Maryland Law Review

Volume 32 | Issue 2 Article 6

Federal Rules of Civil Procedure: Curing an Apparent Waiver of Jurisdictional Defenses - Neifeld v. Steinberg

FEDERAL RULES OF CIVIL PROCEDURE: Curing an Apparent Waiver of Jurisdictional Defenses

Neifeld v. Steinberg[1]

Alleging a breach of contract for failure to sell and deliver shares of stock, Neifeld commenced an action against Steinberg in the Court of Common Pleas of Philadelphia County, Pennsylvania. One month later, Steinberg removed the case to the United States District Court for the Eastern District of Pennsylvania, pursuant to section 1441(a) of Title 28 of the United States Code,[2] and filed an answer asserting lack of personal jurisdiction, improper venue and insufficient service of process. In the same pleading Steinberg filed a permissive counterclaim. Neifeld then moved to strike the defenses of personal jurisdiction, venue and service of process, asserting that Steinberg had submitted to the court's jurisdiction by filing the counterclaim. Steinberg, in response to this motion, amended his answer to withdraw the counterclaim. The court denied Neifeld's motion to strike, reasoning that since the counterclaim had been withdrawn, Neifeld was not entitled to any advantage which would have existed if the counterclaim had been maintained. The Court of Appeals for the Third Circuit affirmed, holding that since Steinberg had the right to dismiss his claim voluntarily, he had not "utilized the District Court's facilities in any meaningful sense"[3] and, therefore, he had not waived his right to assert any jurisdictional defenses. The court was breaking new ground in so ruling.

DOES A GENERAL APPEARANCE ACT AS A WAIVER OF A JURISDICTIONAL DEFENSE? THREE VIEWS

Prior to the adoption of the Federal Rules of Civil Procedure, to make a jurisdictional objection, a party had to balance on the rope of division between general and special appearance.[4] If he was found to have acted in a manner inconsistent with his limited status under

1. 438 F.2d 423 (3d Cir. 1971).

2. 28 U.S.C. § 1441(a) (1970) provides: "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

3. 438 F.2d at 431. The court, relying on Hanna v. Plumer, 380 U.S. 460 (1965), had little difficulty in deciding that the question should be determined under federal rather than state law.

4. "A general appearance is one whereby the party appears and submits to the court's jurisdiction for all purposes, while a special appearance is made for the sole purpose of questioning the court's jurisdiction." 6 C.J.S. *Appearances* § 1(c) (1937)

special appearance, he was said to have considered himself in court for all purposes and to have waived his jurisdictional defenses by general appearance. The filing of a counterclaim was held to act as such a waiver on the theory that, since the defendant had invoked the power of the court to resolve the dispute, he had submitted to the court's jurisdiction for all purposes.[5]

In 1938, the Federal Rules were promulgated to simplify procedure in federal courts.[6] Rule 12(b)[7] was adopted to allow the prompt presentation of all defenses, thereby avoiding the delay incident to the filing of successive motions.[8] With this purpose in mind, courts have generally interpreted rule 12, especially subsection b, as abolishing the distinction between special and general appearances so as to render special appearances no longer necessary.[9] To this effect is the decision in *Orange Theatre Corp. v. Rayherstz Amusement Corp.*,[10] which suggested that the problem of appearances had vanished with the adoption of rule 12(b). In that opinion, Judge Maris disclosed a general interpretation of the far-reaching effects this rule was expected to have, stating:

> A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, de bene esse, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in.[11]

---

5. Merchants Heat & Light Co. v. J.B. Clow & Sons, 204 U.S. 286 (1907).

6. *See* Monod v. Futura, Inc., 415 F.2d 1170 (10th Cir. 1969).

7. FED. R. CIV. P. 12(b) provides *inter alia:*

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process . . . . No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

8. *See* Sadler v. Pennsylvania Ref. Co., 33 F. Supp. 414 (W.D.S.C. 1940). *See also* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1342 (1969).

9. *See, e.g.*, Harrison v. Prather, 404 F.2d 267 (5th Cir. 1968); Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967); Speir v. Robert C. Herd & Co., 189 F. Supp. 436 (D. Md. 1960).

10. 139 F.2d 871 (3d Cir.), *cert. denied*, 322 U.S. 740 (1944).

11. 139 F.2d at 874.

