

Corpus Juris Secundum
Database updated June 2013

Set-off and Counterclaim
John J. Dvorske, J.D., M.A.

[Correlation Table](#)

Summary

Scope:

This title includes cross-demands and claims as grounds of defense to actions or of cross actions; what debts or damages constitute grounds thereof, whether liquidated or unliquidated, and whether connected with, or independent of, the principal cause of action; between what parties and in what actions such cross demands and claims are available; and their operation and effect by way of recoupment or other reduction of the demand or claim sued on, or to counterbalance a recovery thereon, or as ground for affirmative relief.

Treated Elsewhere:

Cross-bills in equity, see [C.J.S., Equity §§ 1 to 166](#)

Pleading set-offs and counterclaims, and replies to counterclaims, see [C.J.S., Pleading §§ 200 to 206](#)

Set-off and counterclaim in insurance matters, see [C.J.S., Insurance § 2088](#)

Set-off or reduction of damages, see [C.J.S., Judgments § 663](#)

Set-offs and counterclaims under the federal rules, see [C.J.S., Federal Civil Procedure §§ 381 to 394](#)

Research References:

Westlaw Databases

[All Federal & State Cases \(ALLCASES\)](#)

[All Federal Cases \(ALLFEDS\)](#)

[American Law Reports \(ALR\)](#)

[West's A.L.R. Digest \(ALRDIGEST\)](#)

[United States Code Annotated \(USCA\)](#)

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Research References

A.L.R. Library

A.L.R. Index, Counterclaim and Setoff

West's A.L.R. Digest, Set-off and Counterclaim §§[1 to 11](#) , [17 to 21](#)

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I. Nature, Grounds, and Right to Remedy
A. Overview

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§ 1. Definitions and nature

West's Key Number Digest

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A set-off, counterclaim, plea in reconvention, or statutory recoupment is, in its nature and effect, an independent action by a defendant against a plaintiff.

A set-off, counterclaim, plea in reconvention, or statutory recoupment has the nature, characteristics, and effect of an independent action or suit by defendant against plaintiff,[1] although in some jurisdictions recoupment is considered a defensive measure rather than an independent cause of action.[2] The fundamental philosophy of all set-offs and recoupments is that they are offered by a defendant in opposition to some money demand asserted by plaintiff.[3] They are procedural devices by which a defendant seeks to reduce the amount he or she owes to a plaintiff by the value of the plaintiff's cross-obligations to the defendant.[4] Both the doctrines of set-off and recoupment permit the adjudication of countervailing claims in one suit when a case is based on any one of them.[5] Where defensive matter interposed by defendant constitutes an independent cause of action and does not go to the foundation of plaintiff's claim, it cannot operate as a reduction of the demand except by way of set-off or counterclaim.[6]

A party can have recoupment and set-off rights only against one asserting claims against himself or herself.[7] Set-off or recoupment are counterclaims[8] and neither is a defense to the liability that is being asserted in the main action.[9]

In a counterclaim, set-off or recoupment action to recover damages for breach of contract, the burden of proof is on the party claiming damages, to prove that damages were caused by the default of the party to be charged, separate from any damages that may have resulted from any act of the claimant, and the burden must be sustained by a preponderance of the evidence.[10]

[FN1] Ariz.—[Unispec Development Corp. v. Harwood K. Smith & Partners](#), 124 F.R.D. 211 (D. Ariz. 1988).

Md.—[Sveum v. J. Mess Plumbing, Inc.](#), 965 S.W.2d 924 (Mo. Ct. App. E.D. 1998).

[FN2] U.S.—*In re H. Wolfe Iron & Metal Co.*, 64 B.R. 754 (Bankr. W.D. Pa. 1986).

[FN3] Tex.—*E. E. Farrow Co. v. U. S. Nat. Bank of Omaha*, 358 S.W.2d 934 (Tex. Civ. App. Waco 1962), writ refused n.r.e., (Oct. 6, 1962).

[FN4] U.S.—*Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236 (D.C. Cir. 1995).

[FN5] U.S.—*In re Hiler*, 99 B.R. 238 (Bankr. D. N.J. 1989).

[FN6] Mass.—*E. H. Hinds, Inc. v. Coolidge Bank & Trust Co.*, 6 Mass. App. Ct. 5, 372 N.E.2d 259, 23 U.C.C. Rep. Serv. 147 (1978).

As to synonymy of, and distinctions between terms, see § 12.

[FN7] U.S.—*Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236 (D.C. Cir. 1995).

[FN8] Ga.—*French Quarter, Inc. v. Peterson Young Self & Asselin*, 220 Ga. App. 852, 471 S.E.2d 9 (1996).

[FN9] Ga.—*T.V. Tempo, Inc. v. T.V. Venture, Inc.*, 182 Ga. App. 198, 355 S.E.2d 76 (1987).

[FN10] Ill.—*Roy Strom Excavating and Grading Co., Inc. v. Miller-Davis Co.*, 149 Ill. App. 3d 1093, 108 Ill. Dec. 679, 509 N.E.2d 105 (1st Dist. 1986).

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§ 2. Definitions and nature—Recoupment

West's Key Number Digest

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Recoupment is of common-law origin and is the abatement or reduction of the plaintiff's claim by means of a legal or equitable right resulting from a counterclaim arising out of the same transaction.

Recoupment is a common-law, equitable doctrine^[1] that permits a defendant to assert a defensive claim aimed at reducing the amount of damages recoverable by a plaintiff.^[2] It allows a court to look at the whole contract, sum up the grievances on each side, strike a balance, and give plaintiff judgment for only such difference as may be found in his favor.^[3] The doctrine of recoupment allows a defendant to "defend" against a claim by asserting, up to the amount of the claim, the defendant's own claim against the plaintiff growing out of the same transaction,^[4] or set of transactions,^[5] strictly for the purpose of abatement or reduction of the plaintiff's claim.^[6] It encompasses the right of a defendant to reduce or eliminate the plaintiff's demand either because the plaintiff has not complied with some cross-obligation under the contract on which the plaintiff sues^[7] or the plaintiff has violated some legal duty in making or performing that contract.^[8]

To constitute a claim in recoupment, a defendant's claim must: (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim.^[9]

The mere fact that the same two parties are involved in the claims to be offset, and that a similar subject matter gave rise to both claims, does not mean that claims arose out of the same transaction for the purposes of recoupment.^[10] Further, an express contractual right is not necessary to effect recoupment,^[11] and the fact that a contract exists between a debtor and creditor does not automatically enable the creditor to effect recoupment.^[12] However, for a valid contract defense such as recoupment to be asserted, there first must be an enforceable contract between the parties.^[13] Recoupment is not limited to cases involving overpayments.^[14]

In the absence of a statute providing otherwise, recoupment is a defensive action that operates to diminish a plaintiffs' recovery rather than to assert affirmative relief,^[15] at least when employed in a court of law.^[16] It goes to the foundation,^[17] justice^[18] or existence^[19] of plaintiff's claim, and only to the abatement, reduction, or mitigation of the damages claimed by plaintiff.^[20] Recoupment is thus in the nature of a defense,^[21] as it denies the validity of plaintiff's claim in the amount claimed, and does not entitle a defendant to any affirmative

relief or any amounts in excess of the amount demanded by plaintiff.[22]

While technically no affirmative relief may be had on recoupment, it is an affirmative cause of action that is distinct from a defense that merely attempts to defeat the plaintiff's cause of action by denial or avoidance.[23] It is regarded as in the nature of a cross action,[24] wherein defendant alleges that he or she has been injured by a breach by plaintiff of another part of the same contract on which the action is founded,[25] and claims to stop, cut off, or keep back as much of plaintiff's damages as will satisfy the damages which have been sustained by defendant.[26] A counterclaim can be treated as an action for recoupment only if it is considered part of the same claim upon which plaintiff is proceeding, that is, as being in the nature of a defense to the claim.[27] A valid claim for recoupment must seek relief of the same kind and nature as is sought by the plaintiff.[28] The party seeking recoupment bears the burden of proving the amount it is entitled to recoup.[29]

Recoupment, being an equitable doctrine, may be allowed only when it will not distort the application of legal rules.[30] The doctrine of equitable recoupment permits a party to assert a defense which could not be asserted affirmatively as a counterclaim because the applicable statute of limitations has run,[31] and plaintiff will not be permitted to insist upon the statute of limitations as a bar to such a defense when he is seeking to enforce payment of that which is due him under the contract out of which the defendant's claim for recoupment arises.[32] However, recoupment is a defensive claim,[33] which can only be asserted in response to an independent action instituted by another party, and does not permit the party asserting it to present otherwise time-barred claims simply by creative pleading in an independent proceeding brought by it.[34] A necessary and important condition to a defendant's right of recoupment is the actual filing of a complaint by a plaintiff.[35]

The equitable practice of recoupment serves to avoid needless delay and unnecessary litigation by permitting a court to examine all aspects of the transaction that is the subject of the action.[36]

It has been said that the defense of recoupment has lost much of its identity under the codes and is generally embraced in the subject of counterclaim.[37]

[FN1] U.S.—*In re A and C Elec. Co., Inc.*, 211 B.R. 268 (Bankr. N.D. Ill. 1997).

Del.—*TIFD III-X LLC v. Fruehauf Production Co., L.L.C.*, 883 A.2d 854 (Del. Ch. 2004).

Mich.—*Mudge v. Macomb County*, 458 Mich. 87, 580 N.W.2d 845 (1998).

[FN2] U.S.—*U.S. v. Keystone Sanitation Co., Inc.*, 867 F. Supp. 275 (M.D. Pa. 1994).

Del.—*TIFD III-X LLC v. Fruehauf Production Co., L.L.C.*, 883 A.2d 854 (Del. Ch. 2004).

[FN3] U.S.—*In re Malinowski*, 156 F.3d 131 (2d Cir. 1998); *Matter of McDonald*, 224 B.R. 862 (Bankr. S.D. Ga. 1998).

Mich.—*Mudge v. Macomb County*, 458 Mich. 87, 580 N.W.2d 845 (1998).

N.Y.—*Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138 (2d Cir. 2002).

[FN4] U.S.—*Bolduc v. Beal Bank, SSB*, 167 F.3d 667 (1st Cir. 1999).

Cal.—[In re Straightline Investments, Inc.](#), 525 F.3d 870 (9th Cir. 2008).

Distinguished from set-off

Me.—[Inniss v. Methot Buick-Opel, Inc.](#), 506 A.2d 212, 1 U.C.C. Rep. Serv. 2d 456 (Me. 1986).

[FN5] U.S.—[In re Malinowski](#), 156 F.3d 131 (2d Cir. 1998).

Factual findings

U.S.—[Mercy Hosp. of Watertown v. New York State Dept. of Social Services](#), 171 B.R. 490 (N.D. N.Y. 1994).

[FN6] Cal.—[In re Straightline Investments, Inc.](#), 525 F.3d 870 (9th Cir. 2008).

Pa.—[Cohen v. Goldberg](#), 554 Pa. 201, 720 A.2d 1028 (1998).

[FN7] Conn.—[Fadner v. Commissioner of Revenue Services](#), 281 Conn. 719, 917 A.2d 540 (2007).

Mich.—[Mudge v. Macomb County](#), 458 Mich. 87, 580 N.W.2d 845 (1998).

[FN8] Conn.—[Fadner v. Commissioner of Revenue Services](#), 281 Conn. 719, 917 A.2d 540 (2007).

Mich.—[Mudge v. Macomb County](#), 458 Mich. 87, 580 N.W.2d 845 (1998).

N.H.—[Hathorn v. Loftus](#), 143 N.H. 304, 726 A.2d 1278, 37 U.C.C. Rep. Serv. 2d 676 (1999).

[FN9] U.S.—[Berrey v. Asarco Inc.](#), 439 F.3d 636 (10th Cir. 2006).

[FN10] U.S.—[Reading Co. v. City of Philadelphia](#), 155 B.R. 890 (E.D. Pa. 1993).

[FN11] U.S.—[In re Clintondale Mills, Inc.](#), 216 B.R. 742 (Bankr. M.D. Pa. 1998).

[FN12] U.S.—[In re Clintondale Mills, Inc.](#), 216 B.R. 742 (Bankr. M.D. Pa. 1998).

[FN13] Conn.—[Sloan v. Kubitsky](#), 48 Conn. App. 835, 712 A.2d 966 (1998).

[FN14] U.S.—[Newbery Corp. v. Fireman's Fund Ins. Co.](#), 95 F.3d 1392 (9th Cir. 1996).

[FN15] U.S.—[Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.](#), 50 F.3d 560 (8th Cir. 1995).

Mo.—[Heintz v. Swimmer](#), 811 S.W.2d 396 (Mo. Ct. App. E.D. 1991).

[FN16] U.S.—[MidAmerican Communications Corp. v. U.S. West Communications, Inc.](#), 857 F. Supp. 772 (D. Colo. 1994).

As to lack of right to judgment for excess over plaintiff's claim, see §§ 108 to 112.

[FN17] Pa.—[Kaiser by Taylor v. Monitrend Inv. Management, Inc.](#), 672 A.2d 359 (Pa. Commw. Ct. 1996).

[FN18] U.S.—*City of Grand Rapids, Mich., v. McCurdy*, 136 F.2d 615 (C.C.A. 6th Cir. 1943).

[FN19] Ga.—*Kuhlke Const. Co. v. Mobley, Inc.*, 159 Ga. App. 777, 285 S.E.2d 236 (1981).

[FN20] Mo.—*Clayton Brokerage Co. of St. Louis, Inc. v. Pilla*, 632 S.W.2d 300 (Mo. Ct. App. E.D. 1982).

Pa.—*Kaiser by Taylor v. Monitrend Inv. Management, Inc.*, 672 A.2d 359 (Pa. Commw. Ct. 1996).

[FN21] U.S.—*In re Malinowski*, 156 F.3d 131 (2d Cir. 1998).

[FN22] N.Y.—*Enrico & Sons Contracting, Inc. v. Bridgemarket Associates*, 252 A.D.2d 429, 675 N.Y.S.2d 351 (1st Dep't 1998).

[FN23] U.S.—*In re Pyramid Energy, Ltd.*, 160 B.R. 586 (Bankr. S.D. Ill. 1993).

[FN24] Ala.—*Walker v. Southern Trucking Corp.*, 283 Ala. 551, 219 So. 2d 379, 37 A.L.R.3d 1013 (1969).

Mo.—*Forsythe v. Starnes*, 554 S.W.2d 100 (Mo. Ct. App. 1977).

