

**NATIONAL MARKETING CORPORATION, PLAINTIFF-APPELLEE, VS.
FEDERATION OF UNITED NAMARCO DISTRIBUTORS, INC.,
DEFENDANT-APPELLANT.**

G.R. No. L-22578. January 31, 1973

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ANTONIO, J.:

Appeal by defendant, Federation of United Namarco Distributors, Inc., from a decision of the Court of First Instance of Manila in Civil Case No. 46124, ordering said defendant to pay the plaintiff, National Marketing Corporation, the sum of P609,014.73, representing the cost of merchandise delivered to, and not paid for by, the defendant, with interest thereon at the legal rate from the date of delivery of the merchandise, until the whole obligation is paid; and the sum of P5,000.00, for and as attorney's fees and other expenses of litigation, plus costs.

The facts of this case, which are not disputed by the parties, are correctly set forth in the appealed decision from which we reproduce hereunder, as follows:

"The plaintiff, hereinafter to be called the NAMARCO, is a government owned and controlled corporation duly organized and existing under and by virtue of Republic Act No. 1345, as amended; and the defendant, hereinafter to be called the FEDERATION, is a non-stock corporation duly organized and existing under and by virtue of the laws of the Philippines.

On November 16, 1959, the NAMARCO and the FEDERATION entered into a Contract of Sale which contains the following stipulations, terms and conditions:

'That, WHEREAS, by virtue of NAMARCO Board Resolution dated November 3, 1959, the Management of NAMARCO was authorized to import the following items with the corresponding dollar value totalling Two Million One Thousand Thirty One Dollars (\$2,001,031.00) to wit;

X X X

X X X

X X X

'That, WHEREAS, for and in consideration of the sum of Two Hundred Thousand Pesos (P200,000.00) as part payment of the items and/or merchandise above-mentioned, and deposited by the FEDERATION with the NAMARCO upon signing of the items and/or merchandise above enumerated items and/or merchandise shall be paid on cash basis upon delivery of the duly indorsed negotiable shipping document covering the same, the NAMARCO agrees to sell the said items and/or merchandise, subject to the following terms and conditions:

'1. That the FEDERATION shall pay the NAMARCO the value of the goods equivalent to the procurement costs plus 5% mark-up, provided, however, that should there be any adjustment in the procurement costs the same shall be refunded to the FEDERATION.

C2. That all handling and storage charges of the goods sold shall be for the account of the FEDERATION.

'3. That the FEDERATION waives its right to claim for any loss or damage that may be suffered due to force majeure such as war, riots, strikes, etc., except when such incident is directly or indirectly due to the negligence of the NAMARCO or its representative;

'4. That the items and/or merchandise sold by NAMARCO to the FEDERATION shall be distributed among its members and retailers in accordance with NAMARCO's existing rules and regulations governing the distribution of NAMARCO goods and at the wholesale and retail prices to be determined by NAMARCO.

x x x

x x x

x x x

(Annex 'A' to the Complaint or Exh. 'A').

"Among the goods covered by the Contract of Sale were 2,000 cartons of PK Chewing Gums, 1,000 cartons of Juicy Fruit Chewing Gums, 500 cartons of Adams Chicklets, 168 cartons of Blue Denims, and 138 bales of Khaki Twill.

"To insure the payment of those goods by the FEDERATION, the NAMARCO accepted three domestic letters of credit, to wit: PNB Domestic L/C No. 600570, dated January 27, 1960, in favor of the NAMARCO for the account of the FEDERATION, available by draft up to the aggregate amount of P277,357.91, covering the full invoice value of the 2,000 cartons PK-5 Chewing Gums, 1,000 cartons of Juicy Fruit Chewing Gums, and 500 cartons of Adams Chicklets; PNB Domestic L/C No. 600606, dated January 28, 1960, in favor of the NAMARCO for the account of the FEDERATION, available by draft up to the aggregate amount of P135,891.82? covering the full invoice value of the 168 cartons of Blue Denims; and PNB Domestic L/C No. 600586, dated January 28, 1960, in favor of the NAMARCO for the account of the FEDERATION, available by draft up to the aggregate amount of P197,804.12, covering the full invoice value of the 183 bales of Khaki Twill, each to be accompanied by statement of account of buyer issued by. the NAMARCO, accepted draft and duly executed trust receipt approved by the Philippine National Bank.

"Upon arrival of the goods in Manila in January, 1960, the NAMARCO submitted to the FEDERATION Statement of Account for P277.357.91, covering shipment of the 2,000 cartons of PK Chewing Gums, 1,000 cartons of Juicy Fruit Chewing Gums, and 500 cartons of Adams Chicklets; Statement of Account of P135,891.32, covering shipment of the 168 cartons of Blue Denims; and Statement of Account of P197,824.12, covering shipment of the 183 bales of Khaki Twill, or a total of P611,053.35, for the FEDERATION to pay.

"On January 29, 1960, the FEDERATION received from the NAMARCO the 2,000 cartons of PK Chewing Gums, 1,000 cartons of Juicy Fruit Chewing Gums, and 500 cartons of Adams Chicklets, all with a total value of P277,357.91, under the condition that the cost thereof would be paid in cash through PNB Domestic L/C No. 600570; and on February 20, 1960, the FEDERATION received from the NAMARCO the 168 cartons of Blue Denims and 183 bales of Khaki Twill, with a total value of P135,891.82 and P197,804.12, respectively, under the condition that the cost thereof would be paid in cash through PNB Domestic L/C Nos. 600606 and 600586, respectively.

"On March 2, 1960, the FEDERATION and some of its members filed a complaint against the NAMARCO, which became Civil Case No. 42684 of this Court, for specific performance and damages, alleging that after the

NAMARCO had delivered a great portion of the goods listed in the Contract of Sale, it refused to deliver the other goods mentioned in the said contract. The pertinent allegations of the complaint in that case is, as follows:

'17. That now the defendant has refused and declined to accept the cash payments by the FEDERATION, in accordance with the terms and conditions stipulated, in said contract, Annex 'A' hereof, against deliveries to it of the commodities listed in paragraph 16 hereof, and has refused and declined to make deliveries thereof to the FEDERATION, in accordance with such terms and conditions; and that the plaintiffs have always been, and still are willing to take deliveries of the same commodities and to pay for them, through the FEDERATION, in accordance with the terms and conditions, of said contract' (Exh. 'Is)

"On March 10, 1960, the NAMARCO presented to the Philippine National Bank, Manila, for payment Sight Draft, dated March 10, 1960, for P277,357.91, to cover the full payment of the 2,000 cartons of PK Chewing Gums, 1,000 cartons of Juicy Fruit Chewing Gums, and 500 cartons of Adams Chicklets, duly accompanied with supporting papers; Sight Draft, dated March 10, 1960, for P135,891.82, to cover the full payment of the 168 cartons of Blue Denims, duly accompanied with supporting papers; and Sight Draft, dated March 10, 1960, for P197,804.12, to cover the full payment of 183 bales of Khaki Twill, duly accompanied with supporting papers.

"On March 19, 1960, the NAMARCO filed in Civil Case No. 42684 its answer to the complaint, alleging that the Contract of Sale was not validly entered into by the NAMARCO and, therefore, it is not bound by the provisions thereof, without setting up any counterclaim for the value of the goods which it had already delivered but which had not yet been paid for by the FEDERATION.

"On May 19, 1960, the Philippine National Bank informed the NAMARCO that it could not negotiate and effect payment on the sight drafts drawn under PNB Domestic L/C Nos. 600570, 600606 and 600586, in the amounts of P277,357.91, P135,891.82 and P197,804.12, respectively, as the requirements of the covering letters of credit had not been complied with. The common condition of the three letters of credit is that the sight drafts drawn on them must be duly accepted by the FEDERATION before they will be honored by the Philippine National Bank. But the said drafts were not presented to the FEDERATION for acceptance.

"On June 7, 1960, the NAMARCO demanded from the FEDERATION the payment of the total amount of P611,053.35, but the latter failed and refused to -pay the said amount, or any portion thereof, to the NAMARCO.

"In the readjustment made on the basis of actual expenditures, the total cost of the goods was reduced from P611,053.35 to P609,014.73.

On October 15, 1960, the Court of First Instance of Manila promulgated its decision in Civil Case No. 42684, ordering the NAMARCO to specifically perform its obligation in the Contract of Sale, by delivering to the FEDERATION the undelivered goods.

"On November 11, 1960, the NAMARCO appealed from the decision. On March 31, 1962, the Supreme Court¹ rendered a decision on NAMARCO's appeal in Civil Case No. 42684, holding that the Contract of Sale was valid." (Record on Appeal, pp. 63-71, Civil Case No. 46124.)