The courts, however, have not unanimously applied this liberal view,[12] and a question remains as to whether the lesser defenses of lack of jurisdiction over the person, improper venue and insufficiency of service of process under rule 12(b) are waived when the defendant includes a counterclaim in his answer. The Rules are not explicit on the point; the Supreme Court has not yet directly decided the question and the few lower court decisions on the point do not agree.

Three distinct theories have evolved from the opinions of courts required to decide the issue of whether jurisdictional defenses are waived when a counterclaim is filed. Some courts have held that any counterclaim will waive jurisdictional defenses; others have distinguished between permissive and compulsory counterclaims, holding that the former act as waivers but the latter do not; a third group of decisions has treated filing of a counterclaim as not representing a waiver of jurisdictional defenses.

The "Traditional" View: Counterclaim Acts as Waiver

Although their reasoning is not uniform, most courts which have considered the issue have held that a counterclaim acts as a waiver of all jurisdictional defenses. One approach taken is simply to state the conclusion — asserting that it is well established that a counterclaim acts as a waiver.[13] This reasoning is interpreted by some commentators as indicating that since the Federal Rules are silent on this issue, the traditional doctrine of waiver still applies.[14]

This conclusion finds support in *Freeman v. Bee Machine Co.*,[15] which was decided by the Supreme Court a short time after the Federal Rules were promulgated. In that case, a Massachusetts corporation had brought an action for breach of contract against a resident of Ohio in the Superior Court of Massachusetts. The defendant then removed the case to federal court and entered a general appearance by pleading on the merits and asserting a counterclaim. The plaintiff amended his complaint, adding a cause of action based upon a violation of the Clayton Act.[16] The defendant objected to the amendment, arguing that the Massachusetts district court did not have jurisdiction

12. *See, e.g.*, Comment, *Waiver by General Appearance: Impact of the Federal and Florida Rules*, 15 U. MIAMI L. REV. 269 (1961), for a view that special appearance has in effect remained in federal procedure.

13. *See* Winslow Mfg. Co. v. Peerless Gauge Co., 202 F. Supp. 931 (N.D. Ohio 1958); Hook & Ackerman, Inc. v. Hirsh, 98 F. Supp. 477 (D.D.C. 1951).

14. 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE WITH FORMS § 370.2, at 536 (rules ed. C. Wright 1960).

15. 319 U.S. 448 (1943).

16. 15 U.S.C. §§ 12 *et seq.* (1970).

to decide the antitrust claim.[17] The district court refused to allow the amendment on jurisdictional grounds; the Supreme Court reversed, holding that requirements of the Clayton Act were only concerned with venue and that the defendant had waived his right to challenge the venue by not seasonably asserting his objection. The Court reasoned that by defending on the merits and filing a counterclaim, the defendant had invoked and submitted to the jurisdiction of the federal court. As support for this contention the Court cited *Merchants Heat & Light Co. v. J. B. Clow & Sons,*[18] decided prior to the enactment of the Federal Rules, implying that the doctrine which held that filing a counterclaim would waive any jurisdictional defense had not been changed by the Federal Rules of Civil Procedure.

Other courts have reached the same conclusion by relying upon a strict reading of the Rules to buttress their conclusion that the liberal treatment of rule 12(b) does not apply to cases in which a counterclaim has been asserted. The essential portions of 12(b) state:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required . . . . No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

The strict interpretation theory is that a careful reading of 12(b) seems to indicate that a counterclaim acts as a waiver because the terms "claim, counterclaim, cross-claim, or third-party claim" refer back to "claim for relief in any pleading" rather than to "defense." This construction relies on the fact that the terms "claim, counterclaim, cross-claim, or third-party claim" constitute an all-inclusive list of the existing methods of stating a claim for relief; however, there are many other defenses, including those listed in the subsequent part of rule 12(b)[19] and those listed in rule 8(c).[20] Therefore, a counter-

17. 15 U.S.C. § 15 (1970) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy . . . ."

18. 204 U.S. 286 (1907).

19. The listed defenses of FED. R. CIV. P. 12(b) are: "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party."

20. Affirmative defenses of FED. R. CIV. P. 8(c) include "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow

claim is not a "defense or objection" which, within the purview of rule 12(b), may be asserted along with other defenses or objections without thereby being waived.[21] Additionally, under this theory rule 8(c) is interpreted to distinguish explicitly between a defense and a counterclaim, thereby showing that the two are not the same.

