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THE PLEADING OF COUNTERCLAIMS*
CHARLES E. CLARK AND LEIGHTON H. SURBECK

HISTORICAL OUTLINE

Recoupment. Under the doctrine of compensatio, known to the Roman Law, mutual debts could be set off against each other. At early common law, however, it seems that mutual cancellation of debts could only be had through an agreement between the parties—implied by the striking of an account, or expressed in the making of a compromise. By the time of Henry VIII, however, a defendant was allowed to introduce new matter which would tend to defeat or diminish the plaintiff’s recovery. This was known as recoupment. At first it was limited to a showing of payment, or of former recovery. Later, recoupment was developed so as to allow a defendant to show, for the purpose of reducing the plaintiff’s recovery, any facts, arising out of the transaction sued upon or connected with the subject thereof, which facts might have founded an independent action in favor of the defendant against the plaintiff. Thus,

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*This article will form a chapter in a book on Code Pleading to be published by the West Publishing Co., St. Paul, Minn.

1 "Probably in the sense that the deduction is made automatically without any mention of the counterclaim in the pleadings." BUCKLAND, ELEMENTARY PRINCIPLES OF ROMAN PRIVATE LAW (1912) § 161, at p. 385. See also 2 STORY, EQUITY JURISPRUDENCE (12th ed. 1877) 1440. It was necessary that the claims be (1) of the same nature, i.e., for quantities of money, corn, wine, etc.; (2) fully due; (3) liquidated; and (4) due to the person who offered it as a compensation. See BARBOUR, LAW OF SET-OFF (1841) 18. See generally LOYD, THE DEVELOPMENT OF SET-OFF (1916) 64 U. Pa. L. REV. 541-569. For the development of "compensatio" in modern civil law see 2 SHERMAN, ROMAN LAW IN THE MODERN WORLD (2d ed. 1924) § 741.

2 LANGDELL, BRIEF SURVEY OF EQUITY JURISPRUDENCE (2d ed. 1908) 118-120. Agreements to set off mutual indebtedness were specifically enforcible in equity. Jeffs v. Wood, 2 P. Wms. 128, 129 (1723). There are, however, some traces of a broader use of set-off. See Rohese Bindebere v. Ralph Bolay (Ct. of Bishop of Ely, 1322-3) SELDEN SOCIETY, THE COURT BARON 133 (Rohese called Ralph a thief; Ralph called Rohese a whore; therefore, both in mercy; but since the trespass done to Ralph exceeds that done to Rohese, he shall recover of her 12d. for his taxed damages).

3 Oliver v. Emsonne, 1 Dyer 1b (6 Hen. VIII).

4 3 SEDGWICK, DAMAGES (9th ed. 1912) § 1035.


6 WATERMAN, SET-OFF (2d ed. 1872) § 459.

7 It may "admit the plaintiff’s cause of action, and set up an affirmative cross-demand so that the sums awarded for each may satisfy one another," the plaintiff recovering only when his claim exceeded that of the defendant as established. See POMEROY, CODE REMEDIES (4th ed. 1904) § 733. Recoup-
in an action for work and labor, the defendant might prove that the work was improperly done; and, in an action for goods sold and delivered, damages could be recouped because of a breach of warranty. Similarly, rent accruing during disseisin could be recouped by a disseisor; and in an action upon one clause of a contract, recoupment has been allowed for a breach by the plaintiff of another clause of the same contract. It was not necessary that the opposing claims be liquidated, nor that they be of the same character, i.e., a claim in "tort" could be set off against one in "contract." It was essential, however, that the claims of both plaintiff and defendant involve the same "subject matter," or arise out of the "same transaction," and that they be susceptible of adjustment in the same action.

Equitable and statutory set-off. But where the defendant's claims arose out of a transaction different from that sued upon, common law recoupment was unavailable. The defendant, therefore, was compelled to bring a separate suit in order to satisfy his claim against the plaintiff. Equity at an early date relieved the defendant of this hardship by allowing a set-off of claims under certain circumstances, as, for example, where mutual credits existed, or where the plaintiff was insolvent or had acted fraudulently. Similarly, where one joint debtor was surety for the other, he was allowed in equity to set off debts due his principal from the plaintiff-creditor. By statute in 1705, set-offs were allowed at law in suits brought by insolvents; and, under a subsequent statute in 1729, mutual debts generally were allowed to be set off at law. But after the passage of these statutes, equity, unfortunately, confined the use of the set-off in equitable suits, except where special equitable grounds for rem,

8 Farnsworth v. Garrard, 1 Camp. 38 (1807); cf. Basten v. Butter, 7 East 479 (1806).
9 See Fisher v. Samuda, 1 Camp. 190 (1803).
10 Coulter's Cas. 5 Co. 30a (40 & 41 Eliz.).
11 Branch v. Wilson, 12 Fla. 543 (1868).
12 Still v. Hall, 20 Wend. 51 (N. Y. 1838).
13 Stow v. Yarwood, 14 Ill. 424 (1853).
14 See generally, 2 Story, op. cit. supra note 1, §§ 1435-1437.
15 (1705) 4 Anne, c. 17, § 11. A person indebted to such bankrupt was not compelled to "pay more than shall appear to be due on such balance." Such special matter could be given in evidence under the general issue. Ibid. § 14.
16 (1729) 2 Geo. II, c. 22, § 13; amended (1735) 8 Geo. II, c. 24 (providing that the debt set off might be given in evidence under the general issue if notice was given, or pleaded in bar).
17 The first set-off statute was passed in 1645 in Virginia. See (1922) 28 W. Va. L. Q. 139.
lieft were shown, to situations where the demands, had they been legal, could have been set off under the statutes.

Under the set-off statute, it was necessary that the demands either be liquidated, or arise out of contract or judgment. It was necessary, also, that the demands be due the defendant in his own right against the plaintiff, or his assignor, and be not already barred by the statute of limitations but existing and belonging to the defendant at the time of the commencement of the action. Set-off was available to the defendant only in actions founded upon such demands as might have been available as the subject of set-off by the plaintiff, had the action been brought by the defendant. Such set-off statutes were generally not repealed by the codes.

The code counterclaim. The counterclaim provision was not contained in the original New York codes of 1848 and 1849. It appeared, however, in the amendments of 1852. While designed to include both recoupment and set-off, the counterclaim is broader than the recoupment in that the defendant, in so far as his claim established at the trial exceeded that of the plaintiff, might recover an affirmative judgment against the

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17 See generally Story, loc. cit. supra note 14.


18 For the requirements of set-off see BARBOUR, op. cit. supra note 1, at 31; WATERMAN, op. cit. supra note 6, passim; cf. SUHS v. Homewood Rice Land Syndicate, 128 Ark. 19, 103 S. W. 271 (1917) (must be liquidated); Kaye v. Metz, 186 Cal. 42, 198 Pac. 1047 (1921) (must be due in same capacity). But see cases supra note 17 on set-off on equitable grounds.


plaintiff. It is also broader than the set-off in that the defendant's claim need not be "liquidated." Thus, in general, the code counterclaim is a cause of action arising out of the transaction set forth in the complaint; or, in actions founded upon contract, the counterclaim may be any other cause of action arising also out of contract.\textsuperscript{22}

Modern provisions in England. The English counterclaim procedure, inaugurated by the Judicature Act of 1873, has been developed far beyond the practice under the American codes. The English Rules of Court provide that the defendant may set up:

"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 a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."\textsuperscript{23}

These provisions, under liberal constructions motivated by the policy of encouraging the settlement of all disputes between the parties in one litigation, have been held to allow many counterclaims which are beyond the scope of those provided for in the usual American codes. Thus, in England, the defendant's counterclaim may be a cause of action accruing after the date of the writ; and it need not in any way be connected with the demand of the plaintiff.\textsuperscript{24} Nor need it arise out of the same transaction, or be a claim of the same nature as the plaintiff's.\textsuperscript{25} But, as pointed out in the next section, there is a tendency, which, although now limited to a few states, it is to be hoped may become general, to adopt provisions as broad as the English rules.

THE CODE PROVISIONS

Defenses and counterclaims. The codes, in general, provide that the defendant, in his answer, may set forth new matter constituting a defense or counterclaim,\textsuperscript{26} and that he may set

\textsuperscript{22} See code provisions \textit{infra} p. 306.

\textsuperscript{23} See \textit{The Annual Practice} (1927) Order 19, rule 3.

\textsuperscript{24} See Beddall \textit{v. Maitland}, 17 Ch. D. 174, 181, 182 (1881).

\textsuperscript{25} See Stooke \textit{v. Taylor}, 5 Q. B. D. 569, 576 (1880). See also cases cited in \textit{The Annual Practice} (1927) 321 \textit{et seq}.

forth as many defenses or counterclaims as he may have. Later sections discussed below limit the kinds of counterclaims which may be pleaded. In general there is contemplated a formal distinction between a defense and a counterclaim, and this is emphasized by the cases. Thus the counterclaim should be pleaded as such, and should be substantially complete in itself; it should contain all the elements of an affirmative cause of action, and should conclude with a prayer for affirmative relief. It is subject to attack by demurrer or motion on grounds substantially similar to those available against a complaint. In spite of this desire, however, to preserve the form of the counterclaim as practically an independent action stated in the answer, the courts say that the nature of the pleading, whether

27 It is generally provided that: "The defendant may set forth by answer as many defenses and counterclaims as he may have. They must be separately stated and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished . . . " Cal. C. C. P. (1923) § 441. See also, N. Y. Civ. Prac. Act (1926) § 262 (". . . whether they are such as were formerly denominated legal or equitable . . . "); Ohio Gen. Code (Page, 1926) §§ 11315-11316 (same); Gary Coast Agency v. Lawrey, 101 Or. 623, 201 Pac. 214 (1921).


No summons, however, is required upon a counterclaim or set-off. See, for example, Ky. Civ. Code (Carroll, 1927) § 97 (2). Otherwise upon cross complaint. Ibid. § 97 (3).


