April 1941

Recent Developments in Local Procedure

Leo Carlin
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Civil Procedure Commons, and the Courts Commons

Recommended Citation
Leo Carlin, Recent Developments in Local Procedure, 47 W. Va. L. Rev. (1941).
Available at: https://researchrepository.wvu.edu/wvlr/vol47/iss3/2

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact beau.smith@mail.wvu.edu.
RECENT DEVELOPMENTS IN LOCAL PROCEDURE

LEO CARLIN

The Supreme Court of Appeals of this state, in three recent cases, two at law and one in equity, has prescribed or suggested what many West Virginia practitioners may consider innovations affecting three very ordinary matters of practice in this jurisdiction. Two of these cases, dealing, respectively, with the manner in which failure of consideration may be asserted as a defense and the necessity of process upon a cross-bill answer, are actual adjudications. One, indicating certain circumstances under which it is deemed the Statute of Frauds should be pleaded specially, contains only dicta so far as that particular question is concerned; but, as exemplified in one of the other cases, the dicta may very soon ripen into actual adjudication. Two of the cases, collectively, are interesting because they indicate a tendency toward a preference for special pleading in a jurisdiction which, upon the whole, is committed to a philosophy of general pleading. Each one, in isolation, is important because it prescribes a specific requirement in a very ordinary matter of practice, failure to observe which will be prejudicial, if not fatal, to the rights of a litigant. One, in particular, is significant, not only for this reason, but also because the basis upon which it was decided seems inevitably to indicate that specific requirements of special pleading will in the future be imposed in other situations where they have not heretofore been considered by many practitioners as necessary. An attempt will be made to expand upon these general observations in the separate topics below.

* Professor of Law, West Virginia University.
PLEADING FAILURE OF CONSIDERATION.

In *Attorneys' National Clearing House v. Greever*, action was brought on a promissory note given by the defendant to the plaintiff for amounts which the defendant, as attorney, had collected on behalf of creditors for whom the plaintiff had acted as intermediary. At the trial, the defendant was permitted to testify, over the plaintiff's objection, that he was entitled to credits for commissions and services in respect to the collections which had not been allowed in computing the amount for which the note was given. The admission of this evidence is one of the grounds upon which the case was reversed by the supreme court. The evidence was offered by the defendant, and treated by the supreme court, as having the effect of showing failure of consideration. The supreme court held that the evidence was not admissible in the absence of a special plea alleging partial failure of consideration.

"In an action on a contract a defense of failure or partial failure of consideration must be founded on a special plea which fairly puts the plaintiff on notice of that defense."

The only authority cited by the court for this proposition is the statute* variably labeled by the cases and the commentators as the statute (1) permitting equitable defenses in actions at law, (2) prescribing pleas in the nature of pleas of set-off, or (3) authorizing pleas in the nature of pleas of recoupment, or statutory recoupment; none of which labels, standing alone, is entirely accurate or adequately descriptive of the various objects of the statute taken as a whole.*

---

1 5 S. E. (2d) 621 (W. Va. 1939).
2 "In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of warranty to him of the title to real property or of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter, as would entitle him to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter, as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit." W. VA. REV. CODE (1931) c. 56, art. 5, § 5.
3 See 4 MINOR, INSTITUTES (1878) 661; BURKS, PLEADING & PRACTICE (1913) 448; Dexter-Portland Cement Co. v. Acme Supply Co., 147 Va. 758, 133 S. E. 788 (1926).

The plea resembles set-off in the respect that the defendant may recover an excess over the plaintiff's claim. It resembles recoupment in that it must arise out of the same transaction as that on which the action is based and the amount.
The logic of the court’s holding would seem to depend upon the answers to two inquiries: (1) Is it permissible at common law to prove failure of consideration under the general issue, without a special plea? (2) Does the statute, regardless of any common law rule, or as amendatory of the common law, have the effect of requiring the matter to be asserted under the special plea therein specified?

In attempting to answer the first question, a distinction must first of all be made between simple contracts and contracts under seal. Of course failure of consideration or want of consideration can not, at the common law, be asserted in any way, either as a total defense or in reduction of damages, in an action on a contract under seal. The defendant’s remedy, if any, is an independent cross action or a suit in equity. One of the very objects of a seal, at common law, is to dispense with a consideration. However, it seems that in most, if not all jurisdictions, failure of consideration, total or partial, in a contract not under seal, is now available as a defense or in reduction of damages, in lieu of an independent cross action, although the methods of asserting it are not uniform. The questions usually arising are, not whether it may properly be asserted as defensive matter, but how it may be so asserted; whether it may be asserted under the general issue or a similar statutory general traverse, or must be pleaded specially; and, if a special plea is not necessary, whether the general issue alone is sufficient, or must be supplemented with notice. Perhaps most frequently the question is discussed under an inquiry as to whether recoupment of damages may be asserted under the general issue, with or without notice, since failure of consideration is recognized as merely one variety of various matters which may be asserted by way of recoupment.

If statements made in some of the books of general reference are taken at their face value, it may seem that the weight of authority, at the common law and under the statutes, is to the effect that failure of consideration must be asserted by a special plea and is not available under the general issue. Considering what would seem to be the ample Virginia and West Virginia authorities hereinafter cited indicating the local common law rule, it may seem unnecessary to examine the purport of decisions in other juris-

\[\text{need not be liquidated. It is probably called by Professor Minor a plea in the nature of a plea of set-off because it was so designated in the original statute. See Fisher v. Burdett, 21 W. Va. 626, 628 (1883).}\]

\[4 \text{See 4 MINOR, INSTITUTES 661; Columbia Accident Ass'n v. Rockey, 93 Va. 678, 685, 25 S. E. 1009 (1896).}\]
dictions. However, the writer has undertaken to examine specifically the multitude of decisions cited by one general reference text and has reached the conclusion that they are not apt authorities, so far as they are intended to sustain any common law rule embodied in the text for which they are cited. Many of the cases are actions on contracts under seal. A few involve statutes specifically requiring failure of consideration to be asserted under a special plea. The great majority were decided, not under the common law, but under practice codes, where a premium is placed on special pleading, the text making no differentiation between the common law and the code practice. In the few common law cases cited to sustain the proposition stated in the text that failure of consideration cannot be proved under the general issue, the question actually involved is, not whether a special plea is necessary, but whether the matter can be proved under the general issue without notice of recoupment.

The West Virginia cases have heretofore treated partial failure of consideration in a simple contract as a matter for recoupment of damages. Hence, following the orthodox common law rule, that it is improper to plead merely in reduction of damages, they not only have held that the matter may be proved under the general issue accompanied by notice of recoupment, but have held that special pleas of recoupment are improper. However, where such special pleas have been improperly filed, they have been permitted

---

6 See 13 C. J. 740 et seq.
6 Such statutes simply require that failure of consideration shall be asserted by a special plea. They are not merely permissive in their terms, and in other respects indicate no intention to serve the purposes of the West Virginia statute.
7 See, for examples, McCormick v. Sawyer, 108 Me. 405, 51 Atl. 482, Ann. Cas. 1913B 316 (1911); Ferguson v. Oliver, 8 Smedes & M. 332 (Miss. 1847); Brewer v. Harris, 2 Smedes & M. 84, 41 Am. Dec. 597 (Miss. 1844); Payne v. Cutler, 13 Wend. 605 (N. Y. 1835); The People ex rel. Fleming v. Niagara C. P., 12 Wend. 246 (N. Y. 1834); Blessing v. Millor, 102 Pa. 45 (1883). Many earlier Pennsylvania cases are in accord.
8 It will be noted that these cases, as do most cases, distinguish total failure or lack of consideration and partial failure of consideration. The former, showing that there is no cause of action, may come in under the general issue without notice. The latter, operating merely to reduce the damages, requires notice, but not a special plea.

