

In my opinion, the legislature did not contemplate that such a claim should be the subject of a counterclaim.

It is true that the language of the Rule giving the right to counterclaim is very wide, but I think it is not wide enough to cover a case of this kind.

Here this defendant has no debt or claim for which she could sue the plaintiff. She has a right as one of the next of kin to bring an action calling upon the plaintiff to account as a trustee or executrix for the moneys of the estate which have come to her hands. That action, notwithstanding Mr. Bicknell's argument, I still think is a class action, an action brought on behalf and for the benefit of all the next of kin of the estate for the purpose of having the accounts taken and the amount in the hands of the defendant distributed.

The only judgment which could result from the counterclaim, if it went to trial, would be a judgment for administration of the estate. It would be necessary to have the other executors before the Court; it would be necessary to have the other next of kin before the Court; and the result would be not a judgment that this defendant should recover from the plaintiff anything,—assuming a sum of money to be in the hands of the defendant,—but an order that the plaintiff pay into Court the amount in her hands, and the Master, or the person to whom the reference was directed, would determine the proportions in which that money would be distributed among the next of kin.

It put in Daniell that a next of kin cannot sue unless for an aliquot portion of an ascertained sum in the hands of an executor. There is no pretence here that there is any aliquot part of an ascertained sum in the hands of the defendants by counterclaim. What is claimed is that she has received the rents of the farm, and that she has not accounted for them, and that the plaintiff by counterclaim is entitled to a distributive share of the moneys in her hands.

I think it would be most inconvenient that an action of this kind, in which the other executors are concerned, and in which the other next of kin are concerned, should be tacked on to an action to recover a legacy to which the plaintiff is entitled under the will; and to treat the provisions of the Rule as to counterclaim as extending so far as to include such a counterclaim would be to create a condition that would be most unsatisfactory, bringing into the suit and tying up along with it an action for the administration of the estate.