31 Thus objection may be made because of such matters as lack of jurisdiction of the subject of the counterclaim, lack of legal capacity in the defendant to recover, another action pending, because the counterclaim is not one properly interposed in the action and because the counterclaim does not state facts sufficient to constitute a cause of action. N. Y. Civ. Prac. Act (1926) rules 109, 110; cf. Utah Comp. Laws (1917) § 6587; Wis. Stat. (1921) § 2658.
defense or counterclaim, is to be determined by its intrinsic nature rather than by the name given it.\textsuperscript{32} It is often difficult to distinguish defenses from counterclaims. In a sense both are defensive, since both aim to defeat the plaintiff's recovery, though the counterclaim may, in addition, be offensive. The situation is rendered more difficult in view of the history connected with certain forms of defensive matter. Thus, recoupment was a defense at common law whereas it is now also treated as included in the counterclaim provisions.\textsuperscript{33} And as we have seen elsewhere,\textsuperscript{34} the question of the so-called equitable defense has proven especially troublesome. This was matter, usually of fraud or mistake, in its nature defensive as to a legal claim, but available before the codes only by an independent action in equity. Now such matter is pleadable in the answer in what was formerly the legal action. Historically, therefore, it would seem to be a counterclaim; analytically it would seem to be a defense. It has proven impossible to compel a view that either one or the other must necessarily be the only correct view.

The question may become important if, as recently in New York, the form of trial, whether by court or jury, is made to depend on the manner in which such matter is pleaded.\textsuperscript{35} But, as suggested in a previous article, this is not the usual view and is not a workable rule. The form of trial should depend on the issues and character of the question raised rather than on the form of pleading.\textsuperscript{36} Again, the question is of importance in those states which require a reply by the plaintiff only to a counterclaim.\textsuperscript{37} But here the rule is generally and properly


\textsuperscript{34} Clark, loc. cit. supra note 32; Cook, Equitable Defenses (1923) 32 Yale Law Journal 645.

\textsuperscript{35} Susquehanna Steamship Co. v. Anderson & Co., supra note 32, discussed in Clark, loc. cit. supra note 32.

\textsuperscript{36} Supra note 34; Clark, The Union of Law and Equity (1925) 25 Col. L. Rev. 1.

\textsuperscript{37} See N. Y. Civ. Prac. Act (1926) §§ 272, 494; Mont. Rev. Codes
followed that if the plaintiff has been misled by the form in which the matter was pleaded, he should at least have the opportunity to amend, even if not permitted to rely on such form.\footnote{Authorities supra note 34; Equitable Life Assur. Soc. v. Cuyler, 75 N. Y. 511 (1878); cf. Clark v. Kirby, 243 N. Y. 295, 153 N. E. 79 (1926); Turner v. Southeastern Grain & Live Stock Co., 179 N. C. 457, 102 S. E. 849 (1920).}

It would seem, therefore, that the distinction between defenses and counterclaims has been somewhat overemphasized in the cases: At most, objections to the form of pleading should be considered as they really are, merely formal, and waived if not raised immediately by the proper steps. And where, as in the case of equitable defenses, there is sound argument for either course, the defendant should be allowed to choose the form in which he phrases his pleading.\footnote{Ibid.; cf. Brown v. Tull, 65 Okla. 119, 164 Pac. 785 (1917) (defendant may elect to counterclaim for damages for non-performance rather than defend against any recovery due to failure to perform).}

The counterclaim provisions. Practically all the codes provide that:

“The counterclaim . . . must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of 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.”

This section will be referred to hereafter as the “transaction” clause.

Most of the codes also add:

2. In an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action.”

This section will be referred to as the “contract” clause.\footnote{The following codes contain both “transaction” and “contract” clauses: Ariz. Rev. Stat. (1913) § 480; Cal. C. C. P. (1923) § 438 (omitting “contract” from “1”); Idaho Comp. Stat. (1919) § 6695 (like Cal.); Minn. Gen. Stat. (1923) § 9254; Mo. Rev. Stat. (1919) § 1233; Mont. Rev. Code (1921) § 9138 (like N. Y. infra); Nev. Rev. Laws (1912) § 5047 (like Cal.); N. M. Ann. Stat. (1915) § 4116; N. Y. Civ. Prac. Act (1926) § 266 (“a counterclaim must tend 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}
"A set-off can only be pleaded in an action on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." 42

Inasmuch as decisions under the set-off statutes appear to be substantially the same as those under the contract clause, they will be discussed together with the cases arising under the contract clause.43

The Iowa code, in addition to the transaction and contract clauses, provides that a counterclaim may be

"any new matter constituting a cause of action in favor of the defendant, or all the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so pleaded." 44

In Connecticut there is a broad counterclaim statute, but the


In the following, "or connected with the subject of the action" is left out of the transaction clause: Alaska Comp. Laws (1913) § 896; Or. Laws (Olson, 1920) § 74. Wis. Stat. (1921) § 2656 (3) provides in addition: "Where the plaintiff is a non-resident of the state any cause of action whatever, arising within the state and existing at the commencement of the action, except that no claim assigned to the defendant shall be pleaded by virtue alone of this subdivision."


43 See infra p. 318.

44 Iowa Code (1927) § 11151 (1-3); infra note 88.
former set-off statutes are also continued, and the rules have apparently not been extended by the code.\(^46\)

In Indiana, a counterclaim

"is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff’s claim or demand for damages." \(^46\)

The Arkansas statutes as amended in 1917 appear to be much more liberal than the other codes.

"The counterclaim . . . may be any cause of action in favor of the defendants, or some of them against the plaintiffs, or some of them.” And “A set off may be pleaded in any action for the recovery of money and may be a cause of action arising either upon contract or tort.” \(^47\)

**Miscellaneous provisions.** A few codes provide that:

“If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff’s claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.” \(^48\)

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\(^{46}\) Conn. Gen. Stat. (1918) § 5635 ("cases where the defendant has either in law or in equity, or in both, a counterclaim, or right of set-off, against the plaintiff’s demand."). This applies only where there is a "right of set-off," or an "equitable claim allowed by the settled chancery practice." Lovell, Trustee v. Hammond Co., 66 Conn. 500, 34 Atl. 511 (1896); Harral v. Leverty, 50 Conn. 46 (1882); Downing v. Wilcox, 84 Conn. 437, 80 Atl. 288 (1911). For the Connecticut set-off statutes, see *supra* note 10.

\(^{47}\) Ind. Ann. Stat. (Burns, 1926) § 373; *infra* note 88.


See also Baker v. Eilers Music Co., 175 Cal. 652, 166 Pac. 1006 (1917) (where damages for eviction should have been pleaded as counterclaim in action for rent, same cannot be pleaded in subsequent action on notes); cf. Ward v. Goetting, 44 Cal. App. 435, 186 Pac. 640 (1919) (in suit by maker
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Where there is not such a statute, the defendant has the option of filing a counterclaim, or of bringing an independent action. Even in such a case, if the issue is the same on both the plaintiff's claim and the defendant's claim, the rule of res adjudicata will, it seems, apply to bar the defendant's action.

Often the counterclaim is expressly allowed in certain types of actions, but denied in others. And a few codes provide for

to cancel note, holder's cause of action to collect note is not within terms of compulsory counterclaim statute).


Holman v. Tjosevig, 136 Wash. 261, 239 Pac. 545 (1925), noted in (1926) 39 HARY. L. REV. 658; Bellinger v. Craigue, 31 Barb. 534 (N. Y. 1860); Watkins v. American Nat'l Bank, 134 Fed. 36 (C. C. A. 8th, 1905); 8 A. L. R. 725-735 (1920) annotation. But see Jones v. Witousel, 114 Iowa 14, 86 N. W. 59 (1901); (1920) 29 YALE LAW JOURNAL 795. The question has at times been raised where equitable defenses are pleaded as counterclaims. Here the cases are in some conflict, due largely to divergent views as to the nature of such defenses. See discussion, (1924) 33 YALE LAW JOURNAL 863, 864, nn. 16, 17; (1922) 22 COLO. L. REV. 180; (1924) 37 HARY. L. REV. 629. The question will also depend upon the nature of the first judgment. Thus, in a collision case, a judgment for the plaintiff establishes his lack of negligence and will bar a subsequent action for negligence by the defendant; a judgment for the defendant does not establish the plaintiff's negligence and has been held not to bar a later suit by the defendant. Seager v. Foster, supra note 49; 3 A. L. R. 695 (1920) annotation.


injunctions and provisional remedies on the counterclaim.

Counterclaims in the reply are expressly allowed by the Kentucky code; but in most codes these are not allowed unless arising out of some matter set forth in the answer.

**Must the counterclaim reduce the plaintiff's recovery?** The codes of Indiana, Montana and New York expressly require that the counterclaim must tend, in some way, to diminish or defeat the plaintiff's recovery. Even without such a statute, this requirement seems quite extensively applied with the result that a counterclaim will not be allowed unless it meets squarely the judgment the plaintiff claims. Thus, in an action on a judgment, a counterclaim to set aside a deed is not allowed; and in an action for a foreclosure, where no money judgment was claimed, a set-off counterclaim for a breach of covenant was refused.

This requirement seems in line with the older view of counterclaims, and like the restrictions involved in the terms "transactions" and "connected with the subject of the action," it seems

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56 Baitzol v. Rhinelander, 179 App. Div. 735, 167 N. Y. Supp. 343 (1st Dept. 1917); Imperial Elevator Co. v. Hartford Accident & Indemnity Co., 163 Minn. 481, 204 N. W. 531 (1925); cf. Green v. Harris, 113 Wash. 259, 193 Pac. 690 (1920) (suit to foreclose mortgage; counterclaim for labor and materials—plaintiff allowed to set up demand for money as off-set to counterclaim).


