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THE LAW OF SET-OFF AND RECOUPMENT IN WEST VIRGINIA.

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Among the many deserving considerations of the remedies of set-off and recoupment one cannot but wonder why it is that these two remedies, differing as they do in so many important particulars, are interchangeably referred to and spoken of. Some courts loosely use the name of one when the other is intended. The only analogous features pertaining to these remedies, as we believe, is that both must be the subject of an independent action which may be asserted in a cross demand. The subject matter to support either of these remedies is entirely different and the character of relief available under either is likewise different. They are likewise entirely different in origin, one finding its basis in the common law, the other in statutory enactment. These two remedies, however, do merge upon common ground in this, that conflicting demands between litigants may be set up and determined in one action. The right to settle and determine conflicting demands between litigants in one cause of action avoids a multiplicity of legal contests and furnishes an expeditious settlement of differences between litigants, saving extra costs and charges, so that these remedies do perform a very useful and beneficial function in the legal practice. Inasmuch as they are resorted to interchangeably to represent the subject matter of cross demands, a consideration of their points of difference may furnish a very satisfactory negative definition of each of them. These distinguishing marks may be more easily observed in the abstract than applied in actual practice.

Recoupment represents a claim for damages arising out of a breach of the contract or some part of the contract which is the basis of the plaintiff's cause of action, while the sub-

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ject matter of set-off must arise out of a contract independent of the one sued on by the plaintiff.

Recoupment makes claim for unliquidated damages, whereas the claim of set-off must be liquidated.

Recoupment is limited in recovery to reducing or extinguishing the plaintiff’s demand with no right of recovery over, while set-off may be relied upon to reduce or extinguish the plaintiff’s demand and if in excess thereof a recovery over may be had for such excess.

Recoupment is of common law origin, while set-off is wholly a creature of statute.

Set-off must be pleaded or an account thereof filed with a plea, whereas recoupment is set up by notice.¹

From these marked points of difference may we not briefly define these remedies? First, jointly: they consist of the right of a defendant to assert against the plaintiff in an action at law an independent cause of action in the reduction or extinguishment of the plaintiff’s demand. Second, recoupment consists of that remedy open to a defendant to assert against the plaintiff a claim for unliquidated damages arising out of a breach by the plaintiff of the contract sued on by him, such damages to be limited to reducing or extinguishing of the plaintiff’s demand;² while the remedy of set-off may be defined to be that right open to the defendant to have one or more liquidated items of account based upon


² 24 R. C. L. 851; 34 Cyc. 695; Winder v. Caldwell, 14 How. (U. S.) 434, 14 L. ed. 487 (1852); West v. Hayes, 104 Ind. 251, 3 N. E. 932 (1885).
obligations independent of the contract sued on, set-off against the plaintiff’s claim in reducing or extinguishing the same, or if they be in excess of the plaintiff’s claim to permit a recovery over of such excess.\(^3\)

The remedy of recoupment is as old as the common law. Formerly it amounted simply to the right to reduce the plaintiff’s claim, but by judicial precedent it has been enlarged so that the defendant may be permitted to entirely extinguish the plaintiff’s claim. The term “recoupment” is of French origin and signifies cutting again or cutting back, or stopping something which is due.\(^4\) The early use of the remedy of recoupment was confined to very narrow limits and amounted to little, if anything, more than the mere right of reducing the plaintiff’s claim on the ground that his damages were really not as high as alleged. So limited was it in application that it was of but little use and for a time became almost obsolete. The principle, however, has always been retained, and as developed by the courts of this country, it has attained a wider and more extended application than in England.\(^5\)

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Mr. Justice Gray, speaking for the Federal Supreme Court, very tersely approves of the enlarged rights under recoupment as follows:

"But in this country the Courts, in order to avoid circuity of action, have gone further, and have allowed the defendant to recoup damages suffered by him for any fraud, breach of warranty or negligence of the plaintiff, growing out of and relating to the transaction in question."