[FN25] Ill.—*Cox v. Doctor's Associates, Inc.*, 245 Ill. App. 3d 186, 184 Ill. Dec. 714, 613 N.E.2d 1306 (5th Dist. 1993).

[FN26] Mo.—*Staab v. Thoreson*, 579 S.W.2d 414 (Mo. Ct. App. S.D. 1979).

N.Y.—*Constantino v. State*, 99 Misc. 2d 362, 415 N.Y.S.2d 966 (Ct. Cl. 1979).

[FN27] U.S.—*Peterson v. Equitable Life Assur. Soc. of U.S.*, 57 F. Supp. 2d 692 (W.D. Wis. 1999).

[FN28] U.S.—*U.S. v. Green*, 33 F. Supp. 2d 203 (W.D. N.Y. 1998).

[FN29] Mo.—*Carlund Corp. v. Crown Center Redevelopment*, 849 S.W.2d 647, 21 U.C.C. Rep. Serv. 2d 176 (Mo. Ct. App. W.D. 1993).

[FN30] U.S.—*In re St. Francis Physician Network, Inc.*, 213 B.R. 710 (Bankr. N.D. Ill. 1997).

[FN31] U.S.—*In re Romano*, 175 B.R. 585 (Bankr. W.D. Pa. 1994).

Pa.—*Kline v. Blue Shield of Pennsylvania*, 383 Pa. Super. 347, 556 A.2d 1365 (1989).

[FN32] Mich.—*Mudge v. Macomb County*, 458 Mich. 87, 580 N.W.2d 845 (1998).

[FN33] U.S.—*U.S. v. Shabahang Persian Carpets, Ltd.*, 21 Ct. Int'l Trade 360, 963 F. Supp. 1207 (1997).

[FN34] U.S.—*Algrant v. Evergreen Valley Nurseries Ltd. Partnership*, 126 F.3d 178 (3d Cir. 1997).

[FN35] U.S.—*Ackerman v. National Property Analysts, Inc.*, 887 F. Supp. 494 (S.D. N.Y. 1992).

[FN36] Conn.—*Fadner v. Commissioner of Revenue Services*, 281 Conn. 719, 917 A.2d 540 (2007).

Del.—*TIFD III-X LLC v. Fruehauf Production Co., L.L.C.*, 883 A.2d 854 (Del. Ch. 2004).

[FN37] Ga.—*H. R. Kaminsky & Sons, Inc. v. Yarbrough*, 158 Ga. App. 523, 281 S.E.2d 289 (1981).

As to counterclaims, see § 9.

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§ 3. Definitions and nature—Set-off

West's Key Number Digest

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A set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of the plaintiff's cause of action.

A set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action.[1] It is the right which exists between two parties, each of whom under an independent contract owes an ascertained amount to the other, to set-off their respective debts by way of mutual deduction, so that in any action brought for the larger debt the residue only, after deduction, may be recovered.[2] The right of set-off is a common-law right, which belongs to every creditor, to apply unappropriated monies of the debtor, in his or her hands, in extinguishment of debts due to him or her.[3] It allows parties that owe mutual debts to each other to assert amounts owed, subtract one from the other, and pay only the balance.[4]

The common-law concept of set-off is a right, not a lien.[5] Statutory law and jurisprudence recognize three kinds of set-off, or compensation: legal, which is effected by operation of law;[6] contractual, which is effected by the will of the parties;[7] and judicial, which is effected by the courts.[8]

A claim for set-off is an independent action which may be raised as a counterclaim.[9] It is a claim for affirmative relief, rather than a defense.[10] Generally, set-off must rest on a claim enforceable in its own right,[11] and a party cannot avail itself of the right to set-off unless it has a legally subsisting cause of action[12] in its favor on which it could maintain an independent action.[13] In this regard, a defendant who pleads a set-off occupies substantially the position of a plaintiff.[14]

Set-off must be applied in the forum in which the conflicting claims are heard,[15] and the fact that another action is pending upon a claim will not prevent the same claim from being used as a set-off in a subsequent action.[16] The claim must be such that at the date of the commencement of plaintiff's suit, the defendant could maintain an action against the plaintiff.[17]

The right of set-off is based on principles of right, justice, and benevolence.[18] The doctrine of set-off, whether legal or equitable, is essentially one of equity,[19] and should be denied in situations where it would be inequitable to allow it.[20] The right to set-off exists independently of statute and rests upon the inherent power

of a court to do justice to the parties before it.[21] In some jurisdictions, set-off is mandatory when both parties to an action agree to it.[22]

The defense of set-off requires mutual obligations whereby each obligor owes an equally liquidated and demandable debt to the other.[23] In order for judgments to be qualified for offset, the demands must be mutual and subsisting between the same parties,[24] and due in the same capacity or right.[25] A contingent or unmatured obligation which is not presently enforceable cannot be the subject of set-off.[26] Where there is no mutual debt there is no possibility of legal set-off.[27] However, under various code provisions, a debt need not be liquidated,[28] matured,[29] or noncontingent for the purposes of set-off.[30]

As general rule, mutual debts are not automatically set-off by operation of law.[31] The right of set-off is an exercisable right, and not a fixed or natural right conclusively established by the mere fact that each of the parties has a claim against the other.[32] The right to set-off is an equitable remedy which arises only when the intent to set-off is asserted.[33] Generally, to effectuate the right of set-off, a party must take following three steps: (1) make a decision to effectuate a set-off, (2) take some action accomplishing the set-off, and (3) record the set-off.[34] One who claims set-off or compensation necessarily admits the debt sued upon.[35]

The procedural concept of "set-off" is subsumed under the term "counterclaim" even where no affirmative relief is sought.[36]

Offset.

The term "offset" is used quite commonly as a synonym of "set-off." [37]

CUMULATIVE SUPPLEMENT

Cases:

Under Ohio law, if the party seeking the setoff could file an independent action to obtain a judgment on the debt owed to him by the opposing party, then the parties are mutual and a setoff is permitted; by contrast, if the party seeking a setoff could not collect on the purportedly offsetting debt in an independent proceeding, then the judgments cannot be set off absent some special justification. [Lewis v. United Joint Venture](#), 691 F.3d 835 (6th Cir. 2012).

[END OF SUPPLEMENT]

[FN1] U.S.—[U.S. v. Shabahang Persian Carpets, Ltd.](#), 21 Ct. Int'l Trade 360, 963 F. Supp. 1207 (1997).

Ala.—[Head v. Southern Development Co.](#), 614 So. 2d 1044 (Ala. 1993).

Ind.—[American Management, Inc. v. MIF Realty, L.P.](#), 666 N.E.2d 424 (Ind. Ct. App. 1996).

[FN2] U.S.—[In re Kleather](#), 208 B.R. 406 (Bankr. S.D. Ohio 1997).

Mich.—[Walker v. Farmers Ins. Exchange](#), 226 Mich. App. 75, 572 N.W.2d 17 (1997).

[FN3] U.S.—[In re Chateaugay Corp.](#), 94 F.3d 772 (2d Cir. 1996) (rejected on other grounds by, [In re Paige](#), 584 F.3d 1327 (10th Cir. 2009)).

[FN4] U.S.—*Matter of GEC Industries, Inc.*, 128 B.R. 892, 15 U.C.C. Rep. Serv. 2d 845 (Bankr. D. Del. 1991); *In re Johnson*, 215 B.R. 381 (Bankr. N.D. Ill. 1997).

[FN5] U.S.—*In re Holder*, 182 B.R. 770 (Bankr. M.D. Tenn. 1995).

[FN6] La.—*American Bank v. Saxena*, 553 So. 2d 836 (La. 1989).

[FN7] Mo.—*Transit Cas. Co. v. Selective Ins. Co. of Southeast*, 137 F.3d 540 (8th Cir. 1998).

[FN8] La.—*Richard v. Vidrine Automotive Services, Inc.*, 729 So. 2d 1174 (La. Ct. App. 1st Cir. 1999).

[FN9] Mo.—*Titan Const. Co. v. Mark Twain Kansas City Bank*, 887 S.W.2d 454 (Mo. Ct. App. W.D. 1994).

[FN10] Ga.—*Charles S. Martin Distributing Co., Inc. v. Bernhardt Furniture Co.*, 213 Ga. App. 481, 445 S.E.2d 297 (1994).

[FN11] Cal.—*R. M. Sherman Co. v. W. R. Thomason, Inc.*, 191 Cal. App. 3d 559, 236 Cal. Rptr. 577 (1st Dist. 1987).

[FN12] Md.—*Sveum v. J. Mess Plumbing, Inc.*, 965 S.W.2d 924 (Mo. Ct. App. E.D. 1998).

[FN13] U.S.—*Ritz-Craft Corp. v. Stanford Management Group*, 800 F. Supp. 1312, 19 U.C.C. Rep. Serv. 2d 987 (D. Md. 1992).

Ariz.—*Turf Paradise, Inc. v. Maricopa County*, 179 Ariz. 337, 878 P.2d 1375 (Ct. App. Div. 1 1994).

[FN14] Conn.—*Hope's Architectural Products, Inc. v. Fox Steel Co.*, 44 Conn. App. 759, 692 A.2d 829 (1997).

Mo.—*Sveum v. J. Mess Plumbing, Inc.*, 965 S.W.2d 924 (Mo. Ct. App. E.D. 1998).

[FN15] U.S.—*In re Bacigalupi, Inc.*, 60 B.R. 442 (B.A.P. 9th Cir. 1986).

[FN16] Pa.—*Virginia Mansions Condominium Ass'n v. Lampl*, 380 Pa. Super. 452, 552 A.2d 275 (1988).

[FN17] Neb.—*M & D Masonry, Inc. v. Universal Sur. Co.*, 6 Neb. App. 215, 572 N.W.2d 408 (1997).

[FN18] Ala.—*Head v. Southern Development Co.*, 614 So. 2d 1044 (Ala. 1993).

N.Y.—*Seneca v. Novaro*, 80 A.D.2d 909, 437 N.Y.S.2d 401 (2d Dep't 1981).

[FN19] U.S.—*U.S. v. York*, 909 F. Supp. 4 (D.D.C. 1995).

Mo.—*Stewart Title Guar. Co. v. Community Title Co.*, 924 S.W.2d 62 (Mo. Ct. App. E.D. 1996).

[FN20] U.S.—*Lines v. Bank of America Nat. Trust & Sav. Ass'n*, 743 F. Supp. 176 (S.D. N.Y. 1990).

[FN21] Cal.—*Keith G. v. Suzanne H.*, 62 Cal. App. 4th 853, 72 Cal. Rptr. 2d 525 (2d Dist. 1998), as supplemented on denial of reh'g, (Apr. 8, 1998).

[FN22] Iowa—*City of Sioux City v. Freese*, 611 N.W.2d 777 (Iowa 2000).

[FN23] U.S.—*In re Allen-Main Associates, Ltd. Partnership*, 233 B.R. 631 (Bankr. D. Conn. 1999).

La.—*Winkle v. Advance Products & Systems, Inc.*, 721 So. 2d 983 (La. Ct. App. 3d Cir. 1998).

N.Y.—*Spodek v. Park Property Development Associates*, 263 A.D.2d 478, 693 N.Y.S.2d 199 (2d Dep't 1999).

[FN24] U.S.—*In re Whimsy, Inc.*, 221 B.R. 69 (S.D. N.Y. 1998).

Cal.—*Birman v. Loeb*, 64 Cal. App. 4th 502, 75 Cal. Rptr. 2d 294 (2d Dist. 1998).

Colo.—*Karg v. Mitchek*, 983 P.2d 21 (Colo. App. 1998).

[FN25] U.S.—*In re Lopes*, 211 B.R. 443 (D.R.I. 1997).

Mo.—*Miles v. Werle*, 977 S.W.2d 297 (Mo. Ct. App. W.D. 1998).

[FN26] U.S.—*In re Tower Environmental, Inc.*, 217 B.R. 933 (Bankr. M.D. Fla. 1997).

[FN27] Conn.—*Godiksen v. Miller*, 6 Conn. App. 106, 503 A.2d 617 (1986).

[FN28] Va.—*Piland Corp. v. League Const. Co., Inc.*, 238 Va. 187, 380 S.E.2d 652 (1989).

[FN29] U.S.—*In re Westchester Structures, Inc.*, 181 B.R. 730 (Bankr. S.D. N.Y. 1995).

[FN30] U.S.—*In re Britton*, 83 B.R. 914 (Bankr. E.D. N.C. 1988).

[FN31] Okla.—*Jones v. England*, 1989 OK 142, 782 P.2d 119 (Okla. 1989).

[FN32] U.S.—*In re Holder*, 182 B.R. 770 (Bankr. M.D. Tenn. 1995).

Ariz.—*Nutter v. Occidental Petroleum Land & Development Corp.*, 117 Ariz. 458, 573 P.2d 532 (Ct. App. Div. 2 1977).

[FN33] U.S.—*In re South Park Care Associates, Inc.*, 203 B.R. 445 (Bankr. W.D. Mo. 1996).

[FN34] U.S.—*In re United Marine Shipbuilding, Inc.*, 158 F.3d 997 (9th Cir. 1998).

Neb.—*Davis Erection Co., Inc. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995).

[FN35] La.—*Hill Wholesale Distributing Co., Inc. v. Louis W. Howat & Son*, 666 So. 2d 1252 (La. Ct. App. 2d Cir. 1996).

[FN36] Ill.—*Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 211 Ill. Dec. 299, 654 N.E.2d 1109 (2d Dist. 1995).

[FN37] U.S.—*In re Alvstad*, 223 B.R. 733 (Bankr. D. N.D. 1998).

Vt.—*Lalime v. Desbiens*, 115 Vt. 165, 55 A.2d 121 (1947).

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§ 4. Definitions and nature—Statutory set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  7

The right or remedy of set-off was unknown at common law and is purely statutory in origin.

The right or remedy of set-off in actions at law is purely statutory^[1] and can only be exercised pursuant to statutory authority or as an incident of a court's equity jurisdiction.^[2]

Generally, the statutory right of set-off is not limited to set-off of claims arising out of the same transaction.^[3] However, under some state enactments of the Uniform Commercial Code, damages which a buyer seeks to set off from the amount due under a sales contract must arise from breach of the same contract under which the seller is attempting to collect.^[4]

A claim for set-off must be asserted as a counterclaim, rather than as a defense, since it does not operate as a denial of the plaintiff's claim.^[5] Under certain state statutes, set-off between parties to a lawsuit is not automatic, but must be preceded by motion.^[6] Set-off, if allowed, permits affirmative judgment for the defendant.^[7]

[FN1] Conn.—[General Consolidated, Limited v. Rudnick & Sons, Inc.](#), 4 Conn. Cir. Ct. 581, 237 A.2d 386 (App. Div. 1967).