58 Dietrich v. Koch, 35 Wis. 618 (1874); National Fire Ins. Co. v. McKay, 21 N. Y. 191 (1860); Cook-Reynolds Co. v. Wilson, 67 Mont. 147, 214 Pac. 1104 (1923) (suit to enjoin harvesting crop, counterclaim for proceeds thereof denied because it did not diminish plaintiff's recovery); Bannorot v. McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (N. S.) 126 (1907) annotation. Compare, for example, Equitable Life Assur. Soc. of U. S. v. Filliate, 127 Misc. 66, 215 N. Y. Supp. 277 (Sup. Ct. 1926) (suit to rescind policy—counterclaim for disability thereunder denied because it did not "diminish" or defeat plaintiff's recovery) with East Lake Lumber Co. v. Van Gorder, 169 N. Y. Supp. 266 (Sup. Ct. 1918) (suit to cancel stock—counterclaim allowable for unpaid dividends because establishment thereof would tend to "defeat" plaintiff's claim). Cf. also Southeastern Life Ins. Co. v. Palmer, 120 S. C. 499, 113 S. E. 310 (1922) (suit to cancel policy—counterclaim for proceeds allowed because "same transaction").
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to be reminiscent of the common law recoupment. As no affirmative judgment could be had against the plaintiff in recoupment, it was available only to the extent of defeating the plaintiff’s recovery. Consequently it was not available in actions for relief other than money payment, i. e., in replevin or ejectment. Such a restriction, though sometimes applied, would seem out of place under the codes. Further, under the codes the defendant may have affirmative judgment against the plaintiff for any excess, or may defeat the plaintiff’s claim and recover on his counterclaim. And where the plaintiff has dismissed his action, or failed to appear, the defendant, under many codes at least, may still proceed to the trial of his counterclaim.

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59 Cf. discussion of transaction clause, infra p. 312.
60 See discussion supra p. 300, 301 under recoupment.
64 See, for example, Ky. Civ. Code (Carroll, 1927) § 387 ("If the defendant establish a set-off or counterclaim, and the plaintiff fail in his action . . . judgment shall be rendered for the defendant accordingly"). See Herring-Hall-Marvin Safe Co. v. Purcell Co., 91 Wash. 662, 663, 158 Pac. 477 (1916).
65 Ark. Dig. Stat. (Crawford, 1921) § 6236; CONNECTICUT PRACTICE BOOK (1922) 294, § 214; Iowa Code (1927) § 11564; Ky. Civ. Code (Car-
The requirement, therefore, though so generally applied, would seem to have doubtful logical or practical support at the present time.

Counterclaim beyond the jurisdiction of the court. Since the defendant may have an affirmative judgment in his favor on his counterclaim, he may desire to plead a claim in excess of the jurisdiction of the court in which it is offered. Under some codes he may do this and then remove the case to a court of higher jurisdiction. In general, he may at least use the claim defensively so far as is necessary to equal the plaintiff's claim; but there is a conflict whether he thereby waives his opportunity to bring a subsequent suit for the balance.

THE TRANSACTION CLAUSE

The transaction clause would appear to sanction at least three classes of counterclaims, namely, causes of action arising out of (1) the “contract,” (2) the “transaction set forth in the complaint as the foundation of the plaintiff’s claim,” and (3) those “connected with the subject of the action.” The problem, then, has a general similarity to that concerning the somewhat similar phrases in connection with joinder of causes of action.

Considering “cause of action” as referring to that group of operative facts which give ground for judicial action, the “found-


Some codes provide that the plaintiff may not dismiss his action where a counterclaim has been filed. Idaho Comp. Stat. (1919) § 6830; Or. Laws (Olson, 1920) § 182; Utah Comp. Laws (1917) § 6348; Wyo. Comp. Stat. Ann. (1920) § 5879.


Defendant can take a non-suit on a counterclaim under the contract clause, but not on a counterclaim arising out of the transaction sued upon. Cohoon v. Cooper, 186 N. C. 26, 118 S. E. 834 (1923).


See code provisions set forth supra note 41.


dation of the plaintiff's claim" may well be defined as compris-
ing the more material facts of that group of facts set forth in
the complaint. The defendant's cause of action, as set forth
in the counterclaim, must "arise out of" such "material facts," not
in the sense that the existence of these material facts may
have been the inducement or the motive for the commission
of the acts complained of by the defendant, but in the sense
that some or all of such "material facts," as stated in the com-
plaint, are also common to, and form a part of, the operative
facts set forth in the answer as an independent cause of action—
"counterclaim"—against the plaintiff and in favor of the defen-

The choice of common operative facts, however, is expressly
limited under the transaction clause to only those facts which
comprise the "contract" or "transaction" set forth in the com-
plaint. "Contract" is thus used to refer to the course of negotia-
tions culminating in the agreement sued upon.\footnote{Thus, in a suit for rent, a counterclaim for the conversion of the defendant's oats, grown by permission on other land of the plaintiff to feed teams for harvesting crops on the leased premises, was deemed to grow out of the negotiations leading up to the lease sued upon. Brunson v. Teague, 123 Ark. 594, 186 S. W. 78 (1916) (under old code provision—see supra note 47). Similarly, in a suit for the breach of covenants in a lease, a counterclaim for the value of hay delivered by the lessee to a vendee of the lessor was held to arise out of the lease, being a part of the dealings relating to the crops. Gentry v. Krause, 106 Wash. 474, 180 Pac. 474 (1919). See also, McNell-Randolph Holstein Farms v. McNell, 203 App. Div. 177, 204 N. Y. Supp. 597 (4th Dept. 1924); Southeastern Life Ins. Co. v. Palmer, supra note 73.}
“transaction” would seem to offer great flexibility. Obviously, being separated from the word “contract” by “or,” it is not limited to contractual negotiations. It is concededly much more inclusive. But how much more is conjectural. Conceivably, “transaction” might include all those facts which a layman would naturally associate with, or consider as being a part of, the affair, altercation, or course of dealings between the parties.

Similarly, the phrase “connected with the subject of the action” might plausibly be understood to allow, as a counterclaim, any cause of action which, although not a part of the plaintiff’s transaction, would, upon trial, raise issues which are so like those raised by the complaint that justice and expediency would require that they should be tried together.

Viewing the transaction clause from this approach, the terms—“contract,” “transaction,” and “subject of the action”—each in succession permit of a broader counterclaim than the next preceding term, blending their scope well within that of the next succeeding term so that there is no natural demarcation between them. Nor would it seem desirable to attempt to de-

75 Bryant, op. cit. supra note 62, at 261; Fort Worth Lead & Zinc Co. v. Robinson, 89 Okla. 221, 215 Pac. 205 (1923); Comment (1924) 33 Yale Law Journal 862, 864.


77 See, for example, Elevator Automatic Signal Co. v. Bok, 169 N. Y. Supp. 13 (Sup. Ct. 1916); Studebaker Corp. of America v. Hanson, 24 Wyo. 222, 160 Pac. 336 (1916) (action for repairs on defective car—counterclaim breach of warranty); Union Ferry Co. v. Fairchild, 106 Misc. 324, 176 N. Y. Supp. 251 (Sup. Ct. 1919) (suit to quiet title to ferry—counterclaim for rent under lease for same); Pickwick Stages v. Board of Trustees of City of El Paso de Robles, 189 Cal. 417, 208 Pac. 961 (1922) (suit for interference with plaintiff’s franchise—counterclaim for interference with defendant’s local franchise over same route).

78 Consequently, in allowing a counterclaim, courts usually state that it arises out of the transaction and that it is also connected with the subject matter. See, for example, Neely v. Wilmore, 124 Ark. 460, 187 S. W. 637 (1916) (under old code provision); Pollack v. Leonard & Braniff, 112 Okla. 276, 241 Pac. 158 (1925); Coppola v. Di Benedetto, 127 Misc. 276, 215 N. Y. Supp. 722 (Sup. Ct. 1926). Similarly, where a court denies a counterclaim, the decision is usually announced by stating both that the counterclaim does not arise out of the transaction and that it is not connected with the subject of the action. See, for example, White v. Greenwood, 52 Cal. App. 737, 199 Pac. 1095 (1921); Damron v. Sowards, 203 Ky. 211, 261 S. W. 1093 (1924); First Guaranty Bank v. Rex Theater Co.
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limit separately the sphere of each term by abstract definitions, or to admeasure their respective scopes with reference to whether the action or counterclaim be ex contractu or ex delicto. Minute definitions would seem devoid of utility as they necessarily vary from case to case. And classifications based upon "tort" or "contract" forms of action would not seem to be sufficiently fundamental to be particularly helpful in predicting the propriety of a given counterclaim. Any attempt at such classifications gives rise to an ever-increasing number of categories with technical demarcations which, in their application, tend to obscure the true function of the counterclaim which, presumably, is to enable litigants to settle in one suit as many controversies as feasible. For example, some courts have denied the counterclaim in collision, and assault and battery cases professedly on the ground that "transaction" refers to business


79 See Mulcahy v. Duggan, supra note 73. But see classifications set forth in Pomeroy, op. cit. supra note 7, §§ 783-790; Kerr, Counterclaim Founded in Tort (1922) 95 CENT. L. J. 27.


negotiations; and in replevin, ejectment, and suits to quiet title, because the "transaction" was the "wrongful detention" or plaintiff's "right to possession," or the "right" sued upon. Other courts, however, have allowed counterclaims in such actions on the ground that they arose out of the fact transaction set forth in the complaint. Thus it would appear that the liberality with which the facts constituting the transaction are selected depends largely upon the individual case.

The only test which can be consonant with the function of the counterclaim is whether or not the particular counterclaim could, in the court's discretion, be expeditiously tried with the plaintiff's case. Such is the sole test under the English Rules of Court. This practice has been approached in Kansas under a set-off statute and in Arkansas and Iowa where the counterclaim is not limited by the "transaction clause."

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85 Cf. Mulcahy v. Duggan, supra note 73.

86 See supra notes 23-25; cf., as to New Jersey, supra note 47.

87 Ruby v. Baker, 106 Kan. 855, 190 Pac. 6 (1920) (action for assault against six defendants—counterclaim by one defendant for alienation of affections; on rehearing, the court indicated that the counterclaim, being for money, need not arise out of the transaction). See the provisions of this statute set forth supra note 42.