In the McClanahan case, Judge Brannon, while holding that a plea of failure of consideration could properly stand as a notice of recoupment, says: 'But really this pleading does not come under the law of notice of recoupment.' Apparently he intends to suggest that the matter could be proved
to stand as notices of recoupment. Perhaps the most enlightening Virginia case to the effect that assertion of failure of consideration in an action on a simple contract does not require a special plea is the leading case of Columbia Accident Association v. Rockey, cited in the West Virginia case of McClanahan v. Caul.

In the light of the Virginia and West Virginia cases cited, it may be understood as heretofore fairly well established that, at common law, assertion of total or partial failure of consideration in an action on a contract not under seal may be made under the general issue and does not require a special plea. It remains to inquire whether the statute cited by the court in the principal case has changed the common law rule.

The statute is complex, in its provisions and in its effects. Failure of consideration is only one of several items of its subject matter. It offers a peculiar opportunity for the application of legislative intent as a criterion for interpretation of its general object, and, therefore, of its specific effects. A careful analysis of its provisions, considered with the common law background, leads inevitably to the conclusion that its general purpose is, in an action on a contract, to permit matters growing out of the same transaction which otherwise would have to be asserted in an independent cross action at law or in a suit in equity, to be asserted by way of defense or reduction of damages in the original action at law.

"The plain purpose of the said statute was to give the same measure of relief, by a plea under it, that could be obtained by the defendant in an independent action brought at law for the same cause, or in equity for relief growing out of the same transaction, and thus to prevent one cause of action from being divided into two."

under the general issue even without notice of recoupment, which may be doubtful in the light of other cases, since the failure was only partial.

In some of the earlier cases, e.g., Fisher v. Burdett, 21 W. Va. 626, 629 (1883), may be found suggestions that partial failure of consideration could not be asserted at all by way of defense, but must be made the subject of a cross action. However, all the cases cited in the particular case mentioned for this proposition, which are early Virginia cases, are actions on sealed contracts. Such suggestions are perhaps merely echoes from statements of the early English rule, which was long ago repudiated in England, so far as it applied to simple contracts. See Bouker v. Randles, Helm & Co., 31 N. J. Law 335 (1865). Also see 13 C. J. 741. In early days the general law of recoupment was clouded with confusion and its scope was very narrow.

9 See cases cited in last note.
10 23 Va. 678, 25 S. E. 1009 (1896), note 4 supra.
11 63 W. Va. 418, 60 S. E. 383 (1908), note 8 supra.
To accomplish this general object, the statute provides a method of asserting by plea three different classes of matters which otherwise, to give the defendant adequate relief, must be asserted by a suit in equity or by an independent action at law: (1) equitable claims or defenses; (2) failure of consideration in an action on a contract under seal; (3) matters proper for ordinary common law recoupment, with the possibility of recovering an excess over the plaintiff's claim, which was not permissible under the common law. The present discussion is concerned only with the third class of matters, last mentioned.

At the common law, the defendant always has an option to assert matter for recoupment in the original action or to reserve it for assertion in an independent cross action. If he asserts it by way of recoupment, it can avail him only to the extent of reducing the amount of the plaintiff's claim; he cannot recover an excess over. Nor can he use part of his claim for the purpose of defeating the plaintiff's recovery and recover the residue in a future cross action. He cannot split his cause of action. Assertion of the claim by way of recoupment effects an abandonment of the residue of the claim. Consequently, if the defendant desires to recover an excess beyond the plaintiff's claim, two actions are necessary on the same contract.

Considering the general object of the statute alone, its purpose would seem to be to enlarge the possibilities of defense in a common law action, not to curtail them; and hence it would appear that, in effect, it is merely supplementary of the common law. However, there are further indications in the statute itself that such was the legislative intent. The defendant is specifically given an option to assert his equitable claims in the common law action

Co. v. Acme Supply Co., 147 Va. 758, 133 S. E. 788 (1926); 4 MINOR, INSTITUTES 661-5; BURKS, PLEADING & PRACTICE 448-452.

4 Recovery of the excess is provided for in W. Va. Rev. Code (1931) c. 56, art. 5, § 9.

Referring to the procedure under the statute, the court, in Monongahela Tie & Lumber Co. v. Flannigan, 77 W. Va. 162, 165, 87 S. E. 161 (1916), says: "The evident object to be attained by this procedure was obviation of the limitations ordinarily imposed upon the extent of the relief allowed under the doctrine of recoupment, as generally understood and applied in this and other jurisdictions. Under it defendant is permitted to defeat or to curtail recovery by plaintiff, but not recover against him when the counter claim exceeds the demand stated by plaintiff. If such claim exceeds or equals his demand, defendant is entitled to costs only." Also see citations in note 13 supra.

4 MINOR, INSTITUTES 665; BURKS, PLEADING & PRACTICE 451; 57 O. J. 520-521.
on the contract or to reserve them, as before, for a suit in equity. Moreover, the statute is permissive in its terms—"the defendant may file a plea," not "shall" or "must" file a plea, or any language of a similar import. Furthermore, the statute is obviously for the benefit of the defendant and it may be argued that there was no intention to give him the benefit of the statutory plea at the price of surrendering his common law privileges; but that the intention was to supply him with an additional possibility of election—an alternative between an independent action at law and the statutory plea, in cases where he desires to attempt a recovery in excess of the plaintiff's claim. If so, the defendant has three elections: (1) common law recoupment; (2) a common law cross action; (3) the statutory plea. The only qualification attached to these electives is that, if the defendant resorts to common law recoupment, he cannot recover an excess.

The statute in question was first enacted in Virginia in 1831, where it has been familiarly known as "The Statute of 1831". It has been extensively construed by the Virginia courts, both before and since its adoption in this state. Consequently, a review of the authorities on construction of the statute may well begin with the Virginia cases and commentaries. Perhaps the best comprehensive judicial exposition of the object and effects of the statute will be found in what seems to be accepted as the leading Virginia case on the subject.

38 See Burks, PLEADING & PRACTICE 450.

Only one circumstance connected with the statute causes Judge Burks to see any room for argument that the statute is intended to supersede common law recoupment — the fact that the legislature seems to have thought it necessary to make express provision for preservation of existing remedies in equity in order to prevent them from being superseded by the statutory remedy — but he concedes little weight to such an argument.