Wis.—[Zweck v. D. P. Way Corp.](#), 70 Wis. 2d 426, 234 N.W.2d 921 (1975).

[FN2] U.S.—[Cearfoss Const. Corp. v. MMSG Ltd. Partnership](#), 904 F. Supp. 450 (D. Md. 1995).

As to the construction of statutory set-off provisions, see [§ 15](#).

[FN3] Conn.—[Hope's Architectural Products, Inc. v. Fox Steel Co.](#), 44 Conn. App. 759, 692 A.2d 829 (1997).

Mont.—[F.D.I.C. v. Northern Montana Gas Co.](#), 274 Mont. 371, 908 P.2d 1357 (1995).

[FN4] U.S.—[Celex Group, Inc. v. Executive Gallery, Inc.](#), 877 F. Supp. 1114 (N.D. Ill. 1995).

[FN5] Ga.—[Stewart v. Stewart](#), 236 Ga. App. 348, 511 S.E.2d 919 (1999).

[FN6] Ga.—[Pinkerton & Laws, Inc. v. Macro Const., Inc.](#), 226 Ga. App. 169, 485 S.E.2d 797 (1997).

[FN7] Pa.—[Hill v. Port Authority Transit System of Allegheny County](#), 137 Pa. Commw. 132, 585 A.2d 1129 (1991), order *aff'd*, 531 Pa. 457, 613 A.2d 1206 (1992).

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§ 5. Definitions and nature—Equitable set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑8(1)

Equity has inherent power, as part of its general jurisdiction, and independently of statute, to allow or compel a set-off. Generally, equity will follow the law with respect to matters of set-off unless a departure from the rules obtaining in courts of law is necessary to prevent wrong and injustice.

When the statutes governing legal setoff do not apply, a party nevertheless may be entitled to equitable setoff, to enforce the simple but clear natural equity in a given case.[1] A court of equity, or a court possessing equitable jurisdiction, has inherent[2] power,[3] as a part of its general jurisdiction,[4] to allow or compel a set-off.[5] Setoff is right grounded in the concepts of fairness and equity.[6] The right to set-off exists independently of statute and rests upon the inherent power of a court to do justice to the parties before it.[7] The doctrine of set-off is based on the principle that natural justice and equity require that the demands of parties mutually indebted be set off against each other and that, in a judicial proceeding by one against the other, only the balance should be recovered.[8] The right of setoff is not a contract defense; rather, setoff is a device that facilitates the efficient reconciliation of competing claims between the same parties.[9]

The equitable remedy of set-off is available only where debts are mutual,[10] and debts arising at different times out of different circumstances[11] or debts that arise when those parties are acting in different capacities, are not considered mutual.[12] The doctrine of "mutuality," which requires the mutuality of debts for set-off, is not permitted to work injustice, for whenever it is necessary to effect a clear equity or to prevent irremediable injustice, set-off will be allowed in equity, even though the debts are not mutual.[13] However, there must be some showing of irremediable injustice to invoke the exception to general rule of the mutuality for set-off of debts.[14] Inquiry into mutuality for equitable set-off is irrelevant where a contractual basis for set-off exists.[15]

Discretion.

The right of equitable set-off is permissive, not mandatory, and its application rests in the discretion of the court, which exercises such discretion under the general principles of equity.[16]

[FN1] Conn.—*Croall v. Kohler*, 106 Conn. App. 788, 943 A.2d 1112 (2008).

As to statutory setoff, see § 4.

[FN2] Fla.—*Chappell v. Chappell*, 253 So. 2d 281 (Fla. Dist. Ct. App. 4th Dist. 1971).

N.C.—*Lake Mary Ltd. Partnership v. Johnston*, 145 N.C. App. 525, 551 S.E.2d 546 (2001).

[FN3] Ill.—*Reinhard v. Reinhard*, 19 Ill. App. 2d 223, 153 N.E.2d 285 (1st Dist. 1958).

[FN4] Mo.—*Watson v. Harris*, 435 S.W.2d 667, 38 A.L.R.3d 582 (Mo. 1968).

S.C.—*W. M. Kirkland, Inc. v. Providence Washington Ins. Co.*, 264 S.C. 573, 216 S.E.2d 518 (1975).

[FN5] Mo.—*Chaney v. Cooper*, 948 S.W.2d 621 (Mo. Ct. App. W.D. 1997).

[FN6] U.S.—*In re Myers*, 362 F.3d 667 (10th Cir. 2004).

[FN7] Cal.—*Keith G. v. Suzanne H.*, 62 Cal. App. 4th 853, 72 Cal. Rptr. 2d 525 (2d Dist. 1998), as supplemented on denial of reh'g, (Apr. 8, 1998).

[FN8] Ala.—*Head v. Southern Development Co.*, 614 So. 2d 1044 (Ala. 1993).

[FN9] U.S.—*J.G.B. Enterprises, Inc. v. U.S.*, 497 F.3d 1259 (Fed. Cir. 2007).

[FN10] U.S.—*International Union of Bricklayers and Allied Craftsmen v. Gallante*, 912 F. Supp. 695 (S.D. N.Y. 1996).

Ill.—*Bank of Chicago-Garfield Ridge v. Park Nat. Bank*, 237 Ill. App. 3d 1085, 179 Ill. Dec. 240, 606 N.E.2d 72 (1st Dist. 1992).

[FN11] U.S.—*Soo Line R. Co. v. Escanaba & Lake Superior R. Co.*, 840 F.2d 546 (7th Cir. 1988).

[FN12] U.S.—*International Union of Bricklayers and Allied Craftsmen v. Gallante*, 912 F. Supp. 695 (S.D. N.Y. 1996).

[FN13] Mo.—*Stewart Title Guar. Co. v. Community Title Co.*, 924 S.W.2d 62 (Mo. Ct. App. E.D. 1996).

[FN14] Mo.—*Stewart Title Guar. Co. v. Community Title Co.*, 924 S.W.2d 62 (Mo. Ct. App. E.D. 1996).

[FN15] Ill.—*Fisher v. State Bank of Annawan*, 163 Ill. 2d 177, 205 Ill. Dec. 520, 643 N.E.2d 811 (1994).

[FN16] U.S.—*Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392 (9th Cir. 1996).

Wyo.—*Cargill, Inc. v. Mountain Cement Co.*, 891 P.2d 57, 27 U.C.C. Rep. Serv. 2d 783 (Wyo. 1995).

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§ 6. Grounds for set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑8

In general, an equitable set-off will be allowed when, and only when, the party seeking it shows some equitable ground therefor, and its allowance is necessary in order to promote justice.

Generally speaking, an equitable set-off will be allowed when the party seeking it shows some equitable ground therefor^[1] and it is necessary in order to promote justice,^[2] to avoid or prevent wrong or irremediable in justice.^[3] The set-off will not be allowed where it would be inequitable^[4] work injustice,^[5] contradict public policy,^[6] or where it is not necessary to prevent irremediable injustice.^[7] In dealing with the equitable right of set-off, the court looks through forms to determine the real facts and the true intention of the parties.^[8]

While there is some authority to the effect that the equitable grounds which will warrant overriding the statutory law are limited to insolvency or nonresidence,^[9] it is generally held that these are not the sole grounds,^[10]] and other grounds include such a connection between the demands that one is the consideration for the other, an agreement to set them off, and a complete liquidation thereof at law.^[11]

[FN1] Ind.—[Anderson v. Biggs](#), 118 Ind. App. 266, 77 N.E.2d 909 (1948).

Iowa—[National Equipment Rental, Ltd. v. Estherville Ford, Inc.](#), 313 N.W.2d 538 (Iowa 1981).

Kan.—[Mynatt v. Collis](#), 274 Kan. 850, 57 P.3d 513 (2002).

[FN2] Md.—[Frank v. Wareheim](#), 177 Md. 43, 7 A.2d 186 (1939).

[FN3] U.S.—[Shima v. Shima](#), 148 F.2d 115 (App. D.C. 1945).

N.H.—[Varney v. General Enolam, Inc.](#), 109 N.H. 514, 257 A.2d 11 (1969).

[FN4] U.S.—[Hutchinson Coal Co. v. Miller](#), 20 F. Supp. 718 (N.D. W. Va. 1937).

[FN5] Utah—*Reeve v. Blatchley*, 106 Utah 259, 147 P.2d 861 (1944).

[FN6] Kan.—*Mynatt v. Collis*, 274 Kan. 850, 57 P.3d 513 (2002).

[FN7] U.S.—*Hutchinson Coal Co. v. Miller*, 20 F. Supp. 718 (N.D. W. Va. 1937).

[FN8] Pa.—*In re Harr*, 319 Pa. 89, 179 A. 238 (1935).

[FN9] Ind.—*Anderson v. Biggs*, 118 Ind. App. 266, 77 N.E.2d 909 (1948).

[FN10] Ala.—*Dudley v. Whatley*, 244 Ala. 508, 14 So. 2d 141, 147 A.L.R. 508 (1943).

[FN11] Mass.—*Ellery v. Cunningham*, 42 Mass. 112, 1 Met. 112, 1840 WL 3051 (1840).

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§ 7. Grounds for set-off—Insolvency

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  8(2)

The insolvency of a person against whom a set-off is claimed may be a sufficient ground for the allowance of the set-off, particularly where such insolvency is coupled with other matters.

Among the grounds of independent equity jurisdiction for allowing set-off are special circumstances, including insolvency, that render it probable that a party will lose his or her demand and be compelled to pay the demand of the other.[1] Thus, insolvency of one of the parties may create an equity, or at least strengthen it, sufficient to allow a set-off of mutual obligations.[2]

[FN1] U.S.—[Adams v. Zimmerman](#), 73 F.3d 1164 (1st Cir. 1996).

Iowa—[Barnhouse v. Hawkeye State Bank](#), 406 N.W.2d 181, 4 U.C.C. Rep. Serv. 2d 1304 (Iowa 1987).

[FN2] U.S.—[Banco De La Provincia De Buenos Aires v. BayBank Boston N.A.](#), 985 F. Supp. 364, 33 U.C.C. Rep. Serv. 2d 964 (S.D. N.Y. 1997).

Mass.—[Commissioner of Ins. v. Munich American Reinsurance Co.](#), 429 Mass. 140, 706 N.E.2d 694 (1999).

Okla.—[Jones v. England](#), 1989 OK 142, 782 P.2d 119 (Okla. 1989).

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§ 8. Grounds for set-off—Nonresidence

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  8(2)

In most jurisdictions the nonresidence of a party against whom a set-off is claimed is a sufficient ground for equitable interference to allow the set-off.

In a majority of jurisdictions the nonresidence of a party against whom a set-off is claimed is deemed to be a sufficient ground for equitable interference to allow the set-off;^[1] but in some jurisdictions the mere fact of nonresidence unaccompanied by any other equitable condition is considered insufficient to warrant the application of the doctrine of equitable set-off.^[2]

[FN1] Colo.—[Walter E. Heller & Co. v. Lindsey](#), 146 Colo. 452, 361 P.2d 979 (1961).

Ga.—[Gordy Tire Co. v. Dayton Rubber Co.](#), 216 Ga. 83, 114 S.E.2d 529 (1960).

[FN2] Ga.—[Gordy Tire Co. v. Dayton Rubber Co.](#), 216 Ga. 83, 114 S.E.2d 529 (1960).

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§ 9. Counterclaim

West's Key Number Digest

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A counterclaim is a cause of action in favor of the defendant on which he might have sued the plaintiff and obtained affirmative relief in a separate action. It is a purely statutory remedy.

The term counterclaim is generic in nature and includes those defenses universally known as recoupment and set-off.[1] A counterclaim is a purely statutory remedy.[2] A counterclaim is a cause of action in favor of a defendant[3] upon which he might have brought a separate action and recovered judgment.[4] A counterclaim is an action brought by a defendant in opposition to the plaintiff's claim[5] that is wholly independent of the transaction upon which plaintiff's cause of action is based and represents the right of the defendant to obtain affirmative relief from the plaintiff.[6] It is a cause of action in which a party seeks judgment on his or her own behalf,[7] and it should be treated as a separate action.[8] With respect to a counterclaim, the defendant assumes the position of a plaintiff.[9] A counterclaim is not a defense on the merits, but is an independent cause of action and must be complete by itself.[10] It differs from "answer" or "affirmative defense," which merely attempts to defeat plaintiff's cause of action, by asserting a claim for affirmative relief.[11] A counterclaim meets plaintiff's claim by opposing to it a demand on the part of defendant to the end that a complete determination of the right to and amount of recovery may be had in the same action;[12] it represents defendant's right to have the claims of the parties counterbalanced in whole or in part, judgment to be entered for the excess, if any.[13] A counterclaim may be legal or equitable in character.[14]

Where permitted, a party may file as a counterclaim any claim against an opposing party regardless of whether it arises out of a transaction separate from the initial claim.[15] However, a counterclaim may only be asserted against an opposing party,[16] and on behalf of a defendant already party to the action.[17] A counterclaim may not be asserted against a plaintiff in a capacity different from that in which the plaintiff appears in the action.[18] Thus, a person who sues in one capacity is not subject to counterclaims against him in another capacity.[19] A counterclaim, to be valid, must be in actual existence at time original action is filed.[20]

[FN1] U.S.—U.S. for Use and Benefit of Greenville Equipment Co. v. U.S. Cas. Co., 218 F. Supp. 653 (D. Del. 1962).

[FN2] Ariz.—Pacific Guano Co. v. Pinal County Land Co., 1 Ariz. App. 34, 399 P.2d 122 (1965).

N.H.—Phinney v. Levine, 117 N.H. 968, 381 A.2d 735 (1977).

S.C.—W. M. Kirkland, Inc. v. Providence Washington Ins. Co., 264 S.C. 573, 216 S.E.2d 518 (1975).

[FN3] Tex.—McBryde v. Curry, 914 S.W.2d 616 (Tex. App. Texarkana 1995), writ denied, (May 10, 1996).

[FN4] U.S.—Unispec Development Corp. v. Harwood K. Smith & Partners, 124 F.R.D. 211 (D. Ariz. 1988).

[FN5] Ariz.—Turf Paradise, Inc. v. Maricopa County, 179 Ariz. 337, 878 P.2d 1375 (Ct. App. Div. 1 1994).

Pa.—Kaiser by Taylor v. Monitrend Inv. Management, Inc., 672 A.2d 359 (Pa. Commw. Ct. 1996).

