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Recoupment–Set-Off-And Counterclaim

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that even though the plaintiff should proceed at law, nevertheless if he desires to waive the tort and sue in *assumpsit* as for money had and received, the court of law will not permit him to recover more than the amount of the defendant's enrichment.²⁷ The *Pentress Case* therefore presents the anomalous situation of a court of equity, under whose influence the courts of common law have moulded the quasi-contractual remedies to prevent unjust enrichment but not to penalize, adopting the harshest rule known to the law courts, the admitted purpose of which is to inflict a penalty.

—J. W. M.

RECOUPMENT—SET-OFF—AND COUNTERCLAIM.—At common law there was no right of set-off, but at an early date recoupment was invented and allowed to avoid circuity of action.¹ It was allowed in the assize of novel disseisin for rent which accrued during the disseisin and in a few other instances when the reduction claimed sprang immediately from the claim relied upon by the plaintiff,² but was very limited.³ In modern law the term has a broader signification. It is said to be "that right of the defendant in the same action to claim damages from the plaintiff either because he has not complied with some cross obligation of the contract upon which he sues, or because he has violated some duty which the law imposes upon him in the making or performance of that contract."⁴ "A defense by way of recoupment denies the validity of the plaintiff's cause of action. It is not an independent cross claim like a separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of or connected with the contract or transaction which forms the basis of the plaintiff's action. It goes only in abatement or reduction of the plaintiff's claim and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand."⁵ It is the right to set up and prove damages as a defense because of failure on part of plaintiff to perform his contract.⁶ In West Virginia the essentials of

²⁷ See Arthur L. Corbin, "Waiver of Tort and Suit in *Assumpsit*," 19 *YALE L. J.* 221, 239.

¹ *Baltimore & Ohio R. R. Co. v. Jameson*, 13 W. Va. 833 (1878); 4 *MINOR'S INST.*, 2 ed., 706.

² *Coulter's Case*, 5 Co. Rep. 30a (1598); *Baltimore & Ohio R. R. Co. v. Jameson*, *supra*.

³ *Baltimore & Ohio R. R. Co. v. Jameson*, *supra*.

⁴ *Dillon Beebe's Son v. Eakle*, 43 W. Va. 502, 27 S. E. 214 (1897).

⁵ *Christiancy, J.*, in *McHardy v. Wadsworth*, 8 Mich. 349 (1860).

⁶ *Parker v. Hart*, 32 N. J. Eq. 225 (1880); *Michigan Yacht Club v. Busch*, 143 Fed. 929, 936 (1906).

a valid recoupment are: (1) Damages may be unliquidated,⁷ (2) There is no recovery over against the plaintiff,⁸ (3) It is not available against the plaintiff's demand based on an instrument under seal,⁹ and (4) The damages sought to be recouped must be for a breach of the same contract, or transaction in an entire contract, as that upon which suit is brought by plaintiff.¹⁰ Originally recoupment seems to have connoted no more than the right to have payments or some fact equivalent to payment shown in mitigation of damages, and that the principle which permits the defendant to recoup damages arose long after the former was established. But beyond the extension of the principle to cover damages on the same contract, the common law courts refused to go, and this gave rise to statutory relief by way of set-off.¹¹

The first statute of set-off was enacted in Virginia in 1645 and is as follows:

“Be it enacted by the authorities of this present Grand Assembly for avoiding causes and suits at law, that where any suit shall be commenced in quarter court [Governor and Council] or county court, that if the defendant have either bill, bond or accompt of the plt. wherein he proves him debtor, that in such cases the court do balance accs. consideration being had and allowance given to the plt. for his charges who first began his suit, as alsoe to the time when such bills, bonds, accompts or demands were due to be compared with the accs. in balance, and this act to continue until the next assembly.”¹²

This statute was “amended the next year, and still further changed by acts passed in 1658 and March, 1662 By the last of these acts it was provided, when a suit should be commenced for a debt, if the defendant have a bill, bond or account of the plaintiff, such debt of the plaintiff shall be discounted out of the debt he claimeth of the defendant.”¹³ This latter act was supplanted by the Act of 1705 which gave defendant in an action for debt “liberty upon trial thereof to make all the discounts he can against such debt.”¹⁴ This latter act was in force in Virginia until the revision of 1849.

⁷ Baltimore & Ohio R. R. Co. v. Jameson, *supra*.

⁸ Baltimore & Ohio R. R. Co. v. Bitner, 15 W. Va. 455 (1879); Natural Gas Co. v. Healy, 33 W. Va. 102, 10 S. E. 56 (1889).