"It suggests, however, the possibility that s. 3299 was intended to take away the common law defence of recoupment in all other cases on the principle expressio unius, exclusio est alterius. Was it so intended? The language of the statute is, 'the defendant may file a plea.' This seems to be permissive only. He is not compelled to file it, but may file it. Furthermore, the general rule of law is that a statute will not be held to repeal the common law in any case unless it plainly does so. This statute certainly does not plainly repeal the common law, and the doctrine of expressio unius, etc., is by no means a safe guide in all cases to determine the legislative intent. For our present purpose we may assume that the common law is still in force." Idem.

Judge Burks might have noted further that, if the doctrine of expressio unius is to prevail in construing this statute, and a defendant is confined to the statutory remedy, he would be deprived of his common law option to assert his claim in an independent action.

Columbia Accident Ass'n v. Rockey, 93 Va. 678, 684-5, 25 S. E. 1009 (1896). Many of the earlier Virginia and West Virginia cases are reviewed in this case.
"The objection made to the third statement was two-fold:

"First, that it set up the defense of failure of consideration, which it was claimed could only be done by a special plea of equitable set-off under section 3299 of the Code, verified by affidavit; and that the statement neither conformed to the requirements of the statute, nor was it sworn to. This raises an important question that was much discussed at the bar.

"It was contended by counsel for the plaintiff that whatever may have been the law prior to the act of 1831, which was the original of section 3299 of the Code, it has not been competent since its enactment to make the defense of failure of consideration, except by a special plea under that statute, verified by affidavit.

"It was entirely competent prior to said statute, according to the practice at common law, to prove, under the plea of non-assumpsit, a want of consideration for the promise, or failure or fraud in the consideration, and in short, with a few well understood exceptions, to prove whatever showed that there was no existing debt due. 4 Minor's Inst. (3d ed.), Pt. 1, 770, 774, and 793; Tyler's Stephen on Plead., 176; 1 Chitty on Pl. (16th ed.) 495; 5 Rob. Pr. 264-278; 2 Tucker's Com. 160; Greene v. Withers, 9 How. 213; Van Buren v. Digges, 11 How. 461; Winder v. Caldwell, 14 How. 434; Bierly v. Williams, 5 Leigh 700; Todd v. Summers, 2 Gratt. 168; and Va. F. & M. Ins. Co. v. Buck & Newsom, 38 Va. 517.

"But while a defendant, under the plea of non assumpsit might give evidence of matter by way of recoupment, or in diminution of the damages claimed by the plaintiff, even to the entire defeat of his action, yet it was not competent for the defendant to recover in that suit any damages he may have shown in excess of the damages of the plaintiff. If he wished to recover such excess, he could only do so in an independent action against the plaintiff. 4 Minor's Inst., Pt. 1, 793 and 798.

"Nor was it competent at common law, as against sealed contracts, to prove a failure in the consideration of the contract, or fraud in its procurement, or breach of warranty of the title or soundness of personal property, but the defendant was driven, as when he proposed to recover against the plaintiff any excess of damages, to his independent action at law to recover the damages he had sustained. 4 Minor's Inst., Pt. 1, 792; Taylor v. King, 6 Munf. 358; Burtner v. Keran, 24 Gratt. 42; and Hayes & Wife v. Va. M. P. Ass'n, 76 Va. 225.

"The object of the act of 1831 was to remedy these defects; and to enable a defendant both to make such defences to a suit at law on specialties, and also to recover against the plaintiff any excess of damages he may have sustained, in
order to settle in one suit all the rights of the parties arising under the contract, and to prevent circuity of action and a multiplicity of suits. Its object was to enlarge the right of the defence, and not to impair any previous right, or to take away such defences where the law previously permitted them to be made."

Professor Minor, referring to the situations enumerated in the statute, makes the following commentary.20

"Where the contract is not sealed, all the circumstances above enumerated may, even at common law, be proved by way of defense to the action on the contract, or may be the subject (except in the case of mistake) of a separate action for damages. But where they are made the subject of defense, their whole effect is exhausted in reducing or preventing the plaintiff’s recovery. No excess can ever be recovered by the defendant in that action.

"The statute in question was designed to give a remedy to the defendant in all these cases, by means of a plea to the plaintiff’s action, so as to make one suit suffice to dispose of the whole controversy, and to enable the defendant to recover of the plaintiff any excess whereby the amount of damages to which the defendant should appear to be entitled should exceed the plaintiff’s demand."

The following commentary is made by Judge Burks.21

"So far as unsealed contracts are concerned, the provisions of that section, disconnected from the right to recover the excess provided by sec. 3304, would seem to have been useless, and to have conferred no right which did not exist before. At common law any of the defences enumerated in that section could have been set up under the general issues of nil debet and non assumpsit, but there could have been no recovery of the excess, if any. Two important changes seem to have been wrought by that section: First, extending the right of recoupment to actions on sealed instruments, which did not exist at common law, and, second, permitting the excess over the plaintiff’s demand to be recovered in any case, whether the plaintiff’s demand be upon a sealed or an unsealed contract. . . . For our present purpose we may assume that the common law is still in force. A defendant then in an action on an unsealed contract may defend (1) as at common law, or (2) under sec. 3299. The relief is the same, except as to the excess over the plaintiff’s demand. Such excess could not be recovered in the plaintiff’s action at common law. For this

20 4 MINOR, INSTITUTES 661-2.
he was put to his cross-action. He could recover to the extent of the plaintiff's demand and surrender the excess, or else stay out altogether and bring his cross-action for the whole matter of recoupment. He could not recoup for a part, and sue in a separate action for the residue. If a defendant desires to recover the excess he must, therefore, make his defense under Code sec. 3299, by a sworn plea."

Professor Minor gives an illustration of application of the statute,22 as demonstrated in an early Virginia case, which is so illuminating that it is quoted below, at the risk of prolixity.

"The case of Thornton v. Thompson & als, 4 Grat. 121, affords a good example of the operation of such a plea as is under consideration. The plaintiff in that case had sold the defendant a jack for $1,500, warranting him 'sound in every particular,' and defendant paid $900 and gave his bond for $600, and on that bond the suit was instituted. The plea stated that the animal was warranted sound and capable, but that he was in fact wholly useless as a foal-getter, and was worth only $150, instead of $1,500; so that the defendant has sustained damage to the amount of $1,350, in consequence of the plaintiff's breach of his said warranty; which sum of $1,350, the defendant was ready and willing, and thereby offered to set-off and allow against the debt in the declaration demanded. To this plea there was a general replication as the statute prescribes, and issue was joined thereon. The jury found the averments of the plea to be true, and whilst they gave the plaintiff his debt, they assessed the damages sustained by the defendant at $1,350; and the court gave judgment for the defendant for the excess, namely, $750; thus in that action settling a controversy which, apart from the statute allowing a plea of this kind, must have been renewed in the form of an action by the purchaser upon the warranty, whilst he, meanwhile, would have been required to pay the $600 in discharge of his bond.

"Had the evidence of debt in this case been a promissory note instead of a bond, the statutory plea, although not so necessary, would still have been highly useful. In an action on the note, the defendant upon the general issue might have shown the warranty and its breach, and have so repelled the plaintiff's action, but he could not have recovered the excess."

