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# Federal Jurisdiction -- Amount in Controversy -- Effect of Counterclaim

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it, but we must wait for the ruling on each set of facts as it is presented.

It is suggested, on the basis of present decisions, that in carrying out the liquidation and sale by the stockholders, the liquidation should be effected, if at all possible, before any definitive negotiating takes place. It should be done as soon as the idea to sell is conceived in order to prevent a holding that any part of the negotiations was corporate action. If the negotiations do take place before liquidation, they should be carried on in behalf of the stockholders by someone who is not an officer of the corporation.[14] When the assets are transferred to an agent for the stockholders, care should be taken that the corporation or the board of directors, as a body, has no hand in the appointment of such agent, but rather that a stockholder's petition or consent should be obtained appointing him.[15]

There should be a complete vesting of title to the assets in the stockholders before the sale takes place. It has been held that payment of a corporate debt out of the proceeds of the sale by the stockholders does not make the sale one by the corporation.[16] It is best, however, to avoid this since it is possible that courts may say that the sale was for the corporation's benefit and hence was corporate action. The rule which permits escape from double taxation in this situation is a just one but great care must be exercised to reap its benefits.

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**Federal Jurisdiction—Amount in Controversy—Effect of Counterclaim**

Under Rule 13 of the Federal Rules of Civil Procedure counterclaims are divided into two classes, compulsory and permissive. A compulsory counterclaim is one which must be pleaded if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, does not require the presence of parties over whom the court cannot acquire jurisdiction, and is not the subject matter of a pending action.[1] A permissive counterclaim is any other claim against an opposing party.[2]

[14] Louisville Trust Co. v. Glenn, 65 F. Supp. 193 (W. D. Ky. 1946) (three man committee appointed by stockholders; only one member of committee was officer of corporation; liquidation resolution but no actual liquidation occurred before negotiations began).

[15] Borall Corp. v. Commissioner, 167 F. 2d 865 (2d Cir. 1948); Louisville Trust Co. v. Glenn, 65 F. Supp. 193 (W. D. Ky. 1946); Burnet v. Lexington Ice & Coal Co., 62 F. 2d 906 (4th Cir. 1933) (North Carolina federal case using what is now N. C. GEN. STAT. §55-132 (1943) which provides that corporation is still entity for winding up purposes for three years after dissolution, and holding that even after dissolution, agent appointed by corporation for stockholders actually corporation's trustee in liquidation and sale by him corporate sale).

[16] Louisville Trust Co. v. Glenn, 65 F. Supp. 193 (W. D. Ky. 1946).

[1] Fed. R. Civ. P. 13(a). [2] Fed. R. Civ. P. 13 (b).

Where jurisdiction of a district court is based on a general federal question, that is, where there is no special provision in an act being to the contrary, there is an additional requirement that the amount in controversy exceed $3,000, exclusive of interest and costs.[3] Where jurisdiction is based upon diversity of citizenship, again the amount in controversy must exceed $3,000, exclusive of interests and costs.[4]

Where a counterclaim is of the compulsory type, there seems to be no question that when the jurisdictional elements are present as to the plaintiff's claim,[5] the counterclaim is regarded as ancillary or auxiliary,[6] and the court will decide the counterclaim even though the opposing claim is denied on the merits.[7] However, if the court has no jurisdiction over the main transaction, even a compulsory counterclaim will be dismissed unless it has independent federal jurisdictional grounds.[8]

Where a counterclaim is of the permissive type, there must be independent grounds of federal jurisdiction or the counterclaim will be dismissed.[9] It has been said that in the case of a set-off, which is defined as a demand asserted to diminish or extinguish plaintiff's demand, which arises out of a transaction different from that sued on, and which must be liquidated and emerge from a contract or judgment, no independent grounds or federal jurisdiction are necessary.[10]

Aggregating the claims of both the plaintiff and defendant in order to make up the amount in controversy presents a more difficult question. In looking at this group of cases it is convenient to break the cases down into (1) cases originating in federal courts, and (2) removal cases.

In cases originating in federal courts and where the defendant's

[3] 28 U. S. C. §1331 (1948). [4] 28 U. S. C. §1332 (1948).