On January 25, 1961, NAMARCO instituted the present action (Civil Case No. 46124) alleging, among others, that the FEDERATION'S act or omission in refusing to satisfy the former's valid, just and demandable claim has compelled it to file the instant action; and praying that the FEDERATION be ordered to pay the NAMARCO the sum of P611,053.35, representing the cost of merchandise mentioned in the preceding paragraph, with interest thereon at the legal rate from the date of delivery of the merchandise in question, until the whole obligation is paid; P20,000.00 as attorney's fees, and other expenses of litigation, plus costs.

On February 7, 1961, the FEDERATION moved to dismiss the complaint on the ground that the cause of action

alleged therein is barred forever, pursuant to Section 6 of Rule 10 of the Rules of Court. In support thereof, the FEDERATION alleged that on March 2, 1960, the FEDERATION and some of its members instituted Civil Case No. 42684 against NAMARCO for specific performance to enforce compliance with the contract of sale; that said contract, basis of Civil Case No. 42684, is also the basis of NAMARCO's present complaint in Civil Case No. 46124; that when NAMARCO filed, on March 19, 1960, its answer to the complaint in Civil Case No. 42684, it did not set up any counterclaim therein; that on October 15, 1960, the Court of First Instance of Manila promulgated the decision in said Civil Case No. 42684, ordering, among others, the NAMARCO to specifically perform its obligation under the contract of sale by delivering to the FEDERATION the goods subject-matter of the contract as are involved in the complaint; that the claim of NAMARCO against the FEDERATION matured either on May 19, 1960 when the Philippine National Bank, Manila, informed the NAMARCO that it could not effect payment on the sight drafts, or on June 7, 1969 when NAMARCO demanded payment of the sum of P611,053.35; that the FEDERATION refused to pay said amount; that NAMARCO's claim in the present case, Civil Case No. 46124, against the FEDERATION alone, being a compulsory counterclaim against the latter, in that it arose out of or is necessarily connected with the transaction or occurrence that is the subject-matter of the action of the FEDERATION in Civil Case No. 42684 against the NAMARCO and therefore it must have been set up in said Civil Case No. 42684 in the manner prescribed by Section 4, Rule 10 of the Rules of Court, and within the time between March 19, 1960, the date of filing, in Civil Case No. 42684, of the answer of NAMARCO, and October 15, 1960, the date of the decision in that case; and that the failure of NAMARCO to set up, in said Civil Case No. 42684, such a counterclaim, precludes NAMARCO from raising it as an independent action, pursuant to Section 6 of Rule 10 of the Rules of Court.

On February 11, 1961, NAMARCO interposed its opposition to said motion to dismiss contending that its claim for the recovery of the cost of merchandise delivered to the FEDERATION on January 29 and February 20, 1960 is not necessarily connected with the suit in Civil Case No. 42684 for specific performance and, therefore, does not fall under the category of compulsory counterclaim; that NAMARCO's failure to set it up as a counterclaim in its answer in Civil Case No. 42684 does not constitute *res judicata*; that the deliveries of the merchandise were effected through the fault or negligence of one of its personnel, Juan T. Arive, who was administratively charged therefor, found guilty and accordingly dismissed; that the issue in Civil Case No. 42684, was the genuineness and due execution of said contract as the same was entered into by the General Manager of the NAMARCO without the knowledge, consent and approval of the Board of Directors and that the same was not approved by the Auditor General conformably with Administrative Order No. 290 dated February 3, 1959 of the President of the Philippines and therefore it would have been inconsistent for NAMARCO to avail itself of the contract the validity of which it was impugning, to enforce its claim; and that the present claim is not necessarily connected with the transaction or occurrence that is the subject matter of Civil Case No. 42684, as the same evidence would not support or refute both.

On February 18, 1961, the FEDERATION filed a rejoinder reiterating that the requirements on the rule of compulsory counterclaim are present; that the first requirement — that the counterclaim arises out of or is necessarily connected with the contract of sale subject-matter of NAMARCO's cause of action — is evident from the face of the complaint itself.

On June 3, 1961, the lower court issued an order holding "in abeyance" action on the motion to dismiss till after the trial on the merits.

On June 14, 1961, the FEDERATION filed its answer to the NAMARCO's complaint admitting some material averments of the complaint, specifically denying other allegations and consistently with its position averred as affirmative defense that NAMARCO's failure to assert its claim against the FEDERATION before judgment in

Civil Case No. 42684 on October 15, 1960 constituted a bar to the institution of the present action. By way of counterclaim, the FEDERATION sought P50,000.00 as attorney's fees and other expenses of litigation, as well as P17,000.00 as damages for improper issuance of a writ of attachment which writ, evidently had been issued earlier by the court.

On June 21, 1961, NAMARCO filed an answer to the FEDERATION'S counterclaim specifically denying the material averments thereof and maintaining that the present action is not barred by Civil Case No. 42684.

On January 13, 1964, after due hearing, the lower court rendered its aforementioned decision. Hence, the present appeal.

In this appeal, the FEDERATION contends that:

I

"The lower court erred in failing to hold that the complaint does not state a cause of action against the defendant-appellant;

II

"The lower court erred in holding that the plaintiff-appellee's claim is not a compulsory counterclaim as defined and governed by Section 6, Rule 10 of the old Rules of Court (Section 4, Rule 9 of the new);

III

"The lower court erred in entering judgment in favor of the plaintiff-appellee and ordering defendant-appellant to pay the former the sum of P609,014.73 with interest thereon at the legal rate from the date of delivery of the merchandise, and the sum of P5,000.00 for and as attorney's fees and other expenses of litigation, with costs."

We shall first proceed because of its decisive significance, with the issue posed by appellant in its second assignment of error * * * whether or not this action of NAMARCO for the collection of the payment of the merchandise delivered to, but not yet paid by, the FEDERATION, is already barred as a consequence of the failure of NAMARCO to set it up as a counterclaim in the previous case, (Civil Case No. 42684).

In ruling that the present claim of NAMARCO is not compulsory counterclaim, that should have been asserted in the previous case the lower court had the following to say:

"As to the meaning of the terms 'transactions' and 'occurrence' used in Section 6, Rule 10, Rules of Court, Francisco in his annotations and commentaries on the Rules of Court, Vol. I, p. 577, cites the following:

"The terms 'transaction' and 'occurrence' used in the section now under consideration include the facts and circumstances out of which a claim may arise, and whether two claims arise out of the same transaction or occurrence depends in part on whether the same evidence would support or refute both. (Williams v. Robinson, 3 Federal Rules Service, 174). These terms are broader than the term 'contract', and authorize matters to be counterclaimed which could not be counterclaimed as arising out of the contract sued upon by the plaintiff. This is obvious, for while a contract is a transaction, a transaction is not necessarily a contract. One of the definitions of the term 'transaction' is, 'a matter of affair either completed or in course of completion,' (Story etc., Commercial Co. v. Story, 100 Cal. 35, 34 Pac. 671).

'Mr. Pomeroy defines the term as 'that combination of acts and events, circumstances and defaults which viewed in one aspect results in the plaintiff's right of action, and viewed in another aspect results in the defendant's right of action. * * * As these two opposing rights cannot be the same, it follows that there may be, and generally must be, acts, facts, events, and defaults in the transaction as a whole which do not enter into

each cause of action.' Every transaction is more or less complex, consisting of various facts and acts done by the respective parties and it frequently happens that one or more of these acts, if viewed by itself, may be such a violation of duty as to give to the other a right of action; but the obligation thus created may be so counter-balanced by other matters growing out of the same transaction that no compensation ought to be made therefor. In such a case, simple equity requires that the respective causes of action in behalf of each be adjusted in a single suit.' (Story, etc. Commercial Co. v. Story, 100 Cal. 35, 34 Pac. 671).

"What is the 'transaction or occurrence that is the subject-matter of the opposing party's (FEDERATION'S) claim' in Civil Case No. 42684? It must consist in 'the facts and circumstances out of which a claim may arise,' or it must be 'that combination of acts and events, circumstances and defaults which viewed in one aspect results in the plaintiff's right of action, and viewed in another aspect results in defendant's right of action.'

"The complaint of the FEDERATION against the NAMARCO in Civil Case No. 42684 was predicated on the refusal of the latter to perform its obligation under the Contract of Sale. The refusal of the NAMARCO to perform its obligation under the Contract of Sale is the act or the event, the circumstance or default, which constitutes the transaction or the occurrence.