The West Virginia cases prior to the principal case are in accord with the holdings of the Virginia courts and the views expressed by the Virginia commentators.

---

22 4 MINOR, INSTITUTES 664-5. A similar illustration will be found in BURKS, PLEADING & PRACTICE 451.
"The defense of failure of consideration may be made, in an action of *assumpsit* upon a promissory note, either under the plea of *non-assumpsit* or a special plea under section 5, chapter 126, Code."\(^{23}\)

In some of these cases special pleas alleging matter proper for recoupment were disapproved as pleas but permitted to stand as notices of recoupment to be proved under the general issue.

"The two special pleas setting up substantially the same facts and claiming injury by misrepresentation and loss of a substantial part of the consideration of the notes, the logging contract, may be treated as notices of recoupment, however, and if the proof establishes a breach of a warranty of the contract, the verdict, allowing nothing by way of abatement for damages, is contrary to the law and the evidence. Treated as notices, these pleas are clearly sufficient."\(^{24}\)

In such cases, of course, the pleas were not verified and there was no intention to file them in pursuance of the statute prescribing verified pleas. The intent was to rely upon common law recoupment. Perhaps a plea, in lieu of notice, of recoupment was filed because of confusion of recoupment with set-off, where the statute permits either a special plea or a notice accompanying the general issue. If the pleas had been verified, they perhaps would have been recognized as proper statutory pleas; but there is no intimation of the necessity of such a plea.

Other cases in point are cited below.\(^{25}\)

It is possible that some of the misconceptions manifested in the cases are due, not only to failure to distinguish common law recoupment from set-off (which is statutory), but also to failure to note that statutory recoupment, requiring the verified plea, and payment and set-off are regulated by different statutes. The section relating to payment and set-off, immediately preceding the one which authorizes the verified plea, is as follows.

"In a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed

\(^{23}\) McClanahan v. Caul, 63 W. Va. 418, 60 S. E. 382 (1908).


\(^{25}\) Armentrout v. Armentrout, 70 W. Va. 661, 74 S. E. 907 (1912); Middle Atlantic Immigration Co. v. Stout, 72 W. Va. 23, 77 S. E. 358 (1913).

For a comprehensive discussion of common law recoupment and its relation to defenses under the statutory plea, see Sterling Organ Co. v. House, 25 W. Va. 64 (1884).
thither, as to give the plaintiff notice of its nature, but not otherwise. . . .

It has frequently been held that under this section full payment (not affected by the statute) may be asserted under the general issue of \textit{nil debet} or \textit{non assumpsit} alone, without notice; but that partial payment must be asserted by a special plea or by a statement ("account filed therewith") accompanying the general issue, sufficient in either case to give the plaintiff notice of the nature of the payment or set-off.\footnote{27} It will be noted that payment and set-off are subjected to the same regulations, and that in neither case is there any provision that the plea or "account" shall be under oath.\footnote{28}

In conclusion, it should be noted that the principal case gives rise to implications which are significant in a much broader field than the single inquiry of how failure of consideration may be asserted. If the defense of failure of consideration must be asserted by a special verified plea, simply because it is one of the matters specified in the statute, then, seemingly, so must all the other matters enumerated therein, including breach of warranty and fraud in procurement of the contract, and the cases heretofore decided holding that fraud in procurement of the contract may be proved under the general issue\footnote{28} must be considered as in effect overruled. In fact, due to insertion in the statute of the words "or any other matter" by the revision of 1931, it would seem that no matter proper for recoupment in an action on a contract can now

\footnotesize

\footnotetext{28}{W. Va. Rev. Code (1931) c. 56, art. 5, § 4.}
\footnotetext{27}{See Shore v. Powell, 71 W. Va. 61, 76 S. E. 126 (1912); Shuman v. Shuman, 79 W. Va. 445, 91 S. E. 396 (1917).}
\footnotetext{28}{If, in lieu of a special plea, a statement ("account") is filed with the general issue, there may be at least some remote ground for argument that the statement must be under oath. This statement is sometimes referred to in the cases as a statement of "particulars", or described in other language indicating that it has the status of a bill of particulars. If it is to be considered as coming within the provisions of the Code, c. 56, art. 4, § 20, generally requiring a defendant to "file a more particular statement, in any respect, of the nature of his defense", then, as required by that section, it must be under oath; otherwise, not. However, the section in article 4, requiring a more particular statement of the nature of a defense, may be construed as relating exclusively to statements of the nature of a defense. Strictly, set-off is not a defense, but, in effect, is a cross action. If, for this reason, a statement of set-off should not require verification, it may be argued that a statement of payment, since it is regulated by the same provisions, does not require verification. Furthermore, it may be suggested that, if a \textit{plea} of payment or set-off does not require verification, neither should the statement, which is alternative to the plea. There would seem to be as much reason for requiring the one to be verified as the other.}
\footnotetext{28}{See Bowyer v. Continental Casualty Co., 72 W. Va. 333, 78 S. E. 1000 (1913), and authorities cited.}
be asserted as at the common law, by notice of recoupment under the general issue, but must be asserted by a special plea under oath.30

PLEADING THE STATUTE OF FRAUDS.

Although there is a division of authority as to whether, in an action at law, the Statute of Frauds may be relied upon under the general issue or requires a special plea,31 it has been held in this state that the defense may be asserted under the general issue.32 However, in some cases, mostly suits in equity, examples of which will be cited hereinafter, will be found general statements to the effect that a party cannot rely on the Statute of Frauds unless he pleads it. In some instances such statements are dicta, and are not even supported by the authorities cited to sustain them. In other instances, particularly in chancery suits, they are made as applicable to peculiar circumstances which, exceptionally, may justify the requirement of special pleading. It is doubtful whether any case will be found in this state which, by actual adjudication, prescribes any circumstances under which, in a common law action, there should be any exception to the general rule that the Statute of Frauds may be asserted under the general issue. Nevertheless, due to the manner in which some of these generalizations are stated, unqualifiedly and without limitation, an apparent confusion arises in the decisions, which can be resolved only by discarding dicta and limiting the generalizations by interpreting them with reference

30 For example, see Monongahela Tie & Lumber Co. v. Flannigan, 77 W. Va. 162, 87 S. E. 161 (1915), where the court recognizes the right to elect between common law recoupment and the statutory plea when the defendant merely seeks to cancel or reduce the plaintiff's claim without recovery of an excess, provided his cross claim is of such a nature as to come within the provisions of the statute. In this case he was not permitted to avail himself of the statutory plea and recover an excess, because his cross claim did not involve failure of consideration, breach of warranty, or fraud in procurement of the contract. At that time the words "or any other matter" were not in the statute. If they had been there, then apparently the court would have held the cross claim proper subject matter for the statutory plea. If so, the holding in the principal case would now compel the defendant in such a case to resort to the statutory plea, and he could not resort to common law recoupment, in spite of the fact that he might be willing to abandon an excess.


to the actual facts to which they are applied. It was apparently
such contradictions as those noted above that caused the court in
the recent case of Jones v. Shipley to refer to "the existence
of some confusion in the West Virginia decided cases" with reference
to the necessity of pleading the Statute of Frauds, and, by way of
dictum, at the least to advise an exception to the heretofore ac-
cepted general rule that the statute may be asserted under the
general issue.

