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ESTABLISHING FEDERAL JURISDICTIONAL AMOUNT BY A COUNTERCLAIM†

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Federal removal procedure is keyed to the original jurisdiction of the district courts.[1] Thus Section 1441 of the Judicial Code provides that any civil action brought in a state court of which the district courts have original jurisdiction may be removed by the "defendant or defendants,"[2] provided further that none of the defendants is a citizen of the state in which the action has been brought.[3] In "diversity" cases, district courts have original jurisdiction if the suit is between citizens of different states and the "matter in controversy" is more than the sum or value of $3000 exclusive of interest and costs.[4] It is clear, therefore, that removal is available to a foreign defendant if the plaintiff asserts against him in a state court a claim in excess of $3000.[5]

A question that often arises in diversity cases, however, is whether a counterclaim may be used to create the requisite amount in controversy

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1. On removal in general see MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 251-88 (1949), hereinafter cited MOORE, COMMENTARY.

2. 28 U.S.C.A. § 1441(a) (1948). It is now settled that it is for the district court alone to decide whether removal is justified. MOORE, COMMENTARY 272. And a district court's decision to deny removal and to remand is not reviewable. *Id.* at 281. The removal petition must be filed in the district court for the district and division within which the state action is pending. *Id.* at 272.

3. 28 U.S.C.A. § 1441(b) (1948). See also MOORE, COMMENTARY 233.

4. The congressional grant of original jurisdiction in cases involving diversity of citizenship is contained in 28 U.S.C.A. § 1332 (1948).

To establish "general federal question" jurisdiction it is also necessary that the amount in controversy be in excess of $3,000 exclusive of interest and costs. 28 U.S.C.A. § 1331 (1948). However, the discussion that follows deals exclusively with jurisdictional amount in diversity cases.

5. See MOORE, COMMENTARY 231-37.

and thus provide the jurisdictional basis for removal. Where the party seeking removal in this situation is the state court plaintiff, his petition has usually been denied either on the theory of waiver, or, if that element is not present, on the theory that the right to remove is expressly limited by Section 1441(a) to "defendants." Thus if a foreign plaintiff claims the jurisdictional amount in a state court and is met by a counterclaim in excess of $3000, it appears that the plaintiff by instituting his action in the state court has waived all right to remove even if it is conceded that as to the counterclaim he becomes a "defendant" within the meaning of Section 1441(a).[6] Even where a suit is for $3000 or less, and a counterclaim is asserted for more than $3,000, there is considerable doubt that the foreign plaintiff can remove, although the doctrine of waiver is obviously inapplicable. Those courts which deny removal proceed on the theory that the original status of the parties is controlling; a "plaintiff" cannot be converted into a "defendant" by a counterclaim.[7] On the other hand, a number of courts have adopted a more functional approach and have permitted removal.[8] They reason that a shift in the plaintiff's capacity results from the assertion of a counterclaim against him and that he becomes a defendant as to the counterclaim.

It is settled law, however, that if a suit is commenced for less than $3000, a foreign *defendant* cannot base a petition for removal on a counter-

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6. West v. Aurora City, 73 U.S. (6 Wall.) 139, 142 (1867) (alternative holding); San Antonio Suburban Irrigated Farms v. Shandy, 29 F.2d 579, 580-81 (D. Kan. 1928) (dictum); Zumbrunn v. Schwartz, 17 F.2d 609, 610 (D. Ind. 1927) (dictum); *cf.* Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 108 (1941). *But see* Bankers Securities Co. v. Insurance Equities Co., 85 F.2d 856 (3rd Cir. 1936).

7. Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 107, 108 (1941) (dictum) (plaintiff's claim in excess of $3,000; counterclaim for $7,200 on a contract which was separate and distinct from the indebtedness sued on by plaintiff); Waco Hardware Co. v. Michigan Stove Co., 91 Fed. 289 (5th Cir. 1899) (suit for less than jurisdictional amount; unrelated counterclaim in excess of jurisdictional amount); *cf.* West v. Aurora City, 73 U.S. (6 Wall.) 139 (1867) amount of plaintiff's claim and defendant's counterclaim not stated); Lee Foods v. Bucy, 105 F. Supp. 402 (W.D. Mo. 1952) (claim less than jurisdictional amount; counterclaim in excess of $3000; removal denied under 28 U.S.C.A. § 1441(c)), noted approvingly 52 COL. L. REV. 282 (1953).