Judge Green, speaking for the West Virginia Court, confirms the same right in announcing:

"When the basis of plaintiff's action is contract, and his complaint is that there has been a breach of such contract by the defendant, then the defendant may, if he chooses, recoup any damages which may have resulted to him by a breach of another portion of the same contract or of a contract made at the same time and constituting a part and parcel of the same transaction."

The right to set up a claim for damages by way of recoupment is not compulsory. A defendant may elect to prosecute an independent cause of action against the plaintiff, especially in those instances wherein the defendant's claim for damages is in excess of the plaintiff's demand. If he so elects he cannot be precluded from prosecuting an independent action for a recovery of that which he may have set up by recoupment, even thought he may have appeared and made defense to the plaintiff's cause of action involving the same contract out of which he claims damages by reason of the plaintiff's breach. If, however, the defendant makes cross-claim for damages by reason of a breach of the contract sued on by the plaintiff, he is precluded from asserting any such claim thereafter in any other cause of action, notwithstanding his damages may have been largely in excess of the plaintiff's demand. Mr. Justice Holmes, speaking for the Federal Supreme Court, announces this rule:

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"Therefore, although there has been a difference of opinion as to whether a defendant, by pleading it, (a cross demand) is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice."

The subject matter for recoupment must be such as would support an independent cause of action and the defendant is not required to set the same up by way of recoupment, but if he does do so he is bound thereby and precluded from thereafter asserting the same.

Where the plaintiff, however, bases his right to recover against the defendant on the quantum meruit, it would seem that the defendant would be required to set up any claim for damages by way of recoupment he may have, because the plaintiff in such an action must establish a reasonable value of each of the items of his claim and any defense thereto must necessarily determine this issue. Consequently it has been held that in this character of case, the defendant, to preserve his claim for damages, must set the same up by recouping against the plaintiff's claim.

Recoupment need not be pleaded but set up by notice under the general issue, and where the same is set up and relied upon no recovery over against the plaintiff can be had, but the trial and judgment thereon is res adjudicata as to the matters therein set up.

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8 Merchants Heat & Light Co. v. Clow & Sons, 204 U. S. 286, 51 L. ed. 488 (1907); 24 R. C. L. 883.
9 34 Cyc. 758; 24 R. C. L. 883; Merchants Heat & Light Co. v. Clow & Sons, supra n. 8; Winthrop Savings Bank v. Jackson, 67 Me. 570, 24 Am. Rep. 56 (1878).
10 24 R. C. L. 884; Davenport v. Hubbard, supra, n. 4.
Under the West Virginia statute, Chapter 126, Section 5, commonly recognized as our statute on equitable defense at law, it would appear to be an enlargement of the common law right of recoupment. The Virginia court in construing the same statute holds:

"When the demands of both parties spring out of the same contract, the defendant may assert his claim for unliquidated damages under his common law right of recoupment, or under Section 3299 of the Code (identical with West Virginia Code, Chapter 126, Section 5), which does not impair his common law right, but in addition thereto permits defendant to recover any legal damages he can prove in excess of the damages claimed by the plaintiff."

However, the West Virginia court most emphatically holds that the common law right of recoupment has not been enlarged by this statute, but remains the same, so that the interpretation placed upon this statute by the West Virginia Court leaves us with no statutory enlargement of the common law remedy of recoupment.

The present West Virginia statute of set-off was taken from the Virginia statute, originally enacted in that Commonwealth as early as February, 1645, amended, however, in 1658, and again amended in March, 1662. This enactment was much earlier than even the English Statute, the first of which was passed in the second year of George II, found in Chapter 22, Sec. 13, and later amended in the eighth year of George II, by Chapter 24, Sec. 4, which statute provides generally that mutual accounts between litigants might be set off, one against the other. It is claimed that the Virginia Statute of set-off, from which ours was taken, is much broader than the English Statute.

