Concurrent Jurisdiction as Affected by the Compulsory Counterclaim Rule

Jere G. Hayes

COMMENTS

CONCURRENT JURISDICTION AS AFFECTED BY THE COMPULSORY COUNTERCLAIM RULE

The existence of concurrent jurisdiction between the federal courts and the state courts has been a source of confusion as to which court has the power to act, and which court should act. The following statement from the opinion of Chief Justice Taft in *Ponzi v. Fessenden*[1] gives an insight as to the nature of this problem.

> We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.[2]

A step in the direction of solving the need, as presented by Chief Justice Taft, has been the adoption of the compulsory counterclaim rule for the federal system of courts.[3] The purpose of this Comment is to discuss this rule in conjunction with the principles of comity, res judicata, and estoppel by judgment as they relate to problems arising from the existence of this concurrent jurisdiction.[4]

COMPULSORY COUNTERCLAIMS

Background of Rule 13a

In the normal course of events many suits might be necessary to finally litigate all of the claims which one party might have

[1] 258 U.S. 254 (1922).
[2] *Id.* at 259.
[3] FED R. CIV. P. 13a.
[4] For discussion of other problems relating to Federal Rule of Civil Procedure 13a, see MOORE, FEDERAL PRACTICE § 13.01-13 (2nd ed. 1948), and Wright, *Estoppel By Rule: The Compulsory Counterclaim*, 39 IOWA L. REV. 255 (1954).

against another party because any cause of action which is a potential counterclaim might be asserted by means of an independent action.[5] To partially alleviate this situation, Rule 13a of the Federal Rules of Civil Procedure was promulgated to force the defendant in a suit in the federal courts to assert as a counterclaim all of his causes of action, which arose from the transaction which is the basis of the plaintiff's cause of action.[6] The policy behind the passage of Rule 13a was that upon the failure of the defendant to so assert these claims as counterclaims[7] in the suit, then the claims would be waived and could not be the basis of any independent action in the future.[8]

Rule 13a states as follows:

> 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 stated if at the time the action was commenced the claim was the subject of another pending action.[9]

Construction of Rule 13a

In the construction of this rule two distinctions which previously had been made have been discarded. First, the rule has been construed to cover legal as well as equitable counterclaims, as was not the case under the predecessor to Rule 13a, Equity Rule 30. In *Ohio Casualty Insurance Co. v. Maloney*[10] the plaintiff by a bill in equity asked for declaratory relief, and the defendant sought to assert a legal counterclaim; the court said, "[I]t is compulsory on the defendant to plead a legal as well as an equitable counter-

[5] The right to so assert the cause of action as an independent suit would be subject to the principle of estoppel by judgment. See discussion pp. 412-15, *infra*.

[6] It has been held that the compulsory counterclaim requires no independent jurisdictional grounds as a basis for its assertion. See Connecticut Indemnity Co. v. Lee, 168 F.2d 420 (1st Cir. 1948), and Safeway Store, Inc. v. Dunnell, 172 F.2d 649 (9th Cir. 1949) (rehearing), *cert. denied* 337 U.S. 907 (1949).

[7] By construction, Rule 13a embraces the actions of set-off and recoupment, thus the counterclaim would be any claim a party has against an opposing party. See CYCLOPEDIA OF FEDERAL PROCEDURE § 16.01 (3rd ed. 1951).

[8] PROCEEDINGS OF THE AMERICAN BAR INSTITUTE ON THE FEDERAL RULES, Cleveland, p. 247 (1938).

[9] FED. R. CIV. P. 13a.

[10] 3 F.R.D. 341 (E. D. Pa. 1943).

claim 'if it arises out of a transaction or occurrence that is the subject matter of the opposing party's claim.' " [11] Second, contrary to earlier practices, there now may be a contract counterclaim in a tort action, and conversely, a tort counterclaim in a contract action. Illustrating this change is the case of *Kuensel v. Universal Carloading and Distributing Co.*[12] where the plaintiff sued for libel and the defendant was allowed to counterclaim for goods sold and delivered.