8. Carson & Rand Lumber Co. v. Holtzclaw, 39 Fed. 578 (E.D. Mo. 1889) (suit for less than jurisdictional amount; counterclaim in excess of jurisdictional amount related to original suit); Chambers v. Skelly Oil Co., 87 F.2d 853 (10th Cir. 1937) (claim for less than $3000; counterclaim of more than $3000 arising out of same transaction); Groveville Sales Co. v. Stevens, 16 F. Supp. 563, 564 (D.C. N.J. 1936) (claim less than $3000; counterclaim in excess of $3000), noted approvingly 14 N.Y.U.L.Q. REV. 412 (1936); *cf.* Bankers Securities Co. v. Insurance Equities Co., 85 F.2d 856, 857 (3rd Cir. 1936) (suit in excess of $3,000).

claim in excess of $3000 which he is permitted but not compelled by state practice to assert.[9] This rule stems from the fact that under state codes the so-called permissive counterclaim need not be related to the transaction which gives rise to plaintiff's claim for relief.[10] Thus the courts apparently feel that the danger of oppression is great where unrelated claims may be brought up or exhumed and asserted for removal purposes. Furthermore, an unrelated claim appears to have little connection with the claim for relief alleged by the plaintiff. And since the "plaintiff's viewpoint" theory of detecting the presence or absence of the necessary elements of federal jurisdiction is a cherished rubric of federal practice,[11] these courts have refused to look to permissive counterclaims to establish jurisdictional amount.

But where a plaintiff's claim is for $3000 or less and a foreign defendant must plead a compulsory counterclaim which is in excess of $3000

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9. Crane Co. v. Guancia, 132 Fed. 713 (S.D. N.Y. 1904); McKown v. Kansas & T. Coal Co., 105 Fed. 657 (W.D. Ark. 1901); Bennett v. Devine, 45 Fed. 705 (S.D. Iowa 1891); LaMontagne v. Harvey, 44 Fed. 645, E.D. Wis. 1891); *cf.* Stuart v. Creel, 90 F. Supp. 392 (S.D. N.Y. 1950) (type of counterclaim not specified); Fearon Lumber & Veneer Co. v. Lawson, 166 Ky. 123, 178 S.W. 1121 (1915) (counterclaim less than jurisdictional sum).

Six states have enacted permissive counterclaim provisions which are substantially the same as FED. R. CIV. P., Rule 13(b). Rule 13(b) states: "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." See CLARK, CODE PLEADING 645, n. 52 (2d ed. 1947). Compare the companion FED. R. CIV. P., Rule 13(a): "A pleading *shall state* as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action." (italics inserted) The latter enacts the so-called "compulsory" counterclaim, now adopted in identical language by eleven states. CLARK, *op. cit. supra* at 645, n. 52, 646, n. 54.

Missouri has expressly provided for the compulsory but not the permissive counterclaim. MO. REV. STAT. ANN. §§ 847.73-847.79. But see Atkinson, *Missouri's New Civil Procedure*, 9 MO. L. REV. 22 (1944), arguing that permissive counterclaims should be allowed under other broad provisions for joinder of claims generally by a defendant.

For a discussion of the counterclaim practice of other states see CLARK, *op. cit. supra* at 642-53.

Unless otherwise noted, the terms "compulsory" and "permissive", as used hereinafter in both text and footnotes, are defined in accordance with FED. R. CIV. P., Rules 13(a) and 13(b) respectively.

10. See note 9, *supra.*

11. See note 28, *infra.*

or lose it,[12] a number of courts hold that the required jurisdictional amount is present and that the defendant may remove.[13] In these cases, the counterclaim must arise out of the same transaction as the plaintiff's claim,[14] and therefore the opportunity to abuse the rule in order to secure advantages under threat of removal is narrowed. Moreover, the fact that the counterclaim must involve issues related to the plaintiff's claim furnishes some support for the argument that the claim and the counterclaim are a single unit of litigation, or matter in controversy, from the "plaintiff's viewpoint."[15]

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12. Under the federal rules and a number of state codes, failure to plead a compulsory counterclaim in a suit which proceeds to judgment bars further litigation of that claim. See CLARK, *op. cit. supra* note 9, at 648, nn. 58, 59, and 646. Even where the res judicata effect of the judgment is not expressly provided for by the state code, the courts will bar an independent suit on the counterclaim if the issue was the same in both the plaintiff and defendant's claim. *Id.* at 646-47, and cases cited therein.