This view derives support from the fact that the rules allow filing of a motion to assert the jurisdictional defenses prior to the filing of an answer, which indicates to some courts that coupling a counterclaim with the 12(b) defenses in the answer constitutes a waiver of those defenses. One such decision was rendered in *North Branch Products, Inc. v. Fisher*.[22] In that case, the plaintiff sought a declaratory judgment that it owned certain patents that had been issued to the defendant. The defendant answered on the merits and counterclaimed for infringement and for royalties. Sixteen months later, the defendant made a motion to dismiss for lack of personal and subject matter jurisdiction. The court, after sustaining its jurisdiction over the subject matter, refused to dismiss the case for lack of personal jurisdiction, relying on the fact that personal jurisdiction had been obtained when the defendant sought affirmative relief by filing a counterclaim.[23] The defendant argued that since his counterclaim was compulsory,[24] the court's interpretation would have forced him either to waive his jurisdictional defenses or to lose his right of action on the counterclaim. The court found this argument unpersuasive because

servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver . . . ."

21. Beaunit Mills, Inc. v. Industrias Reunidas F. Matarazzo, 23 F.R.D. 654, 656 (S.D.N.Y. 1959); 1A BARRON & HOLTZOFF, *supra* note 14.

22. 284 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 827 (1961), *noted in* 63 W. VA. L. REV. 287 (1961).

23. The doctrine has also been applied in cases wherein the defendant had not raised the issue of venue prior to or coincident with the making of his counterclaim. *See, e.g.*, Thompson v. United States, 312 F.2d 516 (10th Cir. 1962) (objection to venue raised after motion for summary judgment and filing of a counterclaim); Rubens v. Ellis, 202 F.2d 415 (5th Cir. 1953) (no jurisdictional question raised by defendant); Textron, Inc. v. Maloney-Crawford Tank & Mfg. Co., 252 F. Supp. 362 (S.D. Tex. 1966) (venue objection raised after counterclaim filed). In these instances the broad application of the doctrine may more properly be interpreted as covering only the narrower fact pattern. *See also* Annot., 5 L. Ed. 2d 1056, § 7 (1961). Courts generally contend that a defense such as personal jurisdiction should be raised early in the pleadings, and that pleading a counterclaim prior to any such defense may be interpreted as active pursuit of the defendant's claim, which seeks and invokes the court's jurisdiction. Kincade v. Jeffery-De Witt Insulator Corp., 242 F.2d 328 (5th Cir. 1957).

24. FED. R. CIV. P. 13(a) provides *inter alia*: "**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 occurrence that is the subject matter of the opposing party's claim . . . ."

the counterclaim could have been interposed after the defendant had objected to personal jurisdiction or venue by a pre-answer motion pursuant to rule 12(b). Under this procedure, if the defendant's motion had been denied, a counterclaim pleaded subsequently would not have waived the right to contest the issue of jurisdiction.[25] Furthermore, even if the determination of the factual issues raised by the motion would have required the taking of testimony, a hearing could have been set down prior to the filing of an answer. The court concluded that if this practice were followed, the defenses, having been seasonably raised before the assertion of the counterclaim, would have been preserved, and the assertion of the compulsory counterclaim would not have constituted submission to the court's jurisdiction for purposes of appeal.[26]

The Middle Ground: Only Permissive Counterclaims Waive Jurisdictional Defenses

The second view, that only a permissive counterclaim waives jurisdictional complaints, has been developed by a number of courts which adhere to the philosophy that since the Federal Rules did not expressly describe the effect a counterclaim would have on the disfavored defenses of rule 12(b), prior case law controls the issue. Courts which adhere to this concept indicate that, since a compulsory counterclaim was unknown prior to the adoption of the Federal Rules, there is merit in drawing a distinction between the effects of the two types of counterclaims on the jurisdictional defenses. Under this rationale, only permissive counterclaims[27] are treated as waiving the jurisdictional defenses; to find that a compulsory counterclaim waived the defenses would be less than fair play, because there is a difference between a party who is compelled to assert a counterclaim under rule 13(a), and a party bringing a claim under rule 13(b) who is indicating a desire to use the forum to advance his own interests.[28] For example, in *Dragor Shipping Corp. v. Union Tank Car Co.*,[29] the plaintiff

25. Knapp-Monarch Co. v. Dominion Elec. Corp., 365 F.2d 175 (7th Cir. 1966).

26. *Accord,* Beaunit Mills v. Industrias Reunidas F. Matarazzo, 23 F.R.D. 654 (S.D.N.Y. 1959).