[FN6] Pa.—Kaiser by Taylor v. Monitrend Inv. Management, Inc., 672 A.2d 359 (Pa. Commw. Ct. 1996).

[FN7] Mo.—Tindall v. Holder, 892 S.W.2d 314 (Mo. Ct. App. S.D. 1994).

[FN8] U.S.—In re Viscount Air Services, Inc., 232 B.R. 416 (Bankr. D. Ariz. 1998).

Okla.—Bird v. Coleman, 1997 OK 44, 939 P.2d 1123 (Okla. 1997), as amended, (Apr. 15, 1997).

Pa.—Chester Upland School Dist. v. Yesavage, 653 A.2d 1319, 97 Ed. Law Rep. 842 (Pa. Commw. Ct. 1994).

[FN9] Conn.—Hope's Architectural Products, Inc. v. Fox Steel Co., 44 Conn. App. 759, 692 A.2d 829 (1997).

[FN10] Ill.—Bernstein v. Lind-Waldock & Co., 153 Ill. App. 3d 108, 106 Ill. Dec. 323, 505 N.E.2d 1114 (1st Dist. 1987).

Or.—Rexius Forest By-Products, Inc. v. A & R Lumber Sales, Inc., 112 Or. App. 114, 827 P.2d 1359 (1992).

[FN11] Fla.—Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730 (Fla. 1991).

Ill.—Norman A. Koglin Associates v. Valenz Oro, Inc., 277 Ill. App. 3d 142, 213 Ill. Dec. 625, 659 N.E.2d 971 (1st Dist. 1995), aff'd, 176 Ill. 2d 385, 223 Ill. Dec. 550, 680 N.E.2d 283 (1997).

[FN12] Cal.—Smith v. Royal Mfg. Co., 185 Cal. App. 2d 315, 8 Cal. Rptr. 417 (1st Dist. 1960).

Wyo.—Hawkeye-Sec. Ins. Co. v. Apodaca, 524 P.2d 874 (Wyo. 1974).

[FN13] Mo.—Forsythe v. Starnes, 554 S.W.2d 100 (Mo. Ct. App. 1977).

Tex.—Adams v. Isbell, 615 S.W.2d 254 (Tex. Civ. App. Dallas 1981).

[FN14] Fla.—*Jones-Mahoney Corp. v. C. A. Fielland, Inc.*, 114 So. 2d 18 (Fla. Dist. Ct. App. 2d Dist. 1959).

As to equitable set-off, generally, see § 92.

[FN15] Okla.—*F.D.I.C. v. Moss*, 1991 OK 116, 831 P.2d 613 (Okla. 1991).

[FN16] Ohio—*Quintus v. McClure*, 41 Ohio App. 3d 402, 536 N.E.2d 22 (9th Dist. Medina County 1987).

[FN17] N.Y.—*Bramex Associates, Inc. v. CBI Agencies, Ltd.*, 149 A.D.2d 383, 540 N.Y.S.2d 243 (1st Dep't 1989).

[FN18] N.Y.—*Corcoran v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 143 A.D.2d 309, 532 N.Y.S.2d 376 (1st Dep't 1988).

[FN19] Ohio—*Quintus v. McClure*, 41 Ohio App. 3d 402, 536 N.E.2d 22 (9th Dist. Medina County 1987).

[FN20] S.D.—*Haberer v. First Bank of South Dakota (NA)*, 429 N.W.2d 62 (S.D. 1988).

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§ 10. Counterclaim—Compulsory and permissive

West's Key Number Digest

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In some jurisdictions, a compulsory counterclaim rule exists which compels a party to state any claim it has against its adversary which arises out of the transaction or occurrence which is the subject matter of the suit.

Some jurisdictions have enacted a compulsory counterclaim rule which compels a party to state any claim it has against its adversary which arises out of the transaction or occurrence which is the subject matter of the suit.^[1] The purpose of the compulsory counterclaim rule is to avoid a multiplicity of actions and to achieve resolution in a single suit of all disputes arising out of the same subject matter.^[2] Compulsory counterclaims, like defenses, are part and parcel of the underlying case and are adjudicated as part of that case.^[3] For a claim to be considered a compulsory counterclaim in the opposing party's previously-filed action, there must be a common factual background and a logical relationship^[4] in the nature of the actions and the remedies sought.^[5] A counterclaim is compulsory if it arises out of the transaction that is the subject matter of the opposing party's claim and does not require the presence of third parties over whom the court cannot acquire jurisdiction.^[6]

Failure to timely file a compulsory counterclaim results in the claim being barred.^[7]

The trial court has discretion to allow a permissive counterclaim.^[8] A rule allowing a party to file a permissive counterclaim against any opposing party is limited by the court's jurisdiction over the subject matter or person.^[9] Once raised by the defendant in response to the plaintiff's action, permissive counterclaims become part of the underlying case.^[10]

"Reconvention."

"Reconvention," "reconventional demand," and "demand in reconvention" are civil-law terms,^[11] and have variously been defined as, or said to be, equivalent to "counterclaim."^[12]

CUMULATIVE SUPPLEMENT

Cases:

The purpose of Ohio's compulsory counterclaim rule, much like the doctrine of res judicata, is to avoid mul-

tiplicity of suits by requiring in one action the litigation of all existing claims arising from a single transaction or occurrence, no matter which party initiates the action. [Ohio Rules Civ.Proc., Rule 13\(A\)](#). [Corbett v. Beneficial Ohio, Inc.](#), 847 F. Supp. 2d 1019 (S.D. Ohio 2012).

[END OF SUPPLEMENT]

[FN1] Mo.—[Choate v. Hicks](#), 983 S.W.2d 611 (Mo. Ct. App. S.D. 1999) (abrogated on other grounds by, [Joel Bianco Kawasaki Plus v. Meramec Valley Bank](#), 81 S.W.3d 528 (Mo. 2002)).

What constitutes compulsory counterclaim

Alaska—[Andrews v. Wade & De Young, Inc., P.C.](#), 950 P.2d 574 (Alaska 1997).

Tex.—[Atchley v. Spurgeon](#), 964 S.W.2d 169 (Tex. App. San Antonio 1998).

[FN2] Ariz.—[Mohave Concrete and Materials, Inc. v. Scaramuzzo](#), 154 Ariz. 28, 739 P.2d 1345 (Ct. App. Div. 1 1987).

N.C.—[Hudson v. Hudson](#), 135 N.C. App. 97, 518 S.E.2d 811 (1999).

Okla.—[McDanel v. Lynn Hickey Dodge, Inc.](#), 1999 OK 30, 979 P.2d 252 (Okla. 1999).

[FN3] Mass.—[PGR Management Co., Inc. v. Credle](#), 427 Mass. 636, 694 N.E.2d 1273 (1998).

[FN4] Ohio—[Keeley & Assoc., Inc. v. Integrity Supply, Inc.](#), 120 Ohio App. 3d 1, 696 N.E.2d 618 (10th Dist. Franklin County 1997).

[FN5] N.C.—[Hudson v. Hudson](#), 135 N.C. App. 97, 518 S.E.2d 811 (1999).

[FN6] Minn.—[G.A.W., III v. D.M.W.](#), 596 N.W.2d 284 (Minn. Ct. App. 1999).

Tex.—[Atchley v. Spurgeon](#), 964 S.W.2d 169 (Tex. App. San Antonio 1998).

[FN7] Ark.—[Estate of Goston v. Ford Motor Co.](#), 320 Ark. 699, 898 S.W.2d 471 (1995).

Ga.—[American Medical Transport Group, Inc. v. Glo-An, Inc.](#), 235 Ga. App. 464, 509 S.E.2d 738 (1998).

[FN8] Ga.—[Southern General Ins. Co. v. Ross](#), 227 Ga. App. 191, 489 S.E.2d 53 (1997).

[FN9] Fla.—[Beach Park Development Corp. v. Remhof](#), 673 So. 2d 912 (Fla. Dist. Ct. App. 2d Dist. 1996).

N.Y.—[Bramex Associates, Inc. v. CBI Agencies, Ltd.](#), 149 A.D.2d 383, 540 N.Y.S.2d 243 (1st Dep't 1989).

[FN10] Mass.—[PGR Management Co., Inc. v. Credle](#), 427 Mass. 636, 694 N.E.2d 1273 (1998).

[FN11] Tex.—[Egery v. Power](#), 5 Tex. 501, 1851 WL 3912 (1851).

[FN12] Tex.—[Waldman-Ross Grain Co. v. Davison & Co.](#), 251 S.W. 521 (Tex. Civ. App. Galveston 1923).

Wis.—[McLeod v. Bertschy](#), 33 Wis. 176, 1873 WL 5785 (1873).

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§ 11. Compensation

West's Key Number Digest

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Compensation, as used in the civil law, is the extinction of debts of which two persons are reciprocally debtors to one another, by the credits by which they are reciprocally creditors of one another; and under this doctrine the debts extinguish each other by mere operation of law to the amount of their respective sums, without any act of either party.

"Compensation" is a civil-law term^[1] and is of three kinds: legal or by operation of law; compensation by way of exception; and by reconvention.^[2] "Compensation" is defined as the extinction of debts, of which two persons are reciprocally debtors to one another, by the credits by which they are reciprocally creditors of one another.^[3]

Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due.^[4] In such a case, compensation extinguishes both obligations to the extent of the lesser amount.^[5] An unliquidated claim for damages may not be used to offset liquidated debt,^[6] and the lack of sufficient liquidity and demandability will preclude a plea of compensation.^[7]

Judicial compensation is the practice of shaping final judgments and is invoked when compensation as matter of law is not operable.^[8] A court may use judicial compensation when two parties are mutually indebted to each other by balancing amounts in fixing judgment.^[9] Compensation does not apply to tort claims.^[10]

Retroactive effect.

Compensation, when decided by the court to be legal, has a retroactive effect to the day both debts, simultaneously existing, were liquidated, due, and demandable.^[11]

[FN1] La.—*Tolbird v. Cooper*, 243 La. 306, 143 So. 2d 80 (1962).

[FN2] La.—*Stewart v. Harper*, 16 La. Ann. 181, 1861 WL 3818 (1861).

[FN3] Iowa—*Tuttle v. Bisbee*, 144 Iowa 53, 120 N.W. 699 (1909).

[FN4] La.—*Buck's Run Enterprises, Inc. v. Mapp Const., Inc.*, 808 So. 2d 428 (La. Ct. App. 1st Cir. 2001).

[FN5] La.—*ITT Residential Capital Corp. v. Cheuk*, 656 So. 2d 747 (La. Ct. App. 5th Cir. 1995), writ denied, 661 So. 2d 465 (La. 1995).

[FN6] La.—*Sentilles v. Kwik-Kopy Corp.*, 618 So. 2d 1133 (La. Ct. App. 4th Cir. 1993), writ denied, 629 So. 2d 348 (La. 1993).

[FN7] La.—*American Bank v. Saxena*, 553 So. 2d 836 (La. 1989).

[FN8] U.S.—*In re MMR Holding Corp.*, 199 B.R. 611 (M.D. La. 1996), *aff'd*, 119 F.3d 1 (5th Cir. 1997).

[FN9] U.S.—*In re MMR Holding Corp.*, 199 B.R. 611 (M.D. La. 1996), *aff'd*, 119 F.3d 1 (5th Cir. 1997).

La.—*Buck's Run Enterprises, Inc. v. Mapp Const., Inc.*, 808 So. 2d 428 (La. Ct. App. 1st Cir. 2001).

[FN10] La.—*A Confidential Limousine Service, Inc. v. London Livery, Ltd.*, 612 So. 2d 875 (La. Ct. App. 4th Cir. 1993), writ denied, 614 So. 2d 1263 (La. 1993).

[FN11] La.—*Brock v. Pan American Petroleum Corp.*, 186 La. 607, 173 So. 121 (1937).

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§ 12. Synonymity of, and distinctions between, terms

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 4

The terms "set-off," "counterclaim," "recoupment," "reconvention," and "compensation" have been compared to, and distinguished from, one another.

Recoupment and set-off are distinguishable from each other.[1] Recoupment differs from set-off in that any claim or demand the defendant may have against the plaintiff may be used as a set-off, while a claim is not a subject for recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action.[2] Thus, unlike set-off, recoupment involves the netting out of the debt arising from a single transaction,[3] and does not involve the concept of mutuality of obligations.[4] Recoupment does not allow one transaction to be offset against another, but only permits a transaction which is made subject of a suit by the plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole.[5]

Although both set-off and recoupment have a common origin and are equitable in nature, recoupment is more limited in its application.[6] In some jurisdictions, by virtue of code or statutory provisions, there is no longer any substantial difference between the two terms,[7] the distinctions having been dissolved.[8] In other jurisdictions, the substantive distinctions between recoupment and set-off articulated at common law remain in place.[9] However, the availability of recoupment does not depend on set-off statutes.[10]

Counterclaim and other cross demands.

Subject to statutory limitations, counterclaim embraces practically every kind of cross demand,[11] including both set-off and recoupment.[12] Sometimes the terms "counterclaim" and "set-off" are used interchangeably in a generic sense,[13] as are similarly "counterclaim" and "recoupment." [14]

A counterclaim is distinguishable from a recoupment in that it is a purely statutory remedy, while recoupment is a development of the common law,[15] and, while in the case of a counterclaim defendant can recover an excess of his or her claim over plaintiff's, recoupment is limited to the amount of plaintiff's demand and will not authorize a judgment in defendant's favor for an excess.[16]

[FN1] Md.—*Imbesi v. Carpenter Realty Corp.*, 125 Md. App. 676, 726 A.2d 854 (1999), rev'd on other grounds, 357 Md. 375, 744 A.2d 549 (2000).

[FN2] U.S.—*In re St. Francis Physician Network, Inc.*, 213 B.R. 710 (Bankr. N.D. Ill. 1997).

Md.—*Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 744 A.2d 549 (2000).

Neb.—*M & D Masonry, Inc. v. Universal Sur. Co.*, 6 Neb. App. 215, 572 N.W.2d 408 (1997).

[FN3] U.S.—*In re Harmon*, 188 B.R. 421 (B.A.P. 9th Cir. 1995).

[FN4] N.Y.—*Matter of Midland Ins. Co.*, 167 A.D.2d 75, 569 N.Y.S.2d 951 (1st Dep't 1991), order aff'd, 79 N.Y.2d 253, 582 N.Y.S.2d 58, 590 N.E.2d 1186 (1992).

[FN5] N.Y.—*Rochester Health Network, Inc. v. Rochester Hosp. Service Corp.*, 123 A.D.2d 509, 507 N.Y.S.2d 100 (4th Dep't 1986).