13. Rosenblum v. Trulliger, 118 F. Supp. 394 (E.D. Ark. 1954); Lange v. Chicago R.I. & P. R.R., 99 F. Supp. 1 (S.D. Iowa 1951), noted 21 U. CIN. L. REV. 88 (1951) (critically) 38 VA. L. REV. 108 (1951) (approvingly); Wheatley v. Martin, 62 F. Supp. 109 (W.D. Ark. 1945); McKown v. Kansas & T. Coal Co., 105 Fed. 657 (W.D. Ark 1901) (dictum); Wolcott v. Sprague, 55 Fed. 545 (D. Kan. 1891); Clarkson v. Manson, 4 Fed. 257 (S.D. N.Y. 1880); *cf.* Ginsburg v. Pacific Mut. Life Ins. Co., 69 F.2d 97 (2d Cir. 1934).

14. See note 9, *supra.*

15. See 3 MOORE, FEDERAL PRACTICE ¶ 13.20 (2d ed. 1948). There are cases which go so far as to permit the creation of jurisdictional amount for removal purposes by aggregation of a claim and a compulsory counterclaim neither of which satisfies the jurisdictional sum required. See 3 MOORE, *op. cit. supra* ¶ 13.15 n. 11. And the rule is sometimes expressed in language so broad as to imply that aggregation will be allowed even where the counterclaim is permissive. See American Sheet & Tin Plate Co. v. Winzeler, 227 Fed. 321 (N.D. Ohio 1915) at 324. Professor Moore takes a dim view of the aggregation cases, 3 MOORE, *op. cit. supra,* at ¶ 13.20 n. 3, although his "single unit of litigation" theory, *supra,* might logically be extended to embrace those cases where the aggregated counterclaim was compulsory.

Other justifications given for removal where a compulsory counterclaim in excess of $3,000 is asserted are less convincing. For example, it has been held that allowing removal is "essential to the ends of justice." Wheatley v. Martin, *supra* note 13. The meaning of this phrase is, apparently, that should the court rule otherwise, a party could be "deprived" of his "right" to sue in a district court by an opponent holding a small claim arising out of the same cause of action. See Lange v. Chicago, R.I. & P. R.R., *supra* note 13. Thus, this theory runs, the opponent could hastily institute his suit in a state court first. The potential federal plaintiff would then be forced to litigate his claim in the state court if the compulsory counterclaim were part of the state practice. *Ibid.* But the "aggrieved" party is not thus prevented from instituting a separate *original* action on his claim in the federal court, since it is assumed the claim satisfies the requirements of jurisdictional amount. Therefore, the potential federal plaintiff is not "deprived" of his federal forum. Furthermore, the value of the "right" to a federal forum here is questionable since its value is predicated on the theory that the party seeking to remove will be subject to local prejudice in the state court. See text at notes 33-36, *infra.*

Nevertheless, in the recent case of *Barnes v. Parker*,[16] it was plainly held for the first time that a defendant who pleaded a compulsory counterclaim for more than $3000 as required by the state practice was not entitled to remove the suit from the state court to the federal district court. Plaintiff brought an action in the Missouri circuit court for breach of contract, praying damages in the sum of $2,161.30. While the cause was pending in the state court, defendant, "for the sole purpose of establishing diversity of citizenship and establishing the requisite amount necessary to render the cause removable,"[17] filed an allegedly compulsory counterclaim for $3,876.84 in the state court. At the same time, defendant submitted to the state court a copy of his petition to the federal district court for removal.[18] After hearing the petition, the district court remanded the case. It held that in determining the amount in controversy it was bound to look solely to the amount prayed for in the complaint, regardless of subsequent events in the action. Thus the court refused to follow the line of cases creating an exception to that rule where a compulsory counterclaim is asserted.[19] To recognize such an exception, the court reasoned, is to predicate federal removal procedure on the vagaries of the classifications contained in state practice codes, thereby sacrificing that orderly procedure and uniformity of practice which has been the aim of all the federal removal acts.[20] Second, adherence to the exception would throw the door wide open to abuse of removal practice and circumvent the "expressed intent" of Congress to restrict removability; for a nonresident defendant would thus be able to bring a claim asserted against him, no matter how minute, within the jurisdiction of the federal court merely by filing a counterclaim to the claim asserted against him.[21]

The *Barnes* opinion overstates the dangers inherent in the line of cases it rejects. Should the theory that the term "matter in controversy" in-