88 See statutes supra notes 44, 47; Coates v. Milner, 134 Ark. 311, 203 S. W. 701 (1918); Newlin v. Webb, 150 Ark. 5, 233 S. W. 826 (1921); cf. Smith v. Glover, 135 Ark. 531, 205 S. W. 891 (1918); Dolan v. Buckley, 197 Iowa 1365, 199 N. W. 302 (1924) (counterclaim need not arise out of the "transaction"). Cf. also, the Indiana provision, supra note 46, which appears to have been construed, however, as though it contained the term
But under the usual code provisions the development of the "convenience of trial" test seems to have been unduly hampered by a tendency to adhere to the former practice. This may be due in part to judicial inertia, and in part to the terms in which the counterclaim provisions were phrased. The same terms—"transaction" and "subject matter"—were familiar to the common law in an analogous and somewhat similar capacity. As we have seen in the previous section, they were frequently used in delimiting the use of the recoupment to situations where it tended in some way to diminish or defeat the plaintiff's recovery, and these restrictions have unfortunately been continued in many decisions under the codes. Thus, where the case is somewhat beyond the recoupment "transaction," courts have been wont to deny the counterclaim as not "arising out of the transaction," or as not being "connected with the subject of the action," although the rejected counterclaim would appear to fall well within the broad and comprehensive language in which the same court may have rephrased these terms when passing upon a counterclaim, the allowance of which required little if any extension of the common law recoupment "transaction." 59

59 For liberal construction, see cases supra, especially in notes 73, 74, 76, 77; also Moore v. N. Y. Cotton Exch., 270 U. S. 593, 46 Sup. Ct. 557 (1926) (suit to cancel contract under the Sherman Act; counterclaim for injunction against purloining quotations allowed); N. Y. Trust Co. v. Am. Realty Co., 244 N. Y. 209, 155 N. E. 102 (1920) (action on note for purchase price of land; counterclaim for breach of trust by director in selling land to the corporation allowed; disapproving of Vulcan Metals Co. v. Simmons Mfg. Co., 248 Fed. 853 (C. C. A. 2d, 1918)); Black v. Stuckey, 47 Cal. App. 95, 190 Pac. 217 (1920) (foreclosure and suit on note; counterclaim for overpayments); Tage v. Tage, 36 Idaho 472, 211 Pac. 548 (1922) (action on note for purchase price of ditch; counterclaim for injunction and damages for injury to same); Hutchings v. Dean, 11 Ky. L. Rep. 310 (1889) (suit for conversion of sacks delivered to be filled
But there would seem to be no reason of practical convenience thus to restrict the counterclaim under modern codes which have professedly abolished the old common law technicalities that curbed the use of the recoupment. The code “transaction” should likewise be limited only where, and to the extent that, expediency of trial in the particular case outweighs the desirability of settling all controversies between the litigants in the one suit.\footnote{See generally, Comment (1924) 33 YALE LAW JOURNAL 362; (1924) 24 Col. L. Rev. 321; Rothschild, New York Civil Practice Simplified (1927) 27 Col. L. Rev. 258, 282; (1915) 14 Mich. L. Rev. 66; (1925) 3 Wis. L. Rev. 289; (1926) 4 ibid. 45. Cf., as to Joinder of Causes, supra note 70. The extension of provisions for the consolidation of suits may widen the possibility of counterclaiming. Cf. Gibbs v. Sokol, 216 App. Div. 260, 214 N. Y. Supp. 533 (4th Dept. 1926); see Clark, op. cit. supra note 70, at 430.}

THE CONTRACT CLAUSE

The “contract” clause provides that in actions “arising out of contract” counterclaims consisting of “any cause of action arising also out of contract” may be interposed. While the scope of this section partially overlaps that of the contract provision contained in the transaction clause, which precedes it, it differs in that the contract set forth in the counterclaim need not arise out of the “same transaction” as the contract pleaded in the complaint. They may be wholly independent, comprising entirely unrelated transactions.\footnote{See, for example, Strong v. Nelson, 38 N. D. 385, 165 N. W. 511 (1917); Mowatt v. Shidler, 66 Okla. 303, 168 Pac. 1169 (1917).} In this respect the clause is similar to the set-off statutes.

The set-off statutes in use prior to the codes allowed mutual demands to be off-set. This procedure was especially commendable, as little inconvenience at trial was thereby incurred because the claims set off were required to be “liquidated.” But the counterclaim, being broader in that it also sanctions unliquidated claims,\footnote{Thayer-Moore Brokerage Co. v. Campbell, 164 Mo. App. 8, 147 S. W. 545 (1912) (action on a note—unliquidated demand may be counterclaim, but not “set-off”).} if altogether unlimited might often prove unduly burdensome at trial. Under the transaction clause, the added burdens at trial incidental to the liquidation of counterclaims are likely to be more than compensated for by the advantages gained through trying in the one suit all manner of mutual claims based upon the same set of facts. No such expediency, however, war-
rants the use of the contract clause, for the counterclaims there-
under usually arise out of altogether different transactions.\textsuperscript{94} It
is true that perhaps the best practice under such codes as the
English would be to permit the filing of all such counterclaims
and allow the court to order separate trials. But such is not the
practice under the ordinary codes, and it must be expected, there-
fore, that the scope of this provision will be reasonably limited.

If the provision is to be given a strictly technical construction,
its phrasing would be unfortunate; it would be the resurrection
of the old forms of action—supposedly buried by the first pro-
visions of the code—thereby reviving the many mooted technical
differences between ex contractu and ex delicto, and thus making
the allowance or disallowance of a counterclaim often hinge
upon the form of the pleading without regard to the feasibility
of trying the particular counterclaim.

"Contract" might well be construed, however, as suggested
in the discussion under the "transaction clause," as a transaction
comprising negotiations which culminate in an agreement. And
a cause of action might be deemed as "arising out of" such a trans-
action when it presents issues which, from the standpoint
of convenience of trial, seem similar to those such as were
formerly triable in any of the contract actions.\textsuperscript{95} This construc-
tion, although not in terms adopted, finds support in the deci-
sions. Thus, where the defendant counterclaims for the breach
of an express agreement, although he may phrase his allega-
tions in such terms as "negligently," "fraudulently" or
"converted," the claim is usually deemed, for counterclaim
purposes, to have arisen out of a contract transaction.\textsuperscript{96} Sim-

\textsuperscript{94} Cf. Woolson Spice Co. v. Columbia Trust Co., 193 App. Div. 661, 184
N. Y. Supp. 484 (1st Dept. 1920) ("wholly unrelated" counterclaim denied
because it tended to prejudice plaintiff by unnecessarily complicating the
issues).

\textsuperscript{95} I. E., "implied contract" claims. See, for instance, Hinds & Lint
(counterclaim for "money had and received" paid by defendant's agent
to plaintiff on gambling contract); La Grand Nat'l Bank v. Oliver, 84 Or.
582, 165 Pac. 682 (1917) (counterclaim on "implied" agreement to pay
for crops, on which defendant had a lien, taken by plaintiff under chattel
552 (4th Dept. 1926) (counterclaim on an arbitration award).

Counterclaims are allowable where the plaintiff's action is upon "implied
(Sup. Ct. 1917). Or upon a statute. Whittier v. Visscher, 189 Cal. 450,
209 Pac. 23 (1922). Or upon appeal or attachment bonds. Brecher v.
Morres, 199 N. Y. Supp. 746 (1st Dept. 1923); Myers v. Mathiscon, 207
Mo. App. 676, 232 S. W. 181 (1921).

\textsuperscript{96} "Negligently": Russell v. Union Machinery & Supply Co., 88 Wash.
532, 153 Pac. 341 (1915); Meadow Valley Land & Inv. Co. v. Manerud,
81 Or. 303, 159 Pac. 559 (1916); Farmers' Union Mercantile Co. v. An-

ilarly, where the plaintiff has "tortiously," in the absence of an
express agreement, taken or received a benefit for which a
quantum meruit compensation should be allowed, the defendant
may counterclaim for re-imbursement. The plaintiff's claim
must also be considered to be one in contract in order that the
counterclaim may be received.

In general, therefore, it may be said that any cause of action
which formerly might have founded a cause of action upon ex-
press or implied contract can now be offered as a counterclaim
under the contract clause. This, however, cannot be regarded as
an inflexible rule. In fact, in some instances, its technical
definiteness and certainty of application becomes illusory, and
the results, from a practical standpoint, seem unsatisfactory.
Thus, where the facts of the case, together with the defendant's
demands for relief, indicate that consequential—so-called ex
delicto—damages are sought, as distinguished from quantum
meruit compensation, the counterclaim is disallowed. Such a

769, 202 N. Y. Supp. 752 (Sup. Ct. 1923).

97Jansen v. Dolan, 157 Mo. App. 32, 137 S. W. 27 (1911) (plaintiff took
and used wagon and harness; counterclaim allowed for reasonable use value,
but not for damages for "conversion"); Casner v. Hoskins, 64 Or. 254,
130 Pac. 55 (1913); Farmers' and Merchants' Nat'l Bank of Hobart v.
Huckaby, 89 Okla. 214, 215 Pac. 429 (1923) (the counterclaim for money
had and received was for money fraudulently obtained by the plaintiff
from the defendant).

98 Thus, where the plaintiff's claim, although arising out of express con-
tract, could found an action for tort damages, any counterclaim arising
out of a separate transaction is likely to be denied unless the plaintiff
"waive" the tort. Grus v. Fortoul Film Corporation, 182 N. Y. Supp.
23 (Sup. Ct. 1920) (false representation as to quality of goods shipped).
Supp. 373 (1st Dept. 1926) (replevin and damages for retention of goods
delivered to defendant for manufacturer); see George Haiss Mfg. Co.
claim tried by consent of parties). Compare, however, Pareclette v.
Record Mfg. Co., supra note 95, where the plaintiff's action was for the
restoration of money fraudulently obtained, and a counterclaim for com-
missions was allowed. Again, where the plaintiff's cause of action is such
that it could be either for quasi-contractual reimbursement or for "tort"
damages, a counterclaim is generally denied on the ground that the plain-
tiff cannot be compelled to "waive" his right to "tort" damages. Allis-
Chalmers Mfg. Co. v. Amenia Seed & Grain Co., 209 N. W. 234 (N. D.
1926); Cunningham v. Long, 154 Wash. 433, 235 Pac. 964 (1925); Wolver-
ton v. Baker, 111 Okla. 239, 239 Pac. 623 (1925); Roney v. Halvorsen Co.,
29 N. D. 13, 149 N. W. 688 (1914).

