the issues were tried, he would be compelled to suffer a judgment against himself for $5,000, because the counterclaims exceeded, by that sum, the amount recoverable by him. He ended it all, for himself, with monoxide gas. But since we have liberal rules on Substitution of Parties, the counterclaims remained to vex and burden his children, and to their full extent, for his own claim for $10,000 or more, being in tort, died with him.

Suppose that this was an actual case and all issues came to trial. Plaintiff's lawyer was employed as if in and for one case, but the counterclaims compelled him to work as if in defending a dozen, each involv-

[7]Coty v. Cogswell (Mont.), 50 Pac. (2d) 249.
[8]Sec. 110 (a)-5, title 11, U. S. C.: 52 Stat. 880.
[9]Rosenblum v. Dingfelder, 111 Fed. (2d) 406.
[10]57 C. J. 521.

ing different legal questions and the necessity of proving or disproving a different set of facts. The more work that the counterclaims imposed on plaintiff's lawyer the lesser became the probability of compensation, if he had to depend on a contingent fee based on amount of recovery. If the final judgment would have been in favor of defendant for a balance of $5,000, there would be no recovery upon which an attorney's lien could attach or from which plaintiff could pay his counsel for work in establishing and getting a verdict for plaintiff's own claim for $10,000.

Not only may a tort-plaintiff's counsel be compelled to work for nothing, but he may also be compelled to incur the displeasure of his own client. Suppose here the lawyer advised John that some of the counterclaims are outlawed, and that he need never pay them. If defendant serves an interrogatory under Rule 33, plaintiff's answer might be construed and held by a court as an "acknowledgment * * * in form of writing,"[11] so as to toll the statute of limitations.[12] Still another interrogatory may compel, in this assumed case, the plaintiff to answer: "I do not remember how much I owed to defendant's assignor." Thereupon defendant and his assignor can fabricate evidence as to the amount of the assigned indebtedness. Perjury is safe, and therefore encouraged, where its victim is unable to expose it.

While Rule 13 (b) was designed "to enable the disposition of a whole controversy,"[13] and to settle all disputes between a plaintiff and defendant, the settled law as to availability of assigned claims as counterclaims[14] enables a defendant to compel plaintiff to suffer trial and adjudication as to obligations incurred to strangers. Where these are upon promissory notes, the defendant, as purchaser, can claim to be a holder in due course, and thus rob plaintiff of his defenses. If one is severely injured in an automobile accident, and sues on account thereof, the circumstances may make him unable to defend, effectively, one or more unexpected counterclaims obtained by defendant by assignment, and if defendant's recovery exceeds that of plaintiff, the latter is but punished, and not compensated, for his personal injuries. Possibly at the time the Federal Rules were being formulated, inquiring minds did not inquire enough, but stopped with the question: Can a defendant in a tort case "come back with a promissory note and adjust that in the same suit?"[15] A defendant can "come back" in many other ways, and make of Rule 13 (b) a Jack the plaintiff-killer.

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[11]Sec. 26, Ch. 102, C. S. A.
[12]Note 10 in 37 C. J. 1116.
[13]Kuenzel v. Universal etc. Co., 29 F. Supp. 407.
[14]57 C. J. 505.
[15]Proceedings of A. B. A. Institute on Federal Rules, as quoted in Kuenzel v. Universal etc. Co., supra, note 13.