In Jones v. Shipley, the plaintiff sought judgment against
the defendant, under a proceeding of notice of motion for judgment,
for breach of an oral contract to pay salary and commissions
accruing over a period of years. The defendant pleaded the
general issue and under it was permitted by the trial court to
raise the objection that the contract sued upon was one which
could not have been performed within a year from its date, and
hence came within the terms of the Statute of Frauds. The supreme
court declined to rule upon the propriety of this procedure, since
no objection was made thereto in the lower court. Nevertheless,
apparently for the benefit of future litigants, the court ventures to
express a doubt as to its validity. The court recognizes as sound
the general rule stated in prior cases, that the Statute of Frauds
may be asserted under the general issue, but thinks that there
should be an exception when the declaration shows on its face
that the contract comes within the ban of the statute.

"Where the declaration or notice does not show the na-
ture of the contract involved, logically the statute of frauds
does [not?] constitute matter of defense at that stage of the
proceeding, so that it is only after the introduction of the plain-
tiff's evidence that the issue develops or arises. Under these
circumstances, the plaintiff (sic) may be permitted to raise
the question under the general issue. But where the allegations
show the nature of the contract by means of which the de-
fendant in this respect is fully informed, we think that the
right of a litigant to be informed as to the nature of the con-
troversy requires a special plea, when the statute of frauds is
depended upon. . . . we are impressed that when the plaintiff's
initial pleading alleges an oral contract the most orderly way
of presenting the question in the record is by means of a
special plea in the nature of a plea by way of confession and
avoidance. Otherwise, the purpose of the statute to prevent
fraud and deceit may be thwarted by means of the statute."

Apparently, the key to the confusion in the cases which the

38 7 S. E. (2d) 346 (W. Va. 1940).
court has in mind in the principal case is the case of *Ruckman v Hay*, cited by the court, in which is found the following statement:

"Under our decisions the statute of frauds, in order to constitute a defense must be pleaded. *Miller v. Lorentz*, 39 W. Va. 160. A contract for the sale and purchase of land will be specifically performed where the pleadings admit the contract and the statute of frauds is not pleaded and relied upon. *Moore, Keppel & Co. v. Ward*, 71 W. Va. 393."

The case in which this statement is made is a suit in equity for specific performance of a contract. The question in actual controversy was whether the plaintiff could have specific performance when he had not signed any writing that would bind him under the Statute of Frauds to perform the contract; in other words, whether, as is held by some courts, there must be mutuality of contract with reference to requirements of the Statute of Frauds. Hence any statements with reference to the necessity of pleading the statute would seem to be mere dicta.

The case in turn cited by *Ruckman v. Hay* to sustain the general statement quoted above, to the effect that the Statute of Frauds must be pleaded, *Miller v. Lorentz*, does not seem to be in point in any respect. It likewise was a suit in equity for specific performance. The Statute of Frauds was specifically pleaded and the question actually in controversy was whether, the bill having alleged an oral contract, the plaintiff, relying on part performance and possession of the premises, had produced sufficient evidence of these facts to entitle him to specific performance.

In the second case cited, *Moore, Keppel & Co. v. Ward*, another case in equity for specific performance, necessity of pleading the Statute of Frauds is recognized only when an oral contract alleged in the bill is admitted by the answer. In such a case, it is said, as is held by other courts, the answer itself satisfies the statute unless the statute is specifically relied upon. In this case, the statute was actually pleaded, and what the court in fact decided was that a deed delivered in escrow was sufficient to satisfy the statute.

All these cases bearing upon the necessity of pleading the statute, it will be noted, are equity cases. They do not, on account of the very nature of equity pleading, serve as very definite criterions as to what may be asserted under the general issue in common law actions. So far as asserting the Statute of Frauds

---

under the general issue at common law is concerned, perhaps the closest analogy in equity is where the answer makes no specific attempt at reliance upon the statute, but merely in general terms denies the existence of a valid contract. It is held that under such a denial the defendant may avail himself of the benefit of the Statute of Frauds. Perhaps the most explicit statement of the rule in a modern West Virginia case will be found in Kennedy v. Burns,35 where the defendant in his answer denied that "such agreement gratuitous or binding was ever made", and the court held:

"A denial in the answer of the contract averred in the bill, requires the plaintiff to prove a binding contract, and raises the defense of the statute of frauds. It is necessary to plead the statute specially, only when the answer admits the contract averred."

The general issue in an action at law would have the same general effect by way of traverse as a denial in general terms of the existence of the contract in an answer. However, obviously, the exception noted in the case above, requiring the statute to be pleaded specially when the answer admits the contract, could have no application in a common law action where the general issue is pleaded. The general issue never makes any such admission.

It is possible that some of the general statements in the cases, to the effect that the Statute of Frauds must be pleaded, are not intended to be understood in a literal and technical sense; but rather are intended to convey the meaning that the benefit of the statute will be waived unless in some manner claimed before the court, by plea or otherwise, as is generally held.

"The statute of frauds need not be specially pleaded, unless the party relying thereon admits making the contract; but in order to avail himself of its benefits he must in some manner distinctly bring the statute to the attention of the court, otherwise it will be considered as waived."36


36 Forman v. Smith, 102 W. Va. 539, 135 S. E. 653 (1926). See Matney v. Blakely, 97 W. Va. 291, 124 S. E. 918 (1924), a suit in equity, in which the general statement is made that the statute must be brought to the attention of the court by the defendant "in some manner by his pleadings", in order to avail him as a defense. But here, actually, the plaintiff was seeking cancellation on "the grounds of fraud and deceit, and failure of consideration", and the courts says "That there was a contract is admitted by each party . . . ." Hence the case comes within the rule stated in the cases cited in note 35 supra.
The logic of the court’s views in the principal case seems to be that, in order to give the plaintiff specific notice of the nature of the controversy, the Statute of Frauds should always be specially pleaded, where it is practicable to require the defendant to file a special plea; but that, unless the declaration shows the nature of the contract (that it is oral, etc.), such a burden cannot fairly be placed on the defendant, because he himself, at that stage of the procedure, does not know what will be the nature of the controversy and will not have such knowledge until the introduction of proof.  

As a conclusion based on a practical concept of the objects and necessities of pleading, the logic of the court’s reasoning may be conceded to be sound; but it may not be so easy to justify the results, on the basis alone that the plaintiff is entitled to notice of the ultimate and specific nature of the controversy, when, by way of comparison, consideration is given to the general liberties of defense which a defendant has under the general issues of *nil debet* and *non assumpsit*. For example, he may, under these general issues, assert the defenses of a release of the cause of action, accord and satisfaction, and infancy, in spite of the fact that the allegations in the declaration may give him information that would enable him and advise him to plead these matters specially before the trial.  

However, independent of the mere matter of giving the plaintiff advance notice of the nature of the defense, it may be possible to urge an additional reason why, when the declaration discloses a contract failing to satisfy the Statute of Frauds, the defendant should be required to plead the statute specially. It is held in this state that, if the declaration discloses on its face a contract that comes within the ban of the statute, the defendant may on this ground demur to the declaration.  