"The FEDERATION contends that NAMARCO's claim arose out of that transaction or occurrence, or was necessarily connected with that transaction or occurrence, because the cause of action of the FEDERATION in Civil Case No. 42684 and the cause of action of the NAMARCO in this case are based on the same Contract of Sale.

"But it will be noted that one of the requisites for the application of the rule on compulsory counterclaim is that the counterclaim should at least be connected with or must arise out of the transaction or occurrence which gave rise to the opposing party's claim.

"To illustrate the meaning of that requisite, the following cases are cited:

'1. In a former suit, B claimed realty under a will of her deceased husband and L claimed the same as a forced heir. After judgment dividing the property and requiring B to turn over a part of the same to L, this suit was brought by B to recover the value of the improvements made on the property during the time she had possession of the same. Defendant pleaded res adjudicata alleging that B should have made a counterclaim in the first action. Held: That the former suit was a petition for the inheritance and the present one being a claim for improvements is in no wise connected with the principal object of the former litigation and that a counterclaim could not properly have been presented in the first action (Bautista v. Jimenez, 24 Phil. 111).'

'2. Mariano executed an instrument purporting to be a deed of conveyance of two parcels of land in favor of Maclan. About a year later, Mariano instituted an action (Civil Case No. 106) against Maclan for the annulment of the said instrument on the ground of fraud and the recovery of the property. Judgment was rendered in favor of Mariano. About two years later, Maclan filed a complaint against Garcia who acquired the property by inheritance from Mariano, for the purpose of recovering the sum of P5,200.00 as necessary expenses allegedly incurred in the preservation of said property prior to the commencement of case No. 106. Held: It is clear that the claim for repairs or necessary expenses allegedly made by Maclan in the property in dispute in Case No. 106, is necessarily connected with the action of the plaintiff therein to recover said property from Maclan. Said connection is substantially identical with that which exists between an action for recovery of a land and the claim for improvements therein made by the defendant in said case. It is well settled that such claim for improvements is barred unless set up by recovery of the land (Bautista v. Jimenez, 24 Phil. 111; Berses v. Villanueva, 25 Phil. 473; Lopez v. Gloria, 40 Phil. 76; Beltran v. Valbuena, 53 Phil. 697; Calit v. Ginness and Hernandez, 62 Phil. 451).'

"The right of the NAMARCO to the cost of the goods existed upon delivery of the said goods to the FEDERATION which, under the Contract of Sale, had to pay for them. Therefore, the claim of the NAMARCO

for the cost of the goods delivered arose out of the failure of the FEDERATION to pay for the said goods, and not out of the refusal of the NAMARCO to deliver the other goods to the FEDERATION. The action of the FEDERATION in Civil Case No. 42684, based on the refusal of the NAMARCO to deliver the other goods, had nothing to do with the latter's claim for the cost of the goods delivered and, hence, such claim was not necessarily connected therewith. * * *

"The claim of the NAMARCO in this case could have been a permissive counterclaim, but is not a compulsory counterclaim, in Civil Case No. 42684.

"While the Contract of Sale created reciprocal obligations between the FEDERATION and the NAMARCO, the refusal of the latter to deliver the other goods was not due to the failure of the FEDERATION to pay for the goods delivered, but rather to the fact that it believed, as alleged in its answer in Civil Case No. 42684, that the Contract of Sale was not validly entered into by it. Such being the case, the failure of the FEDERATION to pay for the goods delivered could not have been properly raised by the NAMARCO as a defense or pleaded as a compulsory counterclaim in Civil Case No. 42684. However, had the NAMARCO alleged its present claim in Civil Case No. 42684, the Court would have permitted it. A permissive counterclaim is one which does not arise out of, or is not necessarily connected with, the transaction or occurrence that is the subject-matter of the opposing party's claim.

"Since the cause of action of the FEDERATION in Civil Case No. 42684 is such that the claim of the NAMARCO in this case could not properly be pleaded as a compulsory counterclaim in that case, the NAMARCO is not precluded from bringing this present action. Section 6, Rule 10, Rules of Court, is not applicable."[2] (*Italics supplied.*)

This ruling of the court a quo is now assigned as error by the FEDERATION for it is its position that the previous action which it filed against NAMARCO, for specific performance to compel NAMARCO to deliver the goods, was predicated upon the contract of sale of November 16, 1959 executed by the FEDERATION and NAMARCO who are the same parties, both in the previous case as well as in the present case, (Civil Case No. 46124) and therefore this action must be considered as having arisen out of or is necessarily connected with the transaction or occurrence that was the subject matter of the previous case. It is the theory of the FEDERATION that the applicable guiding principle is "that there be a logical relationship between" plaintiffs claim and defendant's counterclaim. It insists that "logical relationship" exists between the previous action for specific performance (Civil Case No. 42684) and NAMARCO's present action for the payment of the goods delivered as (a) both actions are derived from the same contract of sale; and (b) the two actions are but the consequences of the reciprocal obligation imposed by law[3] upon the parties by virtue of the aforesaid contract. The alleged failure of the FEDERATION to pay for goods delivered should therefore have been raised by NAMARCO as a defense or counterclaim in the previous case notwithstanding the fact that said claim only accrued after NAMARCO's answer was filed in said Civil Case No. 42684 because NAMARCO could have set it up as a counterclaim in a supplemental pleading pursuant to Section 4 of Rule 10 of the old Rules of Court.[4]

On the other hand, NAMARCO insists that the same evidence or substantial identity in the evidence criterion should be applied in determining whether or not its claim is compulsory, * * * and on the basis of such test its claim could not be considered compulsory, because: (a) the evidence presented to support the genuineness and due execution of the contract of sale as ground for specific performance in Civil Case No. 42684, is not the same as the evidence presented to support NAMARCO's claim for recovery of the cost of the merchandise received by the FEDERATION, subject of the instant appeal; (b) for NAMARCO in Civil Case No. 42684 to interpose its claim for the payment of the goods delivered pursuant to the contract of sale, and thus seek in effect the enforcement of said contract, would have been inconsistent with its defense that the same contract was a nullity, and (c) in any event, such claim could neither have been asserted as a counterclaim by NAMARCO in its answer,

filed on March 19, 1960, to the complaint in Civil Case No. 42684, for it had no cause of action as yet against the FEDERATION as, under the rule, a claim to be available as a counterclaim to an action must be due and owing at the time of the commencement of the action, nor could NAMARCO file it as a counterclaim based on a contingent demand for the same cannot be allowed.

I

- The rule on compulsory counterclaim contained in Section 6 of Rule 10 of the old Rules of Court,[5] is taken from Section 97 of Act No. 190.[6] This rule is substantially the same as Rule 13(a) of the Federal Rules of Civil Procedure.[7] This rule is "mandatory" because the failure of the corresponding party to set it up will bar his right to interpose it in a subsequent litigation.[8] Under this Rule, a counterclaim not set up shall be barred if the following circumstances are present: (1) that it arises out of, or is necessarily connected with, the transaction or occurrence that is the subject matter of the opposing party's claim; (2) that it does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; and (3) that the court has jurisdiction to entertain the claim.[9] Conversely, a counterclaim is merely permissive and hence is not barred if not set up, where it has no logical relation with the transaction or occurrence that is the subject matter of the opposing party's claim, or even where there is such connection, the court has no jurisdiction to entertain the claim or it requires for its adjudication the presence of third persons of whom the court cannot acquire jurisdiction.[10]

The first requisite that the claim should arise out of or is necessarily connected with the transaction or occurrence that is the subject matter of the opposing party's claim, may give rise to the critical question: What constitutes a "transaction" or "occurrence"? On this point the lower court has conveniently embodied in its decision, quoted elsewhere herein, the meaning of the terms "transaction" or "occurrence," as defined in *Williams v. Robinson*,[11] and in *Pomeroy's Treatise on Remedies and Remedial Rights*. [12] The formulation in *Williams v. Robinson* shows the futility of attempting to reduce the term "transaction" or "occurrence" within the context of an all-embracing definition. Such formulation does not adequately answer every question whether a particular claim is compulsory in character. As a matter of fact most courts, rather than attempting to define the key terms of the rule on compulsory counterclaim,[13] have preferred to suggest certain criteria or tests by which the compulsory or permissive nature of specific counterclaims can be determined. *Wright & Miller* in their *Federal Practice and Procedure*[14] summarize them as follows:

- Are the issues of fact and law raised by the claim and counterclaim largely the same?
- Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
- Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
- Is there any logical relation between the claim and the counterclaim?