27. FED. R. CIV. P. 13(b) states: "**Permissive counterclaims.** 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* Baltimore & O.R.R. v. Thompson, 80 F. Supp. 570 (E.D. Mo. 1948), *aff'd,* 180 F.2d 416 (8th Cir. 1950). This was the first case to recognize the rule but there was no discussion as to the reasoning behind the decision.

28. Hasse v. American Photograph Corp., 299 F.2d 666 (10th Cir. 1962).

29. 378 F.2d 241 (9th Cir. 1967).

brought an action alleging breach of a settlement agreement. In his answer the defendant denied the allegations as well as asserting that the court lacked jurisdiction over his person. In addition, the defendant counterclaimed for breach of the same agreement. The court disallowed the jurisdictional defenses, disregarding the argument that the counterclaim was compulsory and should, therefore, not be treated as a waiver of his jurisdictional defenses. The Ninth Circuit Court of Appeals reversed the lower court, holding that it had lacked jurisdiction over the defendant's person. The reasoning of that decision was that, under rule 13(a), if a party fails to plead his compulsory counterclaim, he is held to have waived it and is precluded by res judicata from bringing suit upon it again;[30] since in this situation, a party has no alternative but to submit his compulsory counterclaim, it should not constitute a waiver of any jurisdictional defense.

The "Liberal" View: No Waiver

The third view, that a counterclaim does not waive the 12(b) defenses, has been developed in the belief that the Federal Rules require both liberal interpretation and application,[31] and that literal interpretations which tend to thwart justice are to be avoided.[32] The rationale behind this viewpoint is that rule 12(b) expressly provides that every defense available to a party, including a counterclaim, shall be asserted in a responsive pleading and no defense is waived by being joined with another,[33] and that the Federal Rules were meant to provide for the quick presentation of defenses without requiring that a number of pre-answer motions be filed.[34] Thus, these courts conclude that a functional, rather than a strict, interpretation of the Rules is required to effect their underlying purpose of simplifying procedure and providing swifter justice. Although nothing in rule 12(b) explicitly shields the jurisdictional defenses from waiver, since rule 12(h) describes situations in which a waiver of these defenses will result,

30. Local 11, Elec. Workers v. G.P. Thompson Elec., Inc., 363 F.2d 181 (9th Cir. 1966).

31. *See, e.g.*, Holley Coal Co. v. Globe Indem. Co., 186 F.2d 291 (4th Cir. 1950); Pierkowskie v. New York Life Ins. Co., 147 F.2d 928 (3d Cir. 1944, *amended*, 1945). *See also* FED. R. CIV. P. 1, in which the rule states that the Federal Rules are to be construed to secure the just and speedy determination of every action, suggesting a liberal outlook.

32. Smith v. Jackson Tool & Die, Inc., 426 F.2d 5 (5th Cir. 1970).

33. Kiel Lock Co. v. Earle Hardware Mfg. Co., 16 F.R.D. 388 (S.D.N.Y. 1954). *But cf.* Beaunit Mills v. Industrias Reunidas F. Matarazzo, 23 F.R.D. 654 (S.D.N.Y. 1959).

34. Sadler v. Pennsylvania Ref. Co., 33 F. Supp. 414 (W.D.S.C. 1940).

adherents to the third view find it impermissible to treat a counterclaim as such a waiver, because to do so would add an implied provision to the methods of waiver which have been expressly listed in the rules.

It is possible that within the reasoning of this last classification the better view may be found. To require a defendant to raise his motion for jurisdiction first is to reinstate the concept of a special appearance, contrary to the apparent intent of the rules.[35] Furthermore, it is undisputed that the defense of improper venue or lack of jurisdiction over the person may properly be coupled with an answer on the merits,[36] and, like the answer, the counterclaim may have been filed only in case the jurisdictional defenses do not prevail. It would, therefore, seem that the same method of procedure would be justified in the use of counterclaims as is used with an answer, especially since rule 12(d) permits a hearing on jurisdictional defenses upon request of either party; thus, the plaintiff cannot object that he would be unable to determine how to prepare his case. While the "middle ground" of holding that only permissive counterclaims waive jurisdictional defenses has surface appeal, it is not always a simple matter to distinguish between permissive and compulsory counterclaims,[37] and a matter as crucial as jurisdiction should not be decided on such a fine line.