Counterclaims Coming Within Rule 13a

If the federal court cannot acquire jurisdiction over persons who are necessary for the assertion of the defendants cause of action, then the defendant need not assert his cause of action as a compulsory counterclaim. Also, the defendant's cause of action must have matured at the time the plaintiff serves his pleadings.[13] A third exception is that the defendant's cause of action must not be the subject matter of a pending cause of action at the time the plaintiff files his cause of action in the federal court or Rule 13a will not apply. For example, if *B* sues *A* in the state court, and later *A* sues *B* in the federal court on a cause of action which arose from the same transaction which is the basis of *B's* action in the state court, *B* does not have to assert his cause of action as a compulsory counterclaim in the federal court.

The following phrase coming within Rule 13a has also caused much litigation to determine its meaning: ". . . causes of action arising from the transaction or occurrence that is the subject matter. . . ." Under old Equity Rule 30 this phrase had been construed as including claims logically related, whether they arose from tort or contract, by the case of *Moore v. New York Cotton Exchange.*[14] In this case the defendant's counterclaim was that the plaintiff had been using the defendant's quotations without the defendant's permission because the defendant refused to sell his service to the plaintiff. Here the transaction was a series of events and not a single transaction. Under Rule 13a no specific defini-

[11] *Id.* at 342.
[12] 29 F. Supp. 407 (E. D. Pa. 1939).
[13] See 3 MOORE, *op. cit. supra* note 4, § 13.14 (1), for discussion of and exceptions to this general rule.
[14] 270 U.S. 593 (1926).

tion can be given so as to ascertain what cause of action will result from a given transaction, let alone give a definite description as to what is a transaction within the meaning of this rule. However, the following quotation from Professor Moore gives the interpretation which has been said to be the better view.

> [S]ince the exceptions stated in Rule 13a to the general requirement of compulsory counterclaims adequately safeguard a party, courts should give the phrase "transaction or occurrence that is the subject matter" of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits. Subject to the exceptions, any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim; only claims that are unrelated or are related, but within the exceptions, need not be pleaded.[15]

PROBLEMS RELATED TO THE OPERATION OF RULE 13a

By use of a hypothetical example the operation of Rule 13a and problems incident thereto can best be illustrated. Suppose that a collision occurred in the state of Texas between a car owned by *A*, a resident of Oklahoma, and a car owned by *B*, a resident of Arkansas. On the basis of diversity of citizenship *A* sues *B* in a federal district court in Texas, alleging the negligence of *B* and the resulting physical injuries to *A*. Subsequently, *B* sues *A* in a state district court in Texas, alleging the negligence of *A* and the resulting physical injuries to *B*.

Two principles must be kept in mind as the problems are presented. First, although there occurred only a single transaction, the causes of action of *A* and *B* are separate and distinct. And second, both the federal court and the state court have the *power* to acquire jurisdiction over the respective causes of action.

Effect of a Judgment by the Federal Court

Assume that in the hypothetical example *B* filed his suit in the state district court after the suit in federal court had gone to judgment, and *B* did not file his action as a compulsory counterclaim in the action in the federal court. The problem presented involves consideration of the judgment of the federal court and the effect

[15] 3 MOORE, *op. cit. supra* note 4, at 33.

of the presence of Rule 13a thereon. It should be noted that neither the old Equity Rule 30 nor the present Rule 13a provide by their explicit terms for the effect of the failure of the defendant to present his cause of action as a counterclaim which has been deemed compulsory. However, under both the Rule 13a and the old Equity Rule 30 it has been held that the failure to assert a cause of action before the suit goes to judgment when the rule so provided was a bar to any future independent suit on this cause of action.[16]

An illustration concerning Rule 13a is the case of *Pennsylvania R. R. Co. v. Mustante-Phillips Inc.*[17] where it was held that a cause of action which should have been a compulsory counterclaim will be lost if it is not asserted before the judgment is rendered. In this case the plaintiff sued for freight charges on a shipment which the defendant refused to accept. On the grounds that the federal statute covering the plaintiff's liability as a carrier was not applicable, the plaintiff objected to a counterclaim which the defendant asserted for the negligent handling of the shipment. The reasoning of the court in allowing the counterclaims was that Rule 13a was mandatory and that if the court could find any grounds of negligence to allow the asserting of the counterclaim then the court should allow it, because if the counterclaim was not asserted it would be lost. Another example of the compulsion behind Rule 13a is *Hancock Oil Co. v. Universal Oil Products Co.*[18] Universal sued Hancock for alleged patent infringement. Hancock, having previously filed an answer and counterclaim to the plaintiff's allegations, sought to amend his counterclaim to allege monopolistic activities by Universal, but the amendment was denied. Although the amendment was denied, the court stated that the counterclaim as to the monopolistic activities was compulsory since it arose from the transaction which was the basis of Universal's action, and Hancock's answer must contain this allegation as a compulsory counterclaim or the right to recover thereon would be lost.