99 Abraham v. State, 244 Pac. 741 (Okla. 1926); Farmers' Cash Union
v. Elswood, 248 Pac. 477 (Utah, 1926); cf. Robison v. Robison, 59 Utah
215, 203 Pac. 340 (1921). Thus, the counterclaim is denied where the
plaintiff has received no admeasureable benefit, and the defendant's claim
is one solely for damages for a wrongful act of the plaintiff. Title Ab-
distinction seems of doubtful value except in so far as the
ascertainment of such damages becomes relatively more burde-
some. Considerations of relative trial convenience would seem
of more importance in determining the propriety of counter-
claims submitted under this clause.

Existence at commencement of suit. Counterclaims under the
contract clause are expressly restricted to those existing at the
commencement of the suit. No such restriction appears in the
transaction clause. Consequently, it has been held sufficient
in the case of a transaction counterclaim, or at least one which is
not also a contract claim, that it be mature at the time of trial.

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stract Co. v. Nasburg, 58 Or. 190, 113 Pac. 2 (1911); Bank of Houston v.
Kirkman, 156 Mo. App. 309, 137 S. W. 38 (1911); Liles v. Harris-Grimes
Co., 76 S. E. 115 (S. C. 1912) (no counterclaim that plaintiff, as a competi-
tor, conspired to injure defendant's business); Farmer v. Dalin, 23 N. D.
452, 149 N. W. 354 (1914) (no counterclaim for conversion, trespass to
realty, and ejectment); Hoeven v. Morley, 36 S. D. 421, 155 N. W. 191
(1916) (wrongful attachment of defendant's auto); Ogjhinovich v. Skujle,
250 Pac. 238 (Or. 1926) (damage to defendant's car). And in an action
on a note, a counterclaim on a separate transaction to "reform" an in-
strument, and to recover thereunder as "reformed" was held to be a
counterclaim arising out of "tort." Dessar v. Gunther, 98 Misc. 319, 162
N. Y. Supp. 794 (Sup. Ct. 1917).

See statutes set forth supra note 41. Stockham v. Leach, 233 S. W.
853 (Mo. 1922); Steelman v. Oregon Dairymen's League, 97 Or. 535,
192 Pac. 790 (1920); Beams v. Young, 92 Okla. 294, 222 Pac. 932 (1923);
McColl v. Cottingham, 124 S. C. 389, 117 S. E. 415 (1923); Lappin v.
Martin, 71 Mont. 233, 228 Pac. 763 (1924); Williams v. Williams, 192 N.
C. 405, 135 S. E. 39 (1926); cf. Del Monte Ranch Dairy v. Bernardo, 174
Cal. 757, 164 Pac. 623 (1917) (failure to allege due at commencement of
suit cured by aider by verdict). The codes of Arkansas, Indiana, Kansas,
Kentucky, and Ohio do not appear to contain this requirement.

Sattler v. Neiderkorn, 209 N. W. 607 (Wis. 1926); Town of Stinnett
v. Noggle, 148 Wis. 605, 135 N. W. 167 (1912); Smith Co. v. French, 141
N. C. 1, 53 S. E. 435 (1906); Wilson v. Curran, 190 App. Div. 531, 180
N. Y. Supp. 337 (2d Dept. 1920); Andron v. Funk, 194 App. Div. 258,
185 N. Y. Supp. 159 (1st Dept. 1920); Gatewood v. Fry, 183 N. C. 415,
111 S. E. 712 (1922); Suttevant v. Dowson, 222 Pac. 294 (Or. 1921), on
rehearing rev'd 110 Or. 155, 219 Pac. 802 (1923). Note (1924) 3 Ok. L.
Rev. 253.

Where, however, the counterclaim, although arising out of the same
transaction, is a contract claim which will not mature until after the suit
is commenced, the court is likely to treat it as though it were within the
contract clause instead of the transaction clause, and disallow it on account
of this limitation. See, for example, Pezenik v. Greenberg, 94 Miss. 192,
167 N. Y. Supp. 1093 (Sup. Ct. 1916); Thebold v. Gotham Waist Co., Inc.,
169 N. Y. Supp. 498 (Sup. Ct. 1918); Bessire & Co. v. Corn Products
Cockrell, 286 S. W. 405 (Mo. App. 1926); Cook & Woldson v. Gallatin
R. R., 23 Mont. 509, 73 Pac. 131 (1903); cf. Gurske v. Kolpin, 61 Neb. 517,
85 N. W. 557 (1901).
Undoubtedly these restrictive provisions seek to prevent the defendant, upon notice of suit, from buying up contract claims against the plaintiff—a danger obviously not so prevalent under the transaction clause. Technical adherence to this limitation, however, tends to defeat the ultimate purpose of the counterclaim, for it often prevents the settlement of bona fide claims already owned by the defendant before suit, but not maturing until after commencement of suit. It would seem that if the cause of action be viewed as the operative facts giving grounds for judicial relief, the existence of most of such facts in favor of the defendant at the time the suit is started could plausibly be held to satisfy this provision. In fact, as discussed later in connection with assigned counterclaims, some jurisdictions hold it sufficient that the claim, although not mature at the commencement of the suit, be then owned by the defendant in good faith, if mature when pleaded.

Statute of Limitations. The codes of Iowa, Kansas and Oklahoma expressly provide that if the counterclaim was available at the time the plaintiff’s cause of action first accrued, the defendant shall not be deprived of the use thereof because of the Statute of Limitations. In the absence of such provisions, a cause of action barred by the Statute of Limitations cannot be set up as a counterclaim except where it is tantamount to a recoupment.

102 In Argonia Oil & Gas Co. v. Wasson, 111 Kan. 124, 206 Pac. 320 (1922), the court denied the use of a demand purchased after suit was commenced although the Kansas code does not contain such express limitations in the contract clause.

103 See, for instance, Theobold v. Gotham Waist Co., supra note 101 (suit June 8th, note held by defendant maturing Aug. 14th); Dreidlein v. Manger, 69 Mont. 155, 220 Pac. 1107 (1923) (defendant cannot counterclaim on judgment, obtained in another suit, after commencement of instant suit).

104 Cf. Iowa Code (1927) § 11151-3, and see discussion below.

105 Iowa Code (1927) § 11019 (if owned by defendant when barred, and not barred at time when claim sued upon originated); N. M. Ann. Stat. (1915) § 3357 (similar); Kan. Rev. Stat. (1923) § 60-715 (when cross demands have existed, neither party shall be deprived thereof by death, assignment, or statute of limitation); Okla. Comp. Stat. (1921) § 274 (defendant’s claim not barred by statute of limitations until plaintiff’s claim has been barred); Secor v. Silver, 165 Iowa 573, 146 N. W. 845 (1914); Stauffer v. Campbell, 30 Okla. 76, 118 Pac. 391 (1911). Wis. Stat. (1921) § 4228, however, expressly provides that claims barred by the statute of limitations shall not be used as counterclaims, and N. Y. Civ. Prac. Act (1926) § 61 that such claims cannot be used effectively as either defense or counterclaim.

106 Fish v. Conley, 129 Misc. 388, 221 N. Y. Supp. 379 (Sup. Ct. 1927); Huggins v. Smith, 141 Ark. 87, 216 S. W. 1 (1919); Williams v. Neeley, 134 Fed. 1 (C. C. A. 8th, 1904). Some courts, however, have been rather strict in defining “recoupment” for this purpose. First National Bank of
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Most codes provide only that the counterclaim must be "one existing in favor of a defendant and against a plaintiff between whom a several judgment may be had."\(^{107}\) Thus the addition of a counterclaim to the answer, unlike the addition of a new cause of action to the complaint,\(^{108}\) would not appear to be restricted to situations where the new cause of action affects all parties to the original suit.\(^{109}\) Practical considerations, however, have imposed substantially this restriction, for the added prejudices and burdens of trial incidental to the allowance of a given counterclaim are usually not compensated by resultant advantages to the litigants and gains to the public at large unless the counterclaim affects all parties.

As counterclaims offered under the contract clause usually involve matters quite foreign to the complaint, their use can thus become advantageous only where their establishment may give rise to demands which will off-set those of the plaintiff.\(^{110}\) Such set-offs can be made only where the demands are "mutual," i.e., between the same parties in the same capacity.\(^{111}\) Consequently, where the demands of the plaintiff and those sought to be established by the counterclaim are not "mutual," the counterclaim is likely to be rejected.\(^{112}\) Thus, where several plaintiffs


\(^{107}\) See supra note 41, and compare the following:

"... in favor of the defendants, or some of them against the plaintiffs or some of them. ..." Ark. Dig. Stat. (Crawford, 1921) § 1195. "Judgment may be given for or against one or more of several plaintiffs, and for one or more of several defendants; and the court may determine the ultimate rights of the parties on each side as between themselves." N. D. Comp. Laws (1913) § 7679; S. C. C. C. P. (1922) § 507. "And it shall not be necessary that such set-off shall exist as between all parties plaintiff and defendant in such suit, but any party may enforce his set-off or counterclaim against the liability sought to be enforced against him." Okla. Comp. Stat. (1921) § 274.

\(^{108}\) See Clark, op. cit. supra note 70, at 401.


\(^{110}\) Ruby v. Baker, 106 Kan. 855, 190 Pac. 6 (1920); see Rush v. Thompson, 112 Ind. 158, 13 N. E. 665 (1887).