An affirmative answer to each of the foregoing questions suggests that the counterclaim is compulsory. These tests or standards have been the object of extensive analysis and criticisms, as follows:

The first test * * * identity of issues[15] had been considered of doubtful utility for it assumes that, in order to protect himself from inadvertently losing the right to present his claim in a later action, defendant will be both motivated and able to determine before answering whether his claim must be asserted as a compulsory counterclaim. * * * Yet, no one can be certain what the issues are until after the pleadings are closed and discovery is underway, and in many instances the issues are not really formulated until the pre-trial conference.

The second test * * * that the counterclaim is compulsory if it would be barred by res judicata,[16] has been

judicially recognized by some courts as "the acid test" for distinguishing compulsory from permissive counterclaims. As aptly stated by Judge Frank in a dissenting opinion:

" * * * Everyone agrees, too, that, if a counterclaim is not 'compulsory,' it is 'permissive' and that the following is the acid test in distinguishing the two: If a defendant fails to set up a 'compulsory' counterclaim, he cannot in a later suit assert it against the plaintiff, since it is barred by res judicata; but if it is 'permissive,' then It is not thus barred. To put it differently, if a counterclaim is the kind not thus barred, it is 'permissive'- We have recently employed that test; see *Claim v. Kastar*, 2 Cir, 138 F. 2d 828, 830; See also *Moore*, Federal Practice, 682; *Clark*, Code Pleading, 447; *Big Cola Corp. v. World Bottling Co.*, 6 Cir., 134 F.2d 718." [17]

This criterion has however been found inadequate as an overall standard.

The third test * * * same evidence or substantial identity in the evidence relating to the claim and counterclaim [18] has been considered satisfactory if used with caution. A test based on similarity of evidence appears reasonable considering that the very purpose of making certain types of counterclaim compulsory is to prevent the relitigation of the same set of facts. However, it has been shown that some counterclaims may be compulsory even if they do not meet this test. For instance in an action to void an insurance policy on the ground of fraud, in which there is a counterclaim for the amount of the loss covered by the policy, the evidence of fraud is apt to be entirely different from the evidence as to the loss suffered by the insured (*Mercury Ins. Co. v. Verea Ruegg*, D.C.N.Y. 1949, 12 F. R. Serv. 13a. 11 case 2) or an action for earned freight with counterclaims for damages to cargo, demurrage, and expenses due to the unseaworthiness of the vessel (*Eastern Transp. Co. v. U.S.*, C.A. 2d 1947, 159 F.2d. 349).

The fourth test * * * the logical relationship between the claim and counterclaim has been called "the one compelling test of compulsoriness." [19] It was enunciated in the leading case of *Moore v. New York Cotton Exchange*. [20] Under this test, any claim a party has against an opposing party that is logically related to the claim being asserted by the opposing party and that is not within the exceptions to the rule, is a compulsory counterclaim. Its outstanding quality is its flexibility. On the other hand this flexibility necessarily entails some uncertainty in its application because of its looseness and potentially overbroad scope. This difficulty notwithstanding, of the four judicially formulated criteria it has by far attained the widest acceptance among the courts.

An examination of the cases on compulsory counterclaims may help clarify and illuminate the judicial application of the 'logical relation test.' In the leading case of *Moore v. New York Cotton Exchange* (1926, 46 S.Ct 367, 371, 270 U.S. 593, 70 L. Ed. 750, 45 A.L.R. 1370) the logical relation or connection between the defendant's counterclaim and the plaintiff's claim has been explained thus:

"The bill sets forth the contract with the Western Union and the refusal of the New York Exchange to allow appellant to receive the continuous cotton quotations, and asks a mandatory injunction to compel appellees to furnish them. The answer admits the refusal and justifies it. The counterclaim sets up that, nevertheless, appellant is purloining or otherwise illegally obtaining them, and asks that this practice be enjoined. Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all

particulars, the same as those constituting the defendant's counterclaim. Compare *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372, 390-394. And see generally, *Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co.* supra, p. 408 [243 Fed.]; *Champion Spark Plug Co. v. Champion Ignition Co.* (D.C.) 247 Fed. 200, 203-205.

"So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had said it could not have by judicial compulsion." [21]

It must be observed that in *Moore*, the important link which established that "logical relation" between plaintiff *Moore's* claim and defendant *New York Cotton Exchange's* counterclaim, is the refusal of the latter to furnish to the former cotton price quotations because of its belief that *Moore* was purloining or otherwise illegally obtaining its cotton price quotations and distributing them to bucket-shops. As the Court pointed out "It is an important part of the transaction constituting the subject matter of the counterclaim. It is the one circumstance without which neither party could have found it necessary to seek relief. * * * So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court held it could not have by judicial compulsion."

A review of decided cases in this jurisdiction on compulsory counterclaims likewise demonstrates the nexus between plaintiff's claim and defendant's counterclaim showing the "logical relation" between the two. Thus in actions for ejectment,[22] or for the recovery of possession of real property,[23] it is well settled that the defendant's claims for value of the improvements on the property or necessary expenses for its preservation are required to be interposed in the same action as compulsory counterclaims. In such cases it is the refusal of the defendant to vacate or surrender possession of the premises that serves as the vital link in the chain of facts and events, that constitutes the transaction upon which the plaintiff bases his cause of action. It is likewise an "important part of the transaction constituting the subject matter of the counterclaim" of defendant for the value of the improvements or the necessary expenses incurred for the preservation of the property. For they are off-shoots of the same basic controversy between the parties which is the right of either to the possession of the property.

While the refusal of *NAMARCO* to deliver the remainder of the goods contracted for in its "trade assistance agreement" with *FEDERATION*, is the important link in the chain of facts and events that constituted the transaction upon which *FEDERATION'S* cause of action was based in Civil Case No. 42684, it is not even a part of the transaction constituting the subject matter of *NAMARCO's* present suit. For the action of *FEDERATION* on March 2, 1960, to compel *NAMARCO* to recognize the validity of their agreement and deliver the remainder of the goods to be paid "on cash basis" in no way involved the payment of the merchandise worth P609,014.73, already delivered and presumptively paid for in cash by means of the domestic letters of credit. When the domestic letters of credit were subsequently dishonored by the Philippine National Bank on May 19, 1960 compelling *NAMARCO* to send on June 7, 1960 a letter of demand for payment to *FEDERATION* which the latter received on July 5, 1960, but which it apparently ignored and because of such inaction *NAMARCO* therefore sued *FEDERATION* for payment on January 25, 1961, such non-payment by *FEDERATION* was a matter which was distinct and separate from and had no logical relationship with the subject matter of *FEDERATION'S* own suit. These two claims are separate and distinct, as they involve totally different factual and legal issues and do not represent the same "basic controversy."

"A counterclaim has been held to be compulsory if there is a logical relationship between it and the main claim. Thus, in *Great Lakes Rubber Corporation v. Herbert Cooper Co.*, 286 F.2d 631 (1961), Judge Biggs speaking for the Third Circuit Court said this:

'We have indicated that a counterclaim is compulsory if it bears a 'logical relationship' to an opposing party's claim. *Zion v. Sentry Safety Control Corp.*, 3 Cir., 1958, 258 F.2d 31. See also *United Artists Corp. v. Masterpiece Productions, Inc.* 2 Cir., 1955, 221 F.2d 213, 216. The phrase 'logical relationship' is given meaning by the purpose of the rule which it was designed to implement. Thus, a counterclaim is logically related to the opposing party's claim where separate trials of each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action. * * *"[24]

II

But even assuming for the nonce that NAMARCO's present claim is logically related to the claim of the FEDERATION in the previous case, NAMARCO's claim having accrued or matured after the service of its answer in the earlier case is in the nature of an after-acquired counterclaim which under the rules is not barred even if it is not set up in the previous case as a counterclaim. An after-acquired counterclaim, is one of the recognized exceptions to the general rule that a counterclaim is compulsory and must be asserted if it arises out of the same transaction as the opposing party's claim.

"Although the claim arises out of the transaction or occurrence three exceptions are made to the compulsory requirement that it be pleaded. They are:

(1) Time of Filing. The claim which is the basis of the counterclaim must be in existence at the time the 'counterclaimant' files his pleading. Thus if P sues A and A does not have a claim arising out of the transaction or occurrence of P's suit at the time A files his answer A is not obliged to plead such a claim, although one arises subsequent to the filing of his answer."[25]

Wright & Miller, *Federal Practice and Procedure*,[26] explain this exception to the compulsory counterclaim requirement thus:

"The first exception is that the party need not assert a counterclaim that has not matured at the time he serves his pleading. This is derived from the language in the rule limiting its application to claims the leader has 'at the time of serving the pleading.' A counterclaim acquired by defendant after he has answered will not be considered compulsory, even if it arises out of the same transaction as does plaintiff's claim. Similarly, a counterclaim acquired by plaintiff after he has replied to a counterclaim by defendant is not compulsory under Rule 13(a). However, if a party should acquire a matured counterclaim after he has pleaded, Rule 13(e) provides that he may obtain the court's permission to include it in a supplemental pleading under Rule 15(d)."[27]

"A counterclaim may be asserted under Rule 13(e) only by leave of court, which usually will be granted in order to enable the parties to litigate all the claims that they have against each other at one time thereby avoiding multiple actions. However, Rule 13(e) is permissive in character. An after-acquired counterclaim, even if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, need not be pleaded supplementally; the after-acquired claim is not considered a compulsory counterclaim under Rule 13(a) and a failure to interpose it will not bar its assertion in a later suit."