CURING A WAIVER OF JURISDICTION BY AMENDMENT OR WITHDRAWAL

The *Neifeld* court chose to avoid deciding the issue of whether jurisdictional defenses are waived when a counterclaim is filed,[38] instead reasoning that since the counterclaim had been withdrawn, it should be treated as never having been filed. Although the district court reached this result by holding that the answer had been amended

35. *See* 59 COLUM. L. REV. 1093, 1096 (1959).

36. *See, e.g.,* Untersinger v. United States, 172 F.2d 298 (2d Cir. 1949); Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943).

37. *See, e.g.,* North Branch Products, Inc. v. Fisher, 284 F.2d 611 (D.C. Cir. 1960), *cert. denied,* 365 U.S. 827 (1961), wherein defendant contended that his counterclaim was compulsory; the district court held that it was permissive [284 F.2d at 615] and the circuit court did not decide the issue. *See also* 3 J. MOORE, FEDERAL PRACTICE ¶ 13.13 (2d ed. 1968); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1410 (1971).

38. The court did express a view, in dictum, which approaches the more liberal case holdings when it said:

> While we agree that a defendant's case is even stronger for finding no waiver when a jurisdictional defense is combined with a compulsory counterclaim, we do not think that we should find a waiver simply because the counterclaim in the instant case is not compulsory. Rule 13(b) does not place any restrictions on a

as a matter of right, pursuant to rule 15(a),[39] the Third Circuit found that the same result could more properly be reached by treating the amendment as a voluntary dismissal pursuant to rule 41(c). However, regardless of which rationale is used, the case stands for the proposition that as long as a responsive pleading has not been made, a counterclaim, once withdrawn, will be treated as never having been filed.

This holding is clearly at odds with the law which existed prior to adoption of the Federal Rules of Civil Procedure. Under prior case law, it was recognized that by proceeding to make a general appearance before the issues raised at a special appearance had been settled, the objection to jurisdiction was waived.[40] In the leading case on this point, *Merchants Heat & Light Co. v. J. B. Clow & Sons*,[41] the Supreme Court held that the defendant, by electing to sue upon his claim by way of a counterclaim, assumed the position of a plaintiff invoking the jurisdiction of the court and was thereby considered to have submitted to that jurisdiction. This view was later expanded in *Automatic Toy Corp. v. Buddy "L" Mfg. Co.*,[42] in which it was stated that a general appearance constitutes consent to meet the case on the merits and may not be retracted, and when the defendant couples in one pleading his objection to venue and his defenses to the merits, the objection to venue is waived by his general appearance. Whether this reasoning has any strength today depends upon whether the Federal Rules replaced all prior procedure.

---

defendant's right to assert a permissive counterclaim. Nor does Rule 13(b) mention any untoward procedural results (such as waiver) which will be occasioned by the assertion of a permissive counterclaim.

438 F.2d at 430 n.13.

39. FED. R. CIV. P. 15(a) provides *inter alia*: "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court . . . ." The plaintiff in *Neifeld* argued that his motion to strike the defendant's jurisdictional defenses would prevent the defendant from amending as a matter of right, but the court properly recognized that a motion is not a responsive pleading. *See, e.g.*, Fuhrer v. Fuhrer, 292 F.2d 140 (7th Cir. 1961); Kelly v. Delaware River Joint Comm'n, 187 F.2d 93 (3d Cir.), *cert. denied*, 342 U.S. 812 (1951). Even if a motion had been treated as a responsive pleading, rule 15(a) calls for the courts to grant leave to amend freely. Foman v. Davis, 371 U.S. 178 (1962). Therefore, the defendant would probably have been allowed to amend if he had been required to obtain the court's permission. *See also* Copeland Motor Co. v. General Motors Corp., 199 F.2d 566 (5th Cir. 1952). In that case, the court said a decision on a request for leave to amend should not be influenced by whether an amendment would or would not relate back.

40. Western Loan Co. v. Butte & Boston Min. Co., 210 U.S. 368 (1908).

41. 204 U.S. 286 (1907).

42. 19 F. Supp. 668 (S.D.N.Y. 1937), *aff'd mem.*, 97 F.2d 991 (2d Cir.), *cert. denied*, 305 U.S. 633 (1938).