From the discussion of these two cases it is evident that the federal courts will hold that the cause of action is lost if not

[16] American Mills Co. v. American Surety Co., 260 U.S. 360 (1922).

[17] 42 F. Supp. 340 (N. D. Cal. 1941).

[18] 115 F.2d 45 (9th Cir. 1940), 120 F.2d 959 (9th Cir. 1941), *cert. denied* 314 U.S. 666 (1941).

asserted as a compulsory counterclaim. Therefore, the answer to the question posed concerning the hypothetical example must be that the state court cannot act on the cause of action filed there by *B* because the cause of action has now been lost. One case so holding is *Jocie Motor Lines v. Johnson.*[19] Here the lessee of a truck was involved in a collision. The lessor-owner was sued and he joined the lessee as a third party defendant. The cases were consolidated and the federal district court rendered judgment against the lesee and the lessor. Subsequently the lessee filed a suit in the state court against the lessor seeking to have the lessor adjudged liable for the entire judgment which had been rendered against them jointly. The case was decided in favor of the lessor and court stated that this issue of liability should have been raised in the first suit, but since it was not, the judgment rendered by the federal district court is res judicata as to this issue. Also, the court stated that full faith and credit must be given to the judgment of the federal court.

As pointed out above, the cause of action which was *not* asserted as a compulsory counterclaim in the federal court cannot be asserted in the state court if the federal court has rendered its judgment first. The reasoning upon which this result has been reached has varied. Professor Moore has advocated that the reasoning should be that the principle of res judicata applies to all issues which *should* have been raised during the trial, even though the issues were not raised.[20] A case seeming to follow this reasoning is *Biaett v. Phoenix Title and Trust Co.*[21] In this case Laney brought an interpleader action against Biaett and Phoenix. Biaett cross-actioned against Phoenix alleging that prior to this suit Phoenix had instigated an interpleader action against Biaett and in connection with this suit Biaett had incurred certain expenses for which Phoenix should pay. Since Arizona has a compulsory counterclaim rule which is patterned after Rule 13a, the court held that the cause of action being asserted by Biaett was barred because it was not asserted as a counterclaim. The principle of res judicata was held to apply to all issues which should have been raised, even though they were not.

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[19] 57 S.E. 2d 388 (N. Car. 1950).
[20] 3 MOORE, *op. cit. supra* note 4, § 13.12.
[21] 70 Ariz. 164, 217 P. 2d 923 (1950).

Another theory is that the cause of action is waived when it is not asserted as a compulsory counterclaim. The basis of this theory is that the use of the principle of res judicata creates a fiction because the cause of action which should have been asserted as a compulsory counterclaim is not truly an issue of the other cause of action.[22] Thus the waiver theory reasons that if the cause of action is not asserted as a compulsory counterclaim, then it is waived by the party not asserting it, and the cause of action so waived cannot be the basis of any independent action.

The solution to the difficulty in finding sound legal theory for the result attained (that the judgment of the federal court is a bar to any action in the state court on a cause of action which should have been asserted as a compulsory counterclaim, but was not) might be found in the extension of an idea presented by Professor Wright in his article on the compulsory counterclaim rule. He suggests that possibly the principle of res judicata could take on a new connotation when the effect of the compulsory counterclaim rule is considered.[23] Since the rule deals with causes of action and not issues of causes of action, res judicata in this instance would be a bar to a cause of action which should have been asserted but was not. It is submitted that the application of this new connotation for res judicata should be considered by the state courts when they are confronted with this problem.