"The decision to grant or deny a motion to serve a supplemental counterclaim is totally within the trial court's discretion."[28]

The provisions of Rule 13 of the Federal Rules of Civil Procedure, adverted to in the preceding commentaries and decisions of the federal courts, have been engrafted into our procedural rules. Thus Section 3 of Rule 1029 of the former Rules of Court was taken from Rule 13(a) and (g) of the Federal Rules of Civil Procedure, while Sections

4 and 6 of same Rule 10,[30] were taken, respectively, from Rule 13(e) and (a) of the said Federal Rules.[31]

It is a rational rule of statutory construction that a statute adopted from another state or country will be presumed to have been adopted with the construction placed upon it by the courts of that state or country before its adoption. Such construction is regarded as of great weight, or at least persuasive and will generally be followed if sound and reasonable, and in harmony with justice and public policy, and with other laws of the adopting jurisdiction on the subject.[32] And while the construction of a statute by courts of the original state after its adoption by another, may have no controlling effect on the adopting state, it may be strongly persuasive and will be followed when it is considered to give true force and effect to the statute.[33]

We find no cogent reason why such uniform and settled construction of Rule 13 of the Federal Rules should not be applied in the interpretation of the aforesaid Sections of Rule 10 of the old Rules of Court. Thus while Section 6 of Rule 10 of the old Rules defines a compulsory counterclaim as a claim that "arises out of or is necessarily connected with, the transaction or occurrence that is the subject-matter of the opposing party's claim," Section 3 of the same rule, requires that such counterclaim must be in existence "at the time" the counterclaimant files his answer.

The counterclaim must be existing at the time of filing the answer, though not at the commencement of the action for under Section 3 of the former Rule 10, the counterclaim or cross-claim which a party may aver in Ms answer must be one which he may have "at the time " against the opposing party. That phrase can only have reference to the time of the answer.[34] Certainly a premature counterclaim cannot be set up in the answer. Tftis construction is not only explicit from the language of the aforecited provisions but also serves to harmonize the aforecited Sections of Rule 10, with Section 4 of the same rule which provides that "a counterclaim * * * which either matured or was acquired by a party after serving his pleading may, with the permission of the court, be presented as a counterclaim * * * by supplemental pleading before judgment"

Thus a party who fails to interpose a counterclaim although arising out of or is necessarily connected with, the transaction or occurrence of the plaintiffs suit but which did not exist or mature at the time said party files his answer is not thereby barred from interposing such claim in a future litigation. However such claim may with the court's permission be- included in the same case by way of supplemental pleading before judgment under Section 4 of the former Rule 10 of the Rules (now Sec. 9 of Rule 6). And the same may be allowed unless the case has progressed so far that it may be inconvenient or confusing to allow the additional claim to be pleaded.[35]

We therefore rule that NAMARCO's present action, is not barred by its failure to assert it as a counterclaim in the previous case.

III

The FEDERATION also contends that it has incurred no liability, as NAMARCO has neither alleged nor proved that it has complied with the conditions contained in the three domestic letters of credit, that the sight drafts drawn upon them be presented to FEDERATION for acceptance before they can be honored by the Bank. It is the theory of the FEDERATION in its brief that the failure of NAMARCO to present the sight drafts to the former for acceptance, pursuant to the requirements of the letters of credit deprives NAMARCO of a cause of action against FEDERATION. It must be noted however that such purported discharge from its obligation to NAMARCO due to the failure of the latter to comply with the requirements of the domestic letters of credit, was never invoked by FEDERATION as a basis for its "Motion to Dismiss" of February 7, 1961[36] or as an affirmative defense in its "answer" to the complaint on June 14, 1961 in Civil Case No. 46124.[37] There is no showing that this question was raised as an issue during the trial. As a matter of fact such matter was neither discussed nor mentioned in the appealed judgment since the entire theory of the FEDERATION in its defense is that the claim of NAMARCO

being a "compulsory counterclaim," is now barred, NAMARCO having failed to set it up on a counterclaim in the previous case. Well settled is the rule that questions which were not raised in the lower court cannot be raised for the first time on appeal.[38] Defendant-appellant therefore is now precluded from raising that question.

In any event NAMARCO's action is not based on the domestic letters of credit, but on its legal right to the cost of the goods delivered to the FEDERATION, the correlative obligation of the latter to pay for the same, and its default or refusal to make such payments.

Furthermore the mere delivery by the FEDERATION of the domestic letters of credit to NAMARCO did not operate to discharge the debt of the FEDERATION. As shown by the appealed judgment NAMARCO accepted the three letters of credit "to insure the payment of those goods by the FEDERATION * * *." It was given therefore as a mere guarantee for the payment of the merchandise. The delivery of promissory notes payable to order, or bills of exchange or drafts or other mercantile document shall produce the effect of payment only when realized, or when by the fault of the creditor, the privileges inherent in their negotiable character have been impaired. (Art. 1249, New Civil Code.) The clause of Article 1249 relative to the impairment of the negotiable character of the commercial paper by the fault of the creditor, is applicable only to instruments executed by third persons and delivered by the debtor to the creditor, and does not apply to instruments executed by the debtor himself and delivered to the creditor.[39] In the case at bar it is not even pretended that the negotiable character of the sight drafts was impaired as a result of the fault of NAMARCO. The fact that NAMARCO attempted to collect from the Philippine National Bank on the sight drafts on March 10, 1960, is of no material significance. As heretofore stated they were never taken, in the first instance as payment. There was no agreement that they should be accepted as payment. The mere fact that NAMARCO proceeded in good faith to try to collect payments thereon, did not amount to an appropriation by it of the amounts mentioned in the sight drafts so as to release its claims against the FEDERATION. A mere attempt to collect or enforce a bill or note from which no payment results is not such an appropriation of it as to discharge the debt.[40]

We note however that the lower court erred in imposing interest at the legal rate on the amount due, from date of delivery of the merchandise," and not from the date of the extra-judicial demand. In the absence of any stipulations on the matter, the rule is that the obligor is considered in default only from the time the obligee judicially or extra-judicially demands fulfillment of the obligation and interest is recoverable only from the time such demand is made.[41] There being no stipulation as to when the aforesaid payments were to be made," the FEDERATION is therefore liable to pay interest at the legal rate only from June 7, 1960, the date when NAMARCO made the extra-judicial demand upon said party. We likewise fail to find any factual or legal basis for the award of attorney's fees.

ACCORDINGLY, with the modifications above indicated, the appealed judgment is hereby affirmed, with costs against defendant-appellant.

Fernando, J., concur.

Makalintal, Zaldivar, Esguerra, and Ruiz Castro, JJ., concur in the result.

Teehankee, J., files a separate concurring opinion.

Barredo, J., dissents in a separate opinion.

Makasiar, J., concurs solely on the basis of reason no. II.

Concepcion, C.J., did not take part.

[1] In case G.R. No. L-17819, Federation of United Namarco Distributors, Inc., et al., Plaintiffs-Appellees, vs. National Marketing Corporation, Defendant-Appellant.

[2] See Decision, Record on appeal, pp. 72-79.

[3] Articles 1191, 1524, 1528, 1583, 1597 & 1598, Civil Code of the Philippines.

[4] Now Section 9 of Rule 6 of the new Rules of Court.

[5] Now Section 4 of Rule 9 of the new Rules of Court, with modification.

[6] SEC. 97. Effect of omission to Set up Counterclaim.— If the right out of which the counterclaim arises exists at the time of the commencement of the action and arises out of the transaction set forth in the complaint as the foundation of the plaintiffs claim, or is necessarily connected with the subject of the action, neither the defendant nor his assignee can afterwards maintain an action against the plaintiff therefor, if the defendant omits to set up a counterclaim for the same. But if the counterclaim arises out of transaction distinct from those set forth in the complaint as the foundation of the plaintiffs claim and not connected with the subject of the action, the defendant shall not be barred from any subsequent action upon such counterclaim by reason of his failure to set it up in his answer to the pending action. (Code of Civil Procedure of the P.I., which took effect on Oct 1, 1901; italics supplied.)