16. 126 F. Supp. 649 (W.D. Mo. 1954).
17. *Id.* at 651.
18. In Haney v. Wilcheck, 38 F. Supp. 345 (W.D. Va. 1941), the facts were similar to the Barnes case and removal was denied. However, the Haney result was pegged on the additional ground of waiver. The court stated that by filing their counterclaim simultaneously with their petition to remove, defendants voluntarily invoked the jurisdiction of the state court by seeking its affirmative aid in their behalf. Haney v. Wilcheck, *supra* at 355. In Barnes, removal was denied solely because of the absence of jurisdictional amount.
19. See note 13, *supra*.
20. 126 F. Supp. at 651.
21. *Ibid.*

cludes a compulsory counterclaim be adopted, no reason appears why district courts could not use the definition of compulsory counterclaim contained in Rule 13(a), Federal Rules of Civil Procedure, rather than the relevant state practice code definition. The three cases cited by the *Barnes* court are not strong authority for the proposition that the counterclaim must be classified as compulsory under the local state practice before the exception will be invoked and removal allowed. It does not appear that it was argued in any of the three cases that the federal instead of the state definition should control; and only in *Wheatley v. Martin*,[22] did the court announce gratuitously that it was required to recognize the effect of the Arkansas practice code. Furthermore, in the other two cases cited, *Rosenblum v. Trulliger*,[23] and *Lange v. Chicago, R.I. & P. R.R.*,[24] the counterclaim would have been compulsory under Rule 13(a). Both cases involved counterclaims resulting from the same collision in which the state court plaintiffs were injured. The category of the counterclaim in the *Wheatley* case is more doubtful.

The *Barnes* court's second argument rests on the assumption that a defendant has free play to invoke the exception merely by filing any counterclaim. In fact, the cases have limited removal to the situation where the counterclaim is compulsory.[25] And the more recent cases disallow removal where the counterclaim alone is not in excess of $3,000.[26]

But the result of the *Barnes* case is supported by the well-settled judicial principle of strictly construing the removal statute.[27] Thus, the amount in controversy is determined from the "plaintiff's viewpoint" as

22. 62 F. Supp. 109 (W.D. Ark. 1945).

23. 118 F. Supp. 394 (E.D. Ark. 1954).

24. 99 F. Supp. 1 (S.D. Iowa 1951).

25. See cases cited note 13, *supra; cf.* Wheatley v. Martin, 62 F. Supp. 109 (W.D. Ark. 1945) (state practice code makes *all* counterclaims compulsory).

26. Home Life Ins. Co. v. Sipp, 11 F.2d 474 (3d Cir. 1926); *cf.* Goldstone v. Payne, 94 F.2d 855 (2d Cir. 1938). See also 3 MOORE, FEDERAL PRACTICE ¶ 13.15 (2d ed. 1948) at n. 15, criticizing courts which aggregate the claim and counterclaim.

27. "'Due regard for the rightful independence of state governments which should actuate federal courts requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941) at 109, citing Healy v. Ratta, 292 U.S. 263, 270 (1934); Matthews v. Rodgers, 284 U.S. 521, 525 (1932); Kline v. Burke Construction Co., 260 U.S. 226, 233-4 (1922); Elgin v. Marshall, 106 U.S. 578 (1882).

disclosed by his complaint well pleaded.[28] Moreover, the rule of strict construction and the corollary presumption in favor of state jurisdiction are especially valid when applied to removal predicated on diversity of citizenship.[29] Since *Erie v. Tompkins*,[30] federal courts in diversity cases have been required to decide questions of substance in accordance with applicable state rulings, ascertainment of which is often difficult.[31] And this diverse citizenship litigation occupies more than its proportionate share of the time of federal courts.[32] Furthermore, the original policy basis of diversity jurisdiction, fear of local prejudice against foreign parties, is largely a fiction today.[33] Nearly ninety per-cent of cases removed to the federal courts on the ground of diversity are the result of defendant's incorporation in a foreign state.[34] Many of these "foreign" corporations do business in their opponent's state,[35] and if there is any danger of prejudice, it is against large corporations as such, not "foreign" corporations. Hence it is probable that removal by reason of diverse citizenship is used today primarily as a delaying device or bludgeon by which concessions are obtained in

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28. See *e.g.* Stuart v. Creel, 90 F. Supp. 392 (S.D. N.Y. 1950); Home Life Ins. Co. v. Sipp, 11 F.2d 474, 476 (3d Cir. 1926). For an argument in support of the "plaintiff's viewpoint" theory see Dobie, *Jurisdictional Amount in the United States District Court*, 38 HARV. L. REV. 733, 744 (1925).

29. See generally on the validity of federal original jurisdiction based on diversity of citizenship, Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A.J. 499 (1933); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L.Q. 499 (1928); *A Note on Diversity Jurisdiction—in reply to Professor Yntema*, 79 U. PA. L. REV. 1097 (1931); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216 (1948); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931).

30. 304 U.S. 64 (1938).