[5] When a defendant files a claim against a third party who is brought in as a defendant to this claim, the original defendant becomes a third party plaintiff, and the third party is denominated a third party defendant. If the third party defendant files a claim against the third party plaintiff, this claim is a counterclaim, and not a cross-claim. 3 MOORE'S FEDERAL PRACTICE ¶13.06 (2d ed. 1948).

[6] Moore v. New York Cotton Exchange, 270 U. S. 593 (1926) (decided under old Federal Equity Rule 30); United States, to Use and for Benefit of Foster Wheeler Corp. v. American Surety Co., 142 F. 2d 726 (2d Cir. 1944); Norton v. Agricultural Bond & Credit Corp., 92 F. 2d 348 (10th Cir. 1937); New York Life Ins. Co. v. Kaufman, 78 F. 2d 398 (9th Cir.), *cert. denied,* 296 U. S. 626 (1935).

[7] Kirby v. American Soda Fountain Co., 194 U. S. 141 (1904); Home Ins. Co. v. Trotter, 130 F. 2d 800 (8th Cir. 1942); Horwitz v. New York Life Ins. Co., 80 F. 2d 295 (9th Cir. 1935).

[8] Goldstone v. Payne, 94 F. 2d 855 (2d Cir.), *cert. denied,* 304 U. S. 585 (1938).

[9] Robinson Bros. v. Tygart Steel Products Co., 9 F. R. D. 468 (W. D. Pa. 1949); Jewish Consumptives Relief Society v. Rothfield, 9 F. R. D. 64 (S. D. N. Y. 1949); Cusimano v. Falciglia, 6 F. R. D. 586 (S. D. N. Y. 1947); Marks v. Spitz, 4 F. R. D. 348 (D. Mass. 1945); Donnelly Garment Co. v. Int'l Ladies Garment Workers Union, 47 F. Supp. 67 (W. D. Mo. 1942). See Kantar v. Garchell, 150 F. 2d 47, 49 (8th Cir. 1945) where the report does not state whether or not the counterclaim was raised on appeal, and so may be dictum.

[10] 3 MOORE'S FEDERAL PRACTICE ¶13.19 (2d ed. 1948). A dictum in Marks v. Spitz, 4 F. R. D. 348 (D. Mass. 1945) supports this proposition, but Robinson Bros. v. Tygart Steel Products Co., 9 F. R. D. 468 (W. D. Pa. 1949) is *contra.*

counterclaim is itself in excess of the jurisdictional amount, the meager authority on the point indicates that the federal court has jurisdiction of the entire suit, regardless of plaintiff's claim. *Roberts Mining and Milling Co. v. Schrader*[11] holds squarely that this is so. Dicta in *American Sheet and Tin Plate Co. v. Winzeler,*[12] *Central Commercial Co. v. Jones-Dusenbury Co.,*[13] *Ginsburg v. Pacific Mutual Life Insurance Co.,*[14] and an implication in *O. J. Lewis Mercantile Co. v. Klepner*[15] also support the view that jurisdiction exists.

Where the defendant's counterclaim is not in excess of $3,000, exclusive of interest and costs, but when added to the plaintiff's claim, the total exceeds the minimum jurisdictional amount, the courts again state that this should be allowed, but all of these statements can be classified as dicta. These dicta may be found in *Kirby v. American Soda Fountain Co.,*[16] *Central Commercial Co. v. Jones-Dusenbury Co.,* and *American Sheet and Tin Plate Co. v. Winzeler. Home Life Insurance Co. v. Sipp*[17] is a case in point, usually cited as *contra,* but the peculiar fact situation of that case coupled with language which the court used[18] would seem to be more of a recognition of the rule, with an exception being made. In *Lee v. Continental Insurance Co.*[19] there was a square holding that the amount of the counterclaim could be added to the claim of the plaintiff to make up the jurisdictional amount. This case originated in "a court of Utah territory" and was removed to the federal circuit court when Utah was admitted as a state.