The Federal Rules do not directly answer this question; but the spirit of that enactment was to simplify the complex procedural patterns which existed before those rules were adopted. Thus it can be argued that the new rules were intended to replace *all* prior rules. The Third Circuit indirectly suggested this in *In re United Corp.*,[43] in which it stated that when a situation arises for which no solution has been provided in the Federal Rules, a district court may regulate the practice to be followed in any manner not inconsistent with the Rules. No reference was made to prior law, and if this reasoning is sound, the district courts would have complete discretion in procedural matters, as long as their methods were within the spirit and pattern of the rules.

As was previously mentioned, the defendant in *Neifeld* argued that the language of rule 15(c) required the court to treat defendant's answer, after it had been amended by withdrawal of the counterclaim, as if the counterclaim had never been filed. Rule 15(c) provides essentially that whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading, the amendment will relate back to the date of the original pleading. Therefore, according to the defendant's argument, any jurisdiction that may have attached with the filing of the counterclaim would no longer exist.

Generally, the doctrine of "relation back" has been used to prevent a claim from being barred by the statute of limitations. The judicial philosophy behind it seems to be that a party who is notified of litigation concerning a given transaction or occurrence has been given all the notice that the statute of limitations was intended to afford. If the original pleading gave fair notice of the general fact situation out of which the claim or defense arose, an amendment merely makes more specific what has already been alleged, and the defendant is not placed at any disadvantage with respect to the suit;[44] therefore, an amendment should relate back even though the statute of limitations has run in the interim.[45]

The courts have recognized that the Federal Rules generally call for a liberal application of the doctrine of relation back,[46] and it has often been applied in contexts other than the running of the statute of limitations.[47] Thus, in *Reynolds Jamaica Mines, Ltd. v. La Societe*

43. 283 F.2d 593 (3d Cir. 1960).

44. Travelers Ins. Co. v. Brown, 338 F.2d 229 (5th Cir. 1964).

45. Williams v. United States, 405 F.2d 234, 236 (5th Cir. 1968).

46. *Id.*

47. An example of such relation back may be seen in Junso Fujii v. Dulles, 224 F.2d 906 (9th Cir. 1955), in which plaintiff's amendment to correct his pleadings

Navale Caennaise,[48] the court held that the withdrawal of a counterclaim would relate back to the time the initial pleading was filed. In that case, the plaintiff sought damages for an alleged breach of contract involving the purchase of a ship. The defendant answered on the merits and included a counterclaim in that pleading. The answer was later amended to withdraw the counterclaim and to plead, as a separate defense, an arbitration clause which would have deprived the court of jurisdiction over the controversy.[49] The plaintiff objected to the amendment, asserting that the arbitration defense had been waived by the filing of the counterclaim. The court rejected this argument stating that "[o]nly a very strained application of law would permit [the court] to hold that if a counterclaim is withdrawn, nevertheless, having once been filed no defense inconsistent therewith may validly be interposed, even though . . . no intervening rights arose by reason of the original filing."[50] However, although the doctrine of relation back may be applied to more concepts than statute of limitations, courts also recognize that it should not be applied as liberally "when it will deprive a party against whom the amendment is made of a substantial right, or impose upon such party a serious liability."[51]

related back to the date of his original complaint, which was prior to the repeal of the statute on which the suit was based. *Accord,* MacGowan v. Barber, 127 F.2d 458 (2d Cir. 1942).

48. 239 F.2d 689 (4th Cir. 1956).

49. Although the court concluded that the question presented was closely akin to subject matter jurisdiction, it did state that if the case had been concerned with personal jurisdiction, the filing of a counterclaim would have waived all rights to object to that jurisdiction. *Id.* at 692. Furthermore, it seems axiomatic that if the parties contract to deprive the court of jurisdiction over the controversy, they may, either by agreement or by waiver, repudiate the effect of that contractual provision. *Cf.* Industrial Trades Union of America v. Dunn Worsted Mills, 131 F. Supp. 945, 948 (D.R.I. 1955) ("The rule is well settled that at common law submission to arbitration cannot be specifically enforced and either of the parties to the submission may revoke it at any time before an award is made.")

50. 239 F.2d at 692.

51. United States v. Stromberg, 227 F.2d 903, 906 (5th Cir. 1955). In this case, a denaturalization proceding, the complaint recited that the defendant's "naturalization was 'illegal and fraudulently procured'." After the complaint was filed but before the case was heard, the Nationality Act of 1940, under which the action was brought, was superseded by the McCarran Act of 1952. After the new law took effect, the Government amended its complaint to add an additional ground for denaturalization based upon the prior law. The Government argued that, although its allegations would not justify denaturalization pursuant to the McCarran Act, the amendment related back to the time at which the original pleading was filed, and thus the claim fell within the protection of a provision which stated that the new act would not impair prosecutions that were currently in existence. The Fifth Circuit upheld the district court's refusal to allow the amendment to relate back because to do so would substantially impair the defendant's rights.