31. MOORE, COMMENTARY 335.

32. Clark, *op. cit. supra* note 29, at 503.

33. Frankfurter, *op. cit. supra* note 29, at 521-22.

"According to Marshall's classic justification for diversity jurisdiction, the Constitution entertained 'apprehensions' lest distant suitors be subjected to local bias in state courts, or, at least, it viewed with 'indulgence' 'the possible fears and apprehensions' of such suitors. Whatever may have been true in the early days of the Union, when men felt the strong local patriotism of the politically *nouveaux riches*, has not the time come now to reconsider how justifiable the apprehensions, how valid the fears? The Civil War, the Spanish War, and the World War have profoundly altered national feeling, and the mobility of modern life has greatly weakened state attachments. Local prejudice has ever so much less to thrive on than it did when diversity jurisdiction was written into the Constitution." *Id.* at 521.

34. Clark, *op. cit. supra* note 29, at 503.

35. *Id.* at 502.

state courts, rather than as a method by which defendants protect themselves from local prejudice.[36]

But the limitation of the right of removal imposed by *Barnes* is easily circumvented by the institution of duplicating litigation in a federal court. And Barnes furnishes a strong incentive to a defendant to threaten such an original action on his counterclaim, probably as potent a weapon for vexation as the threat of removal itself,[37] since it seems likely that the defendant will be able to duplicate the *entire* state court action. For example, a foreign defendant may assert his state court counterclaim in an original suit in the appropriate district court. The plaintiff is not *required* to assert his claim by virtue of the proviso to Rule 13(a), Federal Rules of Civil Procedure, that a compulsory counterclaim need not be pleaded "if at the time that action was commenced the claim was the subject of another pending action."[38] However, the state court plaintiff *may* assert his claim as a counterclaim in the federal action if he so elects.[39] Moreover, it seems probable that he will do so. Because of docket conditions or procedural advantages, the federal forum may become the more favorable battleground. And if the state court plaintiff can win in the federal court first, the judgment will usually be res judicata as to the state claim.[40] A state court plaintiff would not foreclose this possibility by failing to assert his counterclaim. Thus, it would appear that the identical issues being litigated in the state suit will usually be presented to the federal court.[41] Consequently, removal of the original suit is in effect achieved by the state court defendant; only the designation of the parties is different.

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36. See Clark, *op. cit. supra* note 29, at 503; Frankfurter, *op. cit. supra*, note 33, at 524-25.

37. See Note, 38 YALE L.J. 997 (1928).

38. For the full text of the rule see note 9, *supra*.

39. 3 MOORE, FEDERAL PRACTICE ¶ 13.14 (2d ed. 1948).

40. See Kline v. Burke Construction Co., 260 U.S. 226, 230 (1922). The issues tried in both cases will generally be the same. Furthermore, "identity of parties is not a mere matter of form, but of substance." Chicago, R.I. & P. Ry. v. Schendel, 270 U.S. 611, 620 (1925). *But see* Campbell v. Ashler, 320 Mass. 475, 70 N.E.2d 302 (1946), criticized in 15 U. CHI. L. REV. 446 (1948).

41. A similar result is likely if the counterclaim is permissive within the meaning of the federal rules or under a state practice code which classifies all species of counterclaims as permissive. It may be asserted in the state court and duplicated in an independent federal action so long as it is in excess of $3000. Again the state court plaintiff will probably wish to plead his cause of action as a counterclaim in the federal court. See text at note 40, *supra*.

Identical problems arise where suit is commenced initially in a federal court. Thus complete duplication may occur where the federal defendant pleads a compulsory or permissive counterclaim and subsequently asserts it in an original action in a state court. See text at notes 46-52, *infra*.

And it is clear that the two suits can properly proceed concurrently. Where two in personam suits involving the same cause of action are litigated in a federal and a state court of concurrent jurisdiction, neither court can restrain the prosecution of the suit in the other forum.[42] Nor is the defendant entitled to an abatement of the subsequent suit in the federal court.[43] Thus the state court plaintiff must suffer the expense and inconvenience of two lawsuits. And the public interest in orderly, inexpensive judicial procedure is also impaired. The duplication of proceedings necessitates additional appropriations for the state and federal judiciary. Witnesses must be shuttled from court to court. Moreover, since each suit will ordinarily be res judicata as to the other,[44] both parties will attempt to rush to judgment in the court in which success is deemed more probable. Conversely, delaying action in the disfavored forum is likely.