In certain types of removal cases the effect of a counterclaim is quite clear. Although before 1941 there was a sharp and irreconcilable split of authority on the point,[20] *Shamrock Oil and Gas Corp. v. Sheets*[21] settled the proposition that if a non-resident plaintiff sued in a state court, for whatever amount, and defendant pleaded a counterclaim in excess of the jurisdictional amount, the plaintiff could not remove, be-

[11] 95 F. 2d 522 (9th Cir. 1938).
[12] 227 Fed. 321, 324 (N. D. Ohio 1915).
[13] 251 Fed. 13, 19 (7th Cir. 1918). [14] 69 F. 2d 97, 98 (2d Cir. 1934).
[15] See 176 Fed. 343, 346 (2d Cir.), *cert. denied,* 216 U. S. 620 (1909), where the court said that the defendant invoked the jurisdiction of the court for its own benefit by putting in a counterclaim, and was estopped to deny jurisdiction. This case has been criticized for its holding by Judge Dobie in an article, *Jurisdictional Amount in the United States District Court,* 38 HARV. L. REV. 733 (1925), and by the court in Home Life Ins. Co. v. Sipp, 11 F. 2d 474 (3d Cir. 1926), on the grounds that the cases cited to sustain the holding will not do so.
[16] 194 U. S. 141, 144 (1904). [17] 11 F. 2d 474 (3d Cir. 1926).
[18] "The counterclaim in this case—$423—is not in itself equal to the jurisdictional amount; nor when added to the plaintiff's demand [an even $3,000] does it raise the total to the amount the statute requires, for the reason that the counterclaim was pleaded not to recover anything from the plaintiff but merely to be deducted from any amount that might be found due the plaintiff, and particularly to be deducted from an amount which the defendant admits it owes."
[19] 74 Fed. 424 (C. C. D. Utah 1896).
[20] For a collection of cases see 28 U. S. C. A. §71, n. 668 (1926).
[21] 313 U. S. 100 (1941).

cause he was not a defendant within the meaning of the removal statutes.

It is equally clear that the defendant being sued in his home state cannot remove, because the statute explicitly limits the right of removal to a nonresident defendant or defendants.[22] By the weight of authority a non-resident defendant who pleads a counterclaim in a state court in excess of the jurisdictional amount cannot remove when the plaintiff claims only $3,000 or less. The courts take the view that it is the demand in the complaint which fixes the amount in controversy, and a counterclaim is not to be considered.[23]

When both original and removal suits are considered, the decisions do not warrant the statements frequently made by writers that it is generally held that a counterclaim can be used to make up the jurisdictional amount.[24] Most of the decisions cited as permitting such a proposition are only dicta.[25]

In conclusion this writer suggests that the existing practice of deciding compulsory counterclaims when there is jurisdiction over the plaintiff's complaint, regardless of the amount of the counterclaim, should be maintained. In addition the effect of a counterclaim upon the jurisdictional amount should be made clear by an amendment to Rule 13 of the Federal Rules of Civil Procedure. The simplest rule, and one which would be in line with the plaintiff's viewpoint theory, as well as the policy of restricting federal jurisdiction, would be a requirement that plaintiff's complaint show that an amount exceeding $3,000 exclusive of interest and costs, be in controversy, and no counterclaim would be considered to make up that amount. No distinction should be made between original and removal jurisdiction.

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### Federal Jurisdiction—Amount in Controversy—Unregistered Trade-marks and Trade Names

Where the owner of a trade-mark has registered it pursuant to the Federal Trade-Mark statutes, no jurisdictional amount is required in an action for infringement in the federal courts.[1] In addition, where a

[22] 28 U. S. C. §1441 (b) (1948).

[23] Gates v. Union Cent. Life Ins. Co., 56 F. Supp. 149 (E. D. N. Y. 1944); Haney v. Wilcheck, 38 F. Supp. 345 (W. D. Va. 1941); Harley v. Firemen's Fund Ins. Co., 245 Fed. 471 (W. D. Wash. 1913); Bennett v. Devine, 45 Fed. 705 (C. C. S. D. Iowa 1891); La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645 (C. C. E. D. Wis. 1891). *Contra:* Wheatley v. Martin, 62 F. Supp. 109 (W. D. Ark. 1945); Clarkson v. Manson, 4 Fed. 257 (C. C. S. D. N. Y. 1880). Mackay v. Uinta Development Co., 229 U. S. 173 (1913) *semble.*

[24] SIMKINS, FEDERAL PRACTICE §132 (3d ed. 1938); MONTGOMERY'S MANUAL OF FEDERAL JURISDICTION AND PROCEDURE §94 (4th ed. 1942); Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure,* 45 YALE L. J. 393 (1936).

[25] Note, 25 MINN. L. REV. 356 (1941).

[1] 28 U. S. C. §1338(a) (1948).