The state of affairs presented in *Neifeld* falls squarely within the situation in which the Federal Rules contemplated that an amendment would relate back to the time at which the original pleading was filed. The plaintiff in that case could not claim undue prejudice or hardship, since his substantive rights did not differ from what they would have been if the counterclaim had never been filed. Furthermore, since Neifeld was fully aware of the defendant's objection to jurisdiction, he could claim no surprise at the withdrawal of the possible waiver of jurisdictional defenses. The *Neifeld* result, in this respect, is easier to reach than the *Reynolds Jamaica Mines* decision, as to which it might have been argued that the plaintiff assumed a waiver and was unfairly surprised by the later request for arbitration. As expressed in *Chamberlin v. United Engineers & Constructors, Inc.*,[52] in reference to a plaintiff amending his complaint to correct deficiencies, the complaint is not precluded from being amended merely because the other party may subsequently lose as a result of the amendment. The other party cannot rely on defects in pleading, because complaints are freely amendable under the Federal Rules.[53]

An argument may be made that controversies should be decided on the merits and not on procedural niceties, wherever possible.[54] In *Neifeld,* therefore, the amendment should not have been allowed to relate back. While it is true that the courts will not adhere rigidly to the Rules if the end result is to thwart justice,[55] the right to dismissal for lack of personal jurisdiction, improper service of process or improper venue is explicitly stated in the Rules and is therefore an unqualified right[56] that should not be withheld indiscriminately.[57]

52. 194 F. Supp. 647 (E.D. Pa. 1961).

53. *See also* Schwartz v. American Stores Co., 22 F.R.D. 38 (E.D. Pa. 1958). There the court expressed the opinion that a defendant should not be penalized because of an apparent oversight by counsel, the court contending that the "sporting" element of pleading had been eliminated by the Rules.

54. *See, e.g.,* Cooper v. American Employers' Ins. Co., 296 F.2d 303 (6th Cir. 1961); Green v. Walsh, 21 F.R.D. 15 (E.D. Wis. 1957).

55. Smith v. Jackson Tool & Die, Inc., 426 F.2d 5 (5th Cir. 1970).

56. *See, e.g.,* Ulmer v. Hartford Accident & Indem. Co., 380 F.2d 549 (5th Cir. 1967) (defendant has a right to dismissal if there is no personal jurisdiction); Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962) (defendant has an unqualified right to have an order of dismissal entered when court has no jurisdiction over the defendant); Schadl v. Boyer, 56 F. Supp. 897 (E.D. Pa. 1944) (where service of process is insufficient on an indispensable party, the action must be dismissed).

It should be noted, however, that there has been a move to limit lack of venue as a defense. In 28 U.S.C. § 1406 (1970), a means has been provided to district courts for curing a defect in venue by allowing the court, if it finds it is in the interest of justice, to transfer the case to the proper district rather than dismiss the case. But it has been held that this statute was never intended as a means of avoiding the consequences of failure to perfect service of process or as a device to

Although, in *Neifeld,* the Third Circuit asserted the validity of allowing the withdrawal of a counterclaim by amendment to relate back to the time at which the original pleading was filed, it held that the same result was more properly achieved by treating the amendment as a voluntary dismissal. Since a voluntary dismissal[58] leaves the parties as if suit had never been filed, any jurisdiction the court may have acquired over the defendant as a result of the counterclaim would be extinguished, since the suit would then stand as it had stood prior to the filing of the counterclaim.

Arguably, one difficulty may also be anticipated in the use of voluntary dismissal. Under rule 41(a)(2),[59] after a defendant raises a counterclaim, the plaintiff may no longer voluntarily dismiss his pleading unless the counterclaim can remain before the court for independent adjudication. The purpose of this rule is to preserve to a defendant the jurisdiction of the court.[60] The argument may then be made that if filing the counterclaim preserves the defendant's jurisdiction, a defendant should be refused dismissal of his counterclaim if that will have the result of costing the plaintiff *his* jurisdiction over the defendant. The answer may be found in the Rules, in that rule 41(c) applies only if the plaintiff has not replied to the counterclaim; once the plaintiff replies, or evidence is introduced, there are no pro-