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15 Monongahela Tie & Lumber Co. v. Flannigan, supra, n. 1.
Statutes of set-off being remedial in character are given a liberal construction to accomplish the purposes for which they were enacted, but the statute being the basis of the remedy, the subject matter thereof, as well as the method to be employed in asserting it, must conform to the statute. The subject matter of the set-off must be such as would support an independent cause of action against the plaintiff, and this independent cause of action must of necessity grow out of and be based upon a contractural obligation.

The scope of this article will not permit of that comprehensive consideration of this subject that is desirable; but there are certain limitations to which the right of set-off is subject that it might well be to briefly notice. The general rule, subject to exceptions, however, is that the same defense may be made to set-off that would be available against an independent action where the same subject matter was the basis thereof. In West Virginia a defendant may have allowed to him as a set-off any debt due and owing from the plaintiff to him which he describes and sets forth in his plea or in an account filed therewith, such as will give notice to the plaintiff of his claim, bearing in mind, however, that the enforcement of this claim by this method is subject to the same rules as obtain with reference to the enforcement of the same claim if it were the basis of an independent action. We may notice some of the limitations to which this remedy is subject. For instance, it will not lie against a claim for exempt property, such as property that may be set apart for the benefit of a householder free from claims of his creditors, which right is usually authorized by constitutional provision, and to permit a defendant to set-off against such a claim would amount to defeating the claim, as well

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19 34 Cyc 629.
as the constitutional right to make the same, nor will set-off lie in actions for tort or to set-off unliquidated damages. This remedy is limited exclusively to contractual obligations which are liquidated or subject to be liquidated by computation. This excludes all damages arising out of tort or breach of contract.

On the principle that an action may not be prosecuted against the State or Federal Government without its consent, set-off will not lie against the claim of the State. In some jurisdictions claimants have been permitted to recoup to the extent of the State's claim, such, for instance, as where the State contracts her prison labor; in an action to recover for the contract price, the defendant has been permitted to recoup damages to the extent of such claim by showing that the state failed to furnish the required number of laborers.

Set-off must be mutual, both with reference to parties and subject matter, the test generally being whether the defendant claiming set-off could prosecute an independent cause of action against the party or parties against whom he seeks to enforce such claim of set-off. However, this does not preclude a defendant from setting off assigned claims against the plaintiff which have been duly assigned to him and such assignments, according to the greater weight of judicial decision, may be acquired up to the time of the filing of the set-off. However, a different rule obtains in

22 Bradley v. Earl, 22 N. Dak. 139, 132 N. W. 660, 42 L. R. A. N. S. 575 (1911); Beckman v. Manlove, 18 Cal. 388 (1861); Cone v. Lewis, 64 Tex. 331, 53 Am. Rep. 767 (1885); Elder v. Trevert, 18 Nev. 446, 5 Pac. 69 (1884); Wilson v. McElroy, 32 Pa. 82 (1859); Sirmans v. Sirmans, 74 Ga. 541 (1885). See note, Caldwell v. Ryan, 210 Mo. 17, 108 S. W. 533, 10 L. R. A. N. S. 494 (1908); Cleveland v. McCanna, 7 N. Dak. 455, 75 N. W. 908, 41 L. R. A. 852 (1898).


reference to commercial paper negotiated for value before maturity. This character of claim is not subject to set-off. Some courts have gone so far as to hold that commercial paper, negotiated after maturity, is likewise exempt from a claim of set-off. The West Virginia Court specifically passed upon this question in Davis v. Noll, and announced the rule obtaining in this jurisdiction to be:

“A bona fide purchaser, for value, of an overdue negotiable instrument, holds it subject only to such equities as attach to the instrument itself at the time of the transfer, of which he has no notice.”

The rule, however, supported by the greater weight of authority is that negotiable paper transferred after maturity is subject to set-off in the same manner as any ordinary assignable claim.

