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Civil Procedure - Jurisdiction - Effect of Filing Counterclaim After Denial of Objection to Jurisdiction

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RECENT DECISIONS

CIVIL PROCEDURE—JURISDICTION—EFFECT OF FILING COUNTERCLAIM AFTER DENIAL OF OBJECTION TO JURISDICTION—Plaintiff brought suit in the Municipal Court of Cleveland based on an automobile collision which occurred in the city. Defendant was served by mail at his residence outside the city and beyond the territorial jurisdiction of the court. Appearing specially, defendant moved to quash service of summons; the trial court overruled the motion and gave him leave to plead. Defendant then filed a counterclaim based on the same collision, alleging the negligence of the plaintiff and requesting damages. On appeal of the decision overruling his motion to quash service, *held,* defendant had not waived his objection to jurisdiction by seeking affirmative relief in his answer. *Bennett v. Radlick,* (Ohio App. 1957) 145 N.E. (2d) 334.

The Ohio courts have frequently held that a defendant does not waive jurisdictional defects by defending on the merits after an objection to jurisdiction over the person, made in a special appearance,[1] has been overruled.[2] To hold otherwise would impose upon the defendant the unfair choice of either defending on the merits and thereby waiving the "valuable right"[3] to contest jurisdiction, or relying on his exception to jurisdiction at the risk of losing his defense on the merits.[4] Generally, the rule is limited to defenses and is not extended to the case where the defendant requests affirmative relief.[5] The principal case extends the rule where the

1 The timing of defensive pleadings or motions in connection with special appearances is crucial. Any motions or pleadings other than those relating to objections to jurisdiction over the person made before the court passes upon the jurisdictional objection are generally held to effect a general appearance. See 111 A.L.R. 925 (1937).

2 Ohio Electric Ry. Co. v. United States Express Co., 105 Ohio St. 331, 137 N.E. 1 (1922); Glass v. McCullough Transfer Co., 159 Ohio St. 505, 115 N.E. (2d) 78 (1953). There is a conflict in the decisions in other states on this question. See 93 A.L.R. 1302 (1934), 107 A.L.R. 1102 (1937). 34 CORN. L. Q. 230 (1948) suggests that the majority and more modern view is that the defendant may defend on the merits without waiving his jurisdictional objections.

3 Principal case at 339. Not all courts agree that a "valuable right" is involved, some treating objections to jurisdiction over the person as merely dilatory where the defendant is before the court on special appearance. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317 (1909). Cf. York v. Texas, 137 U.S. 15 (1890).

4 Ohio Electric Ry. Co. v. United States Express Co., note 2 supra. For discussions of the arguments on both sides of this question, see 9 MICH. L. REV. 396 (1911), 34 CORN. L. Q. 230 (1948). The reason why the defendant is put to this unfair choice is that a denial of a motion to quash service of summons, or similar motion, is generally held not to be an appealable order. Thus the defendant would have to allow a default judgment to be entered against him before he could get an appellate ruling on the jurisdiction question. Burns v. Northwestern National Bank, 65 N.D. 473, 260 N.W. 253 (1935). In some jurisdictions, however, prohibition may be used to test the defendant's exception [Oak Park Country Club v. Goodland, 242 Wis. 320, 7 N.W. (2d) 828 (1943)], while in others this has been specifically denied [State ex rel. Rhodes v. Solether, 162 Ohio St. 559, 124 N.E. (2d) 411 (1955)].

5 Morehart v. Furley, 149 Minn. 56, 182 N.W. 723 (1921); Chandler v. Citizens' National Bank, 149 Ind. 601, 49 N.E. 579 (1898).

defendant's counterclaim is based on the same facts as the complaint. Since the controversy over the facts in the plaintiff's complaint is already before the court, it is reasoned that the defendant does not "invoke the jurisdiction of the court anew"[6] by asserting a counterclaim based on the same facts.[7] In addition, the court asserts that the reasons for allowing a defense on the merits apply equally to the counterclaim, because a judgment for plaintiff would bar any subsequent claim by the defendant.[8] The court cites no authority for its holding, and there appear to be few if any cases that have gone this far.[9] The soundness of the court's reasoning would seem to turn upon a question not discussed in the opinion, whether a defendant may interpose as a defense facts which would justify a counterclaim and, if judgment is rendered in his favor, bring a subsequent suit for affirmative relief on these same facts. In general the courts distinguish between use of the defensive matter merely as facts inconsistent with plaintiff's cause of action[10] and the assertion of a claim by way of recoupment or set-off. In the latter case, subsequent use of the same facts to sue for the balance of the claim constitutes splitting of a cause of action and is denied.[11] Moreover, in states having compulsory counterclaim statutes,[12] the subsequent claim may be barred if it arose out of the same transaction as the complaint in the original suit. Where the defendant would not be barred in the subsequent suit he stands in no danger of losing his counterclaim by not requesting affirmative relief in the first suit, and the argument of the court in the principal case that the defendant would be prejudiced by not allowing the counterclaim fails.[13] Where the counterclaim is barred or is made compulsory by statute, however, the principal case in conforming with the policy against forcing defendant to an election of defenses is

[6] Principal case at 339.

[7] The general view where the same facts are presented is, however, to the contrary. See, e.g., Merchants Heat and Light Co. v. Clow and Sons, 204 U.S. 286 (1907).

[8] This conclusion is based on the fact that a judgment for plaintiff, as in the negligence action here, would operate as res judicata as to any subsequent claim by defendant, such a judgment being a determination that defendant was negligent and plaintiff was not. See 8 A.L.R. 727 (1920) for a discussion of this point.

[9] There is dictum in Buckley v. John, 314 Mass. 719 at 721, 51 N.E. (2d) 317 (1943), to the effect that, "we are not inclined to regard the counterclaim as a general submission to the jurisdiction for the reason that he was probably required to file it by Rule 32 of Superior Court . . . or run the risk of losing rights."

[10] Benedict v. Nielsen, 204 Iowa 1373, 215 N.W. 658 (1927); Ott v. DuPlan Silk Corp., 271 Pa. 322, 114 A. 630 (1921). See also cases collected at 83 A.L.R. 654 (1933).

[11] Mitchell v. Federal Intermediate Credit Bank, 165 S.C. 457, 164 S.E. 136 (1932).

[12] For a list of these jurisdictions, in addition to the federal system, see 8 A.L.R. 727 (1920).

[13] The principal case does make one further argument in support of its ruling. Although there is no compulsory counterclaim in Ohio, Ohio Rev. Code (Baldwin, 1953) §2323.40, provides that if a defendant omits to set up a counterclaim he cannot recover costs against the plaintiff in any subsequent action thereon. The court argues, at page 339, that a defendant would therefore be "penalized" by not filing his counterclaim.

sound.[14] In such situations there would seem to be no reason for distinguishing between defenses on the merits and counterclaims arising out of the facts involved in the complaint.

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14 Obviously, in those jurisdictions that hold a defense on the merits to constitute a waiver of jurisdictional defects, it would follow, a fortiori, that filing a counterclaim would also have that effect.