⁹ Baltimore & Ohio R. R. Co. v. Jameson, *supra*. *Quaere* as to the recent statute abolishing seals on deeds.

¹⁰ Logie v. Black, 24 W. Va. 1 (1884); Guano Co. v. Appling, 33 W. Va. 470, 10 S. E. 809 (1890); Dillon Beebe's Son v. Eakle, *supra*.

¹¹ Baltimore & Ohio R. R. Co. v. Jameson, *supra*.

¹² 1 HENING'S LAWS 294.

¹³ Green, President, in Baltimore & Ohio R. R. Co. v. Jameson, *supra*.

¹⁴ 3 HENING'S LAWS 378.

In England the first statute which gave to the defendant in an action a right of set-off was passed in 1729,¹⁵ and was only temporary, but it was reenacted in 1735¹⁶ and amended to read in part as follows:

“Mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall be truly and justly due to the plaintiff after one debt being set against the other as aforesaid.”

This statute was not repealed until the Statute Law Revision and Civil Procedure Act of 1883,¹⁷ and has had much influence in the Virginias in the development of the law of set-off, although the Virginia statutes were enacted at the earlier date.¹⁸ The present West Virginia statute¹⁹ provides that

“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 therewith, as to give the plaintiff notice of its nature, but not otherwise”

It would seem that this statute is broad enough to permit the offset of an unliquidated claim, but the very unfortunate use of the term “set-off” in the statute made it necessary to revert to the older statutes for its meaning with the result that “set-off” is confined to liquidated debts.²⁰ So in West Virginia the essentials of a valid set-off are: (1) The plaintiff’s demand must be in the nature of a debt,²¹ (2) The demand proposed to be set off must also be in the nature of a debt, and not a claim for unliquidated damages, but it may be either legal or equitable,²² (3) The demands must be due between the same parties,²³ (4) The debts must be due in the same right,²⁴ and (5) The debt to be set off must be

¹⁵ 2 GEO. II, c. 22.

¹⁶ 3 GEO. II, c. 24.

¹⁷ 46 & 47 VICT. c. 49.

¹⁸ “A set-off, in the proper sense of cross demand, [says Professor Minor] was at common law recoverable only by a separate action. As a defense it originated in the statute (8 Geo. II, c. 22) which enacted that where there are mutual debts between the plaintiff and defendant, ‘that is, debts due in the same right and between the same parties,’ one debt may be set off against the other.” 4 MINOR’S INST., 2 ed, 786.

¹⁹ W. VA. CODE, c. 126, § 4.

²⁰ See n. 18, *supra*.

²¹ Baltimore & Ohio R. R. v. Jameson, *supra*.

²² Webster v. Couch, 6 Rand. 519 (Va. 1828). Robertson v. Hogsheads, 3 Leigh 667 (Va. 1832); Harrison v. Wortham, 3 Leigh 296 (Va. 1837).

²³ Ritchie v. Moore, 5 Munt. 388 (Va. 1817).

²⁴ Glazebrook’s Adm’r. v. Ragland’s Adm’r., 8 Gratt. 333 (Va. 1851).

due and payable.²⁵ For the most part equity follows the law as to the doctrine of set-off with the exception that where irremediable loss would otherwise result, as in insolvency, the courts have been more liberal.²⁶ While set-off in West Virginia is limited to actions upon contracts and debts this is no exception to the almost universal rule not to allow set-off in tort actions,²⁷ and while liquidated contract demands under the statutes in other states can generally be set off there is hopeless confusion as to allowance of unliquidated claims.²⁸ Perhaps the underlying reasons for the statutes of set-off were the prevention of circuity of action and the injustice to the defendant in refusing him such relief, yet the singleness of the issue in pleading defeated, to a great extent, the desired end. To furnish a remedy in cases not covered by either the law of recoupment or by the statutes of set-off as developed, many jurisdictions have enacted statutes of counterclaim.

In England the statutes of set-off have been repealed and the right of set-off as it now exists is conferred by the Rules of the Supreme Court under the Judicature Act, as follows:

“A defendant in an action may set off or set up by way of counterclaim against the claim of the plaintiff any right or claim whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross claim. But the court or judge may, on the application of the plaintiff before the trial, if in the opinion of the court or a judge such set-off cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.”²⁹

“Where in any action a set-off or counterclaim is established as a defense against the plaintiff’s claim, the court or a judge may, if the balance is in favor of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.”³⁰

By this consolidation of the statutes of set-off and the right of counterclaim a remedy is provided for all cases which formerly fell under either the common law recoupment or the statutory

²⁵ *Clopton v. Morris*, 6 Leigh 278 (Va. 1835).

