BANKRUPTCY-GOVERNMENT CLAIMS--POWER OF A BANKRUPTCY COURT To ALLOW AN AFFIRMATIVE JUDGMENT ON A COUNTERCLAIM AGAINST THE UNITED STATES.

Danning v. United States ('9th Cir. 1958)

In this bankruptcy proceeding the United States filed a tax claim against the bankrupt, and the trustee in bankruptcy counterclaimed seeking affirmative relief against the United States. The referee held that a court of bankruptcy does not have jurisdiction to entertain such a counterclaim, and a petition for review was denied by the district court. The Court of Appeals for the Ninth Circuit affirmed, *holding* that a court of bankruptcy, although having jurisdiction to entertain counterclaims up to the amount of the Government's claim, has no jurisdiction to grant affirmative relief on such counterclaim. *Danning v. United States,* **259 F.2d 305** (9th Cir. 1958).[1]

It is well settled that without specific statutory consent [2] no action may be brought against the United States,[3] and no officer of the United States can waive the requirement of such consent.[4] In bankruptcy proceedings, as in other actions, a counterclaim[5] may be maintained up to the amount of a creditor's claim, even

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[1] Danning v. United States, 259 F.2d 305 (9th Cir. 1958).

[2] Ryv. STAT. § 1059 (1875), 28 U.S.C. § 1491 (1952)
"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States
(1) Founded upon the Constitution; or
(2) Founded upon any act of Congress; or
(3) Founded upon any regulation of an executive department; or
(4) Founded upon any express or implied contract with the United States; or
(5) For "liquidated or unliquidated damages in cases not sounding in tort."

[3] Kansas v. United States, 204 U.S. 331 (1506).

[4] United States v. Shaw, 309 U.S. 495 (1940).

[5] See Note 50 Col,um. L. RAV. 505, 508 n. 30 (1950) distinguishing set-off, recoupment, and counter claim.

when that creditor is the United States[6] This is true whether the bankruptcy court has summary jurisdiction over such claim[7] or whether the creditor must institute a plenary action in order to recover thereon.[8] When affirmative relief is sought on a counterclaim, such relief will be granted against a creditor not possessing sovereign immunity if the bankruptcy court has summary jurisdiction.[9]

However, where the action is one in which a plenary suit would have to be brought to recover on the counterclaim, the courts are divided as to whether even a private creditor, by filing a claim in the bankruptcy court, waives that court's lack of jurisdiction over plenary proceedings, thereby allowing the court to grant affirmative relief on the counterclaim.[10] Where the bankruptcy court would have jurisdiction to grant affirmative relief on a counterclaim against a private creditor, it has generally been held that affirmative relief on a counterclaim against the United States will not be awarded if the court has no statutory authority to entertain a direct suit against the Government.[11] In *United States v. United States Fid. & Guar.* CO.[12] the Supreme Court held that: the awarding of an affirmative decree to a trustee in bankruptcy on a counterclaim against a federal tax claim, was invalid for lack of jurisdiction since the court which entered the decree had no statutory authority to entertain a direct action against the Government. The Court in that case reasoned that a set-off up to the amount

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[6] Rev. STAT. § 951 (1875), 28 U.S.C. § 2406 (1952) ; United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940) ; Bull v. United States, 295 U.S. 247 (1935).

[7] *In re* Clayton Magazines Inc., 77 F.2d 852 (2d Cir. 1935).

[8] United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940).

[9] 30 Stat. 565 (1898), 11 U.S.C. § 108; Hcneyman v. Hughes, 156 F.2d 27 (9th Cir. 1946), *ceyt. denied* 329 U.S. 739 (1946).

[10] Chase Nat'1 Bank v. Lyford, 147 F.2d 273 (2d Cir. 1945) ; James Talcott Inc. v. Glavin, 104 F.2d 851 (3d Cir. 1939) ; Florance v. Kresge, 93 F.2d 784 (4th Cir. 1938) ; In re Nathan, 98 F. Supp. 686 (S.D. Cal'.. 1951). Contra B.F. Avery & Sons Co. v. Davis, 192 F.2d 255 (5th Cir. 1951) ; Kleid v. Ruthbell Coal Co., 131 F.2d 372 (2d Cir. 1942).

[11] United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940).