The statute of limitations runs against a claim of set-off until the same is actually filed and such claim is subject to such statute in the same manner and to the same extent as if such claim was sought to be enforced in an independent action.

Set-off is a cause of action prosecuted by the defendant against the plaintiff, and is not in any sense to be treated or considered as a defense to the plaintiff’s action, but on the other hand, set-off and recoupment admit the plaintiff’s demand.

The defendant is not required under our statute to assert his claim of set-off, but where he does so he is bound thereby. Statutes generally on set-off, and particularly the

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28 24 R. C. L. 821.
31 34 Cyc. 644.
32 34 Cyc. 759-60.
33 34 Cyc. 758; 24 R. C. L. 383; Merchants Heat & Light Co. v. Clay & Sons, supra, n. 8; Winthrop Savings Bank v. Jackson, supra, n. 9; 24 Am. Rep. 56 (1878).
statute in the Virginias, provide that a litigant "may" assert his claim against the plaintiff by set-off, but his failure to do so does not in any wise prejudice his prosecution of an independent cause of action therefor. The statute does not deprive one of his common law right, but is remedial in character and purposes to enlarge rather than restrict common law rights. While there are no strict technical rules to be observed in the filing of the plea of set-off, still a claim to be available as set-off must be filed in the action so that the plaintiff may have timely notice of the defendant's cross demand. Unless this is done it is not available.  

However, in Virginia and West Virginia, the procedure by notice of motion for judgment is so informal that a defendant may prove set-off under the general issue without notice. The informality of this character of procedure seems to be the only justification for relaxing the statutory requirement of the filing of the plea or an account with the plea.  

Notwithstanding the marked distinction between the remedies of recoupment and set-off, the application of these remedies present most difficult questions. For instance, take the case of a non-resident prosecuting a claim against a resident of this state, who, at the same time, has an unliquidated claim against the non-resident plaintiff, which unliquidated claim grows out of an entirely different transaction than that sued on by the plaintiff, the plaintiff, in addition to being a non-resident of the state, may also be insolvent; against the non-resident plaintiff's claim, the resident defendant has no defense; under such a state of facts it would be most desirable to have settled and determined in the plaintiff's case the unliquidated claim of the resident defendant. This, however, he cannot do either by set-off or recoupment. He cannot set-off because his demand is unliquidated, and even though he only desires to recoup

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85 Whitley v. Booker Brick Co., 114 Va. 434, 74 S. E. 100 (1912); Schmwlbach v. Williams, 95 W. Va. 281, 120 S. E. 600 (1923).
damages to the extent of extinguishing the plaintiff's claim, this he may not do because the unliquidated claim for damages grows out of a different transaction from the one sued on by the plaintiff. 36

Another illustration of the inadequacy of these remedies presents itself when a plaintiff seeks judgment for money due under a contract. The plaintiff may have so breached the contract as to cause the defendant to sustain damages is a much larger sum than the amount claimed to be due by the plaintiff. If the defendant resorts to recoupment he must waive all that portion of his claim for damages that may be in excess of the plaintiff's demand. He cannot resort to set-off because his claim is unliquidated and grows out of the same transaction as that sued on by the plaintiff.

Appropriate legislation should be enacted so as to enlarge the remedy of recoupment so that recovery over may be had in all such instances.

The last illustration submitted was taken from the facts in a recent case passed upon by the West Virginia Court. In that case the defendant claiming a breach of the contract sued on set up a claim for damages largely in excess of the plaintiff's claim. This cross demand was represented by a notice of recoupment and also a notice of set-off under the general issue. Upon the trial the court directed a verdict in favor of the defendant for a recovery over against the plaintiff in excess of the plaintiff's claim. The case was prosecuted by writ of error to the Supreme Court where the judgment of the lower court was reversed solely on the ground that a verdict should not have been directed, but that there was such a conflict in the evidence as made it a case for jury determination. The question of the defendant's right to recover over in this case seems not to have been questioned, either in the trial or appellate court. To be denied this right when both of the parties are before the court contesting their differences over a single transaction,

must conclusively demonstrate the imperative demand and necessity for the enlargement of the common law remedy of recoupment.\textsuperscript{37}