²⁶ *Feazle v. Dillard*, 5 Leigh 30 (Va. 1834); *Gilliat v. Lynch*, 2 Leigh 493 (Va. 1831); *Ragsdale v. Hagv*, 9 Gratt. 409 (Va. 1852).

²⁷ *Talbot v. Whipple*, 73 Mass. 122 (1856); *Dearing etc. Co. v. Thompson*, 156 Mich. 365, 120 N. W. 801 (1909); 24 R. C. L. 810-13; 24 L. R. A. (n. s.) 748.

²⁸ 34 Cyc. 693.

²⁹ R. S. C. (1883), Ord. 19, r. 3, reproducing R. S. C. (1875), Ord. 22, r. 10; 25 HALSBURY, LAWS OF ENGLAND, 487-488.

³⁰ R. S. C. (1883), Ord. 21, r. 17.

right of set-off, and there is permitted in addition a cross claim which did not exist under the statutes of set-off—*viz.*, for unliquidated claims, and the additional right of recovery to the defendant where formerly there was none—*viz.*, where in recoupment a balance is found to be due the defendant, and these rights are not confined to suits on contracts. The object of this procedure is certainly to cut down the number of suits and to encourage settlement of all controversies between the litigants, whether arising from contract or tort.

In the United States the statutes of counterclaim with minor variations follow the New York statute which reads as follows:

“The counterclaim, specified in the last section, must tend, in some way, to diminish or defeat the plaintiff’s recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more of the defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action, arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff’s claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.”³¹

“When a counterclaim is established, which equals the plaintiff’s demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff’s demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff’s demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff

. . . .’³²

While the counterclaim of the New York statute is not so broad as that allowed in England it is more comprehensive than prior statutory set-off, including unliquidated demands, and much broader than common law recoupment, including affirmative relief to defendant where his damages exceed those of the plaintiff.

The need of a counterclaim statute in West Virginia is apparent from the reading of a recent case.³³ It was an action in *assumpsit* for goods sold and the defendants sought to offset two counterclaims for damages for alleged breaches of the plaintiff’s contracts to sell and deliver to defendants certain other goods which, because

³¹ §501, N. Y. Code of Civil Procedure.

³² §503, *ibid.*

³³ *Van Raalte Co. v. Solof Bros. Co.*, 108 S. E. 488 (W. Va. 1921).

of such breaches, they had been obliged to purchase in the market at higher prices, whereby they were damaged in an amount greatly in excess of the plaintiff's claim against them. The counterclaims were disallowed, as they were unliquidated and arose out of different contracts. Conceding that the refusal of offset is sound under the West Virginia law, the injustice of causing the defendant to defend one suit, then of putting him to the trouble of bringing a separate suit to secure from the plaintiff what is justly his, offends against one's inborn sense of justice—especially since in this particular cause the defendant is driven out of the state to bring his suit because the plaintiff is a foreign corporation. Here is the cost and incident trouble of the defense of one suit, the expense and vexation of bringing and prosecuting a second suit,—to settle differences on contracts between identical parties, both of whom are before the court in the first instance. Life is too short, time is too precious, for laymen of this modern age of steam and electricity to submit tamely to injustice worked by the drily logical results of a decadent procedure. It is universally agreed that circuitry of action is undesirable, there is no policy against more modern expeditious methods, and until we secure through legislative enactment some of the simple ones, such as counterclaim, we may never hope to drown lay criticism of the technicality of the law, and injustice of our courts.

—C. R. S.

THE MODIFICATION OF AN EXISTING LEGAL RULE AS A DENIAL OF DUE PROCESS, EQUAL PROTECTION, OR FUNDAMENTAL PRINCIPLES OF RIGHT AND JUSTICE.—The majority opinion in the *Truax Case*¹ decided by the Supreme Court of the United States on December 19, 1921, holds unconstitutional a statute of the state of Arizona prohibiting the issuance of injunctions by courts for peaceful picketing during labor disputes. The decision, it is submitted, will challenge the attention of the legal profession and will give rise to at least the following questions:

1. Does this decision hold that one may, under the Constitution of the United States, have a vested interest in an existing legal rule, which prevents that rule from being modified, even as to subsequent transactions?

2. Does this decision hold that neither the chancellor nor the

¹ *Truax v. Corrigan*, 42 Sup. Ct. 124 (1921) Opinion by Chief Justice Taft. Associate Justices Holmes, Brandeis, Pitney and Clarke dissented.