The problem is somewhat different where the state suit is subsequent. Although the rule with respect to injunctive relief is the same in both cases,[45] a number of state codes provide that a pleader may demur to a complaint "when it shall appear upon the face thereof . . . that there is another action pending between the same parties for the same cause . . . ."[46] However, this defect will rarely appear on the face of the complaint.[47] But "the codes generally provide, in connection with the statute stating the grounds of objection which may be made by demurrer, that, where any of these matters enumerated as grounds of demurrer do not

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42. "Each court is free to proceed in its own way and in its own time, without reference to the pleadings in the other court." Kline v. Burke Construction Co., 260 U.S. 226, at 230 (1922). On the other hand, "because of practical necessity two in rem actions cannot proceed concurrently and hence the general rule is that 'the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. . . .'" MOORE, COMMENTARY 404.

43. "The pendency of a prior suit is, as a rule, the basis of a plea in abatement of a later one brought in the same court. But even that is not so when one of the suits is brought in a federal court and the other in a state court of concurrent jurisdiction, and the judgment sought is a personal one." Franceschi v. De Tord, 71 F.2d 95 (1st Cir. 1934) at 98, holding that plaintiff's assertion of his federal cause of action as a counterclaim in a subsequent state suit is no ground for abatement of the federal action. *Accord*, Kline v. Burke Construction Co., 260 U.S. 226, 232 (1922) (dictum); McCellan v. Carland, 217 U.S. 268 (1910).

44. See note 40, *supra*.

45. Kline v. Burke Construction Co., 260 U.S. 226, 232 (1922).

46. See CLARK, CODE PLEADING (2d ed. 1947), at 505, n. 14, citing the various codes. No such provision is contained in the federal rules.

It is clear, however, that the state code demurrer is not available where the federal action was commenced *after* the state action. Wheatley v. Martin, 62 F. Supp. 109 (W.D. Ark. 1945).

47. CLARK, op. cit. *supra* note 46, at 518.

appear on the face of the complaint, the objection may be taken by answer.'"[48] Nevertheless, there is considerable doubt that in the circumstance posed the state court will look upon an answer in abatement with favor. The general rule that the pendency of a prior suit in one jurisdiction cannot be pleaded in abatement to a subsequent suit in another jurisdiction even though both suits are between the same parties and upon the same cause of action,[49] has been read into the code provision.[50] Abatement under such a provision is therefore granted only in the limited circumstance where the prior action is pending in another court in the same state. Furthermore, the required identity of parties has been strictly construed by state courts.[51]

Courts could sacrifice the policy underlying strict construction of the removal statute in modern diversity cases,[52] and allow removal in order to prevent multiple litigation where a counterclaim is asserted for the jurisdictional amount.[53] But such a rule would be subject to limitations which would seriously impair its function. For example, under the suggested theory, a federal plaintiff who asserts his cause of action as a counterclaim in a subsequent state court suit commenced by his opponent should be able to remove the whole duplicating action from the state court and consolidate

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48. *Id.* at 603.

49. See note 43, *supra.* See also Simmons v. Superior Court, 96 Cal. App.2d 119, 123, 214 P.2d 844, 848 (1950).

50. See, *e.g.*, Simmons v. Superior Court, *supra* note 49, at 123, 848; Oneida Bank v. Bonney, 101 N.Y. 173 (1886).

51. See, *e.g.*, Hamm v. San Joaquin & Kings River Canal Co., 44 Cal. App.2d 47, 111 P.2d 940 (1941) (abatement will not lie as to cross suits pending in same jurisdiction); Western Pipe & Steel Co. v. Tuolumne Gold Dredging Co., 63 Cal. App.2d 21, 146 P.2d 61 (1944) (parties in both suits must stand in same relative position as plaintiff or defendant).

52. See text at notes 31-36, *supra.*

53. If the prevention of multiple litigation becomes the underlying rationale for removal in these cases, then it would be immaterial whether the counterclaim were permissive or compulsory. The fact that a claim and a compulsory counterclaim appear to be more like a single matter in controversy than a claim and a permissive counterclaim becomes unimportant. Compare 3 MOORE, FEDERAL PRACTICE ¶ 13.20 (2d ed. 1948). Removal would be permitted if the state court counterclaim could be duplicated in the federal court, or if a suit on a claim in excess of $3000 were pending in a federal court and the opposing party pleaded counterclaims and subsequently sued on them in a state court. In the latter case, the federal plaintiff would assert his claim as a counterclaim in the state court and be permitted to remove. Furthermore, those cases in which jurisdictional amount is established by aggregating a claim and a counterclaim would be overruled should this rationale be adopted. Where both claims involve $3000 or less, there is no danger of duplication of either claim since the original jurisdiction of a federal court in diversity cases does not extend to such claims. Compare the reasoning of Professor Moore at 3 MOORE, *op. cit. supra,* ¶ 13.20, n. 3.