If, having had this opportunity, he waives it and pleads the general issue, it may not be unreasonable to permit the plaintiff to assume that a defense based on the statute has been waived altogether and will not be asserted.

---

37 There is a very close analogy here to the requirements with reference to pleading an estoppel. By the weight of authority, an estoppel in pais must be specially pleaded if the party relying upon it has had an opportunity to do so. Whether he has had the opportunity or not generally depends upon what information he has obtained from his opponent’s pleadings.

38 He would generally have sufficient information when the plaintiff relies upon special counts.

at the trial.⁴⁰ The court may have had some such idea in mind in the principal case when it says that failure to plead the statute specially, when the allegations in the declaration disclose the propriety of the defense, may result in the purpose of the statute to prevent fraud and deceit being thwarted by means of the statute, although there is nothing articulate in the opinion to indicate that the court bases its conclusions on any consideration of waiver by failure to demur.

There may be a difference of opinion as to the advisability of the exception suggested in the principal case. It may be argued that there should be a uniform rule, one way or the other; and that on one occasion to permit the statute to be asserted under the general issue and on another occasion to require it to be specially pleaded would complicate the pleading process and lead to confusion. Those who have a preference for a minimum of pleading may justify liberty of resorting to the general issue on all occasions by suggesting that, on the whole, we are committed to a policy of general pleading; that recognition of the exception under discussion would be a step in the direction of special pleading; and that there is no more justification for it than there would be to require numerous other affirmative defenses now admissible under the general issues to be specially pleaded. Some who believe in uniformity may be inclined to seek it in the other direction, by way of requiring the statute to be specially pleaded on all occasions, as is required in many jurisdictions. It may be suggested that there is not enough reality in the assumption, that the defendant does not know the nature of the contract upon which he is being sued unless it is described in detail in the declaration, to excuse him from pleading the statute specially on any occasion; and that, if he thinks he lacks information, he may obtain it through a bill of particulars.

In conclusion, it may be noted that, if the scope of the general issue is to be curtailed as advised in the principal case, it will be necessary to revise a statement made by Professor Minor and reiterated in the Virginia and West Virginia cases for the purpose of defining the scope of the general issues of nil debet and non

⁴⁰ In at least one state, the doctrine of waiver has been carried so far, apparently by virtue of statute, that, when the defendant has had an opportunity to take advantage of the statute by demurrer, he is not permitted to avail himself of it by plea. Wiseman v. Thompson, 94 In. 607, 63 N. W. 346 (1895); Marr v. The Burlington, Cedar Rapids & Northern Ry., 121 Iowa 117, 96 N. W. 716 (1903).
assumpsit. The latest version of this statement in the West Virginia cases will be found in *Davis v. Davis Trust Co.*,\(^4\) as follows.

"Under the practice in this state and in Virginia, it is generally understood that any defense can be made under the general issues of nil debit (sic) and non assumpsit, except the statute of limitations, bankruptcy and tender."

This general statement is adopted with approval by way of quotation from an earlier West Virginia case, *McClanahan v. Otto-Marmet Coal & Mining Co.*,\(^2\) heretofore cited, specifically holding:

"The statute of frauds need not be specially pleaded but may be relied on under the general issue of non assumpsit."

**PROCESS ON A CROSS-BILL ANSWER.**

There is no little confusion in the decisions of other states as to when it is necessary to issue process on a cross claim asserted by a defendant.\(^4\) In some jurisdictions, the necessity of process depends upon the manner in which the cross claim is asserted. If the cross claim is asserted in an independent pleading in the nature of an equity cross bill, perhaps the weight of authority requires the issuance of process, whatever may have been the status in the original bill of the defendants in the cross pleading, although a few cases will be found making no distinction based upon the nature of the cross pleading.\(^4\) If the cross claim is not asserted in an independent pleading, but, by virtue of statute, in an equity answer, or in an answer to a complaint or petition under the code practice,

\(^{41}\) 114 W. Va. 655, 645, 173 S. E. 266 (1934).

\(^{42}\) 74 W. Va. 543, 32 S. E. 762 (1914).

\(^{43}\) See 21 C. J. 353-4. Many of the cases cited in this reference were decided under practice codes, where the procedure is fairly analogous to the equity practice, the complaint and answer taking the places of the bill and answer; others, particularly the earlier ones, are equity cases. Many of the code cases are directed in point as authorities on the equity practice, the codes having omitted to regulate the matter of issuing process on a cross claim and the courts having resorted to the equity practice for a criterion.

\(^{44}\) It is not always easy to determine whether the cross claim was asserted in an independent pleading, or in a defensive pleading corresponding to an answer in equity. The following cases seem to be illustrative of those failing to make any distinction based on the nature of the cross pleading. *Fleece v. Russell*, 13 Ill. 31 (1851); *Peak v. Percifull*, 3 Bush 218 (Ky. 1867); *Horine v. Moore*, 14 B. Monroe 251 (Ky. 1853); *Shelby v. Smith’s Heirs*, 2 A. K. Marshall 504 (Ky. 1820); *Carlow v. Aultman*, 28 Neb. 672, 675, 44 N. W. 873 (1890); *Ledbetter v. Mandell*, 124 App. Div. 854, 109 N. Y. Supp. 602 (1908), construing the Arkansas law.

Sometimes the necessity of process is determined by considering the degree of remoteness of the cross claim from the transaction alleged in the original bill or complaint. See *Shaul v. Rinker*, 139 Ind. 163, 163 N. E. 593 (1894); *Bevier v. Kahn*, 111 Ind. 200, 12 N. E. 169 (1887); *Southward v. Jamison*, 66 Ohio St. 290, 64 N. E. 135 (1902).
there is a marked tendency to distinguish between plaintiffs and defendants in the original pleading. Many cases hold that in such a case, although process must issue against defendants in the original bill (or equivalent pleading) who will be affected by the cross claim, it is not necessary to issue process against the plaintiffs in the original bill, but that they must take notice of the cross claim from the mere filing of the answer. In some cases, it is held that the necessity of process, even against a plaintiff in the original bill, depends upon the time when the cross claim is filed, process being necessary only when it is filed out of time.

It has perhaps uniformly been assumed in this state that process must issue against all the defendants in a cross bill in equity, whether plaintiffs or defendants in the original bill, except, of course, where process is waived by appearance. It has been uniformly held that, when an answer, under the statute, has been substituted for a cross bill, process must issue against all the defendants in the original bill whose interests will be affected by the cross-bill answer. As to whether process must issue on a cross-bill answer against parties who are plaintiffs in the original bill, there is a difference of opinion in this state, although the matter does not seem to have been actually adjudicated by the West Virginia court.

Perhaps many practitioners, without the impetus of authority, have assumed that it is not necessary to issue process on a cross-bill

45 See same citations. Also see Farmers' State Bank v. Kirkland, 200 Ala. 146, 75 So. 894 (1917); Pillow v. Sentell, 49 Ark. 430, 5 S. W. 783 (1887); Treiber v. Shaffer, 18 Ia. 29 (1864).

