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Set-off and Counterclaim - Effect of Failure to Assert or Claim - Identity of Parties under Compulsory Counterclaim Rule

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to defendant's "silence" when it was not shown he knew, or could reasonably have been expected to know, of the facts from which the plaintiff's cause of action grew. By the very nature of his profession a physician must be held to a high degree of care, but the law cannot consider him as superhuman and omnipotent. Public policy considerations justifiably dictate many decisions, but care must be exercised lest logic suffer to an unreasonable degree.

SHANNON MAHONEY.

SET-OFF AND COUNTERCLAIM — EFFECT OF FAILURE TO ASSERT OR CLAIM — IDENTITY OF PARTIES UNDER COMPULSORY COUNTERCLAIM RULE. — Plaintiff brought an action against defendant as the administratrix of an estate. Previously, defendant, in her personal capacity, had recovered a judgment against plaintiff for injuries arising out of the same incident. Defendant contended that her recovery of a judgment was res judicata to the plaintiff's claim under Rule 97 (a) of the Texas Rules of Civil Procedure which provides for compulsory counterclaims.[1] The Court of Civil Appeals of Texas *held* that the compulsory counterclaim rule did not apply since the defendant had sued as an individual and the plaintiff had no cause of action against her, while in this action she was sued in her capacity as administratrix with the result that the plaintiff was not bringing his action against her, but against the estate — a different party — and the issue was not res judicata as contended. *Robertson v. Estate of Melton,* 306 S.W.2d 811 (Texas 1957).

A counterclaim is a cause of action in itself and seeks affirmative relief, while a defense merely defeats the plaintiff's claim.[2] It meets the plaintiff's claim by opposing to it a demand on the part of the defendant to the end that a complete determination of the right to and amount of recovery may be had in the same action. It represents the defendant's right to have the claims of the parties counterbalanced in whole or in part, judgment to be entered for the excess, if any.[3]

Where the parties are not the same in both actions, it has been held that the failure to assert a counterclaim under Federal Rule 13 (a)[4] in the prior action did not preclude assertion of the claim in a separate and subsequent action. In a case similar to the principal case, the plaintiff, as administrator, brought an action to recover for the wrongful death of his intestate alleged to have been caused by the negligence of the defendant. The plaintiff in a later action sought to recover as representative of the beneficiaries, where in the former action he had been acting on behalf of the creditors. The court pointed out that for the purpose of res judicata the administrator in acting on behalf of the beneficiaries was not, under the death statute, the same person

1. Texas Rule 97 (a) is substantially the same as Rule 13 (a) of the North Dakota Rules of Civil Procedure which provides: "COMPULSORY COUNTERCLAIMS. 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 occurance that is the subject matter of the opposing parties' 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."

2. Secor v. Siver, 165 Iowa 673, 146 N.W. 845 (1914).

3. Olsen v. McMaken & Pentzien, 139 Neb. 506, 297 N.W. 830 (1941).

4. Texas Rule 97 (a) and Federal Rule 13 (a) both deal with compulsory counterclaim.

as when he represented the creditors.[5] The rule of civil procedure which provides for compulsory counterclaims contemplates situations where the primary parties – the cross-plaintiff and at least one cross-defendant – are before the court as parties to an action which arises out of the same "transaction or occurrance".[6]

The rule as stated in the cited cases appears to be that the demands must be mutual, between the same parties, and in the same capacity. A judgment against one as an individual does not bind him as executor, nor does one against him as executor bind him as an individual in a subsequent action, although the issue is identical and the decision in the first action was upon its merits.[7]

While actions by the same individual in different capacities are treated as actions brought formally in different capacities, but actually for the ultimate benefit of the same person, are by the same person.[8] This view appears to be a minority with the great weight of authority supporting the theory that the parties must also be acting in the same capacity.

ALAN WARCUP.

TRIAL – PREJUDICIAL ERROR – DISCLOSURE OF DEFENDANT'S LIABILITY INSURANCE. – In a damage suit resulting from an automobile accident, plaintiff was asked by his attorney who took the statement of facts following the accident. Plaintiff answered that he was unaware of the person's name, but thought he was an insurance man. Defendant's motion for a mistrial was overruled, but the court admonished the jury not to consider the matter of insurance. The Supreme Court of Arkansas *held* that the reference to insurance was voluntary and not responsive and the prompt admonition to the jury removed any prejudicial effect. *Ragon v. Day*, 306 S.W.2d 687 (Ark. 1957).

A majority of the courts[1] hold that in an action for personal injury or death, the disclosure of the fact that the defendant is protected by liability insurance is inadmissible and ground for mistrial.[2] Such evidence is inadmissible because it does not bear on the issue of negligence and tends to

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5. Campbell v. Aahler, 320 Mass. 475, 70 N.E.2d 302 (1946). See also *In re* Kenin's Estate, 346 Pa. 127, 29 A.2d 495 (1942), where the court held that in an action by an individual, a claim against him as executor or administrator cannot be pleaded as a set-off.

6. Stevenson v. Reed, 96 A.2d 268 (Mun. Ct. of App. for D. C. 1953); Ruzicka v. Rager, 305 N.Y. 191, 111 N.E.2d 878 (1953); Rose v. Motes, 220 S.W.2d 734 (Tex. Civ App. 1949). See Hoffman v. Stuart, 188 Va. 785, 51 S.E.2d 239 (1949).

7. First Nat'l Bank v. Shuler, 153 N.Y. 163, 47 N.E. 262 (1897).

8. Chicago, R. I. & P. Ry. Co. v. Schendel, 270 U.S. 611 (1925); *In re* Parks Estate, 166 Iowa 403, 147 N.W. 850 (1914). See Clark, Code Pleading, p. 479 n.157 (2nd ed. 1947). *But see* Newton v. Mitchell, 42 So.2d 53 (Fla. 1949).

1. See, *e. g.*, Garee v. McDonell, 116 F.2d 78 (7th Cir. 1940), *cert. denied*, 313 U.S. 561 (1941); Johnson v. Stotts, 344 Ill. App. 614, 101 N.E.2d 880 (1951); Carls Markets v. Meyer, 69 So.2d 789, (Fla. 1953); 21 Appleman, Insurance Law & Practice § 12832 (1947). *But see* Crum, *Counterclaims and Third-Party Practice*, 39 N. Dak. L. Rev. 7, 24 (1958) as to joining an insurance company as an outright codefendant.

2. See Beardsley v. Ewing, 40 N.D. 373, 168 N.W. 791 (1918). ("The trial judge, who has the advantage of the atmosphere of the trial can best determine the extent of the threatened prejudice, and can take precautionary measures . . . even to the extent of granting a new trial.")