It is oftentimes difficult to determine just what is meant by the term “unliquidated damages.” A claim may call for an amount represented by the difference between the contract price and the market price of a commodity at a given time and place. There may be no dispute as to the market price, upon which state of facts one may conclude that the claim, while not definite and certain, is subject to be made so by calculation, and hence is, or subject to become, a liquidated demand. However much these facts may make this claim appear to be liquidated, it is not so recognized by the authorities. No such claim as rests in opinion that must be fixed by a jury is regarded as a liquidated claim. A claim to be liquidated must be such as is fixed and certain or is subject to be made so by calculation from a fixed, definite and undisputed premise.\textsuperscript{38}

While set-off is not a common law remedy, courts of equity have always recognized it and applied it in causes where doing so would be equitable and not to do so would be inequitable.\textsuperscript{39} The right to set-off in equity must be grounded upon some principle recognized in equity.\textsuperscript{40} One of the most common occurrences for the application of equitable set-off is

\textsuperscript{37} Superior Elkhorn By-Products Coal Co. v. Three-States Coal Co., 106 W. Va. 270, 145 S. E. 436 (1923).
\textsuperscript{38} Hooper-Mankin Fuel Co. v. Shrewsbury Coal Co., supra, n. 23; Hoce, Plead. & Prac. 203; Navigation Co. v. Rice, supra, n 3; Guano Co. v. Appleing, supra, n. 3; Hargreaves v. Kimberly, 26 W. Va. 787 (1885); 24 R. C. L. 856; Tidewater Quarry Co. v. Scott, supra, n. 3.
\textsuperscript{40} Rolling Mill Co. v. Steel Mill Co., supra, n. 39; Gray v. Rollo, 18 Wall. (U. S.) 608, 21 L. ed. 927 (1873); Caldwell v. Stevens, 64 Okla. 287, 167 Pac. 610 (1917); Porter v. Roseman, 165 Ind. 265, 74 N. E. 1105 (1905); Mylius v. Massillon Engine & Thresher Co., 70 W. Va. 576, 74 S. E. 728 (1912); 34 Cyc. 634-39-40; Dade v. Irwin, 2 How. (U. S.) 383, 11 L. ed. 308 (1844); Jarrett v. Goodnow, 39 W. Va. 602, 20 S. E. 575 (1894); Harvey v. Ryan 59 W. Va. 134, 53 S. E. 7 (1906); White v. Moss, 88 W. Va. 1, 196 S. E. 72 (1921).
where the principal debtor is insolvent and to permit him to collect his claim from one to whom he is indebted might result in defeating the rights of such other to collect against him.\footnote{41}

Our statute providing for the making of equitable defenses at law, does not deprive equity of jurisdiction where equity would have had jurisdiction in the absence of such statute. The statute is remedial and cumulative of the common law.\footnote{42} The statutory remedy of set-off being cumulative of the common law does not in any wise restrict or limit the jurisdiction of courts of equity to administer or apply the remedy of set-off in the same manner and to the same extent as if the statute did not exist, nor is one required to give reason or excuse for failing to set-off at law under the statute in order to invoke the jurisdiction of a court of equity.\footnote{43}

In the prosecution of the remedies of recoupment and set-off the defendant has the affirmative, the claim of the plaintiff being admitted, the only question for determination is that arising on these cross demands. Upon the defendant is the burden of establishing his cross demand by a preponderance of the evidence in the same manner and to the same extent as he would be required so to do if he were prosecuting an independent cause of action therefor. This burden and responsibility carries with it, however, the right of his counsel to open and close the argument before the jury.\footnote{44}