[FN6] U.S.—*In re CDM Management Services, Inc.*, 226 B.R. 195 (Bankr. S.D. Ind. 1997).

[FN7] Mo.—*State v. Weatherby*, 344 Mo. 848, 129 S.W.2d 887 (1939).

[FN8] Utah—*Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

[FN9] U.S.—*In re Concept Clubs, Inc.*, 154 B.R. 581 (D. Utah 1993).

[FN10] U.S.—*Lago & Sons Dairy, Inc. v. H.P. Hood, Inc.*, 892 F. Supp. 325 (D.N.H. 1995).

[FN11] N.C.—*Etheridge v. Wescott*, 244 N.C. 637, 94 S.E.2d 846 (1956).

[FN12] Mo.—*Edmonds v. Stratton*, 457 S.W.2d 228 (Mo. Ct. App. 1970).

N.C.—*Etheridge v. Wescott*, 244 N.C. 637, 94 S.E.2d 846 (1956).

[FN13] Colo.—*Corbin Douglass, Inc. v. Kelley*, 28 Colo. App. 369, 472 P.2d 764 (App. 1970).

[FN14] Pa.—*Cooper v. Frost*, 43 Pa. D. & C. 636, 1942 WL 2668 (C.P. 1942).

[FN15] W.Va.—*Bowdish & Degarmo Bros. v. Groscup*, 70 W. Va. 758, 74 S.E. 950 (1912).

[FN16] Mo.—*Edmonds v. Stratton*, 457 S.W.2d 228 (Mo. Ct. App. 1970).

Or.—*Rogue River Management Co. v. Shaw*, 243 Or. 54, 411 P.2d 440 (1966).

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§ 13. Objects of, and favor shown, remedies

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑4

In general, the common object of the various forms of cross demand, such as set-off and counterclaim, and of statutory provisions relating thereto, is to prevent a multiplicity of suits by allowing the entire controversy between the parties to be determined in one action, and to this end the statutes are given a liberal construction.

The object of a plea of recoupment is to rebate or recoup in whole or in part the claim sued on.[1] The object of a set-off is to liquidate the whole or a part of plaintiff's demand, according to the amount of the set-off,[2] or, if the amount of the set-off exceeds plaintiff's demand, obtain judgment for the excess.[3] The purpose of a counterclaim has been said to be to enable a defendant to make his defense more complete and effectual than it would be if he stood on an answer alone.[4] In general, the common object of the various forms of cross demand, such as recoupment, set-off, counterclaim, and the like,[5] and of code and statutory provisions relating thereto,[6] is to avoid and prevent circuity of action and multiplicity of suits by allowing the entire controversy between the parties to be litigated and finally determined in one action, allowing disposition of all claims at once,[7] wherever this can be done with entire justice to all parties before the court.[8]

A liberal construction should be given to the rules creating and regulating the doctrines of set-off and recoupment[9] as well as to code and statutory provisions relating to counterclaims, set-offs, or other cross demands.[10]

[FN1] Pa.—*Cohen v. Goldberg*, 554 Pa. 201, 720 A.2d 1028 (1998).

[FN2] U.S.—*Matter of GEC Industries, Inc.*, 128 B.R. 892, 15 U.C.C. Rep. Serv. 2d 845 (Bankr. D. Del. 1991); *In re Johnson*, 215 B.R. 381 (Bankr. N.D. Ill. 1997).

[FN3] Fla.—*Delco Light Co. v. John Le Roy Hutchinson Properties*, 99 Fla. 410, 128 So. 831 (1930).

[FN4] N.J.—*Hoffman v. Maloratsky*, 112 N.J. Eq. 333, 164 A. 260 (Ct. Err. & App. 1933).

[FN5] Mich.—*Lamb v. Oakwood Hospital Corp.*, 41 Mich. App. 287, 200 N.W.2d 88 (1972).

[FN6] N.C.—*First Nat. Life Ins. Co. v. Falconer*, 272 N.C. 702, 158 S.E.2d 793 (1968).

Okla.—*Meyer v. Vance*, 1965 OK 135, 406 P.2d 996 (Okla. 1965).

[FN7] Okla.—*F.D.I.C. v. Moss*, 1991 OK 116, 831 P.2d 613 (Okla. 1991).

[FN8] Ala.—*Maxcy v. Twilley*, 289 Ala. 681, 271 So. 2d 243 (1972).

N.Y.—*Schultz v. Wilson*, 59 Misc. 2d 14, 297 N.Y.S.2d 478 (City Ct. 1969).

[FN9] N.J.—*Newman v. Hatfield Wire & Cable Co.*, 113 N.J.L. 484, 174 A. 491 (N.J. Ct. Err. & App. 1934).

[FN10] Okla.—*Meyer v. Vance*, 1965 OK 135, 406 P.2d 996 (Okla. 1965).

S.C.—*Few v. Few*, 239 S.C. 321, 122 S.E.2d 829 (1961).

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§ 14. Jurisdiction

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  2, 19

In the absence of a statute extending its jurisdiction, a court may entertain a set-off or counterclaim only where it would have jurisdiction to entertain the claim originally; and the cross demand must be within the jurisdiction of the court both as to subject matter and territorial limitations.

In the absence of statutory provisions extending its jurisdiction a court may entertain a counterclaim, set-off, or reconvention only where it would have jurisdiction to entertain the claim originally.[1] The cross demand must be within the jurisdiction of the court as to subject matter[2] and territorial limitations.[3] However, a party who brings an action may thereby give the court jurisdiction over him with respect to a counterclaim although such jurisdiction would not otherwise have existed.[4]

[FN1] U.S.—[Pennsylvania R. Co. v. Musante-Phillips, Inc.](#), 42 F. Supp. 340 (N.D. Cal. 1941).

Fla.—[Simpson v. Simpson](#), 247 So. 2d 792 (Fla. Dist. Ct. App. 3d Dist. 1971).

Effect of set-off or counterclaim on jurisdiction of court, see [C.J.S., Courts § 33](#).

[FN2] Ala.—[Allen v. Zickos](#), 37 Ala. App. 361, 68 So. 2d 841 (1953).

[FN3] U.S.—[Pennsylvania R. Co. v. Musante-Phillips, Inc.](#), 42 F. Supp. 340 (N.D. Cal. 1941).

[FN4] Pa.—[Respecki v. Mowery](#), 45 Erie C.L.J. 349 (Pa. C.P. 1962).

Place where cause of action arose

La.—[Collins v. McCook](#), 17 La. App. 415, 136 So. 204 (2d Cir. 1931).

Nonresident

Iowa—[Linscott v. Linscott](#), 243 Iowa 335, 51 N.W.2d 428, 30 A.L.R.2d 789 (1952).

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§ 15. Construction of statutory provisions

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  3

Questions concerning the availability of a set-off or counterclaim as provided by statute must be determined in accordance with the language of the statute as construed in the light of its purpose.

The statutory provisions in some jurisdictions pertaining to counterclaims and crossclaims, taken together, form a comprehensive enactment intended to cover the various phases and aspects of crossclaims.[1] Questions concerning the availability of a set-off or counterclaim as provided by statute must be determined in accordance with the language of the statute,[2] and any judicial construction of such a statute should be made in the light of the purpose of the statute.[3] Statutes respecting counterclaims indicate an intent on the part of the legislature to eradicate the limitations on the interposition of counterclaims which had theretofore existed, to the end that parties to a lawsuit might litigate all differences at one trial.[4]

Where by statute counterclaim has been substituted for the remedies of recoupment and set-off, defendant may counterclaim for any claim which he previously could have set up by way of recoupment or set-off.[5]

[FN1] N.Y.—*Getlan v. Hofstra University*, 41 A.D.2d 830, 342 N.Y.S.2d 44 (2d Dep't 1973).

As to the nature of statutory set-off, see § 4.

[FN2] Ind.—*Anderson v. Biggs*, 118 Ind. App. 266, 77 N.E.2d 909 (1948).

Md.—*Edmunds v. Lupton*, 253 Md. 93, 252 A.2d 71 (1969).

[FN3] Ill.—*Miller v. Bank of Pecatonica*, 83 Ill. App. 3d 424, 38 Ill. Dec. 658, 403 N.E.2d 1262 (2d Dist. 1980).

[FN4] Cal.—*Bewley v. Riggs*, 262 Cal. App. 2d 188, 68 Cal. Rptr. 520 (5th Dist. 1968).

Kan.—*In re Meyer's Estate*, 191 Kan. 408, 381 P.2d 546 (1963).

[FN5] Md.—[Holloway v. Chrysler Credit Corp.](#), 251 Md. 65, 246 A.2d 265 (1968).

Purpose

Ill.—[Olin Mathieson Chemical Corp. v. J. J. Wuellner & Sons, Inc.](#), 72 Ill. App. 2d 488, 218 N.E.2d 823 (5th Dist. 1966).

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§ 16. What law governs

West's Key Number Digest

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Set-off, counterclaim, and recoupment are governed by the law of the state in which the operative facts occurred.

The nature, existence, and enforceability of claims sought to be set off are determined by applying the law of the state in which the operative facts occurred.[1] In determining a conflicts of law issue in a case involving contribution and set-off, contacts between each individual state should not be mechanically counted, but rather, the conflict between the states' laws should be resolved rationally based upon the interests and policies of each state.[2] A plaintiff's right to choose the forum in which to bring an action does not allow the plaintiff to control the choice of law to be applied to counterclaims against it.[3]

[FN1] U.S.—[Matter of GEC Industries, Inc.](#), 128 B.R. 892, 15 U.C.C. Rep. Serv. 2d 845 (Bankr. D. Del. 1991).

[FN2] Idaho—[Barringer v. State](#), 111 Idaho 794, 727 P.2d 1222 (1986).

[FN3] U.S.—[Continental Cablevision, Inc. v. Storer Broadcasting Co.](#), 653 F. Supp. 451 (D. Mass. 1986).

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§ 17. Remedies as affected by agreement, waiver, or estoppel

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 20, 21

A party may be precluded by waiver or estoppel from asserting a right which he would otherwise have to interpose a set-off or counterclaim; and the parties to an action may agree to permit a set-off which, in the absence of agreement, would not be available.

The parties to an action may agree to permit a set-off or counterclaim to be based on claims which, in the absence of agreement, could not be set-off or made the basis of a counterclaim.[1] An agreement to allow set-off need not be express, but may be inferred from the circumstances,[2] and if it be executed, needs no consideration.[3] Matters which could not in any event be made the subject of set-off cannot be made so by agreement.[4]

Waiver of right to interpose.

A defendant may, for a valuable consideration,[5] waive the right to use a set-off[6] or counterclaim which would otherwise be available.[7] It is generally held that waiver of set-off may be either express[8] or implied,[9] but it has also been held that a defendant cannot be deprived of a right of set-off by anything less than a contract,[10] and that an agreement must be clear and specific in order to deprive a party of the ordinary right of set-off.[11]

Waiver of the right to assert set-off or counterclaim prevents a defendant from asserting the unrelated claim as a defense to liability in an action brought against him; it does not extinguish unrelated liabilities, but prevents their assertion as defense to liability to plaintiff for the unrelated debt.[12]

Enforceability of a waiver to assert set-off or counterclaim depends on the nature of the claims involved,[13] and a waiver provision will not be enforced to bar a viable set-off or counterclaim sounding in fraud or one which is based upon a creditor's negligence in failing to liquidate collateral upon the guarantor's demand.[14]

Estoppel.

A defendant may, by his or her conduct or representations, be estopped to interpose a set-off which would be otherwise available.[15]

[FN1] N.Y.—*Jones Motrola Corp. v. Troy Industries, Inc.*, 33 A.D.2d 1029, 307 N.Y.S.2d 899 (2d Dep't 1970).

N.C.—*Crosrol Carding Developments, Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 183 S.E.2d 834 (1971).

[FN2] Idaho—*Resource Engineering, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972).

[FN3] Ga.—*Long v. Cash*, 54 Ga. App. 764, 189 S.E. 73 (1936).

[FN4] N.Y.—*Diehl v. General Mut. Ins. Co.*, 3 N.Y. Super. Ct. 257 (1848).

[FN5] U.S.—*Atlantic Coast Line R. Co. v. U.S. Fidelity & Guaranty Co.*, 52 F. Supp. 177 (M.D. Ga. 1943).

[FN6] U.S.—*Cearfoss Const. Corp. v. MMSG Ltd. Partnership*, 904 F. Supp. 450 (D. Md. 1995).

[FN7] U.S.—*de Arellano v. Jacques Coe & Co.*, 403 F.2d 1012 (2d Cir. 1968).

Tex.—*City of Fort Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969).

[FN8] Pa.—*Smith v. Stricker*, 123 Pa. Super. 181, 186 A. 369 (1936).

[FN9] U.S.—*Hoffman v. Gleason*, 107 F.2d 101 (C.C.A. 6th Cir. 1940).

Fla.—*Cheezem Development Corp. v. Maddox Roof Service, Inc.*, 362 So. 2d 99 (Fla. Dist. Ct. App. 2d Dist. 1978).

[FN10] Pa.—*Smith v. Stricker*, 123 Pa. Super. 181, 186 A. 369 (1936).

[FN11] U.S.—*Updike v. Oakland Motor Car Co.*, 53 F.2d 369 (C.C.A. 2d Cir. 1931).

[FN12] U.S.—*Resolution Trust Corp. v. Minassian*, 777 F. Supp. 385 (D.N.J. 1991).

[FN13] N.Y.—*Barclays Bank of New York, N.A. v. Heady Elec. Co., Inc.*, 174 A.D.2d 963, 571 N.Y.S.2d 650 (3d Dep't 1991).

[FN14] N.Y.—*Barclays Bank of New York, N.A. v. Heady Elec. Co., Inc.*, 174 A.D.2d 963, 571 N.Y.S.2d 650 (3d Dep't 1991).

[FN15] Mich.—*Ombrello v. Montgomery Ward Long Term Disability Trust*, 163 Mich. App. 816, 415 N.W.2d 658 (1987).

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§ 18. Existence of cause of action of plaintiff

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑11

It has been held that the defendant cannot assert a set-off, counterclaim, or recoupment where the existence of such cross demand depends on the nonexistence of the plaintiff's cause of action; but the rule is not universal.

It has been held that the right to a set-off[1] or counterclaim[2] depends on plaintiff having a right of action against defendant, and that, where the cause of action on which defendant's cross demand is based depends for its existence on the nonexistence of plaintiff's cause of action, defendant cannot assert his or her demand by way of set-off,[3] counterclaim,[4] or recoupment.[5] It has also been held that if there is an independent jurisdictional basis for a counterclaim, and the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint.[6]

[FN1] Mich.—[Walter A. Wood Mowing & Reaping Mach. Co. v. Seaver](#), 90 Mich. 546, 51 N.W. 637 (1892).