The result of Rule 13a has been that a rule of procedure establishing compulsory counterclaims has been the basis for holding that the state court cannot act on a cause of action which should have been a compulsory counterclaim in the federal court, when the federal court has rendered the first judgment. This is an interesting result because a compulsory counterclaim rule, which generally is binding only in the sphere of the courts to which the particular rules of procedure apply, has been given extra-territorial effect. Because the compulsory counterclaim rule defines the causes of action to which res judicata will apply, this is substantive law. As such, full faith and credit must be allowed by other states and other federal courts.[24] Thus the rule of procedure has given

[22] See State *ex. rel.* Mack v. Scott, 235 S.W.2d 106 (Mo. App. 1950). See also Wright, *op. cit. supra* note 4, at 261.

[23] Wright, *op. cit. supra* note 4, at 261.

[24] *Supra* note 19.

rise to substantive law. The following quotation illustrates the illogical, but good result.

> Can a neater example be imagined of the impossibility of sensible distinctions between "substance" and "procedure"? Compulsory counterclaim provisions are enacted as a regulation of "procedure," and indeed if, as in most jurisdictions, they have been made by rule of court, they are valid only as a regulation or "procedure" which must leave rights of "substance" unimpaired. Yet their effect are held to be extraterritorial on the explicit grounds that these effects are "substantive!"[25]

Effect of an Action Pending in the Federal Court

Returning again to the hypothetical fact situation and assuming that *B* files his cause of action in the state court while *A's* action in the federal court is still pending, a problem to be considered is whether the state court can be prohibited from action; and if not, *should* it act? The case of *Red Top Trucking Co. v. Seaboard Freight Lines*[26] answers the question of whether the federal court can prohibit the state court from acting on *B's* cause of action filed there. In this case a suit was filed in the Municipal Court of New York City alleging negligence on the part of the defendant in causing a collision. Later the defendant instigated a cause of action, alleging negligence, in a federal district court in New York against the plaintiff in the municipal court action. Motion was made in the federal court to stay the state court action. The motion was denied for the reason that where an in personam action is filed in both the state court and the federal court, and the subject matter is the same in each suit, both suits may proceed at the same time and the first judgment rendered can be pleaded as a bar in the other suit. The court further said that to stay the municipal court action would increase the jurisdiction of the federal courts, a result which was not intended by the passage of the federal rules of procedure. For the proposition that the two in personam suits may proceed concurrently, the court in the *Red Top* case cited with approval the case of *Kline v. Burke Construction Co.*[27] The *Kline* case, decided in 1922, was on very similar facts. The con-

[25] Wright, *op. cit. supra note* 4, at 268-69.
[26] 35 F. Supp. 740 (S. D. N. Y. 1940).
[27] 260 U.S. 226 (1922).

struction company brought an action in a federal district court alleging breach of contract against certain officials of Texarkana, Arkansas. Subsequently, these officials instigated a cause of action in the Arkansas chancery court against the construction company and their sureties. The construction company then asked the federal district court to issue an injunction against the state chancery court. On appeal, the United States Supreme Court denied the injunction. The court stated that since the action involved only the question of personal liability the jurisdiction of the court in which the first action is filed will not be impaired by allowing the subsequent suit because there is no conflict of jurisdiction over a res or object. Therefore, the court went on to say that a federal court and a state court may at the same time handle a cause of action which involves the same subject matter.[28] Thus the answer to the question of whether the federal court may enjoin the state court must be answered in the negative.

The remaining question is whether the state court in the hypothetical example *should* act when a cause of action involving the same subject matter is filed in the federal court prior to the state action, and the cause of action being asserted in the state court should have been a compulsory counterclaim in the federal court. The *Kline* case and the *Red Top* case only deal with the question of *power* to act, and it is submitted that these cases are authority for the proposition that both courts *may* act at the same time, but not for the proposition that both courts *should* act at the same time. In deriving an answer to this question, the following three points should be considered: the purpose of Rule 13a, the effect of a judgment which could be rendered by the federal court, and finally, the principle of comity.

As has been previously stated, the purpose for the passage of Rule 13a was to prevent multiplicity of lawsuits by restricting the method by which the causes of action arising from a transaction or occurrence could be asserted.[29] In the conference where Rule 13a was drafted it was recognized that Rule 13a would not bind the state courts as such, but the hope was expressed that the state courts would accept Rule 13a for the purpose for which it was

[28] For a recent case reaching this same result see Ermentrout v. Commonwealth Oil Co., 220 F.2d 527 (5th Cir. 1955).