---

acquire personal jurisdiction not properly invoked. *See* Hohensee v. News Syndicate, Inc., 286 F.2d 527 (3d Cir. 1961). *Contra,* Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F.2d 590 (D.C. Cir. 1960), in which the court said a district court has the power to act on a motion under 28 U.S.C. § 1406(a) even if it has not acquired jurisdiction over the defendant's person, thereby using the statute as a device to acquire personal jurisdiction. However, this statute is inapplicable to a case removed from a state court to a federal court. Grimes v. Hull-Dobbs, Inc., 154 F. Supp. 151 (E.D. Ky. 1957). Also, a number of states that have adopted the Federal Rules as a guide for their procedural rules have deleted lack of venue as a ground for dismissal. *See, e.g.,* MINN. R. CIV. P. 12.02; MONT. R. CIV. P. 12(b); NEV. R. CIV. P. 12(b). *See also* Bistline v. Eberle, 85 Idaho 167, 376 P.2d 501 (1962).

57. Justice Frankfurter stated in his dissent in *Freeman v. Bee Machine Co.:* "I quite agree with the Court that venue is a privilege that may be waived, that it 'may be lost by failure to assert it seasonably.' . . . But the waiver must be actual, not fictitious. There must be a surrender, not resistance." 319 U.S. at 459 (Frankfurter, J., dissenting).

58. Dismissal would be through rule 41(c), which applies the provisions of rule 41(a) to the dismissal of a counterclaim. FED. R. CIV. P. 41(a) provides in part: "[A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer. . . ."

59. FED. R. CIV. P. 41(a)(2) states in part: "If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court."

60. S.C. Johnson & Son, Inc. v. Boe, 187 F. Supp. 517 (E.D. Pa. 1960).

visions for the defendant to withdraw his counterclaim unless the plaintiff consents. This would give the same effect to the plaintiff's reply as rule 41(a)(2) gives to a counterclaim in preventing a voluntary withdrawal.

It seems, therefore, that with respect to a waiver of jurisdictional defenses, amendment and voluntary dismissal have the same effect.[61]

CONCLUSION

The "liberal" view supported by *Neifeld v. Steinberg* — that filing a counterclaim does not waive jurisdictional defenses pleaded at the same time — avoids the hazards of reinstating special appearances on the one hand and deciding important jurisdictional issues on the fine line between compulsory and permissive counterclaims on the other. Such an interpretation is also more in keeping with the purposes of the Federal Rules of Civil Procedure than either the traditional view or the "middle ground" endorsed by some courts. Criticism may be raised that adoption of the liberal view would have changed the result in the *North Branch*[62] case, in which the objection to jurisdiction was filed sixteen months after the counterclaim. A strict interpretation of the rule would at first glance seem to bring the *North Branch* facts within *Neifeld*'s coverage. However, rule 12(h), which provides that a party waives all jurisdictional defenses not presented as motions or in his answer, would still create a waiver of the defenses in that case. Also, all courts would probably interpret the defendant's delay of sixteen months as unseasonable assertion of the defenses and as active pursuit of the court's jurisdiction. In the absence of prejudice to the plaintiff, however, the *Neifeld* decision would seem to represent a logical step in encouraging prompt and straightforward adjudication of the issues in a controversy.

61. Reynolds Jamacia Mines, Ltd. v. La Societe Navale Caennaise, 239 F.2d 689, 692 (4th Cir. 1956); *accord,* Etablissements Neyrpic v. Elmer C. Gardner, Inc., 175 F. Supp. 355 (S.D. Tex. 1959).

It should be noted that treating the withdrawal as a voluntary dismissal could, in the long run, prejudice the rights of the defendant. Under rule 41(a), if the defendant dismisses for a second time, the dismissal acts as an adjudication on the merits and prevents the defendant from trying the claim in the future. Thus, if the defendant had previously brought suit and dismissed the counterclaim, treating its withdrawal to preserve jurisdictional defenses as a voluntary dismissal would preclude him from reinstating the counterclaim in the event that his objections to the court's jurisdiction were not sustained. Permitting the counterclaim to be withdrawn by amendment would not subject the defendant to a similar disadvantage, and he would be able either to reinstate his suit or to bring a separate action on his claim in the future.

62. North Branch Prods., Inc. v. Fisher, 284 F.2d 611 (D.C. Cir. 1960), *cert. denied,* 365 U.S. 827 (1961).