[FN2] Cal.—[Dabney v. Shippey](#), 40 Cal. App. 3d 990, 115 Cal. Rptr. 526 (1st Dist. 1974).

Md.—[Edmunds v. Lupton](#), 253 Md. 93, 252 A.2d 71 (1969).

[FN3] Ala.—[Davis v. Evans](#), 261 Ala. 548, 74 So. 2d 705, 48 A.L.R.2d 740 (1954).

[FN4] U.S.—[State of Ala. ex rel. Gallion v. Rogers](#), 187 F. Supp. 848 (M.D. Ala. 1960), judgment aff'd, 285 F.2d 430 (5th Cir. 1961).

Ga.—[Southern Ry. Co. v. Insurance Co. of North America](#), 228 Ga. 23, 183 S.E.2d 912 (1971).

[FN5] Miss.—[Hoover Commercial Co. v. Humphrey](#), 107 Miss. 810, 66 So. 214 (1914).

[FN6] U.S.—[Tavitoff v. Stepovich](#), 9 Alaska 144, 91 F.2d 106 (C.C.A. 9th Cir. 1937).

Md.—[Edmunds v. Lupton](#), 253 Md. 93, 252 A.2d 71 (1969).

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§ 19. Set-off or counterclaim against set-off or counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  18

In a proper case a claim may be allowed as a set-off against a counterclaim.

A claim may be allowed as a set-off against a counterclaim[1] or a cross complaint[2] in a proper case.

[FN1] N.M.—[Skarda v. Davis](#), 83 N.M. 342, 491 P.2d 1153 (1971).

Utah—[Salt Lake City v. Telluride Power Co.](#), 82 Utah 607, 17 P.2d 281 (1932).

[FN2] Cal.—[Bagdasarian v. Gragnon](#), 31 Cal. 2d 744, 192 P.2d 935 (1948).

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§ 20. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑12

In general, a set-off is allowed only in actions on demands which could themselves be the subject of a set-off; and in some jurisdictions a counterclaim is available only in actions in which a money judgment is sought.

While it is difficult to deduce from the decisions any universal rule as to the cases in which the remedy of set-off or counterclaim is available,[1] it is held as a broad general rule that set-off can be allowed only in actions founded on demands which could themselves be the subject of a set-off.[2] Courts are loath to exercise their discretion in favor of permitting a defendant to set up counterclaims in an action brought against him for misapplication or failure to pay moneys belonging to plaintiff.[3] It is the substance of the cause of action contained in the allegations of the complaint, and not the form of action, which determines the right of set-off.[4]

Defendant may file a counterclaim in an action for the recovery of money only;[5] and in some jurisdictions set-offs or counterclaims are unavailable in actions in which a money judgment is not sought,[6] but other authorities do not so limit its use.[7] Some statutes have been held not to limit the right to plead a counterclaim to actions in contract.[8]

CUMULATIVE SUPPLEMENT

Cases:

In Ohio, the decision to grant a party's request for a setoff lies within the discretion of the trial court. [Lewis v. United Joint Venture](#), 691 F.3d 835 (6th Cir. 2012).

[END OF SUPPLEMENT]

[FN1] Ill.—[In re Knight](#), 60 Ill. App. 2d 457, 208 N.E.2d 679 (1st Dist. 1965).

[FN2] Mich.—[Smith v. Warner](#), 16 Mich. 390, 1868 WL 3273 (1868).

Counterclaim allowable in interpleader action

Fla.—[Trak Microwave Corp. v. Medaris Management, Inc.](#), 236 So. 2d 189 (Fla. Dist. Ct. App. 4th Dist. 1970).

[FN3] N.Y.—[Jayell Films v. A.F.E. Corp.](#), 67 N.Y.S.2d 77 (Sup 1946).

[FN4] N.Y.—[Pink v. Title Guarantee & Trust Co.](#), 274 N.Y. 167, 8 N.E.2d 321 (1937).

[FN5] Ohio—[Baldwin v. Baldwin](#), 37 Ohio L. Abs. 400, 47 N.E.2d 792 (Ct. App. 9th Dist. Lorain County 1940).

[FN6] Ala.—[Heflin v. Heflin](#), 222 Ala. 662, 134 So. 20 (1931).

N.J.—[Hudson City Contracting Co. v. Jersey City Incinerator Authority](#), 17 N.J. 297, 111 A.2d 385 (1955).

[FN7] Tex.—[Burt v. City of Stamford](#), 237 S.W. 977 (Tex. Civ. App. El Paso 1922).

[FN8] Ind.—[Opple v. Ray](#), 208 Ind. 450, 195 N.E. 81 (1935).

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§ 21. Contracts

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  13, 14

A recoupment, set-off, or counterclaim ordinarily is available in actions ex contractu.

Recoupment is allowed in contract actions,[1] on unsealed instruments or instruments under seal.[2] Under the codes and statutes, set-offs and counterclaims are allowed in contract actions,[3] and it has been held that a set-off is available only in such actions.[4] The law allows offset of a contract claim with a tort claim.[5]

Recoupment is allowed in foreclosure actions involving the Law Against Discrimination (LAD), Fair Housing Act (FHA), and Civil Rights Act (CRA) because without the defense, the mortgagee could simply take the mortgaged premises, leaving the borrower without a remedy.[6]

[FN1] Md.—[Fidelity & Deposit Co. v. Haines](#), 78 Md. 454, 28 A. 393 (1894).

[FN2] Cal.—[Bank of America Nat. Trust & Sav. Ass'n v. Lamb Finance Co.](#), 145 Cal. App. 2d 702, 303 P.2d 86 (2d Dist. 1956).

Cannot be used against sealed instrument

Va.—[City of Richmond v. Chesapeake & Potomac Tel. Co. of Va.](#), 205 Va. 919, 140 S.E.2d 683 (1965).

[FN3] U.S.—[R. L. Pohlman Co. v. Keystone Consol. Industries, Inc.](#), 399 F. Supp. 330, 17 U.C.C. Rep. Serv. 1188 (E.D. Mo. 1975).

Neb.—[Midwest Laundry Equipment Corp. v. Berg](#), 174 Neb. 747, 119 N.W.2d 509 (1963).

As to set-off in actions for unliquidated damages for breach of contract, see [§ 22](#).

[FN4] Ga.—[Dell v. Kugel](#), 99 Ga. App. 551, 109 S.E.2d 532 (1959).

[FN5] N.Y.—[Merritt Meridian Const. Co. v. Paramount Fabricators](#), 221 A.D.2d 420, 633 N.Y.S.2d 812 (2d Dep't 1995).

[FN6] N.J.—[Associates Home Equity Services, Inc. v. Troup](#), 343 N.J. Super. 254, 778 A.2d 529 (App. Div. 2001).

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§ 22. Unliquidated demands

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  16

Set-off is generally held unavailable in actions on unliquidated demands; but the statutes in some jurisdictions permit a set-off or counterclaim in actions on contract, whether for liquidated or unliquidated damages.

Since set-off is allowed only in actions founded on demands which could themselves be the subject of set-off,[1] and since it is generally held that unliquidated demands cannot be the subject of set-off,[2] the general rule is that set-off is not allowed in actions on unliquidated demands.[3] In some states, however, the statutes, more in harmony with the object of the remedy, which is to settle cross demands in one action, wherever possible, permit a set-off or counterclaim in actions on contract, whether for liquidated or unliquidated damages.[4]

[FN1] For a discussion of actions in which set-off is available, see §§ 20 to 25.

[FN2] For a discussion of liquidated and unliquidated demands, see §§ 55 to 61.

[FN3] U.S.—[American Training Service, Inc. v. Commerce Union Bank](#), 415 F. Supp. 1101 (M.D. Tenn. 1976), *aff'd*, 612 F.2d 580 (6th Cir. 1979).

[FN4] Md.—[Great Atlantic & Pacific Tea Co. v. Royal Crown Bottling Co.](#), 243 Md. 280, 220 A.2d 598 (1966).

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§ 23. Penalties

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 13

Some authorities permit a set-off or counterclaim to be asserted in an action for a penalty, but other authorities do not.

According to some authorities, in an action for the recovery of a statutory penalty defendant may not interpose a set-off[1] or counterclaim.[2] Other authorities, however, have held that the penal element in a statute should not be decisive on the question of the allowance of a counterclaim, provided a jurisdictional basis is established,[3] and have permitted a set-off or counterclaim to be asserted in an action for a penalty;[4] and in some jurisdictions the rule is that such an action is considered an action in debt in which a proper claim may be set-off.[5] Actions on an undertaking given to secure an attachment[6] or on an appeal bond,[7] have been held to be actions on contract in which counterclaims or set-offs are available. A counterclaim is available in an action to recover money derived from the collection of penalties.[8]

[FN1] Ind.—[Irvin v. Rushville Co-op. Telephone Co.](#), 161 Ind. 524, 69 N.E. 258 (1903).

[FN2] N.Y.—[Moore v. Trimmer](#), 6 N.Y.S. 430 (Sup 1889).

In prosecution under ordinance

Ala.—[Nelson v. City of Roanoke](#), 24 Ala. App. 277, 135 So. 312 (1931).

[FN3] U.S.—[Marks v. Spitz](#), 4 F.R.D. 348 (D. Mass. 1945).

Pa.—[Davis v. Colgan](#), 70 Pa. D. & C. 386, 1950 WL 2943 (C.P. 1950).

[FN4] U.S.—[Thompson v. Taylor](#), 60 F. Supp. 395 (S.D. Fla. 1945), judgment set aside on other grounds, 62 F. Supp. 930 (S.D. Fla. 1945).

Pa.—[Davis v. Colgan](#), 70 Pa. D. & C. 386, 1950 WL 2943 (C.P. 1950).

[FN5] Ala.—*Kelly v. Johnson*, 129 Ala. 627, 29 So. 672 (1901).

[FN6] Mo.—*State ex rel. Myers v. Mathieson*, 207 Mo. App. 676, 232 S.W. 181 (1921).

[FN7] Mo.—*Green v. Conrad*, 114 Mo. 651, 21 S.W. 839 (1893).

[FN8] Colo.—*Board of Com'rs of Arapahoe County v. City of Denver*, 30 Colo. 13, 69 P. 586 (1902).

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§ 24. Taxes

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  13

In the absence of express authority, it is generally held that a set-off is unavailable in an action brought for the recovery of taxes.

In an action for taxes, set-off of an indebtedness of the state or municipality to the tax debtor will not be allowed, the statutes of set-off being construed in the light of public policy as not allowing the remedy in proceedings for this purpose^[1] unless expressly authorized,^[2] nor is such a claim subject to compensation.^[3]

[FN1] Tex.—*State v. Humble Oil & Refining Co.*, 141 Tex. 40, 169 S.W.2d 707 (1943).

[FN2] Mass.—*Boston Five Cents Sav. Bank v. City of Boston*, 318 Mass. 183, 61 N.E.2d 124 (1945).

[FN3] La.—*State v. Weaver*, 55 So. 2d 279 (La. Ct. App. 2d Cir. 1951).

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§ 25. Torts

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑15

Recoupment is generally held available in tort actions, and, under some statutes, a set-off or counterclaim may also be interposed in such actions.

Under some statutes a defendant in an action at law for a tort may file a crossclaim against plaintiff for damages arising out of the same transaction.[1] Recoupment is very generally allowed in actions which are based on a ground of tort.[2]

Set-off.

Since set-off is statutory,[3] the right to set-off in an action on a tort depends on the statutes.[4] While some statutes have been construed to allow set-offs in tort actions,[5] other statutes have been construed to exclude set-off in tort actions.[6] Where the facts pleaded by plaintiff would constitute an action for tort, but also constitute an action on contract, a set-off may be interposed.[7]

Counterclaim.

While the statutes in some jurisdictions providing the remedy of counterclaim have been held not to authorize counterclaims in actions of tort,[8] even when the counterclaim grows out of the same occurrence,[9] it is generally held that, where the subject matter of the counterclaim is proper, the fact that a cause of action alleged in the complaint sounds in tort is no obstacle to setting up a counterclaim thereto in the answer.[10]

[FN1] Va.—[Hoffman v. Stuart](#), 188 Va. 785, 51 S.E.2d 239, 6 A.L.R.2d 247 (1949).

[FN2] Ala.—[Brown v. Patterson](#), 214 Ala. 351, 108 So. 16, 47 A.L.R. 1093 (1926).

Not limited to contracts

R.I.—[Di Chiaro v. Spirito](#), 89 R.I. 50, 150 A.2d 637 (1959).

[FN3] For a discussion of statutory set-off, see [§ 4](#).

[FN4] Ill.—*General Motors Acceptance Corp. v. Vaughn*, 358 Ill. 541, 193 N.E. 483 (1934).

[FN5] Md.—*Great Atlantic & Pacific Tea Co. v. Royal Crown Bottling Co.*, 243 Md. 280, 220 A.2d 598 (1966).

[FN6] Ala.—*Ladd v. Townsell*, 38 Ala. App. 181, 79 So. 2d 709 (1955).

In suit for wrongful conversion

La.—*Glod v. Baker*, 998 So. 2d 308 (La. Ct. App. 3d Cir. 2008), writ denied, 1 So. 3d 497 (La. 2009).

[FN7] Ky.—*McFall v. Burley Tobacco Growers' Co-op. Ass'n*, 246 Ky. 278, 54 S.W.2d 922 (1932).

[FN8] Del.—*Pawley v. Brooks*, 57 Del. 283, 199 A.2d 322 (Super. Ct. 1964).

Trover

Ga.—*Martin v. Phelps*, 115 Ga. App. 552, 155 S.E.2d 447 (1967).

La.—*Tolbird v. Cooper*, 136 So. 2d 83 (La. Ct. App. 3d Cir. 1961).

[FN9] Miss.—*Moore v. Abdalla*, 197 Miss. 125, 19 So. 2d 502 (1944).

[FN10] N.Y.—*Vandervort v. Mink*, 113 A.D. 601, 98 N.Y.S. 772 (4th Dep't 1906).

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§ 26. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) ☞ 22, 22(1), 30, 31, 54

The claims which may properly be made the subject of a cross demand such as set-off, counterclaim, compensation, or reconvention depend on the statutes in force as they have been interpreted by the courts.