The remedies of recoupment and set-off are controlled by the law of the forum. The right which a defendant may have to make cross demands, either by recoupment or set-off, is not compulsory. He may elect to do so or reserve the right to present his cross demands in an independent action. The common law right thus to do is not taken away by

\footnote{42} 24 Cyc. 634-39-40; Bias v. Vickers, supra, n. 13.
\footnote{43} Mylius v. Massillon Engine & Thresher Co., 70 W. Va. 576, 74 S. E. 729 (1912); White v. Moss, supra, n. 40; Harvey v. Ryan, supra, n. 40.
\footnote{44} Sammons & Piercy v. Hawvers, 25 W. Va. 678 (1885); Levine Bros. v. Mantell, supra n. 3.
reason of the statute, but where he elects to make cross demand by either remedy, judgment thereon is res adjudicata as to all matters and claims therein determined.

Recoupment and set-off are remedies and not pleas. They are independent causes of action and not defenses, but for them the prosecution of independent actions would be necessary. By and through them this is avoided, permitting cross demands between litigants to be settled and determined in one action. To skilfully apply these beneficent remedies is the exclusive function of the legal profession. May it so discharge this duty that these remedies may be enlarged and extended by statutory enactment.

Since the preparation of this article my attention has been called to specific recommendations made by Dean Arnold, Professor Simonton and Professor Havighurst of the faculty of West Virginia University Law School, contained in the Law Quarterly for December, 1929, with reference to joinder of claims and parties as appears, pages 44-51 of the Quarterly. Dean Arnold and his Committee have given very capable consideration to this very important subject of practice and have very skilfully developed the idea that joinder of parties litigant, plaintiff or defendant, should not be divorced from joinder of subject matter.

On this question I can envision much controversy; extending from that school of thought which believes that a legal contest should be limited to a single controversy exclusively between the interested parties; though another class believing that the limitation should apply only to parties with the right to determine between the parties more than one controversy, on to that still other class believing, as does Dean Arnold's Committee, that the necessity for any controversy should justify the unlimited joinder of parties, as well as subject matter. As a matter of practice, the subject matter

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45 Davis v. Noll, 38 W. Va. 66, 17 S. E. 791 (1893); BURK, PLED. & PRAC. 443.
of controversies may be extended so as to permit more than one independent cause of action to be determined so long as the subject matter is limited to parties who have a common and mutual interest in such controversies. Particularly is this true where the defendant has a demand which he desires to assert against the plaintiff that cannot properly be made the subject matter of set-off or recoupment. In such case the remedy of recoupment should be enlarged so as to give to the defendant the right to assert by cross demand against the plaintiff any unliquidated claim which he may have growing out of a breach not only of the contract sued on by the plaintiff but the breach of any other obligation on the part of the plaintiff, and be entitled to recover over against the plaintiff such amount as may be in excess of the plaintiff's claim. So far as Dean Arnold's Committee on proposed legislation extends in this respect I am willing to endorse unqualifiedly. I am aware of the fact that there are many in the profession that would be agreeable to extending the right of the defendant to recoup unliquidated damages in a tort action. While there may be virtue in this position, I am not now convinced of it. My consideration of the remedies of set-off and recoupment have not been set forth with any view of influencing legislation, but solely with the view to presenting the practical application of these remedies as they obtain in our practice today. In as much as both of these remedies find their basis in the subject matter of an independent cause of action to be asserted by the defendant against the plaintiff, they might well be superseded by simple statutory enactment, which would give to the defendant the right to assert against the plaintiff any demand which he may have, which may be made the subject matter of an independent cause of action and the relief to be obtained therein not limited by the amount of the plaintiff's demand. This would comprehend all rights of the defendant by set-off or recoupment and permit recovery over in that class of cases where the defendant's demand was for unliquidated damages and may have arisen out of a breach of a different contract from that sued on by the plaintiff.