it with the original federal action. Since the counterclaimant is designated a "defendant" in the state action, Section 1441(a) authorizes him to remove,[54] if it is assumed that his counterclaim establishes jurisdictional amount. But suppose a defendant who possesses and asserts a counterclaim in excess of $3000 in a state action subsequently institutes original action on his claim in a district court. The state court plaintiff should be able to remove the state action to prevent duplication. Taking a functional view, the plaintiff is a defendant as to the counterclaim.[55] But by a parity of reasoning, the defendant who asserts a counterclaim in a suit brought subsequent to his federal action must be a plaintiff respecting his counterclaim and therefore incapable of removing pursuant to Section 1441(a). It could be argued, however, that the term "defendant" is sufficiently broad to cover both defendants to counterclaims and defendants to an original complaint. But there is strong precedent opposed to such a theory. In *Shamrock Oil & Gas Co. v. Sheets,*[56] the Supreme Court held that a foreign plaintiff could not base removal of a state court action on a permissive counterclaim in excess of $3000 pleaded by the defendant. Although the plaintiff originally claimed damages for more than $3000 in the state court, and the Supreme Court could have invoked the doctrine of waiver,[57] it flatly stated that the plaintiff could not remove regardless of the amount of his original claim.[58] The Court thought the question of removal by plaintiffs foreclosed by the present statutory provision confining removal to "defendants,"[59] whereas, it noted, the prior statute specifically provided for removal by either party.[60] But even if a broad definition of

54. See text at note 2, *supra.*

55. It has been so held: Merchants Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U.S. 368 (1894); Hansen v. Pacific Coast Asphalt Cement Co., 243 Fed. 283 (S.D. Cal. 1917); Bennett v. Devine, 45 Fed. 705 (S.D. Iowa 1891); Haney v. Wilcheck, 38 F. Supp. 345 (W.D. Va. 1941).

56. 313 U.S. 100 (1941), noted 29 CALIF. L. REV. 769 (1941), 27 VA. L. REV. 1094 (1941).

57. See text at note 6, *supra.*

58. Shamrock Oil & Gas Co. v. Sheets, U.S. 100 (1941), at 108.

59. *Id.* at 106-7. And see text at note 2, *supra.*

60. Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100 (1941), at 106. The House Report cited in the Court's footnote 2 at page 106 does not help to bear out the broad ramifications attributed by the court to the change. "In the opinion of the committee," the report declares, "it is believed to be just and proper to require the plaintiff to abide his selection of a forum. If he elects to sue in a state court when he might have brought his suit in a federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause. Experience in the practice under the act of 1875 has shown that such a privilege is often used by plaintiffs to obtain unfair concessions and compromises from defendants who are unable to meet the expenses incident to litigation in the federal courts remote

"defendant" were adopted, the use of removal to prevent multiple litigation could never be fully effective. Because its historic function is to prevent local prejudice, the right of removal is limited to a *foreign* party.[61] Thus, removal would often be unavailable solely because the potential remover originally sued in his own state or was forced to litigate there.

To preserve the limits of original federal jurisdiction as defined by *Barnes*,[62] and fully implement the policy of preventing multiple litigation,[63] district courts should instead exercise their equitable power to stay an action if such action is shown to duplicate a counterclaim which has been or can be asserted in a prior state suit.[64] Since it is addressed to the discretion of the court, the stay is not subject to the technical barriers noted above which impede the use of a demurrer or an answer in abatement as a remedy in these circumstances.[65] And, unlike the use of an injunction, it does not result in the forcible assertion of the will of one court against a court of another jurisdiction.

Federal courts already grant a stay in an analogous situation. Thus in actions involving the discretion of a federal court to grant relief by declaratory judgment, the court may properly refuse to proceed where, because of the duplicating character of the federal action, it serves no useful purpose.[66] A case even closer in point, and a landmark in undermining the doctrine of absolute access to the federal courts, is *Mottolese v. Kaufman*.[67] It was there held by the Second Circuit that a district court had discretion to stay proceedings in a stockholder's derivative suit where an identical action had already been commenced in the courts of New York. The Second Circuit rested its decision on the doctrine of forum non conveniens, and on

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from their homes." *Id.* at 106-7 n. 2. Therefore, the court might well have decided the *Shamrock* case on the ground of waiver alone. And, furthermore, it would seem consonant with the stated purpose of the amendment to allow a foreign plaintiff with a claim of $3000 or less to remove if a counterclaim for the jurisdictional amount is asserted against him.