In Alabama, process against a plaintiff is dispensed with by statute. "A defendant may obtain relief against a party complainant or defendant for any cause connected with, or growing out of the bill, by alleging in his answer, and as a part thereof, the facts upon which such relief is prayed. The matters or facts thus alleged and put in issue must be considered in the nature of a cross-bill, and be heard at the same time as the original bill. It shall not be necessary to issue a summons to any defendant in the cross-bill, except those who are not complainants in the original bill." Quoted in 1 Whitehouse, Equity Practice (1915) 277-8.

46 Youngson v. Bond, 64 Neb. 635, 90 N. W. 556 (1902). Numerous earlier Nebraska cases are in accord.

47 Curiously enough, it may seem, no case has been found where the question has arisen in this state on the filing of a formal cross bill, whether due to the fact that nobody has attempted to dispense with process against any of the parties to such a pleading, or to the fact that use of a cross bill in this state has been largely abandoned in favor of the cross-bill answer. However, pertinent dicta will be found in some of the cases, as in Goff v. Price, 42 W. Va. 384, 26 S. E. 287 (1896), hereinafter discussed.

answer against parties who are plaintiffs in the original bill. Such
an assumption, although facetiously adopted, is not without logic.
Under the equity practice, as everybody knows, process on an
answer is not necessary. It is easy to assume that an answer, al-
though its function has been enlarged by statute, is still an answer,
and that the expansion of its contents has not altered its exterior
procedural incidental. In fact, if consideration is given at all to
the question of process, it may be assumed that one of the very
objects of permitting an answer to perform the functions of a
cross bill may have been to present the cross claim in such a way
that service of process could be dispensed with where only the in-
terests of a plaintiff in the original bill are concerned. However
this may be, undoubtedly an early decision in this state, Goff v.
Price,\textsuperscript{40} has had an influence on the situation, particularly for those
who look to the syllabus for the law of the case, even if the case is
only dictum. In this case, the following statement is made in the
syllabus:

"An answer, under section 35, chapter 125, Code, con-
taining new matter constituting a claim for affirmative relief,
may be taken as for confessed as against the plaintiff, but not
against another defendant, without service of process to reply
to it."

The statement in the syllabus is expanded upon in the opinion,\textsuperscript{50}
Judge Brannan speaking for the court, as follows:

"So I hold that such an answer can not, on new matter
first introduced by it, be the basis of a decree against other
defendants without process against them to reply to it. I do
not think process necessary as to the plaintiff, as he has called
for the answer and must notice all of its matter. It is true
that our practice requires process against the plaintiff to answer
a cross-bill; but the cross-bill is filed by his adversary as an
attack upon him, and not like an answer, in response to his
own call for it."

Apparently, the first criticism of the views expressed in Goff
v. Price in subsequent West Virginia cases is in Brand v. Gibson,\textsuperscript{51}
where the court, by way of dicta, advises that process should
be served upon all the parties to the original bill who will be affected
by the cross relief sought in the answer, whether plaintiffs or de-
fendants in the original bill. The weight of Goff v. Price as author-

\textsuperscript{40} 42 W. Va. 384, 26 S. E. 287 (1896).
\textsuperscript{50} At page 392.
\textsuperscript{51} 115 W. Va. 399, 176 S. E. 611 (1934).
DEVELOPMENTS IN LOCAL PROCEDURE

ity is challenged, on the ground that the statements above quoted are only dicta, although no contrary West Virginia case is cited. The case is put in an additional unfavorable light, perhaps inadvertently, by the manner in which it is analyzed. The court in the later case seems to assume that Judge Brannan in the earlier case undertook to say that process against a plaintiff could be dispensed with, not only in the case of a cross-bill answer, but also in the case of a pure cross bill filed under the equity practice, which of course is not an accurate interpretation of his statements or reasoning, as will appear from the quotations above. This discrepancy, however, seems to have contributed little, if anything, to the general reasoning on which the earlier case is disapproved.

The question next comes up for consideration in the case of Meadow River Lumber Co. v. Easley, where, by way of actual adjudication, Goff v. Price is expressly overruled.

It is conceivable that process on a cross-bill answer might be required for one or more of three different reasons: (1) to obtain technical personal jurisdiction over the plaintiff for the purpose of adjudicating the cross claim; (2) to give the plaintiff notice of intention to assert the claim; (3) to give him time in which to prepare his reply. Statements in one of the cases repudiating Goff v. Price seem to indicate that reliance is placed on the first reason, although the greater weight of emphasis, in the two cases read together, seems to be placed upon the second.

---

62 "In the case of Goff v. Price, 42 W. Va. 384, 26 S. E. 287, it is forcibly argued by way of dicta that as to a plaintiff in the original bill in equity, there need be no process on the incoming of a cross-bill or answer in the nature of a cross-bill. On the basis of this case, and of several other West Virginia cases in which comment occurs, the annotators and text-writers have classified West Virginia as a state not requiring process against the plaintiff in the original bill when a cross-bill or answer in the nature of a cross-bill comes in."

Brand v. Gibson, note 51 supra.

63 7 S. E. (2d) 864 (W. Va. 1940).

64 In this case the court emphasizes the fact that the cross-bill answer was filed by a defendant who was not a party to the original bill, but who was brought into the suit by a codefendant. However, there does not seem to be any intention to confine the requirement of process to this particular situation. Upon the general reasoning of the court, Goff v. Price is overruled in toto.

65 "It seems to us that a plaintiff comes into court asking only an answer to his bill of complaint. True, he has voluntarily submitted himself to the court, but he did so only for the purposes set forth in his bill of complaint. He should not, therefore, be countered with a cross-bill, or an answer in the nature of a cross-bill, which are, in many respects, tantamount to new suits, without process having been served upon him, and we so hold."

Meadow River Lumber Co. v. Easley, note 53 supra.

66 "Certainly the better practice upon the incoming of a pleading alleging new matter and seeking new relief is to require that every other party to the
Some of the decisions in other states seem to base the requirement of process against a plaintiff on a cross-bill answer directly on jurisdictional grounds. However, if process against a plaintiff in such a case is required in the same sense and for the same reason that original process against a defendant is necessary to give the court jurisdiction to adjudicate the plaintiff's equities, the requirement, as based on such a concept, even if sound in theory, may be criticized as technical. The object of process is to bring a party into court. The plaintiff is already there. It is true that process gives a party notice that he is being sued and very general information as to the nature of the claim. But if a party is already in court, and has such a status that he will receive such notice and information from some other source, process would seem unnecessary. If any kind of general appearance will subject the defendant to the jurisdiction of the court why not a like rule with reference to the plaintiff? The plaintiff, by suing the defendant and offering his own equities for adjudication, voluntarily submits himself to the jurisdiction of the court. The law informs him that, when he invokes the jurisdiction of the court for the purpose of litigating his own cause, the defendant has a right to assert his cross claims. It would seem peculiarly appropriate to charge him with such knowledge and its consequences in a court of equity, which delights in doing complete justice between all the parties. Jurisdiction to entertain the cross claims would seem to be incidental to and based upon jurisdiction to adjudicate the plaintiff's equities. The unity of the court's jurisdiction, as embracing all matters which may properly be put in controversy, is illustrated by the status of a purely legal claim asserted in a cross bill. If a purely legal claim is presented in an

case be put upon adequate notice before the trend of that cause can be reshaped." Brand v. Gibson, note 51 supra.