\(^{111}\) Fleming v. Palmer, 77 Ind. App. 572, 133 N. E. 926 (1922); Barnes v. Esch, 87 Or. 1, 169 Pac. 512 (1917); Edelman v. Schwartz, 178 N. Y. Supp. 587 (Sup. Ct. 1919); see Beecher v. Vogt Mfg. Co., 227 N. Y. 468, 125 N. E. 831 (1920). But claims which are not "mutual" may be set off by consent of all parties. See McDonald v. Mackenzie, 24 Or. 573, 14 Pac. 866 (1887).

\(^{112}\) Except, perhaps, in the case of "equitable" set-offs. See Ecorse
sue upon a "joint" claim, no counterclaim is available against one of the plaintiffs individually.\textsuperscript{113} On the other hand, however, where the respective interests of two plaintiffs can be readily apportioned without prejudice to either, one plaintiff may recover in full his share of the "joint claim," while the other's share may be off-set by a counterclaim established against him.\textsuperscript{114}

A defendant sued alone on a "joint and several" obligation may use as a counterclaim any demand against the plaintiff, held by him individually,\textsuperscript{115} or jointly with his co-obligor.\textsuperscript{116} Likewise, where several defendants are sued upon a "joint and several" obligation, any such defendant may establish and set off his individual counterclaim against the plaintiff, thus discharging \textit{pro tanto} the claim jointly against all the defendants.\textsuperscript{117} It

\begin{itemize}
  \item Kales v. Houghton, 190 Cal. 294, 212 Pac. 21 (1923); Jacobs v. Mulford, 197 App. Div. 835, 189 N. Y. Supp. 481 (3rd Dept. 1921). Thus in a suit by a partnership no counterclaim may be had on indebtedness of one partner individually. Sessions v. Ballard, 160 Ark. 146, 254 S. W. 446 (1923); Bauer Cooperage Co. v. Ewell & Smith, 149 Ky. 838, 149 S. W. 1137 (1912); Hoaglin v. C. M. Henderson & Co., 119 Iowa 720, 94 N. W. 247 (1903); Gotthauer v. Cunningham, 4 Okla. 551, 47 Pac. 479 (1896); Rush v. Thompson, supra note 110.
  \item Robertson v. Howerton, 56 Okla. 555, 156 Pac. 329 (1916) (plaintiffs, each owning half interest in a lease, sold same to defendant and in a suit for the purchase price, defendant was allowed to counterclaim against one plaintiff to the extent of one half the price); cf. Wade v. Citizen's State Bank of St. Paul, 158 Minn. 231, 197 N. W. 277 (1924) (counterclaim against one plaintiff where other is mere nominal party). See also liberal code provisions of North Dakota, Oklahoma and South Carolina, supra note 107.
  \item Fidelity & Deposit Co. of Md. v. Duke, 293 Fed. 661 (C. C. A. 9th, 1923); McKay v. Hall & Co., 30 Okla. 773, 120 Pac. 1108 (1912); Southland v. Aiken, 155 N. C. 212, 71 S. E. 230 (1911); Richardson v. Richardson, 134 Iowa 424, 111 N. W. 934 (1907); American Guild of Richmond v. Damon, 186 N. Y. 360, 78 N. E. 1081 (1906); cases infra note 133. See, also, Mo. Rev. Stat. (1919) § 1296. But cf. National Handle Co. v. Hufman, 140 Mo. App. 634, 120 S. W. 690 (1909) (no individual counterclaim on "joint" demand).
  \item Gooding v. Vaught, 279 S. W. 208 (Mo. App. 1926); Bryant & Bro. v. Reamer, 211 Ky. 593, 277 S. W. 826 (1925); Richmond Ins. Co. v. Littleton, 1 F. (2d) 311 (C. C. A. 8th, 1924); Hughes v. Garrett, 160 Ark. 404, 234 S. W. 265 (1921); Kneuper Specialty Co. v. Kneuper, 171 App. Div. 555, 167 N. Y. Supp. 395 (1st Dept. 1916); Curlee v. Ruland, 56 Okla. 329, 165 Pac. 1182 (1916); cf. Lebanon Steam Laundry Co. v. Dyckman, 22 Ky. L. 348, 57 S. W. 227 (1900) (denied because both defendants could not be jointly
\end{itemize}
would seem that he should be allowed to recover any excess for himself.\textsuperscript{118}

But where counterclaims are offered under the “transaction” clause, such sharing with co-defendants, although apparently common in practice,\textsuperscript{119} should not be compulsory. As counterclaims under the transaction clause usually comprise substantially the same group of facts as the plaintiff’s cause of action, the general benefits in convenience to the litigants and in expediency to the court, gained through trying at once both the plaintiff’s cause of action and the counterclaim, might often outweigh incidental delays or minor prejudices to parties to the action who are not directly interested in the counterclaim.\textsuperscript{120}

Consequently, the use of such counterclaims might sometimes be justifiable although not all parties to the action are thereby affected. Accordingly, under such circumstances, in suits by several plaintiffs, the defendant has been allowed to counterclaim against one of the plaintiffs.\textsuperscript{121} It would seem that where there are several defendants the same expediency might well prompt a similar use of the transaction counterclaim in the rendition of

credited with counterclaim of the one defendant, the other defendant having shared equally with the plaintiff the sum for which the counterclaim was brought). But cf. Grunas v. Fortoul Film Corp., 182 N. Y. Supp. 28 (Sup. Ct. 1920) (denied where counterclaim offered on behalf of only one defendant). Some cases have held that where the suit is “jointly” against the defendants, neither can set up individual counterclaims. Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 130 (1909); Coleman v. Elmore, 31 Fed. 392 (D. Or. 1887). A defendant may counterclaim on a demand “jointly and severally” against the plaintiff and another, although such other be not a party to the suit. See cases infra note 133.


\textsuperscript{119} See, for example, Columbia Taxicab Co. v. Mercurio, 236 S. W. 1096 (Mo. App. 1922); Progress Blue Ribbon Farms v. George, 167 Wis. 223, 167 N. W. 253 (1918); cf. Eads v. Murphy, 27 Ariz. 267, 232 Pac. 877 (1925) (one defendant counterclaimed on agreement to make certain credits on note sued upon); Calara Valley Realty Co. v. Smith, 29 Cal. App. 589, 156 Pac. 369 (1916) (counterclaim by one defendant on “joint” claim); Scott v. Waggoner, 48 Mont. 536, 139 Pac. 454 (1914).

\textsuperscript{120} See Loeb v. Loeb, 24 Okla. 384, 103 Pac. 570 (1909) (added trial inconvenience thought to be less than that of separate trial). But cf. Mayer v. Klug, 10 Ohio App. 303 (1919) (court thought allowance of counterclaim against co-defendant would be too prejudicial to plaintiff). Compare, also, cases cited infra note 150 under cross complaint.

\textsuperscript{121} Gilboy v. Lennon, 115 Misc. 467, 193 N. Y. Supp. 606 (Sup. Ct. 1920) (suit by insured and insurer for damages due to collision of insured with defendant; counterclaim against insured for damages); Cooper v. Gibson, 69 Okla. 105, 170 Pac. 229 (1918) (counterclaim against intervening party); Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142 (1910) (suit by firm on judgment—counterclaim against one partner for damages due to representations used in inducing defendant to become surety on note sued upon).
a “several judgment” between “a plaintiff and a defendant,” even where such defendant does not elect to share his individual claim with his co-defendants.\textsuperscript{122} This is substantially what was done under the former equitable cross bill.\textsuperscript{123} The fact that the counterclaim or cross complaint\textsuperscript{124} has, in many respects, supplanted the cross bill would lead one to expect a like practice to be equally feasible under the codes.

\textit{Suits by or against representatives.} Where suit is brought by or against one in a representative capacity, as a trustee, executor or administrator, the desirability of keeping accounts separate,\textsuperscript{125} and of avoiding possible prejudice to the party represented\textsuperscript{126} or unfairness or inconvenience to the party bringing suit\textsuperscript{127} is thought to outweigh the policy of allowing the defendant to litigate all controversies in the one suit. Consequently, except where the individual bringing or defending the action clearly appears to be the sole “real party in interest,”\textsuperscript{128} no counter-

\begin{footnotesize}
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\item \textsuperscript{122} Such judgment would seem well within the code provisions of Arkansas, North Dakota, Oklahoma and South Carolina, quoted supra note 107.
\item \textsuperscript{123} Thus, where the cross bill does not affect all defendants. Cf. Rickoy Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 31 Sup. Ct. 11 (1910). Or where cross defendants are not equally affected. Smith v. Rhodes, 206 Ala. 480, 90 So. 349 (1921). See generally, CLEPHANE, EQUITY, PLEADING and PRACTICE (1926) 308-322.
\item \textsuperscript{125} Cf. Wittich v. Wittich, 263 S. W. 1001 (Mo. App. 1924); Allaire v. Silberberg, 210 App. Div. 169, 205 N. Y. Supp. 634 (1st Dept. 1924); Mahon v. Harney County Nat'l Bank, 104 Or. 323, 206 Pac. 224 (1922); Sanford v. Pike, 87 Or. 614, 171 Pac. 394 (1918); Florence-Goldfield Mining Co. v. Dist. Ct., 30 Nev. 391, 97 Pac. 49 (1908); Houts v. Sioux City Brass Works, 134 Iowa 484, 110 N. W. 166 (1907).
\item \textsuperscript{126} Cf. Thompson v. Sunrise Coal Co's Trustee, 181 Ky. 168, 204 S. W. 89 (1918); Craig v. Chicago, St. P. M. & O. Ry., 97 Neb. 586, 150 N. W. 648 (1915).
\item \textsuperscript{127} Cf. Lowndes v. City Nat'l Bank, 79 Conn. 693, 66 Atl. 514 (1907). And where the plaintiff is a mere nominal party, counterclaims are available on claims against the “real party in interest,” to off-set recovery by the plaintiff; but no affirmative relief may be had against the nominal party plaintiff. Cf. Strong v. Gordon, 203 Mo. App. 470, 221 S. W. 770 (1920). Compare also, discussion infra under Assignments.
\end{itemize}
\end{footnotesize}
counterclaims are available which affect him in his representative capacity to the extent of off-setting the demand sued upon. This practice, in suits brought by trustees, executors, or administrators, is expressly provided for by statute in some states.