[7] RULE 13(a) 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 and does not require for its adjudication the presence of third parties of whom the courts cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13. (Federal Rules of Civil Procedure, which took effect in 1938; italics supplied.)

[8] De Jesus v. I M. Tuason & Co., 18 SCRA 403; Papa v. Banaag, 17 SCRA 1083; Tornado v. Bilbars 17 SCRA 251; Pennsylvania R. Co. v. Musante- Philipps, Inc., 42 F. Supp. 340.

[9] See Sec. 3 of Rule 10 of the old Rules, now Sec. 8 of Rule 6 of the new Rules of Court Cf. Yu Lay v. Galmes, 40 Phil. 651.

[10] Sec. 8 Rule 6, New Rules of Court; Rule 13(b) Federal Rules of Civil Procedure.

[11] 3 Federal Rules Service, 174.

[12] Cited in Story 8c Isham Commercial Co. v. Story, 100 Cal. 35, 34 Pac. 671.

[13] Sec. 3 of Rule 10 of old Rules, now Sec. 8 of Rule 6 of the new Rules of Court; Rule 13(a) Fed. Rules of Civil Procedure.

[14] 6 Fed. Practice & Proc, Civil Sec. 1410, p. 42, 1971 Ed. Same issues of fact and law test applied in: Connecticut Indem. Co. v. Lee, CA. 1st, 1948, 168 F. 2d 420.

[15] Same issues of fact and law test applied in: Connecticut Indem. Co. v. Lee, CA. 1st, 1948, 168 F.2d420. Nachtman v. Crucible Steel Co., CA. 3d, 1948, 165 F.2d 997. Nye Rubber Co. v. V.R.P. Rubber Co., D.C. Ohio 1948, 81 F. Supp. 635.

Keyes Fibre Co. v. Chaplin Corp., D.C. Me. 1947, 76 F. Supp. 981. International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Piasecki Aircraft Corp., D.C. Del. 1965, 241 F. Supp. 385.

[16] Res judicata as test applied in:

Libbey-owens-Ford Glass Co. v. Sylvania Indus. Corp., CA 2d, 1946, 154 F.2d 814, 818, certiorari denied 66 S.Ct 1353, 328 U.S. 859, 90 L.Ed. 1630; Big Cola Corp. v. World Bottling Co., CA. 6th, 1943, 134 F.2d 718; Weber v. Weber, D.C. Pa. 1968, 44 F.R.D. 227; Non Ferrous Metals, Inc. v. Saramar Aluminum Co., D.C. Onio 1960, 25 F.R.D. 102; American Samec Corp. v. Florian, D.C. Conn. 1949, 9 F.R.D. 718.

[17] Libbey-Owens-Ford Glass Co. v. Sylvania Indus. Corp., supra.

[18] Same evidence or substantial identity as test applied in: Non-Ferrous Metals, Inc. v. Saramar Aluminum Co., D.C. Ohio 1960, 25 F.R.D. 102. In the Matter of Farrell Publishing Corp., D.C.N.Y. 1955, 130 F. Supp. 449.

Kuster Labs., Inc. v. Lee, D.C. Cal. 1950, 10 F.R.D. 350. American Samec Corp. v. Florian, D.C. Conn. 1949, 9 F.R. D. 718. Keyes Fibre co. v. Chaplin, D.C.Me. 1947, 76 F.Supp. 981. Williams v. Robinson, D.C.D.C. 1940, 1 F.R.D. 211.

[19] Rosenthal v. Fowler, D.C.N.Y. 1952, 12 F.R.D. 388, 391.

[20] Logical relation as test applied in: Moore v. New York Cotton Exchange, 1926, 46 S.Ct. 367, 371, 270 U.S. 593 70 L.Ed. 750, 45 AX.R. 1370.

U.S. for Use & Benefit of D'Agostino Excavators, Inc. v. Heyward-Robinson Co., CA.2d, 1970,430 F.2d. 1077. Revere Copper 8c Brass Inc. v. Aetna Cas. & Sur. Co., C.A. 5th, 1970, 426 F.2& 709.

Koufakis v. Carvel, C.A. 2d, 1970, 425 F.2d 892.

Diamond v. Terminal Ry. Alabama State Docks, C A. 5th 1970, 421 F.2d. 228, certiorari denied 90 S.Ct 1531, 397 U.S. 1079, 25 L.Ed. 2 815.

Kissel Co. v. Farley, C.A. 7th, 1969, 417 F.2d. 1180. National Equip. Rental, Ltd. v. Fowler, C.A. 2d. 1961. 267 F.2d 43. Great Lakes Rubber Corp. v. Herbert Cooper Co., C A. 3d, 1961, 286 F.2d. 631, 634.

[21] 70 L. ed. pp. 756-757.

See also United States v. Heyward-Robinson Co. (430 F. 2d. 1077 [1970] where the court ruled in an action by D'Agostino against Heyward to recover payments alleged to be due on a Navy construction job, that Heyward's counterclaim for alleged overpayments and extra costs of completing both the Navy construction contract and the construction of a plant for Stelma Inc., was compulsory. The court explaining the close and logical relationship between the two claims thus:

"There was such a close and logical relationship between the claims on the Navy and Stehna jobs that the Stelma counterclaims arose out of the same 'transaction or occurrence' as those terms are now broadly defined. Both subcontracts were entered into by the same parties for the same type of work and carried on during substantially the same period. Heyward had the right to terminate both subcontracts in the event of a breach by D'Agostino of either. Heyward also had the right to withhold monies due on one to apply against any damages suffered on the other. Progress payments made by Heyward were not allocated as between jobs and were made on a lump sum basis for both as though for a single account.

"A single insurance policy covered both jobs. The letters of Heyward to D'Agostino of October 8 and 19,1965

threatening termination and terminating both jobs, allegedly because of the cancellation by D'Agostino of this point insurance coverage and failure to properly man both projects, treated both jobs together. These letters formed the basis of one of Heyward's major claims at the trial.

"The controversy between the parties which gave rise to this litigation was with respect to both jobs and arose from occurrence affecting both. Indeed, it would seem to have been impossible for Heyward to have fully litigated the claims against it on the Navy job without including the Stelma job, because the payments it made to D'Agostino could not be allocated between the two jobs.

"As the appellants themselves point out in their brief, the 'Stelma and Navy claims were so interwoven at the trial that they are now absolutely incapable of separation.' The proof as to payments and alleged defaults in payments was made without any differentiation between the two claims and neither of the parties was able to offer any evidence of apportionment. Finally, the evidence as to the breaches of contract claimed by the respective parties related in the main to both contracts rather than to one or the other."

[22] *Berses v. Villanueva*, 25 Phil. 473; *Beltran v. Valbuena*, 53 Phil. 697; *Ozoa v. Vda. de Montaur*, L-8621, Aug. 26, 1956, 99 Phil. 1061; *Carpena v. Manalo*, 1 SCRA 1060.

[23] *Berses v. Villanueva*, supra; *Yap Unli v. Chua Jamco*, 14 Phil. 602; *Camara v. Aguilar*, 94 Phil. 527; *Castro v. Montes*, 107 Phil. 533; See also; *Motos v. Soler*, 2 SCRA 293, 295.

[24] *International Union, U.A., A. & A.I. Wxrs v. PIASECK 1 Air Corp.* 241 Fed. Supp. pp. 388-389.

[25] *I Moore's Federal Practice*, 1938, pp. 384-385.

[26] 6 *Wright & Miller, Federal Practice and Procedure*, Civil Section 1411, pp. 54-55, citing:

Stahl v. Ohio River Co., C.A. 3d 1970, 424 F. 2d 52.

Esquire, Inc. v. Varga Enterprises, Inc., C.A. 7th, 1950, 185 F. 2d 14.

Denys Fisher (Spirograph) Ltd. v. Louis Marx & Co., D.C.W. Va. 1969, 306 F. Supp. 956.

Goldlawr, Inc. v. Shubert, D.C. Pa. 1967, 268 F. Supp. 965.

Marcus v. Marcoux, D.C.R.I. 1967, 41 F.R.D. 332.

Local Union 499 of Int'l Bhd. of Elec. Workers, AFL-CIO v. Iowa Power & Light Co., D.C. Iowa 1964, 224 F. Supp. 731, 738.

Slavics v. Wood, D.C. Pa. 1964, 36 F.R.D. 47.