In questions involving set-off,[1] counterclaim,[2] compensation,[3] and reconvention,[4] which were unknown at common law and exist today only under the authority of statutory provisions, claims which may properly be made the subject of a cross demand depend on the statutes as they have been interpreted by the courts. Unless the claim is embraced within the provisions of the statutes, as such provisions have been interpreted, the remedy is denied,[5] and in particular cases the assertion of certain matter in set-off[6] or as a counterclaim[7] is improper. Ordinarily the statutes are given a liberal interpretation,[8] but it is inadvisable to devise a rule for the determination of what constitutes proper subject matter which will fit all cases which may arise in the future.[9]

Generally, damages may be set-off for which a cross action would lie at the time of pleading them.[10] However, every claim must have a fair legal or equitable basis to be the subject of recoupment or set-off,[11] and a set-off[12] or counterclaim[13] will not be allowed where it would result in a double recovery for the defendant. While a counterclaim, provided for by statute, may extend to subject matter which previously could have been set up by way of recoupment or set-off, it may also be limited to such subject matter.[14] Further, in some jurisdictions, a counterclaim will not be allowed where it tends to prejudice and embarrass the fair trial of plaintiff's action.[15]

Set-off in bankruptcy cases is governed by federal law[16] and the governing federal law is not an independent source of law governing set-off, but rather, it is generally understood as a legislative attempt to preserve the common-law right of set-off arising out of nonbankruptcy law.[17]

An objection to the interposition of a set-off, counterclaim, or reconventional demand may be waived,[18] as where the objection is not timely made[19] or there is an express agreement allowing the set-off or counterclaim.[20] Also, an objection to a counterclaim may be waived by failure to either demur thereto or object to the introduction of evidence thereunder.[21]

[FN1] Ind.—*Noblesville Milling Co. v. Johnson*, 116 Ind. App. 437, 65 N.E.2d 250 (1946).

Mich.—*Mason v. Lee-Bert, Inc.*, 326 Mich. 32, 39 N.W.2d 319 (1949).

[FN2] Neb.—*Tilden Bank v. Retzlaff*, 188 Neb. 834, 199 N.W.2d 734 (1972).

W.Va.—*State ex rel. West Virginia Truck Stop, Inc. v. Belcher*, 156 W. Va. 183, 192 S.E.2d 229 (1972).

[FN3] La.—*Moore v. Guillot*, 197 So. 2d 384 (La. Ct. App. 2d Cir. 1967).

Nature of compensation, generally, see § 11.

[FN4] La.—*Southern Hide Co. v. Best*, 174 La. 748, 141 So. 449 (1932).

[FN5] La.—*D'Asaro v. Cotonio*, 73 So. 2d 41 (La. Ct. App., Orleans 1954).

N.Y.—*White v. White*, 271 A.D. 581, 66 N.Y.S.2d 273 (1st Dep't 1946).

[FN6] Vt.—*Templeton Const. Co. v. Kelly*, 130 Vt. 420, 296 A.2d 242 (1972).

Alimony obligation of husband

Cal.—*Williams v. Williams*, 8 Cal. App. 3d 636, 87 Cal. Rptr. 754 (1st Dist. 1970).

[FN7] Ga.—*Georgia Machinery Co. v. Auburn Mach. Works, Inc.*, 103 Ga. App. 574, 120 S.E.2d 28 (1961).

N.Y.—*National Telefilm Associates, Inc. v. Pamandia Productions, Inc.*, 42 A.D.2d 514, 344 N.Y.S.2d 418 (1st Dep't 1973).

[FN8] Object of statutory remedies, see § 13.

[FN9] Ohio—*Price v. Kobacker Furniture Co.*, 20 Ohio App. 464, 4 Ohio L. Abs. 68, 152 N.E. 301 (6th Dist. Lucas County 1925).

[FN10] N.M.—*Gawlick v. American Builders Supply, Inc.*, 86 N.M. 77, 519 P.2d 313, 13 U.C.C. Rep. Serv. 1031 (Ct. App. 1974).

[FN11] Tenn.—*Helms v. Citizens Bank of Erwin*, 20 Tenn. App. 268, 97 S.W.2d 665 (1936).

[FN12] Tenn.—*Helms v. Citizens Bank of Erwin*, 20 Tenn. App. 268, 97 S.W.2d 665 (1936).

[FN13] N.J.—*Miller v. Stieglitz*, 109 N.J.L. 138, 160 A. 543 (N.J. Ct. Err. & App. 1932).

[FN14] Statutory provisions, see §§ 15, 16.

[FN15] N.Y.—*David J. Hodder & Son, Inc. v. Pennetto*, 32 Misc. 2d 764, 223 N.Y.S.2d 685 (Sup 1961)

.
Necessity, generally, that claim be such that it is just and practicable to adjust it in plaintiff's action, see § 13.

[FN16] 11 U.S.C.A. § 553.

[FN17] U.S.—*Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392 (9th Cir. 1996).

[FN18] Or.—*Chadwick v. Lakeview Mfg. Co.*, 208 Or. 452, 301 P.2d 1042 (1956).

Va.—*Jetco, Inc. v. Bank of Va.*, 209 Va. 482, 165 S.E.2d 276 (1969).

[FN19] La.—*Younger Bros. v. Spell*, 194 La. 16, 193 So. 354 (1939).

[FN20] Okla.—*Morton v. Beidleman*, 1951 OK 241, 205 Okla. 350, 237 P.2d 421 (1951).

[FN21] Or.—*Chadwick v. Lakeview Mfg. Co.*, 208 Or. 452, 301 P.2d 1042 (1956).

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§ 27. Tendency to defeat or diminish plaintiff's claim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  23

Under some statutory provisions, a counterclaim must tend to diminish or defeat plaintiff's recovery, and to have such effect it must be such that it resists or modifies some state of facts in, or impairs, affects, or qualifies, at least in some degree, plaintiff's cause of action, and is antagonistic thereto.

Under the statutes in some of the states it is expressly provided that a counterclaim must tend to diminish or defeat plaintiff's recovery.[1] Where, by virtue either of such specific statutory provisions or, in their absence, of the recognition of a similar requirement as existing under the statutes creating and defining counterclaims, such a principle is established, a cross demand not so tending does not constitute and is not allowed as a counterclaim.[2] In order to have that effect it must be such that it resists or modifies some state of facts in the plaintiff's cause of action,[3] and is antagonistic thereto.[4]

While recoupment may be used only to reduce or extinguish the plaintiff's recovery, set-off may be awarded for any amount to which the defendant is entitled.[5] However, a set-off, as distinguished from a counterclaim, is in the nature of a defense, which may be used to diminish or defeat the assignee's claim, even though the assignee has no liability in excess of the amount that it sues to recover.[6]

[FN1] Ala.—*Givens v. General Motors Acceptance Corp.*, 56 Ala. App. 561, 324 So. 2d 277 (Civ. App. 1975).

Cal.—*Olson v. Sacramento County*, 274 Cal. App. 2d 316, 79 Cal. Rptr. 140 (3d Dist. 1969).

[FN2] Ala.—*Givens v. General Motors Acceptance Corp.*, 56 Ala. App. 561, 324 So. 2d 277 (Civ. App. 1975).

Cal.—*Olson v. Sacramento County*, 274 Cal. App. 2d 316, 79 Cal. Rptr. 140 (3d Dist. 1969).

[FN3] N.Y.—*Grady v. Balmain*, 28 A.D.2d 702, 280 N.Y.S.2d 956 (2d Dep't 1967).

[FN4] N.M.—*La Mesa Community Ditch v. Appelzoeller*, 19 N.M. 75, 140 P. 1051 (1914).

[FN5] N.J.—*Beneficial Finance Co. of Atlantic City v. Swaggerty*, 86 N.J. 602, 432 A.2d 512 (1981).

[FN6] Mont.—*F.D.I.C. v. Northern Montana Gas Co.*, 274 Mont. 371, 908 P.2d 1357 (1995).

Wash.—*Nancy's Product, Inc. v. Fred Meyer, Inc.*, 61 Wash. App. 645, 811 P.2d 250 (Div. 3 1991).

Assignment of cross demands, see §§ 85 to 99.

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§ 28. Necessity that recoupment, counterclaim, or set-off be based on plaintiff's default

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  27(1), 27(2)

The defendant in an action on a contract may recoup only such damages as were caused by the plaintiff's default.

The damages that the defendant in an action on a contract may recoup are only such as were caused by the plaintiff's default.[1]

In a counterclaim, set-off or recoupment action to recover damages for breach of contract, the burden of proof is on the party claiming damages, to prove that the damages were caused by the default of the party to be charged, separate from any damages that may have resulted from any act of the claimant, and the burden must be sustained by a preponderance of the evidence.[2]

Moreover, both recoupment and set-off defenses in a landlord-tenant action are really nothing more than requests that the court reduce any award to the plaintiff by any sums owed to the defendant as a result of the tenancy.[3]

[FN1] Tenn.—*Mack v. Hugger Bros. Const. Co.*, 153 Tenn. 260, 283 S.W. 448, 46 A.L.R. 389 (1926).

[FN2] Ill.—*Roy Strom Excavating and Grading Co., Inc. v. Miller-Davis Co.*, 149 Ill. App. 3d 1093, 108 Ill. Dec. 679, 509 N.E.2d 105 (1st Dist. 1986).

[FN3] D.C.—*Shin v. Portals Confederation Corp.*, 728 A.2d 615 (D.C. 1999).

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§ 29. Generally

West's Key Number Digest

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A party cannot avail itself of the right to set-off, recoupment, counterclaim, compensation, or reconvention unless it has a legally subsisting cause of action in its favor on which it could maintain an independent action.

A party cannot avail itself of the right to set-off unless it has a legally subsisting cause of action in its favor on which it could maintain an independent action.[1] The same rule applies where the defendant in the action endeavors to set up an alleged claim by way of recoupment,[2] or where the defendant sets up a claim by way of counterclaim,[3] or reconvention.[4] Generally, a set-off must rest on a claim enforceable in its own right.[5] If one is not entitled to relief in a direct action, he or she is not entitled to assert a set-off or counterclaim.[6] The defendant who pleads a set-off occupies substantially the position of a plaintiff and must have a subsisting demand which would afford the subject matter for a cause of action.[7]

A secured party may effect a set-off if he or she reasonably believes at the time of the set-off that his or her security, when reduced to cash, will fall short of the debt by at least the amount of set-off.[8]

However, some decisions have held that the test of the propriety of forcing a set-off lies, not in the right to sue, but in the right to assert one's cross demands in the suit brought against him or her by the other.[9] Conversely, a set-off is valid if the substance of the facts alleged, standing alone, would constitute a cause of action by the defendant against the plaintiff.[10] A complaint and counterclaim are distinct claims even though they arise from the same transaction and are compulsory in nature, and each claim must stand or fall on its own merits, without reference to the other.[11]

[FN1] U.S.—[Ritz-Craft Corp. v. Stanford Management Group](#), 800 F. Supp. 1312, 19 U.C.C. Rep. Serv. 2d 987 (D. Md. 1992).

[FN2] Tenn.—[Combustion Engineering Co. v. McFarland](#), 209 Tenn. 75, 349 S.W.2d 138 (1961).

[FN3] N.H.—*Phinney v. Levine*, 117 N.H. 968, 381 A.2d 735 (1977).

N.Y.—*Third Manhattan Corp. v. Consolidated Elec. Meter Co.*, 18 A.D.2d 1055, 238 N.Y.S.2d 913 (1st Dep't 1963).

[FN4] Tex.—*Rose v. Motes*, 220 S.W.2d 734 (Tex. Civ. App. Galveston 1949).

[FN5] Cal.—*R. M. Sherman Co. v. W. R. Thomason, Inc.*, 191 Cal. App. 3d 559, 236 Cal. Rptr. 577 (1st Dist. 1987).

[FN6] Ariz.—*Turf Paradise, Inc. v. Maricopa County*, 179 Ariz. 337, 878 P.2d 1375 (Ct. App. Div. 1 1994).

[FN7] Mo.—*Sveum v. J. Mess Plumbing, Inc.*, 965 S.W.2d 924 (Mo. Ct. App. E.D. 1998).

[FN8] U.S.—*In re Ledgemere Land Corp.*, 116 B.R. 338 (Bankr. D. Mass. 1990).

[FN9] U.S.—*J.L. Hudson Co. v. Thomas*, 6 F. Supp. 857 (E.D. Mich. 1934).

Ohio—*State ex rel. Gray v. Alward*, 44 Ohio App. 281, 18 Ohio L. Abs. 225, 185 N.E. 560 (5th Dist. Licking County 1933).

[FN10] U.S.—*Westinghouse Elec. Supply Co. v. Fidelity & Deposit Co. of Maryland*, 560 F.2d 1109 (3d Cir. 1977).

[FN11] Ind.—*Paul v. Kuntz*, 524 N.E.2d 1326 (Ind. Ct. App. 1988).

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§ 30. Void or unenforceable claims

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  24

Generally, only such demands may be set-off as constitute valid and enforceable obligations at the time; a demand growing out of an illegal transaction and which, therefore, cannot be recovered or enforced directly cannot be set-off, counterclaimed, or reconvened.

As a general rule, only such demands may be set off as constitute valid and enforceable obligations at the time.^[1] Accordingly, a contract which is void under the statute of frauds,^[2] or because unsupported by a consideration,^[3] or, generally, a contract barred by the statute of limitations,^[4] cannot be the subject of a set-off.

Expenses paid by purchasers of estate real property for maintenance and upkeep of property, including utilities, insurance, and taxes, are expenses of administration which can be asserted only during probate proceedings and, thus, cannot be used as set-off against an amount due under a promissory note used to purchase property, since the closure of the estate was a final judgment on claims against the estate.^[5]

[FN1] U.S.—*In re Texoil Service Co.*, 122 F. Supp. 276 (E.D. Tex. 1954); *Flying Tiger Line, Inc. v. U. S.*, 145 Ct. Cl. 1, 170 F. Supp. 422 (1959).

N.Y.—*Valentino v. State*, 44 A.D.2d 338, 355 N.Y.S.2d 212 (3d Dep't 1974).

[FN2] Unenforceability of a contract under the statute of frauds as precluding the use of such contract as a defense to an action, see *C.J.S., Frauds, Statute of § 179*.

[FN3] N.Y.—*Hines v. Hearn*, 232 A.D. 210, 249 N.Y.S. 658 (1st Dep't 1931).

[FN4] Pleading of the statute of limitations to a set-off, counterclaim, or plea in reconvention, see *C.J.S., Limitations of Actions § 81*.

[FN5] Ind.—*Trinkle v. Leeney*, 650 N.E.2d 749 (Ind. Ct. App. 1995).

