

In determining whether the Norris-LaGuardia Act by implication exempts the non-enjoinable activities from all penalties under the Sherman Act, the court might reconsider the original doubt as to the applicability of the Sherman Act to labor,³⁶ the attempt in the Clayton Act to obtain for labor more favorable treatment under the Sherman Act,³⁷ the severe civil penalties in the act, and the unpopularity of criminal prosecutions under its provisions.³⁸ The widespread criticism of the decision in *Bedford v. Journeymen Stonecutters' Association*,³⁹ where acts, now non-enjoinable, were held to violate the Sherman Anti-Trust Act, suggest the desirability of a change in application. It is arguable that the Norris-LaGuardia Act does not reveal an intent to leave the non-enjoinable activities subject to Sherman Act penalties, but that it cautiously avoids any exemption merely as a tactical maneuver in order to avoid conflict with *Truax v. Corrigan*.⁴⁰

Since repeals by implication are not favored,⁴¹ it is unlikely that the Supreme Court will hold that the Norris-LaGuardia Act fully repeals the Sherman Act in its application to non-enjoinable union activities. But some relaxation of the strict application of the Sherman Act to organized labor may result⁴² from redefinition of "direct restraint" and "intent to restrain," and by applying the flexible "rule of reason" found in this "charter of freedom," in a manner influenced by changes in the standards of the times.⁴³

Procedure—Counterclaim to Action by Partners—[Federal].—In a suit by members of a partnership upon an obligation owed the firm, the defendant sought to counterclaim separate causes of action against each member of the firm. *Held*, counterclaims

on non-union goods shipped in interstate commerce, *Bedford v. Journeyman Stonecutters Ass'n*, 274 U.S. 37 (1927); picketing and striking when a union seeks to prevent one manufacturer from dealing with a non-union manufacturer in the same trade or industry, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). *Christ*, Federal Anti-Injunction Bill, 26 Ill. L. Rev. 516, 523 (1932).

³⁶ Sharp, review of the book, *Labor and the Sherman Act*, 21 Am. Econ. Rev. 335 (1931).

³⁷ 38 Stat. 731 (1914), 15 U.S.C.A. § 17 (1927); 38 Stat. 738 (1914), 29 U.S.C.A. § 52, (1927).

³⁸ Freund, *Standards of American Legislation* 223 (1917).

³⁹ 274 U.S. 37 (1927), and Brandeis' dissent, at 56; *The Stonecutter's Case—Strikes on "Unfair" Material Entering Interstate Commerce*, 37 Yale L.J. 84 (1927); 43 Harv. L. Rev. 459 (1930); 40 Harv. L. Rev. 1154 (1927); 4 Wis. L. Rev. 250 (1927).

⁴⁰ This decision indicated that the court would regard it a violation of due process to take away all remedy against such activity as picketing. It should be noted that the decision may be interpreted to rest on the libelous features of the picket's signs. 257 U.S. 312 (1921).

⁴¹ *Stewart v. United States*, 106 F. (2d) 405 (C.C.A. 9th 1939); *Borquist v. Ferris*, 112 N.J. Eq. 557, 165 Atl. 417 (1933); *State ex rel. Geo. Peck Co. v. Brown*, 340 Mo. 1189, 105 S.W. (2d) 909 (1937); 1 *Sutherland*, *Statutory Construction* § 247 (2d ed. 1904); 1 *Cooley*, *Constitutional Limitations* 316 (8th ed. 1927); *Repeal or Amendment Implied from Later Inconsistent Enactment*, 37 Col. L. Rev. 292 (1937).

⁴² *Labor and the Sherman Act*, 49 Yale L. J. 518 (1940); *Gregory*, *Labor's Coercive Activities under the Sherman Act—The Apex Case*, 7 Univ. Chi. L. Rev. 347 (1940).

⁴³ *Appalachian Coals Co. v. United States*, 288 U.S. 344, 359-60 (1933). "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."

permissible under Rule 13(c) of the Federal Rules of Civil Procedure.² *Abraham v. Selig*.²

Counterclaims, by means of which a defendant can obtain a separate judgment in the same suit, are a creation of modern codes. In actions at law, before the codes, a defendant could obtain recoupment by asserting facts which reduced the amount of the plaintiff's claim, or set-off, by interposing a separate claim which diminished the amount of the plaintiff's recovery.³ Since the use of the latter device was restricted to claims which were "mutual," the set-off of partnership and individual claims was not permitted.⁴ Thus, where suit was brought upon an obligation due the partnership, a defendant could not, because some plaintiffs were not liable to the defendant, set off a several claim against an individual member. Inasmuch as set-off, by definition, involves the rendering of a single judgment for the difference between the two claims, to permit such a remedy in this situation would in effect amount to an appropriation of partnership assets for the benefit of the individual partner.⁵ While courts of equity generally followed the requirements of the set-off statutes, exceptions were recognized under certain circumstances.⁶