[12] Ibid.

of the Government's claim was a valid defense and, therefore, permissible, but any affirmative award would violate the Government's sovereign immunity, it being, in the nature of a direct action by the trustee [13] In *Re Greenstreet,*[14] a bankruptcy proceeding, it was held that affirmative relief against the United States will not be granted where a counterclaim is for more than 10,000 dollars since the district courts' jurisdiction under the Tucker Act[15] is limited to suits for less than 10,(100 dollars. The opinion of the court there would seem to indicate that had the suit been within the statutory limit, affirmative relief might have been granted notwithstanding the fact that since the passage of the Tucker Act the courts have been in conflict as to whether or not that act extends the right of counterclaim to include affirmative relief. Some courts reason that the Tucker Act applies only to direct suits, and therefore, the United States has not waived its sovereignty as to counterclaims for affirmative relief; [16] while other courts hold that since the Tucker Act gives authority

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209 F.2d 660 (7th Cir. 1954). Accord, North Dakota-Montana. Wheat Growers Assn. v. United States, 66 F.2d 573 (8th Cir. 1933) ; United States v. United States Tin Corp., 148 F. Supp. 922 (Alaska 19E;7) (contract counterclaims on mortgage foreclosures)

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The Tucker Act, 24 Stat. 505 (1887), 28 U.S.C. § 1346 (a) (2) (1952) gives the district courts concurrent jurisdiction with the court of claims in all the situations in section 1491 where the amount does not exceed 10,000 dollars, and the Federal Tort Claims Act, section 1346(b) gives the district courts exclusive jurisdiction over any suits for torts committed by a government employee, acting in the scope of his employment, in which a private person would have been liable.

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United States v. Nipissing Mines Co., 206 Fed. 431 (2d Cir. 1913) (contract counterclaim on a tax claim) ; United States v. Thompson, 150 F. Supp. 674 (N.D. W. Va. 1957) ; United States v. Double Bend Mfg. Co., 114 F. Supp. 751 (S.D.N.Y. 1953) ; United. States v. Lashlee, 105 F. Supp. 184 (W.D. Ark. 1952) (counterclaims on same contract) ; United States v. Nine Acres of Land, 100 F. Supp. 379 (E.D. La. 1951) ; United States v. 1070 Acres of Land, 52 F. Supp. 378 (M.D. Ga. 1943) (counterclaims on eminent domain proceedings) ; Graske v. Johnson, 97 F. Supp. 679 (S.D.N.Y. 1951) (counterclaim by individual for overpaid income taxes against government's tax claim) ; In re Flato, 68 F. Supp. 632 (S.D.N.Y. 1946) (counterclaim by trustee in bankruptcy for overpaid 'taxes against government's tax claim) ; United States v. Biggs, 46 F. Supp. 8 (E.D. Ill. 1942) (contract counterclaim on suit).

for a direct suit it should also apply to counterclaims for affirmative relief.[17] Although the court relied on extensive authority, it would appear that such authority is distinguishable from the instant case, since in the cases the court cited, the courts did not have jurisdiction to entertain a direct suit, and, therefore, could not allow a counterclaim for affirmative relief. In the instant case, if the statute[18] creating courts of bankruptcy is one which extends the jurisdiction of the district courts to include bankruptcy proceedings, rather than one which constitutes the district courts as separate courts of bankruptcy, the court would have jurisdiction up to the amount of 10,000 dollars as provided ,for in the Tucker Act, and possibly for more under the Federal Tort Claims Act. If the statute extends the jurisdiction and a direct suit would be allowed under the Tucker Act or the Federal Tort Claims Act, there seems to be no reason why a counter claim for affirmative relief should not be allowed against the Government within the jurisdictional limits provided by those acts,[19] assuming, as the court did here, that a federal district court has jurisdiction to grant affirmative relief on a counterclaim against a private creditor. However, if the courts are established as separate courts of bankruptcy, they would have no jurisdiction over an original suit, because the Tucker Act and Federal Tort Claims Act would not apply,[20] and therefore, they could not entertain a claim for affirmative relief against the Government. Though the court did not discuss this problem, [21] in view of the fact that the present trend is to allow affirmative relief in cases under the Tucker Act

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[17] United States v. Silverton, 200 F.2d 824 (1st Cir. 1952) ; United States v. Petaschnick, 143 F. Supp. 206 (E.D. Wis. 1956) (counterclaims on the same contract) ; United States v. King, 119 F. Supp. 398 (Alaska 1954) (counterclaims for repairs under statutory lien in action for recovery of the chattel).

[18] 30 Stat. § 45 (1898), 11 U.S.C. § 11 (1952).

[19] It may be argued that adjudications in bankruptcy are settled by a referee and not by a district court judge, but this would appear to be of little merit since the decision of the referee is subject to review by the district court.

[20] Both the Tucker Act and the Federal Tort Claims Act apply only to the district courts. See note 14, supra.

[21] The opinion of the court does not deal with this problem nor does it state whether the district court would have had jurisdiction over a direct suit rather than a counterclaim, although it

and the Federal Tort Claims Act, [22] a better decision might have been to allow relief on the counterclaim and to construe the statute as enlarging the jurisdiction of the district courts.

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does intimate that the counterclaim is a tax claim which could be brought under the Tucker Act. No figures are given and as the lower court has not yet written an opinion, it is impossible to determine whether the 10,000 dollar limit under the Tucker Act applies.

[22] See Note, 25 Goo. WASH. L. Rtv. 315, 333 (1956-57).