[29] See discussion pp. 402-3, *supra*.

passed.[30] As concerns the federal system of courts the case of *Crosley Corporation v. Hazeltine*[31] held that the assertion of the cause of action, which should be a compulsory counterclaim, as grounds for an independent action in another *federal* court is grounds for abating the second action.

The state court should also consider the effect of the judgment which would be rendered by the federal court when it acts. The judgment rendered by the federal court would be res judicata or a bar to the cause of action now being asserted in the state court. As previously discussed,[32] the need for any subsequent action by the state court would be improbable. Therefore, any action which the state court would take would lead to an extra lawsuit since the causes of action will be determined by the judgment in the federal court, regardless of whether or not the defendant asserts his cause of action there as a counterclaim.

Finally, the state court should consider the relationship of the principle of comity to the above stated problems. Briefly stated, the principle of comity is that the first court, federal or state, to acquire jurisdiction over the person and the subject matter of a cause of action shall retain this jurisdiction to the exclusion of any other court until its duty has been performed.[33] Comity seems to be a principle much discussed but little applied. Nevertheless, the principle is sound as concerns the avoidance of needless and hopeless conflict. Comity is usually applied by means of the abatement of the second suit by the second court in which a cause of action is instigated after a prior cause of action concerning the same subject matter has already been instigated. The hypothetical example which has been stated seems to offer a situation where the principle properly could be applied. After a consideration of these points it is submitted that the state court should abate the action in favor of the jurisdiction of the federal court because the judgment rendered by the federal court will be a bar to the action pending in the state court.

[30] PROCEEDINGS OF THE AMERICAN BAR INSTITUTE ON THE FEDERAL RULES, Cleveland, p. 248 (1938).

[31] 122 F.2d 925 (3rd Cir. 1941), *cert. denied* 315 U.S. 813 (1942).

[32] See discussion pp. 405-9, *supra.*

[33] Covell v. Heyman, 111 U.S. 176 (1884); Gregg v. Winchester, 173 F.2d 512 (9th Cir. 1949), *cert. denied* 338 U.S. 847 (1949).

Two leading cases have reached this result. In *Conrad v. West*[34] a tenant, due to violation of the rent ceiling pricing, sued his landlord in a federal district court seeking to break his lease. Shortly thereafter, the landlord sued the tenant in a state court alleging non-payment of rent. The tenant petitioned the state court to abate the action there in favor of the pending action in the federal court. The state court abated the action and gave two reasons. First, the court stated that this situation presented proper grounds for applying the principle of comity. Second, the action being asserted by the landlord in the state court should have been the subject of a compulsory counterclaim in the suit pending in the federal court.

A more recent case is *Sparrow v. Milton and Stuart Nerzig.*[35] In this case a collision occurred in South Carolina between a truck owned by Sparrow and a car owned by Milton Nerzig and driven by Stuart Nerzig. Sparrow sued Milton Nerzig in a state court in South Carolina alleging that the latter was driving negligently at the time of the collision. Subsequently, Stuart Nerzig filed suit in a federal court in South Carolina alleging that Sparrow had been negligent. Sparrow returned to the state court and there moved to amend his petition to make Stuart Nerzig an additional party defendant and to allege that at the time of the collision Stuart was driving the car and became jointly and severally liable. The state court abated the state action as a matter of comity since the action being asserted in the state court should have been a compulsory counterclaim in the action pending in the federal court.

Problems Arising If Rule 13a Is Disregarded

Returning again to the hypothetical example, problems are created if the state court in which *B* has filed his action does not abate the action but instead acts on the cause of action instigated by *B* while the action instigated by *A* is still pending in the federal district court. As has been pointed out, the better procedure would be for the state court to abate the action filed there by *B*, but it must be remembered that the state court has the power to act;

[34] 98 Cal. App. 181, 219 P.2d 477 (1950).
[35] 89 S.E.2d 718 (S. Car. Sup. 1956).

therefore the ramifications of a judgment rendered by the state court should be considered.[36]

The effect of the judgment will come through the application of the principle of estoppel by judgment. Estoppel by judgment means that any issues which were litigated or of necessity litigated[37] will be forever settled between the parties and their privies by the judgment.[38] Issues which could have been raised, but were not, can be raised in a later action.[39] Thus in the hypothetical example, if the state court renders judgment for *B* on the issue of negligence, *B* can introduce this judgment in the federal court and the issue of negligence between *A* and *B* cannot be relitigated in the cause *A* vs. *B* pending in the federal court.[40] Thus the effect of a judgment rendered by the state court would be to preclude any action by the federal court in the cause of action pending there as concerns any issues which have been decided by the state court even though the federal court had acquired jurisdiction over the subject matter first, and the cause being asserted in the state court should have been a compulsory counterclaim in the federal court.