Bringing in new parties. A counterclaim founded upon a joint and several claim against the plaintiff and another, although such other be not a party to the suit, is allowed on the ground that the plaintiff is individually liable for the whole of the several claim. But if the claim be against the plaintiff "jointly," it is unavailable because the presence of such other party is deemed necessary to the determination of a joint claim.

Some codes, however, provide that the court may either permit such persons to be made parties or dismiss the counterclaim, thereby placing the question of new parties largely within the discretion of the court. This would seem highly desirable.


130 Kelley-Clark Co. v. Leslie, 61 Cal. App. 559, 215 Pac. 699 (1923); Strong v. Gordon, supra note 127; Curlee v. Ruland, supra note 117.


132 "The defendant in ... (an action by an executor or administrator) may set off any claim he has against the estate, instead of presenting the same to the probate court; and if the final judgment be in his favor such shall be certified by the court rendering it to the probate court and shall be considered the true balance." Minn. Gen. Stat. (1923) § 8819. For similar statutes see: Mo. Rev. Stat. (1919) § 1294 (set off in the same manner as though the action had been brought by deceased); N. Y. Civ. Prac. Act (1926) § 269; Wash. Comp. Stat. (Rem. 1922) §§ 268-9, 271. Cf. Griggs v. Renault Selling Branch, 179 App. Div. 845, 167 N. Y. Supp. 355 (1st Dept. 1917).

133 Griswold v. Morrison, 53 Cal. App. 93, 200 Pac. 62 (1921) ("tort" by plaintiff and third party); Coates v. Milner, 134 Ark. 311, 203 S. W. 701 (1918) (action by partner on personal claim; counterclaim against partnership); Davis v. Bessemer City Cotton Mills, 178 Fed. 784 (C. C. A. 4th, 1910) (same); Ashire v. Corey, 113 Ind. 484, 15 N. E. 685 (1887) (plaintiff principal maker on note on which counterclaim based); cf. Steinhauer v. Leykom, 130 Wis. 438, 110 N. W. 217 (1907); cases supra note 115.

134 Rouse v. Bolten, 17 Ariz. 14, 147 Pac. 736 (1915); Apelt v. Melin, 138 Minn. 269, 164 N. W. 979 (1917); Taylor v. Matteson, 86 Wis. 113, 22 N. W. 22 (1889); Loundes v. City Nat'l Bank, supra note 127.

135 "When it appears that a new party is necessary to a final decision upon the counterclaim, the court may either permit the new party to be made, by a summons, to reply to the counterclaim in the answer, or may direct that it be stricken out of the answer and made the subject of a separate action." Ark. Dig. Stat. (Crawford, 1921) § 1196. For similar provisions see Iowa Code (1927) § 11154; Kan. Rev. Stat. (1923) § 60-712
Obviously, the bringing in of new parties cannot be satisfactorily regulated by fixed rules, but should be determined for each case according to the circumstances peculiar to that case.\footnote{130}

The codes of New York and Montana,\footnote{137} modeled after the English Practice Rules,\footnote{138} stipulate that where the counterclaim "raises questions" between the defendant "and the plaintiff along with any other persons," such other persons "shall be summoned." Here, too, the matter becomes one substantially within the court's discretion, for no new parties need be summoned unless the propriety of the particular counterclaim, under the circumstances in which it is offered, be sanctioned. Thus, while in some cases a counterclaim has been rejected where the plaintiff could be held "severally" responsible, or where he was sought to be charged in the alternative only, under slightly different circumstances, similar counterclaims have been allowed and the new parties summoned accordingly.\footnote{120}

(counterclaim), § 60-714 (set-off); Neb. Comp. Stat. (1922) § 8619 (counterclaim), § 8621 (set-off); cf. Ky. Civ. Code (Carroll, 1927) § 96-3; Okla. Stat. (1921) § 277 (counterclaim), § 278 (set-off)—"if it also appear that, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set off."); Utah Comp. Laws (1917) § 6580; Wis. Stat. (1921) § 2656a; Wyo. Comp. Stat. (1920) § 5663.

Some codes allow such new parties to be made by cross complaint. See infra, text, under Cross Complaints.

\footnote{126} Cf. Johnson v. Moore, 241 Pac. 140 (Okla. 1925); Enid Oil & Pipe Line Co. v. Champlin, 240 Pac. 649 (Okla. 1925); Johnson v. Cullinan, 94 Okla. 246, 221 Pac. 732 (1923).


\footnote{138} English Rules, Order 21, rr. 11-14. The "rule" is said not to be applicable where relief is sought against the plaintiff or such new party in the alternative; it must be against him "along with" the plaintiff.


COUNTERCLAIMS AGAINST CO-DEFENDANTS

The code provisions of Ohio and Wyoming \(^{142}\) stipulate that the counterclaim may be against "the plaintiff or another defendant." Presumably, such counterclaims against co-defendants need not be also against the plaintiff; nor would it seem necessary that they should tend to diminish or defeat the plaintiff's recovery. But these considerations would be likely to weigh heavily as factors in determining the advisability of a particular counterclaim.\(^{143}\)

Cross complaints. Some codes provide for similar relief against new parties or co-defendants by way of "cross complaint" \(^{144}\)—a pleading seemingly intermediate the counterclaim and the former equitable cross bill, presumably created to preserve to litigants the convenience of the cross bill in all situations not expressly within the counterclaim provisions. The


\(^{143}\) See, for example, discussion in Mayer v. Klug, supra note 120. See also, cases cited infra note 150.

cross complaint must be complete in itself,145 and the defendants therein are served in the same manner as defendants to the plaintiff's complaint.146 It is like the transaction counterclaim in that the cause of action set forth must arise out of the “facts” relied upon in the original complaint;147 but differs from the contract counterclaim in that it need not affect all parties to the action.148 Thus, it need not delay the original action “when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross complaint.”149 In this respect it partakes of the equitable cross bill. Its use is within the sound discretion of the court.150 In the absence of cross complaint provisions, or of express counterclaim stipulations for relief against co-defendants or the bringing in of new parties, some courts have resorted to the former equitable cross bill.151 But this would seem unnecessary. Since the transaction counterclaim becomes substantially co-extensive with a cross bill or cross complaint152 against a plaintiff and others already parties

145 Wait v. Pierce, 210 N. W. 822 (Wis. 1926); Taylor v. Wilson, 182 Ky. 592, 206 S. W. 865 (1918).

The cross complaint requires a reply. But where this is omitted the court is likely to treat it as a counterclaim and deem it denied without a reply where no reply is required to a counterclaim. See San Joaquin Brick Co. v. Mulcahy, supra note 124.


147 San Joaquin Brick Co. v. Mulcahy, supra note 124; cf. Hunter v. Porter, 10 Idaho 72, 77 Pac. 434 (1904); Bothe v. Nolack, 149 Ark. 297, 232 S. W. 606 (1921); Young v. Vail, 29 N. M. 324, 222 Pac. 912 (1924).

148 See Hunter v. Porter, supra note 147.

149 See, for example, Ark. Dig. Stat (Crawford, 1921) § 1204-3; Ky. Civ. Code (Carroll, 1927) § 97-3.

150 See Wait v. Pierce, supra note 145, 43 A. L. R. 879 (1926) annotation. Its use will depend upon whether the advantages gained in the trying of similar fact situations together outweighs possible prejudice and delay entailed thereby in the particular case. For example, compare O'Connor v. Pawling & Harnischfeger Co., 185 Wis. 226, 201 N. W. 393 (1923), where defendant in an injury suit was allowed to file a cross-complaint against his co-defendant, and Liebhauser v. Milwaukee Electric Ry. & Light Co., 180 Wis. 468, 193 N. W. 522 (1922), where similar relief was denied because of possible delay to plaintiff the outcome of litigation between the co-defendants. See these cases discussed in (1923) 3 Wis. L. Rev. 289.


152 Courts often use the terms cross-bill, cross-complaint, and counterclaim interchangeably. See, for example, Johnson v. Cullinan, supra note 136; San Joaquin Brick Co. v. Mulcahy, supra note 124; Taylor v. Wilson,
to the action, it would appear to require little, if any, extension on the part of a code court, while applying counterclaim provisions, to continue to exercise its former "equitable" powers and bring in new parties.\textsuperscript{153}

COUNTERCLAIMS AGAINST ASSIGNED CAUSES OF ACTION

\textit{Effect of assignment.} Most of the codes provide that the assignment of a non-negotiable chose in action shall be without prejudice to "any set off or other defense" existing at the time of, or before notice of the assignment.\textsuperscript{154} Thus the usual defenses, such as failure of consideration,\textsuperscript{155} or non-fulfillment of conditions precedent,\textsuperscript{156} are obviously available. Some codes also provide that "counterclaims" may be used against the assignee.\textsuperscript{157}


\textsuperscript{153} Federal equity rule 30 abolished "cross-bills" against plaintiffs, substituting "counterclaims" in their stead. In Vidal v. South American Securities Co., 276 Fed. 855 (C. C. A. 2d, 1921), the court went a step further and allowed a counterclaim for relief against a co-defendant, without recourse to the former equitable cross-bill. Cf. Pollock v. Scribner, 98 Wis. 104 (1897); Joyce v. Growney, 154 Mo. 253, 55 S. W. 466 (1900); Seacoast Development Co. v. Beringer, 134 Atl. 770 (N. J. 1926).

\textsuperscript{154} "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set off, or other defense existing at the time of, or before notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration before maturity." Cal. C. C. P. (1923) § 368. For similar provisions see: Minn. Gen. Stat. (1923) § 9166; N. D. Comp. Laws (1913) § 7396; Or. Code (Olson, 1920) § 28; S. C. C. C. P. (1922) § 355; Utah Comp. Laws (1917) § 6196; Wis. Stat. (1921) § 2606.

"In actions on assigned accounts and non-negotiable instruments, the defendant shall be allowed every just set-off or defense which existed in his favor at the time of his being notified of such assignment." Mo. Rev. Stat. (1919) § 1293. For a similar provision see Wyo. Comp. Stat. (1920) § 6466 (justice court).