Allstate Ins. Co v. Valdez, D.C. Mich. 1962, 29 F.R.D. 479.

Miner v. Commerce Oil Ref. Corp., D.C.R.I. 1961, 198 F. Supp. 887, vacated on other grounds C.A. 1st, 1962, 303 F. 2d 125.

Hartford Ace. & Indem. Co. v. Levitt & Sons, Inc., D.C.Pa. 1959, 24 F.R.D.230.

Cyclotherm Corp. v. Miller, D.C.Pa. 1950, 11 F.R.D. 88.

Goodyear Tire & Rubber Co. v. Marbon Corp., D.C. Del. 1940. 32 F. Supp. 279, 280.

Cold Metal Process Co. v. United Engineering & Foundry Co., C.A. 3d, 1951, 190 F. 2d 217.

Magna Pictures Corp. v. Paramount Pictures Corp., D.C. Cal. 1967, 265 F. Supp. 144.

RFC v. First Nat. Bank of Cody, D.C. Wyo. 1955, 17 F.R.D. 397.

[27] Ibid., Civil Section 1411, p.55.

[28] Ibid., Civil Section 1428, pp. 148-149.

[29] Now Section 8 of Rule 6, Revised Rules of Court.

[30] Now Section 9 of Rule 6, and Section 4 of Rule 9, respectively of the Revised Rules.

[31] Rule 13. Counterclaim and Cross-Claim.

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing 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.

x x x

x x x

x x x

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

x x x

x x x

x x x

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant. (See 1 Moore's Federal Practice, 1938 ed., pp. 664-665.)

[32] 82 C.J.S. 860-863; Cu v. Republic, 89 Phil. 473.

[33] 82 CIS. 867-868.

[34] The counterclaim procedure in the federal courts is set forth in Rule 13 of the Federal Rules of Civil Procedure. Rule 13 refers only to claims which have "matured" at the time they are pleaded as counterclaims. See Cold Metal Process Co. v. United Engineering & Foundry Co., 190 F. 2d 217 (3d Cir. 1951); 3 J. MOore, Federal Practice, par. 13.32, pp. 85-88 (2d ed. 1966), pp. 46-47 (Supp. 1967). 1A. Barron & Holtzoff, Federal Practice and Procedure, Sec. 402, p. 622 (1960) and cases cited therein. The crucial time for determining whether a claim may

be filed as a counterclaim under the Rule 13(a) and Rule 13(b) is the time pleadings are filed. 3 J. Moore, Federal Practice, par. 13.32. Claims which have "matured" after the filing of a party's pleadings in the action may be pleaded with the permission of the court under Rule 13(e). But under the specific language of Rule 13(e) such permission may be given only if the claim is a "matured" one at the time permission is requested. (*Stahl v. Ohio River Company*, 424 F. 2d 52).

[35] A motion to serve a supplemental counterclaim should be granted when plaintiff cannot be seriously prejudiced by so doing inasmuch as the trial of the case will not be delayed, (*Dazian's Inc. v. Switzer Bros., Inc.*, D.C. Ohio 1953, 14 F.R.D. 24), unless the case has progressed to a stage in the action that to do so would cause hardship or confusion (*Newell v. O.A. Newton & Son Co.*, D.D. Del. 1950, 10 F.R.D. 286.)

See also: *Shwab v. Doelz*, C.A. 7th, 1956, 229 F. 2d 749 *Michigan Tool Co. v. Drummond*, D.C.D.C. 1938, 33 F. Supp. 540.

[36] Pp. 15-31, Record on Appeal.

[37] Pp. 54-61, Record on Appeal.

[38] *City of Manila v. Ebay*, 1 SCRA 1086; *Zambales Chromite Co. v. Robles*, 2 SCRA 1051; *Ferrer v. Commissioner of Internal Revenue*, 5 SCRA 1022; *San Miguel Brewery v. Vda. de Joves*, 23 SCRA 1093; *Luzon Surety Co. Inc. v. De Garcia*, 30 SCRA 111 and other cases.

[39] *Compania General de Tabacos v. Molina*, 5 Phil. 142.

[40] *Olyphant v. St. Louis Ore & Steel Co.*, 28 F. 729.

[41] *Vda. de Murciano v. Auditor General*, 103 Phil. 907, 914

SEPARATE OPINION

TEEHANKEE, J.,

I concur in the main opinion in effect affirming in toto the appealed judgment sentencing defendant-appellant to pay plaintiff-appellee the sum of P609,014.73 representing the Cost of admittedly unpaid merchandise delivered to defendant since January, 1960, with interests, attorney's fees and costs of suit.

The merchandise was delivered by plaintiff Namarco to defendant under the so-called Namarco "trade assistance agreements" whereby Namarco imported the merchandise under its dollar allocation tax- and duty-free and in turn sold and delivered the same to defendant at procurement cost plus a mere 5% mark-up, for distribution to Namarco retailers for resale supposedly under Namarco-approved prices.

Defendant in turn contracted to pay for the merchandise upon delivery in cash through domestic letters of credit opened through the Philippine National Bank in favor of Namarco.

The mere fact that defendant federation as plaintiff filed suit against Namarco on March 2, 1960 for specific performance, to require Namarco to make delivery of the remainder of the merchandise contracted for in their "trade assistance agreement" and to accept the cash payments preferred therefor by the federation (since Namarco had second thoughts about the legality and validity of its agreement) in no way involved the merchandise worth P609,014.73 already delivered by Namarco and presumably paid for in cash under the domestic letters of credit opened therefor. When it turned out subsequently on May 19, 1960 that the sight drafts drawn by Namarco against the domestic letters of credit opened with the Philippine National bank for collection of the payments due thereon

were not honored, such non-payment was entirely separate from the subject-matter of the federation's first suit against Namarco to compel it to recognize the validity of their agreement and deliver upon cash payment the remainder of the contracted merchandise.

Such non-payment could in no way be deemed a compulsory counterclaim that should have been filed as such by Namarco in the first suit, so as to bar the present action subsequently filed on January 25, 1961 by Namarco as plaintiff this time against the federation as defendant to collect the unpaid price of P609,014.73 justly due Namarco for the merchandise.

This collection suit by Namarco could not be deemed barred by the compulsory counterclaim rule provided in Rule 9, Section 4 (formerly Rule 10, Section 6) since it was not a compulsory counterclaim that should have been set up as such in the first suit and it was long after Namarco had joined issues therein with the filing of its answer that its sight drafts for collection under the domestic letters of credit opened in its favor were dishonored by the bank. Namarco had every reason to expect that the federation, which was suing it for further deliveries, would honor its just commitments and see to it that the sight drafts drawn against its L/C's would be duly honored and made good.

Namarco had every legal right therefore to institute in January, 1961 this action for collection and payment of the sums justly due it, upon the federation's failing to make payment notwithstanding the lapse of over a year.

The Rules of Court were never intended to serve as a tool for a party to unjustly enrich itself to the extent of over PI million (including interests) for merchandise long delivered to it in 1960 practically at procurement cost, which it could not otherwise have procured due to exchange and import control restrictions and which it has not paid for up to now notwithstanding its then having immediately enjoyed the benefits and profits thereof.

The defendant-appellant's stance raises a mere technicality — which, as was long ago held by me Court, when it deserts

its proper office as an aid to the administration of justice and becomes its great hindrance and chief enemy, deserves scant consideration from the courts. (Alonso vs. Villamor, 16 Phil. 315).

Hence, even if Namarco's present collection suit could technically be deemed a compulsory counterclaim which should have been filed by it as such in the first suit filed against it by the federation, I would disregard such a technicality and hold nevertheless as a matter of plain and simple justice and equity that Namarco's failure to file such counterclaim should not bar the present action and Namarco's right to judgment against defendant federation for the sums justly due it.

DISSENTING

BARREDO, J.,

I was on the verge of expressing my reluctant concurrence in the judgment in this case, when upon further study and deeper reflection, I became more convinced that a reversal rather than an affirmance of the trial court's decision would be more in consonance with the fundamental principles on the prescription of compulsory counterclaims.

As I see it now, the situation confronting the Court in this case is very simple and is far from being unusual. Its solution requires no more than the application of the basic rules on pleadings, without the need of any scholarly discourse which can only serve to confuse concepts and mislead one into error in the application of the proper

rule.