67 This is particularly true when the cross pleading is filed out of time. "Where a cross-bill asking affirmative relief against a co-defendant is filed out of time, and no summons is issued thereon, or served upon such co-defendant, and no appearance is made thereto, the court has no jurisdiction to try the issues tendered by such cross-bill." Youngson v. Bond, 64 Neb. 615, 90 N. W. 556 (1902). The same court holds that, if the cross pleading is filed in time, process is not necessary, even against a defendant in the original bill. "When a defendant files his answer and cross-bill within the time fixed by law, he is not required to give any notice to the other parties to the action. Carlow was bound to take notice of the filing of the cross-bill of C. Aultman & Co., and the district court had jurisdiction of the persons of the Carlows." Carlow v. Aultman, 28 Neb. 672, 675, 44 N. W. 873 (1890). In this case, one defendant was seeking cross relief against another defendant. The rule should apply all the more forcibly where the cross relief is sought against a plaintiff. One is impelled to inquire whether, in such cases, the term "jurisdiction" is used in a technical sense.
original bill for adjudication, it is necessary, in order to give the court jurisdiction, to allege additional facts of equitable cognizance. Otherwise, the court would lack jurisdiction because of an adequate remedy at law. Yet it is familiar law that such a claim may be asserted in a cross bill without alleging any facts showing equitable jurisdiction. The only question is whether the claim is germane to the whole matter of controversy. The plaintiff, by invoking the jurisdiction as to the principal matter in controversy, has incidentally established a basis for the collateral jurisdiction. A further illustration, perhaps more forcible, may be borrowed from the common law. In a personal action at common law, jurisdiction of the person is just as important as in equity for validity of the judgment. Yet, presumably, nobody ever thought of any necessity of issuing process against a plaintiff in a common law action for the purpose of giving the court jurisdiction to adjudicate a cross claim in the nature of recoupment or set-off.

As already noted, principal emphasis upon the necessity of process against a plaintiff on a cross-bill answer seems to be placed by the court, in the two cases overruling Goff v. Price, upon requirements, not of jurisdiction, but of notice to the plaintiff that the defendant is undertaking to avail himself of a jurisdiction which may be assumed already to have been established. Of course all parties to be affected by the cross claim, whether plaintiffs or defendants in the original bill, should have notice thereof; and if service of process is necessary for such a purpose, no further justification for its use is required.

Theoretically, one defendant is not interested in the answer of another defendant, but only in his own answer and the allegations and prayer of the bill. Under the equity practice, unregulated by statute, an answer is purely defensive in character and prays only for dismissal of the bill. Hence a defendant is under no obligation to consult his codefendant's answer for the purpose of discovering

---

68 See 1 WHITEHOUSE, EQUITY PRACTICE 277-8.
69 Statements in accord with the views expressed in this paragraph will be found in some of the cases. "Under our statute, no process is necessary to summon the parties to the original bill to answer the cross-bill; the latter is an adjunct to the former, all constituting but one case." Fleece v. Russell, 13 Ill. 31 (1851). "The bill and cross-bill make but one cause." Treiber v. Shaffer, 18 Iowa 29, 33 (1864). Further in the same opinion, p. 34, the court, referring to the fact that the cross bill made no new parties, says: "It is a fair deduction alike from the authorities, and from the nature of the proceeding itself, that such a cross-bill as the one under consideration cannot justly be regarded as in the nature of an original suit, in such a sense that the statutory process or notice must necessarily be issued and served upon the plaintiffs in the same manner as the original bill."
matters affecting his own interests. Wherefore it may be conceded that a codefendant's rights should not be affected by either a cross bill or a cross-bill answer, without the service of notice, in the form of process or in some other form; and that the mere filing of the cross bill or the cross-bill answer should not operate as notice. All this may be conceded without assuming that service of process is necessary to give the court technical jurisdiction to adjudicate the cross claim against the codefendant. As to the necessity of process against a plaintiff, the circumstances are different.

The court emphasizes the supposition that a plaintiff, when he is sued, cannot be assumed to expect the assertion of a cross claim against him, and therefore, presumably, that this lack of expectation can be compensated only by the service of process giving him notice; but, disregarding any implications of jurisdictional necessities, the practical question would seem to be, not what the plaintiff may have expected when he sued, but what he has discovered after he has sued, due consideration being given to the manner and time of his discovery. It may be conceded that, on some rare occasion, a plaintiff (or rather his counsel) will fail to notice a pure cross bill filed in the suit—although it is among the other papers filed and its filing has been noted, either in the rule book or by a court order—because he has not demanded it in his bill. And so the cases, even Goff v. Price, require process against him on a cross bill. But it is difficult to conceive that a plaintiff will fail to expect and to read an answer which is filed in response to a request therefor in his bill. If he does read the answer, it would seem equally difficult to conceive that he would read only that part of it which operates as a defense to the bill and would remain unaware of the residue asserting a claim for cross relief, whether or not the answer is labeled, as it should be, so as to indicate that it serves a double function. Here, again, it may be permissible to refer to a common law analogy. It is familiar law that a defendant in a common law action must give the plaintiff notice of recoupment or of a set-off. Yet the mere filing of a notice or a plea constitutes sufficient notice.

---

60 "Conceding the plausibility of the dicta in the Goff case to the effect that a plaintiff in a court of equity comes there voluntarily, demanding answers from the defendants, and for that reason he must be prepared at all times to meet their pleadings, even those seeking affirmative relief upon new matter, we believe that the contrary of this position to the effect that the plaintiff comes into court demanding only the answer to his bill of complaint, and perhaps not expecting a counter suit against him, is equally plausible." Brand v. Gibson, note 51 supra.
without any service thereof, in spite of the fact that the plaintiff, when he sues, may not expect a counter claim.

The third reason heretofore mentioned why process might be required on a cross-bill answer—to give the plaintiff time after the process has been served to prepare his reply—is suggested only as a possibility. It is not intimated in the cases, and perhaps will not be seriously contended, that process is necessary for such a purpose. If the plaintiff, having examined the cross-bill answer after it has been filed, insists that he has been surprised and needs time to reply, it certainly is within the discretion of the court to grant him sufficient time. In fact, if it were necessary to remand the cause to rules for the purpose of issuing process on the cross-bill answer, the defendant might, by resorting to such a strategy, unduly and arbitrarily delay the hearing of the cause. However, it is suggested in *Goff v. Price* that it is not necessary to remand the cause to rules for such a purpose.

"It may be well to add that the court may either award a rule against the co-defendants to reply to such answer—that is, make an order requiring them to be summoned to reply to such answer by a given date or within a given time—or send it to rules with direction to issue process summoning such co-defendants to reply to it and then proceed on it as on a cross-bill."

61 42 W. Va. 384, 393, 26 S. E. 287 (1896).