Although a few states still retain the set-off as a separate remedy,⁷ the typical code provision has replaced it with the counterclaim.⁸ With respect to the limitation as to parties, most codes require that the counterclaim be one ". . . in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."⁹ Such provisions have been interpreted to permit counterclaims only if a separate judgment could be had on the original cause of action between those parties affected by the defendant's counterclaim.¹⁰ Under such an interpretation the decision in the instant case cannot be reached; for since partners are ordinarily jointly interested in the original partnership claim,¹¹ a judgment cannot be rendered in favor of one of them.¹² Conversely, where suit is brought upon a partnership obligation in a jurisdiction in which partnership liability is joint and several, a partner should be able, because judg-

² 28 U.S.C.A. following 723(c) (Supp. 1939).

²⁹ F. Supp. 52 (N.Y. 1939).

³ Clark, Code Pleading 436-40 (1928).

⁴ Waterman, Set-off 251 (2d ed. 1872).

⁵ *Rush v. Thompson*, 112 Ind. 158, 13 N.E. 665 (1887); *Jones v. Vinal Haven Steamboat Co.*, 90 Me. 120, 37 Atl. 879 (1897); *Kleinschmidt v. White*, 159 Okla. 234, 15 P. (2d) 127 (1932).

⁶ *Wallenstein v. Selizman & Co.*, 7 Bush. (Ky.) 175 (1870) (nonresidence of the firm); *Seligmann v. Heller Bros. Clothing Co.*, 69 Wis. 410, 34 N.W. 232 (1887) (insolvency of the firm).

⁷ Ky. Codes Ann. (Carroll, 1932) Civ. Prac. § 96; Okla. Stat. (Harlow, 1931) § 208; R.I. Gen. Laws (1938) 521, § 2.

⁸ Clark, Code Pleading 445 (1928).

⁹ Cal. Code Civ. Proc. (Deering, 1937) § 438; see also Colo. Code Civ. Proc. Ann. (Michie, 1935) § 63; Idaho Code Ann. (1932) § 5-613; Minn. Stat. (Mason, 1927) § 9254.

¹⁰ Pomeroy, Code Remedies 1020 (5th ed. 1929).

¹¹ Mechem, Partnership 125 (2d ed. 1920).

¹² *Peck v. Snow Church & Co.*, 47 Minn. 398, 50 N.W. 470 (1891); *Kentling & Kentling v. Magers*, 256 S.W. 528 (Mo. App. 1923); *Yankelewitch v. Beach*, 115 Cal. App. 629, 2 P. (2d) 498 (1931); see *Woolman v. Capital Nat'l Bank*, 2 Colo. App. 454, 31 Pac. 235 (1892).

ment might have been rendered against him alone in the original action, to interpose an individual claim against the plaintiff.¹³

In a few states it has been recognized that the problem of the use of the counterclaim is merely one aspect of the broader problem of joinder of causes of action.¹⁴ These jurisdictions have enacted provisions which would seem to remove all restrictions, both as to substance and parties, from the pleading of counterclaims.¹⁵ Danger of prejudice to parties is guarded against by vesting broad powers of severance in the trial court.¹⁶

Prior to the promulgation of the new Federal Rules, set-off and counterclaim practice in actions at law in the federal courts was governed by the laws of each state;¹⁷ federal equity practice, on the other hand, was regulated by Rule 30 of the Federal Equity Rules.¹⁸ Both Rules 13(a)¹⁹ and (b)²⁰ of the new rules, expanding the liberal equity rule to include what were formerly actions at law, render counterclaims pleadable against any opposing party. In addition, Rule 13(c)²¹ negatives the restriction of the remedy to the limitations of set-off, for it expressly provides that the counterclaim need not diminish or defeat the recovery sought by the plaintiff.

The problem of interposing partnership against individual claims or obligations may arise in a number of situations. In suits between individuals, the ultimate test for the admission of counterclaims, under both the typical code provision and the more liberal procedure exemplified by the federal rules, would seem to be whether or not the defendant might bring a separate suit upon the claim which he asserts.²² Thus, where a partner brings suit upon an obligation owed him personally and the defendant counterclaims with a claim which he has against the firm, the state law of partnership governing the liability of individual partners for the debts of the firm would determine the admissibility of the counterclaim.²³ Conversely, the ability of a partner sued upon a

¹³ *Burton v. Blytheville Realty Co.*, 108 Ark. 411, 158 S.W. 131 (1913); *Columbia Taxicab Co. v. Mercurio*, 236 S.W. 1096 (Mo. App. 1921); *Boeger & Buchanan v. Hagen*, 204 Iowa 435, 215 N.W. 597 (1927).