Both the claim of the Federation against the Namarco in Civil Case No. 42684 and the claim of the Namarco against the Federation in Civil Case No. 46124 arose from the same contract. The Federation had sued Namarco for the specific performance thereof seeking the delivery of the balance of the goods which Namarco allegedly agreed to sell to it, but which the former refused to deliver claiming that the contract was illegal, whereas Namarco, in turn, sued the Federation in the present action for the payment of the goods already delivered thereunder, with the particularity, however, that Namarco chose to file this suit against the Federation only when the Federation's case against it was already pending appeal by Namarco in this Court. The issue now is whether or not Namarco should have made its claim against the Federation the subject of a counterclaim when the Federation's own claim against it was still pending in the lower court, with the consequence that, not having done so, it should no longer be allowed to maintain the case at bar, pursuant to the rule on prescription of compulsory counterclaims, more specifically, what was Section 6 of Rule 10 of the old rules and is now Section 4 of Rule 9 of the present rules in force since January 1, 1964.[1]

It appears that when Namarco was informed by the Philippine National Bank on May 19, 1960 that it could not negotiate and effect payment of the sight drafts of the Federation totally worth P611,053.35, corresponding to the goods already received by the Federation since January 29, 1960 and February 20, 1960 and covered by PNB Domestic L/C Nos. 600606 and 600586, respectively, the Federation's action against it (Civil Case No. 42684) for specific performance by the delivery of the balance of the goods stipulated in the contract was still pending in the trial court. In fact, the Federation had already failed to pay notwithstanding Namarco's formal demand made on June 7, 1960, when the decision of the trial court was promulgated on October 15, 1960.

Notwithstanding the lengthy exposition in the main opinion regarding the meaning of the words "transaction" and "occurrence" used in the aforecited provisions, it is very clear to me that, having in mind the objective of the rules in permitting counterclaims and, more particularly, in making some of them compulsory, Namarco's present claim did arise out of or was necessarily connected with the transaction or occurrence that was the subject matter of the Federation's action in Civil Case No. 42684 within the contemplation of the rule on compulsory counterclaims. It is too obvious for equivocation or doubt that the material subject matter of both of said claims were the goods referred to in their contract, while juridically, it was the contract itself. As I have already stated, the Federation sued for their complete delivery, whereas Namarco has sued in the present action for the payment of the part thereof that it had already delivered to the Federation. I consider it beyond dispute that under these circumstances, the claim of Namarco for such payment of the goods it had delivered pursuant to the contract "arose out of that contract, which is precisely the very same one that was "the subject matter" of the Federation's claim for the delivery of the balance of the goods covered by it

To believe otherwise is to ignore the fundamental reason behind the rule on counterclaims which is to avoid multiplicity of suits. In the case of permissive counterclaims which are unrelated to the adverse party's claims, I can understand the option given to the defendant to plead them in the same action or not, because it is possible that the defendant may wish to immediately remove the risk of a judgment against him and thus have peace of mind as early as possible, instead of suffering delay in his exoneration by litigating with the plaintiff in regard to his (defendant's) own claims against him, which, of course, will necessarily entail a longer and more complicated proceeding. On the other hand, one can easily see why the claims of the defendant arising out of the same transaction or occurrence are made compulsory in the sense of considering them as completely barred if they are not set up in the same action of the plaintiff. Since the subject matter involved in the defendant's claim is the same one on which the plaintiff has sued him, it becomes a matter of public policy that they should be settled in one proceeding, thus avoiding any duplication of the time, effort and money that would have to be spent in the trial

and disposition of more or less the same set of facts and circumstances as well as legal issues, varying only in some details or aspects which can anyway be conveniently and properly determined in the same proceeding. Thus, it is too plain to be overlooked or not to be understood that when, on the one hand, a party sues for the complete delivery of goods covered by a contract, and the other party, on the other hand, claims payment for goods it has already delivered under the same contract, the rule should be that both claims should be made in the same action or in one single proceeding, and, as I will explain later, this must be the rule even if

the legality or validity of the contract should be put in issue by any of the parties. This to me in synthesis is the situation in the case at bar. Indeed, even if it were necessary to apply the so-called logical-relation-test referred to in the main opinion, I would still say that there is definitely such logical relation between the claim at bar of Namarco and the claim of the Federation in Civil Case No. 42684, since that one was for the delivery of goods promised under the contract whereas the other was for the payment of goods delivered under it, so much so that the reliefs in one could in fact be possibly set off against the reliefs in the other.

It was the element of time herein involved that somehow induced me at the beginning to be inclined, albeit reluctantly, to sustain Namarco's position in this appeal. As I have explained above, at the precise time that Namarco filed its answer in Civil Case No. 42684, it was not yet certain that the Federation would not pay or that payment of its sight drafts would not be effected by the bank. In other words, from that point of view, Namarco's cause of action had not yet matured then. It is also clear, however, that said cause of action accrued before the judgment was rendered by the trial court. Under Section 4 of Rule 10 of the old rules, now Section 9 of Rule 6, a counterclaim which either matured or was acquired by a defendant after serving his answer may be set up in a supplemental pleading later -before judgment. Since this may be done or not in the case of counterclaims not arising out of the same transaction or occurrence, the question that arises is, must it have to be done in the case of counterclaims that do arise from the same transaction or occurrence, such that if not interposed, they must be deemed barred? Stated differently, the doubt that assailed me in regard to this view of this case is whether or not the fact that a supplemental pleading could in fact have been filed by Namarco before judgment placed its present claim within the contemplation of Section 6 of Rule 10 of the old rules as a claim that should be barred.

In this connection, much as I am inclined towards compelling parties to litigate all their claims against each other in one single proceeding in the interest of a more speedy restoration of normal

relations between them, I feel constrained in the absence of any contrary precedent, to yield to the observations noted in footnote 25 of the main opinion to the effect that for a counterclaim, arising out of the same transaction or occurrence that is the subject matter of the plaintiffs claim to be compulsory, under the said Section 6 of Rule 10, it must be existing at the time of the filing of the answer by the defendant, and the fact that Section 4 of the same rule allows the filing of supplemental counterclaims before judgment does not alter the situation.

To make myself clearer, I agree that the Court rule for the present that for a counterclaim to be considered as barred, under the above provisions, the cause of action thereof must have already accrued at the time the answer is filed by the defendant, although I, for one, would prefer that, considering the provisions allowing the filing of supplemental counterclaims, the defendant should just the same be compelled to allege it in such a supplemental pleading in those cases where his claim accrues before trial has begun or at the latest, before the defendant has started presenting his evidence. Otherwise stated, my position is that the claim of Namarco in this case did arise out of the same transaction or occurrence that was the subject matter of the Federation's anterior action, but inasmuch as, on the hypothesis that the contract were binding, the former's cause of action could not have been considered as already matured when it filed its answer, there would have been no need for it to file this counterclaim..

The whole trouble with Namarco's pose in this appeal lies, however, in the fact that in its answer to the Federation's complaint, it pleaded the defense of illegality or nullity of the contract. From that point of view, it was immaterial to Namarco's recovery of the purchase price of goods it had already delivered under the contract that there was in said contract any term for the payment thereof. As far as Namarco was concerned, those goods had been delivered illegally and should have been immediately returned unless their value had been paid for, [Article 1412. (2), Civil Code] or Namarco was in *pah delicto* (Article 1411, *id.*). Such being the case, it is quite evident that when Namarco filed its answer to the Federation's action, its cause of action for the recovery of the price of the delivered goods was already existing and could have been the subject of a counterclaim. This means that as of the time Namarco filed its answer contesting the legality or validity of the contract, it was already incumbent upon it to then and there seek recovery of whatever it had delivered thereunder. Nothing could be more logical and legally proper, specially when viewed from the angle of diligent protection of public interest, Namarco being a government corporation.

Obviously, the foregoing consideration serves also to refute Namarco's contention that it could not have claimed for the payment now in question because it would have been inconsistent for it to do so. Moreover, in *Camara vs. Aguilar*, 94 Phil. 527, this Court already held that:

"The contention that a counterclaim for expenses incurred in clearing and cultivating the parcel of land and planting coconut and other fruit-bearing trees therein could not have been set up in the former case because that would have been inconsistent with or would have weakened the claim that they were entitled to the parcel of land, is without merit, because 'A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one cause of action or defense or in separate causes of action or defenses.' Hence, the plaintiffs herein and intervenors in the former case could have set up the claim that they were entitled to the parcel of land and alternatively that assuming (hypothetically) that they were not entitled to the parcel of land, at least they were entitled as possessors in good faith to the coconut and other fruit-bearing trees planted by them in the parcel of land and their fruits or their value."

IN VIEW OF ALL THE FOREGOING, I vote to reverse the judgment of the lower court, with the result that Namarco's present suit should be dismissed, without costs.

[1] The action herein was filed and tried before the Revised Rules of 1964 took effect.

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