One question which might be raised is whether the result would be the same if the state court were a court of limited jurisdiction.[41] A case which fully illustrates the problem and also the reasoning which presently has been accepted as the solution is the case of *Foreman v. Massoni.*[42] This case involves two courts within Texas, but the principle established has been applied in the area of concurrent jurisdiction.[43] The plaintiff instigated a cause of action in a county court in Texas, which court had a jurisdictional

[36] The case of U. S. v. Sillman, 167 F.2d 607 (3rd Cir. 1948), *cert. denied* 335 U. S. 825 (1948), held that a judgment of a state court must be given full faith and credit in the federal courts.

[37] The term "or of necessity litigated" is meant to be construed as meaning issues which were uncontested but were necessarily decided in favor of the winning party.

[38] Cromwell v. County of Sac, 94 U.S. 351 (1876); Northern Trust Co. v. Essaness Theater Corp., 103 F. Supp. 954 (N. D. Ill. 1952); Gorden v. Gorden, 59 So. 2d 40 (Fla. 1952), *cert. denied* 344 U.S. 878 (1952).

[39] Buromin C. v. National Aluminate Corp., 70 F. Supp. 214 (N. D. Del. 1947); and see cases in note 38 *supra.*

[40] It should be remembered that the negligence case presents the clearest example of what issues are involved.

[41] By the term "court of limited jurisdiction," as used here, is meant that the jurisdiction of the court is limited so that only causes of action within certain money limits can be brought.

[42] 176 S.W. 2d 366 (Tex. Civ. App. 1943) *error ref.*

[43] Cases so holding are Geracy Inc. v. Hoover, 133 F.2d 25 (D. C. Cir. 1942), and U. S. v. Sillman, note 36 *supra.*

limit of $1,000. The defendant tried to cross claim for an amount above this jurisdictional limit, but this cross-action was dismissed before the suit was tried. Judgment was rendered for the plaintiff. Subsequently, the defendant in the prior action brought an action against the plaintiff in the prior action, and the basis of the action now being asserted was the claim which the defendant attempted to assert in the first suit. Judgment was rendered for the defendant, who was the plaintiff in the first action. The court held that the county court had the power to handle all issues within the jurisdictional limit of the court. Since the same issues were involved in both actions, the prior adjudication of these issues by the court of limited jurisdiction was conclusive by the application of the principle of estoppel by judgment when these issues were presented in the second action. The court concluded its opinion with an example of the extreme to which this doctrine might extend:

> As a result of a collision one party may suffer damages in the sum of $50,000, the other damages in the sum of not more than $19, a sum less than the appellate jurisdiction of the County Court. Upon the principle underlaying the holding we have made in this case a conclusive determination of the action for $50,000 might doubtless be had in the Justice Court. In such a case the public policy which limits the jurisdiction of the Justic Court to small matters obviously is inconsistant with the public policy embodied in the doctrine of estoppel by judgment, but is not necessarily in conflict therewith. If the defect requires remedying, recourse must be had to the policy making power of the State which fixes the jurisdiction of courts.[44]

Those who opose the result of the *Foreman* case contend that the result is contrary to the purpose for which the courts of limited jurisdiction were established, i.e., that litigation of smaller claims could be handled speedily in an inferior court where the rules of procedure are not as formal as in the other courts. It is asserted that by the establishment of these inferior courts it was not intended that such inferior courts conclusively decide matters which require for their adjudication strict procedure and a judge of the highest qualifications. This inconsistency was recognized in the *Foreman* case, as was noted in the quotation in the preceding paragraph. One possible solution would be a legislative enactment which would provide that if the defendant cannot assert his coun-

[44] 176 S.W. 2d at 368.