¹⁴ *Recent Trends in Joinder of Parties, Causes, and Counterclaims*, 37 Col. L. Rev. 462 (1937).

¹⁵ Ill. Rev. Stat. (1939) c. 110, § 162; N.Y. Civ. Prac. Act (Cahill, 1937) § 266.

¹⁶ Ill. Rev. Stat. (1939) c. 110, § 168; N.Y. Civ. Prac. Act (Cahill, 1937) § 262.

¹⁷ *Davis v. Bessemer City Cotton Mills*, 178 Fed. 784 (C.C.A. 4th 1910).

¹⁸ Rule 30: ". . . The answer must state . . . any counterclaim arising out of the subject matter of the suit and may . . . set up any set-off or counterclaim against the plaintiff which might be the subject of a separate suit in equity against him, . . ." 28 U.S.C.A. following § 723 (1928).

¹⁹ Rule 13(a): "A pleading shall state as a counterclaim any claim . . . which at the time of 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. . . ."

²⁰ Rule 13(b): "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction . . . that is the subject matter of the opposing party's claim."

²¹ Rule 13(c): "A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. . . ."

²² *Pomeroy*, Code Remedies 1014 (5th ed. 1929).

²³ *Coats v. Milner*, 134 Ark. 311, 203 S.W. 701 (1918); *Rath v. Kelly*, 246 Mich. 25, 224 N.W. 377 (1929).

personal obligation to interpose a right of action which his firm has against the plaintiff, depends upon his right to sue upon the firm claim.²⁴

Where, however, all members of the partnership are parties to the original suit, either as plaintiffs or defendants, the only obstacle to the pleading of counterclaims, under the liberal practice established by the new Federal Rules, would seem to be the practical considerations of trial convenience and possible prejudice to the parties. Rule 13(a) provides that any cause of action arising out of the transaction which forms the basis of the plaintiff's complaint must be pleaded by the defendant;²⁵ since a counterclaim offered under this provision will usually raise issues closely connected with those presented by the complaint, the avoidance of duplication which would result from separate trials would seem to outweigh any disadvantages the parties might suffer from the joinder. On the other hand, Rule 13(b) permits the defendant to counterclaim any other cause of action which he has against an opposing party.²⁶ Since a counterclaim offered under this provision may involve matters entirely foreign to the complaint, presentation of complicated and unrelated issues to the jury may seriously prejudice parties not otherwise concerned with the defendant's cause of action. This would seem to present a proper situation for the exercise of the court's power of severance under Rule 42(b).²⁷ While the report of the opinion in the instant case fails to disclose the substantive nature of the counterclaims pleaded, the court evidently felt that the issues which they raised were sufficiently connected with those presented by the complaint to justify a settlement of all claims in one trial.

Procedure—Federal Venue Statute—Appointment of Agent for Service of Process Pursuant to State Law as Waiver of Improper Venue—[Federal].—The complainants, stockholders in United Shipyards Incorporated, brought suit against that company, certain of its officers, and the Bethlehem Shipbuilding Corporation. Complainants were citizens of New Jersey, Bethlehem was a Delaware corporation, and all other defendants were residents of New York. Suit was brought in the District Court for the Southern District of New York where Bethlehem had its main executive offices and where it had appointed an agent for service of process to fulfill the requirements of the New York corporation law.² Bethlehem moved to quash the service of process on the ground of non-compliance with Section 51 of the Judicial Code² which provides: “. . . where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of residence of either the plaintiff or the defendant. . . .” On certiorari from an affirmance³ of an order dis-

²⁴ *McGuire v. Lamb*, 2 Idaho 378, 17 Pac. 749 (1888); *Hallam v. Henkin*, 31 S.D. 637, 141 N.W. 784 (1913); *Heinrich v. Kirby*, 64 Mont. 1, 208 Pac. 897 (1922).

²⁵ Note 19 supra.

²⁶ Note 20 supra.

²⁷ Rule 42(b): “The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim. . . .”

² N.Y.L. 1892, c. 687, pp. 1805-6; substantially reenacted in N.Y. Gen'l Corp. Law § 210.

² 49 Stat. 1213 (1936), 28 U.S.C.A. § 112 (Supp. 1939). For comment on the effect of the instant case on construction of other federal venue statutes (listed in 3 Moore, Federal Practice § 105 (1938)) see Federal Venue Requirements for Foreign Corporations, 49 Yale L. J. 724, 726, 729 (1940).

³ *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 103 F. (2d) 765 (C.C.A. 2d 1939).