61. MOORE, COMMENTARY 233.

62. See text at notes 16-21, *supra*.

63. See, *e.g.*, the statement of the court in Simmons v. Superior Court, 96 Cal.App.2d 119, 214 P.2d 844 (1950), at 124-25, 849.

64. A motion to obtain an order to stay an action should be distinguished from a demurrer and an answer in abatement. The latter two are granted as a matter of legal right, while the former is addressed to the discretion of the court. Simmons v. Superior Court, *supra* note 63, at 123, 848; International Nickel Co. v. Barry, 204 F.2d 583 (4th Cir. 1953); Arkay Infants Wear v. Kline's, 98 F. Supp. 862 (W.D. Mo. 1950).

65. See text at notes 42-43 and 44-51, *supra*.

66. Brillhart v. Excess Insurance Co., 316 U.S. 491, 495 (1942).

67. 176 F.2d 301 (2d Cir. 1949).

cases where district courts held that they possessed equitable powers to stay suits which duplicated prior actions in other district courts.[68] If the *result* of *Barnes* is correct, as this writer contends, then giving the district court the power to stay a suit that is really a counterclaim in a prior non-removable state action is, as to *Mottolese,* an a fortiori case: a stay in such circumstances would also effectuate the limitations thus placed on the original jurisdiction of federal courts.[69] State courts should likewise refuse to hear duplicating actions commenced by federal defendants on the grounds of comity and preventing multiple litigation.[70]

Although a stay should be a discretionary remedy and not obtainable as of right, there should be a presumption in favor of granting it where the defendant alleges and proves the existence of an identical cause of action already pending as a counterclaim against him in another forum, or capable of being asserted as such. Evidence pertaining to the ordinary advantages of litigating in a federal court, such as the supposed superiority of judges and juries, the desirability of obtaining discovery or other procedural machinery of the Federal Rules of Civil Procedure, or the power of federal judges to comment on the evidence, should not be sufficient to rebut the presumption that a stay should be granted.[71] However, if it can be shown that the prior action was instituted in bad faith for the primary purpose of delaying its determination and forcing an unreasonable settlement, the presumption should be held to be rebutted. Such a case would exist, for example, if the federal defendant commenced the prior action with knowledge that the subsequent suit would probably be brought and the docket in the first forum is so crowded as to make it likely that a hold-up settlement would be procured if the subsequent action is not allowed to proceed.

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68. As to the latter category of cases see Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952); Landis v. North American Co., 299 U.S. 248, 254 (1936); International Nickel Co. v. Barry, 204 F.2d 583 (4th Cir. 1953); Arkay Infants Wear v. Kline's, 98 F. Supp 862 (W.D. Mo. 1950).

69. Compare the effect of a stay with the text at notes 37-41, *supra.*

70. Authority for such a proposition already exists in an analogous case, Simmons v. Superior Court, 96 Cal.App.2d 119, 125, 214 P.2d 844, 849 (1950), where, "as a matter of comity," a California court stayed a California suit for divorce pending the final determination of a prior divorce action between the same parties in Texas.

71. The *Mottolese* case took an intermediate position on this point. The court left the door open to further proceedings in the district court if it could be shown that defendants refused to submit to as full examination in the New York court as the plaintiff could obtain under the federal rules. Mottolese v. Kaufman, 176 F.2d 301, 304 (2d Cir. 1949). This aspect of the case has been soundly and extensively criticized in Note 59, YALE L. J. 978 (1950).

Conclusion

Expansion of federal diversity jurisdiction beyond the boundaries clearly set out by Congress is unjustified because hostility to nonresidents in local courts, the original rationale of such jurisdiction, is largely nonexistent today. The use of counterclaims, whether permissive or compulsory, to establish the jurisdictional amount constitutes an attempt to transgress this new policy basis for strictly construing the removal statute.

But decisions denying removal in such cases must be implemented by the use of the stay to prevent subsequent independent actions commenced in federal courts based on these counterclaims. Furthermore, a stay prevents multiple litigation as well as effectuating the restriction placed on diversity jurisdiction by the *Barnes* case. The present rule which permits in personam suits between the same antagonists to proceed concurrently in two forums is highly questionable when the first forum is capable of dealing with the controversy. And where a state court suit is based on a claim for less than $3000 which has been or can be asserted as a counterclaim in a previously instituted federal action, the policy of preventing multiple litigation is sufficient justification for the state court to deny plaintiff a forum by the use of a stay.