"In the case of an assignment of a thing in action the action of the assignee shall be without prejudice to any set-off or other defense now allowed . . ." Kan. Rev. Stat. (1923) § 60-402; Ky. Civ. Codes (Carroll, 1927) § 419.

\textsuperscript{155} Valuecy v. Hunt, 20 N. D. 579, 129 N. W. 455 (1910); Corbin v. Preston, 109 Or. 230, 218 Pac. 917 (1923) ("fraud").


\textsuperscript{157} The codes of Iowa, New Mexico and New York so provide.

"The assignment of a thing in action shall be without prejudice to any counterclaim, defense or other cause of action whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignor before notice of the assignment . . ." Iowa Code (1927) § 10971; N. M. Ann. Stat. (1915) § 4117.
In the absence of the latter provision, a few jurisdictions have denied that “set off or other defense” should be construed so as to include counterclaims on the technical ground that a “counterclaim” must be a cause of action against a “plaintiff,” and not against an assignor not party to the action. The objection, however, if valid, would appear to be equally applicable to any “set off or other defense”—it too must be against a plaintiff. Nevertheless, the historical development of the assignment of choses in action has been otherwise. All manner of defenses came to be allowed against the assignee to the same extent as though the assignor were plaintiff. Subsequent innovations, such as set-offs and equitable defenses—affirmative defenses, so called—were later also saved to the obligor to prevent possible prejudice because of the assignment. A like policy would seem

“If the action is founded upon a contract which has been assigned... a demand existing against the party thereto or an assignee of the contract at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of the assignment, must be allowed as a counterclaim to the amount of the plaintiff’s demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.” N. Y. Civ. Prac. Act (1926) § 267 (also containing similar provisions as to negotiable instruments assigned after they are due).

A few codes also contain a cross-demand provision:

“When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other and neither can be deprived of the benefit thereof by the assignment or death of the other.” Cal. C. C. P. (1923) § 440; Kan. Rev. Stat. (1923) § 60-715 (adding “or by reason of the statute of limitations”); Mont. Rev. Codes (Choate, 1921) § 9145; Ohio Gen. Code (Page, 1926) § 11321; Okla. Comp. Stat. (1921) § 279.


Early New York cases likewise denied the use of the counterclaim against assignees. See Vasseur v. Livingston, 4 Duer 285 (N. Y. 1855); Gleason v. Moen, 2 Duer 639 (N. Y. 1853). But see modern New York provisions supra note 157; and cases cited infra notes 170, 171.

In states where the transaction clause appears (see supra note 41) a counterclaim against the assignee must therefore be one arising out of the transaction sued upon. Cf. Board of City of Frankfort v. Brislan, 126 Ky. 477, 104 S. W. 311, 1199 (1907); Curlee v. Ruland, supra note 157; Cross v. Snyder’s Adm’x, 164 Ky. 370, 175 S. W. 641 (1915) (different transaction); Bramblett v. Siemp, 32 Ky. L. 1329, 108 S. W. 339 (1908); Johnson v. Acme Harvesting Machine Co., 24 Okla. 468, 103 Pac. 638 (1909) (compare latter case with Oklahoma “cross demand’ statute cited supra note 157).

See generally, Cook, The Alienability of Choses in Action (1917) 30 Harv. L. Rev. 449 et seq.
to sanction a similar use of the "counterclaim"—not for the purpose of affirmative recovery over against the assignee, but for the purpose of establishing demands to off-set, and thereby diminish pro tanto the recovery by the assignee. As thus used, the counterclaim partakes of the set-off, differing from the former set-off in that the counterclaim may also comprise demands requiring liquidation before the set-off is actually made.

In general, it may be said that counterclaims under the transaction clause are allowed against assigned causes of action, especially where the facts therein set forth are tantamount to a defense which was formerly recognized against an assignee. And counterclaims under the contract clause, if for liquidated demands, are likewise recognized, but a few courts have denied such counterclaims for unliquidated demands arising out of contracts unrelated to the assigned claim upon which suit is brought. In particular instances, as where it would be unduly burdensome for all concerned for the assignee to contest the counterclaim, some such distinctions might well be drawn; but

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162 See Gleason v. Moen, supra note 158 (not available as "counterclaim"—but facts set forth amount to a recoupment); Nat'l Bank of Commerce v. Feeney, supra note 158 (dicta that facts in counterclaim might be available as "defense"). But cf. Baueroff v. Henry Vose Wall Paper Co., supra note 158 (where court might have treated the facts of the counterclaim as a recoupment).

163 Ashley v. Rumelin, Bankers v. City of Portland, 90 Or. 40, 175 Pac. 447 (1918); Tayian v. Yertzian, 58 Cal. App. 466, 208 Pac. 985 (1922). Such counterclaims, being liquidated, are tantamount to set-offs. Cf. Quaintance v. Mahaska County State Bank, 205 N. W. 739 (Iowa, 1925); Nordell v. Neilsen, 150 Minn. 224, 184 N. W. 1023 (1921); Pully v. Pass, 123 N. C. 168, 31 S. E. 478 (1898). Compare cases cited supra notes 160 and 162.

it would seem that often the dual policy of protecting debtors and of settling all in one litigation would require the allowance of such counterclaims.

Maturity of the assigned claim. The set-off known to the Roman Law—the compensatio—was based upon the theory that mutual demands "automatically" cancelled each other. Consequently, assignment by either party after the demands became mutual could be of no effect. A few jurisdictions in this country appear to have followed this concept in requiring that the assigned claim must first become mature in the hands of the assignor—thus giving rise to "mutual" demands prior to assignment—before any set-off can be available to the debtor against the assignee. In other jurisdictions, however, the courts, motivated by general commercial policies, have rejected "mutuality" fictions to the extent of preserving to the debtor the "set off and other defense," although the claim sued upon was not mature when assigned.

A like policy would also sanction set-offs against intermediate assignees.

\[\text{165 See supra page 300.}\]
\[\text{166 Cf. Dameron v. Carpenter, 190 N. C. 595, 130 S. E. 328 (1925) (suit against assignee to compel "set-off" of demands "mutual" with the assignor before assignment); Machado v. Borges, 170 Cal. 601, 160 Pac. 351 (1915) (same).}\]
\[\text{168 Thus where the claim arises out of the transaction sued upon. Storm v. Sunset Road Oil Co., 47 Cal. App. 334, 190 Pac. 651 (1920); Suhr v. Metcalf, supra note 156; National Nassau Bank of N. Y. v. I. M. Ludington's Sons, supra note 156; Farmer's & Traders Nat'l Bank v. Woodell, supra note 161.}\]
\[\text{Likewise, where the counterclaim arises out of separate transactions. Davies v. Stevenson, supra note 164; cf. Eagle Impr. Co. v. Wagner, supra note 160; see Richards v. La Tourette, 119 N. Y. 54, 58 (1890) (mortgagee made general assignment to creditors before due—"equitable" set-off of demand due by assignor to defendant at time of assignment); Norddell v. Neilsen, supra note 163; Martin v. Pillsbury, 23 Minn. 175 (1876); cf. Chung v. Stephenson, supra note 161; St. Louis Nat'l Bank v. Guy, 101 Cal. 286, 35 Pac. 876 (1894). Contra: Myers v. Davis, 22 N. Y. 489 (1860).}\]
\[\text{169 For set-offs against intermediate assignees in whose hands demands}\]
Maturity of the claim set off. The codes of New York and Washington provide that a claim, to be available to the debtor against the assignee, must "exist" at the time of the assignment and belong to the defendant before notice of the assignment. 170 Under most codes, however, it is sufficient if the claim "exist" at the time of, or before notice of the assignment. 171 The codes of Iowa and New Mexico require only that the claim "exist" in favor of the defendant at the time of notice, "if mature when pleaded." 172

Such statutes, presumably, were designed to preserve all "defenses" to the obligor, to safeguard the assignee from subsequently acquired claims, and at the same time to encourage the settlement of as many disputes as convenient in the one suit. These policies would seem best served under these statutes by considering a claim as "existing" for counterclaim purposes when substantially all the facts upon which the claim is based have occurred. 173 The courts, however, have construed claims, although owned by the defendant at the time of assignment, as "existing" for "counterclaim" purposes only from the time of "maturity." 174 But those claims arising out of the contract transaction sued upon, although based upon a breach occurring after assignment, are generally held to "exist" at the time of assignment, and in consequence, are allowed as counterclaims.

became mutual, see New York provisions, supra note 157, § 267-2; infra note 170 (Washington provision); Harris v. Burwell, 65 N. C. 584 (1871). But see 3 Am. Law Inst. Contracts Restatement, § 164 (3); Frowein v. Calvird & Lewis, 75 Mo. App. 567 (1898) (set-off against intermediate assignee who held assigned claim before due denied because not mutual—quaere if result would have been different had demand matured in hands of intermediate assignees?)

170 See New York provisions supra note 157. See also, Wash. Comp. Stat. (Rem. 1922) § 266 ("And in all such actions . . . which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of assignment thereof, belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him.")

171 See Codes cited supra note 154.

172 See provisions of Iowa and New Mexico, supra note 157.

173 Cf. supra under discussion of the contract clause.

against the assignee. Yet such a remedial right to damages is contingent at the time of assignment.

As indicated by the statutes, where the counterclaim has been assigned to the defendant, he must have acquired it before notice of the plaintiff's assignment. It would seem, therefore, that a claim owned by the defendant which is certain at the time of assignment, but falling due at a fixed date thereafter, could just as reasonably be held to "exist" for counterclaim purposes against the assignee. Both claims rest upon facts, a substantial number of which have already occurred at the time of the assignment. That "existing" could plausibly have been so construed is evidenced by the use of the word "exist," obviously in this sense, in the codes of Iowa and New Mexico referred to above.

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175 Seibert v. Dunn, supra note 167, and other cases supra note 167. Contra: King v. West Coast Grocer Co., supra note 166.