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§ 31. Claims nonexistent at commencement of action, generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 24, 40

A debt or demand must, as a general rule, have existed at the commencement of the action in order to be available as a set-off, counterclaim, or recoupment; but the rule is otherwise under some statutory provisions.

A counterclaim, set-off, or cross-petition, to be available as a matter of affirmative defense or affirmative relief, must be a claim upon which the defendant could, at the date of commencement of the plaintiff's suit, have maintained an action on the defendant's part against the plaintiff.[1] A set-off must be such that at the date of commencement of the plaintiff's suit, the defendant could have maintained an action against the plaintiff.[2]

For a defendant to exercise its common-law right of offset, the claim need not be reduced to judgment, and an offset may be effected pending the resolution of the controversy.[3]

A debt or demand must, as a general rule, have existed at the commencement of the action in order to be available as a set-off,[4] or, likewise, in order to be available as a counterclaim.[5] It is not required, however, that a set-off be a legal subsisting claim at the time the right of action accrued to the plaintiff on his or her claim in suit.[6] Under some statutory provisions, a counterclaim need not have existed at the time of commencement of the action in order to be asserted.[7]

The general rule that an amended declaration or complaint which does not introduce a new cause of action relates back to the original commencement of the action has been applied in determining the time of commencement with respect to the validity of a counterclaim.[8] A counterclaim based on a judgment obtained after the first, but before a later, amendment to plaintiff's complaint is not in existence at the time of action where the subsequent amendment merely stated the same cause of action as the original complaint.[9]

[FN1] Neb.—[Davis Erection Co., Inc. v. Jorgensen](#), 248 Neb. 297, 534 N.W.2d 746 (1995).

No existing debt

U.S.—*Lyndon Property Ins. Co. v. Eastern Kentucky University*, 200 Fed. Appx. 409, 2006 FED App. 0651N (6th Cir. 2006).

[FN2] Neb.—*Davis Erection Co., Inc. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995).

[FN3] U.S.—*Mega Const. Co., Inc. v. U.S.*, 29 Fed. Cl. 396 (1993).

[FN4] Ga.—*Metro Chrysler-Plymouth, Inc. v. Pearce*, 121 Ga. App. 835, 175 S.E.2d 910 (1970).

S.C.—*Brock v. Mason*, 233 S.C. 40, 103 S.E.2d 423 (1958).

[FN5] Ind.—*Kerfoot v. Kessener*, 227 Ind. 58, 84 N.E.2d 190 (1949).

S.C.—*Smart v. Charleston Mobile Homes, Inc.*, 269 S.C. 588, 239 S.E.2d 78 (1977).

[FN6] Ala.—*Life & Casualty Ins. Co. v. Bell*, 235 Ala. 548, 180 So. 573 (1938).

[FN7] Ark.—*Troxler v. Spencer*, 223 Ark. 919, 270 S.W.2d 936 (1954).

Ga.—*Monumental Properties, Inc. v. Johnson*, 136 Ga. App. 39, 220 S.E.2d 55 (1975).

[FN8] Mont.—*Dreidlein v. Manger*, 69 Mont. 155, 220 P. 1107 (1923).

[FN9] Mont.—*Dreidlein v. Manger*, 69 Mont. 155, 220 P. 1107 (1923).

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§ 32. Inchoate and contingent claims

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 24, 37

Although the remedy may temporarily be suspended so that no action can be maintained, if a good cause of action exists, it may be used as a set-off. Ordinarily the defendant cannot plead as a set-off a contingent liability, where the circumstances on which the liability is contingent have not yet occurred.

Although the defendant has been allowed in equity to set-off a contingent liability where plaintiff was insolvent,[1] ordinarily the defendant cannot plead as a set-off a contingent liability, where the circumstances on which the liability is contingent have not occurred.[2] Likewise, it is improper to counterclaim for a possible future contingent liability.[3] A debt is not "demandable" within the meaning of a statute dealing with compensation between two debts, until all suspensive conditions on which its maturity depends are fulfilled.[4]

[FN1] N.Y.—*Fehlhaber Corp. v. State*, 69 A.D.2d 362, 419 N.Y.S.2d 773 (3d Dep't 1979).

[FN2] D.C.—*Yellowitz v. J. H. Marshall & Associates, Inc.*, 284 A.2d 665 (D.C. 1971).

Wis.—*City of Milwaukee v. Milwaukee Civic Developments, Inc.*, 71 Wis. 2d 647, 239 N.W.2d 44 (1976).

[FN3] Ill.—*Countiss v. Whiting*, 306 Ill. App. 548, 29 N.E.2d 277 (1st Dist. 1940).

N.Y.—*Viola v. Scandore*, 195 N.Y.S.2d 361 (Sup 1959), judgment aff'd, 9 A.D.2d 922, 196 N.Y.S.2d 558 (2d Dep't 1959).

[FN4] La.—*Federal Deposit Ins. Corp. v. Page*, 195 So. 629 (La. Ct. App. 2d Cir. 1940).

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§ 33. Claims not yet due at commencement of action

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 24, 36

Generally, a demand of defendant against plaintiff not due at the commencement of the action cannot be made the subject of a set-off, counterclaim, compensation, or reconvention; but defendant may set-off a demand not due until after suit brought, if he has made an agreement with plaintiff to that effect, or if a statute so permits.

Generally, a demand of a defendant against the plaintiff not due at the commencement of the action cannot be set off,[1] and the same rule applies to counterclaim,[2] compensation[3] and reconvention.[4] The defendant may, however, set off a demand not due until after suit brought, if a statute so permits.[5]

A set-off existing at the time an action is filed may be pleaded by permissive counterclaim, and a set-off which later matures may likewise be pleaded with the approval of the court.[6] A state rule of civil procedure under which a claim which either matured or was acquired by the pleader after already serving the pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading, is permissive and not mandatory.[7]

A debt due at a future time cannot as a general rule be set off in equity against a debt presently due.[8] A right of equitable set-off ordinarily attaches, however, where mutual demands exist and insolvency has intervened, even though one of the demands has not yet matured,[9] although such right is not absolute or paramount to superior equities of other claimants.[10] Thus, according to some decisions, equity will allow a set-off if the claim of the party asserting it against an insolvent has matured, even though the claim of the insolvent against the party asserting the set-off has not yet matured.[11] However, if the debt due to the party claiming the set-off has not matured, he is not at liberty to offset it against the debt which he owes to an insolvent.[12] In some decisions, however, it has been said that there can be no set-off of an unmatured demand in cases of insolvency.[13]

[FN1] U.S.—[Liberty Sav. Ass'n v. Sun Bank of Jacksonville](#), 572 F.2d 591 (7th Cir. 1978); [In re Cohn](#),

11 B.R. 611 (Bankr. D. Mass. 1981).

Neb.—*McGerr v. Beals*, 180 Neb. 767, 145 N.W.2d 579 (1966).

Ohio—*Walter v. National City Bank of Cleveland*, 42 Ohio St. 2d 524, 71 Ohio Op. 2d 513, 330 N.E.2d 425 (1975).

[FN2] Conn.—*Nuclo v. Associated Realty Corp.*, 22 Conn. Supp. 21, 158 A.2d 604 (Super. Ct. 1960).

Neb.—*Weller v. Putnam*, 184 Neb. 692, 171 N.W.2d 767 (1969).

[FN3] La.—*Long v. Matthews*, 186 So. 2d 868 (La. Ct. App. 2d Cir. 1966), writ refused, 249 La. 576, 187 So. 2d 739 (1966).

[FN4] La.—*Thomas v. Mobley*, 118 So. 2d 476 (La. Ct. App. 1st Cir. 1960).

[FN5] N.Y.—*Fistere v. Janapoll*, 241 A.D. 353, 272 N.Y.S. 332 (1st Dep't 1934).

[FN6] Mass.—*Decota v. Town of Stoughton*, 23 Mass. App. Ct. 618, 504 N.E.2d 672 (1987).

[FN7] Alaska—*Andrews v. Wade & De Young, Inc., P.C.*, 950 P.2d 574 (Alaska 1997).

[FN8] Neb.—*Lyhane v. Durtschi*, 144 Neb. 256, 13 N.W.2d 130 (1944).

[FN9] U.S.—*American Surety Co. of New York v. City of Akron*, 95 F.2d 966 (C.C.A. 6th Cir. 1938); *J.L. Hudson Co. v. Thomas*, 6 F. Supp. 857 (E.D. Mich. 1934).

Wis.—*In re Milwaukee Commercial Bank*, 236 Wis. 105, 294 N.W. 538 (1940).

[FN10] U.S.—*American Surety Co. of New York v. City of Akron*, 95 F.2d 966 (C.C.A. 6th Cir. 1938).

[FN11] Mass.—*Friedman v. Commissioner of Banks*, 291 Mass. 108, 196 N.E. 264 (1935).

Neb.—*Lyhane v. Durtschi*, 144 Neb. 256, 13 N.W.2d 130 (1944).

N.Y.—*Siegel v. State*, 262 A.D. 388, 28 N.Y.S.2d 958 (3d Dep't 1941).

[FN12] N.Y.—*Gerseta Corporation v. Equitable Trust Co. of New York*, 241 N.Y. 418, 150 N.E. 501, 43 A.L.R. 1320 (1926).

[FN13] Mo.—*Carson Nat. Bank of Auburn, Neb. v. American Nat. Bank of St. Joseph*, 225 Mo. App. 948, 34 S.W.2d 143 (1930).

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§ 34. Pendency of another action relating to same claim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 24, 39

Pendency of another action for a claim offered as a cross demand does not affect the right of plaintiff in the former action to interpose, when sued by defendant in the former action, such claim in recoupment, set-off, counterclaim, or reconvention; but other decisions hold that such a cross demand cannot avail if it appears that an action is then pending for the same cause, and, in successive actions by the same plaintiff, defendant may not ordinarily interpose the same set-off or counterclaim.

In some cases, that pendency of another action for a claim offered as a cross demand does not affect the right of plaintiff in the former action to interpose, when sued by defendant in the former action, such counterclaim.[1] Also, the counterclaim in the second suit will be dismissed where such course of action is necessary to avoid the possibility of double recovery, leaving available the remedy of consolidation to avoid unnecessary multiplicity of suits.[2]

Other decisions have followed the rule that a demand in counterclaim cannot avail if it appears that an action is then pending for the same cause,[3] and the same rule has been applied to reconvention.[4]

In successive actions by the same plaintiff, the defendant may not interpose the same counterclaim,[5] except that, where the counterclaim is pleaded as a defense, it may properly be interposed as such in the second action.[6]

[FN1] U.S.—*Porter v. Reid*, 79 F. Supp. 898, 38 Ohio Op. 363, 54 Ohio L. Abs. 129 (D. Mass. 1948).

[FN2] N.Y.—*Loehr v. Sheffield*, 81 N.Y.S.2d 871 (Sup 1948).

[FN3] Ohio—*Secrest v. Standard Oil Co.*, 118 Ohio App. 270, 25 Ohio Op. 2d 99, 194 N.E.2d 68 (10th Dist. Franklin County 1963).

[FN4] La.—*Fontenot v. Benoit*, 128 So. 2d 815 (La. Ct. App. 3d Cir. 1961).

[FN5] N.Y.—*Jefferson County Nat. Bank v. Dusckas*, 166 Misc. 720, 2 N.Y.S.2d 336 (Sup 1938).

[FN6] N.Y.—*A.B. Aldus Realty Co. v. Breslof*, 133 Misc. 149, 231 N.Y.S. 640 (City Ct. 1928).

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§ 35. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑25, 26

Claims arising out of the same transaction may constitute a proper basis for a cross demand, such as set-off, recoupment, or counterclaim, where other statutory requisites exist.

Claims arising out of the same transaction may constitute a proper basis for a cross demand, such as set-off, recoupment, or counterclaim, where other statutory requisites exist.[1] On the other hand, except as otherwise provided by statute, cross demands, such as counterclaim, recoupment, or reconvention, ordinarily are not properly pleaded where they do not arise out of the same contract or transaction as that constituting the basis of plaintiff's claim,[2] and are unrelated to the subject matter of such claim,[3] although the rule is otherwise as to set-off.[4] However, cross demands, whether arising out of the same or wholly disconnected transactions, may be enforced whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice.[5] A key difference between recoupment and set-off is that set-off may involve different transactions, while the essential element of recoupment is that it is a demand arising from the same transaction as the plaintiff's claim.[6] Thus, recoupment, unlike set-off, does not involve the concept of mutuality of obligations.[7] A defendant's right to recoupment exists in a claim it has against the plaintiff that arises from the same transaction as the plaintiff's claim against the defendant, whereas the defendant's right to set-off exists as a result of the claim it has against the plaintiff that arises in a separate cause of action against the plaintiff.[8]

In most cases, a court's analysis of whether, under the "same transaction" test, an entity's action constitutes recoupment or setoff should both begin and end with the "same transaction" question, without discussing other equitable issues.[9]

A condition precedent to the application of a statute providing for set-off is that the defendant's claim arise from a debt due by the plaintiff, but unlike a counterclaim, which arises out of the same transaction described in the complaint, a set-off is independent thereof.[10] Moreover, while a counterclaim seeks affirmative judgment and need not arise out of the same transaction or occurrence which is the basis of the plaintiff's action, a recoupment must arise out of the same transaction or occurrence which is the basis of the plaintiff's action and it is merely defensive, that is, does not seek an affirmative judgment in the action.[11]

[FN1] Iowa—*Capitol City Drywall Corp. v. C. G. Smith Const. Co.*, 270 N.W.2d 608 (Iowa 1978).

Tex.—*Compton v. Polonski*, 567 S.W.2d 835 (Tex. Civ. App. Corpus Christi 1978).

[FN2] Recoupment, counterclaim, and reconvention as arising out of the same transaction as the main claim, see §§ 35, 39 to 42.

[FN3] Connection with the subject of the main action, see §§ 43 to 47.

[FN4] Set-off as being required to arise out of the same transaction as the main claim, see § 37.

[FN5] U.S.—*North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 14 S. Ct. 710, 38 L. Ed. 565 (1894); *Brownley v. Peyser*, 98 F.2d 337 (App. D.C. 1938); *In re Shoppers Paradise, Inc.*, 8 B.R. 271 (Bankr. S.D. N.Y. 1980).

[FN6] U.S.—*Reading Co. v. City of Philadelphia*, 155 B.R. 890 (E.D. Pa. 1993); *In re Midway Airlines, Inc.*, 221 B.R. 411 (Bankr. N.D. Ill. 1998); *In re 105 East Second Street Associates*, 207 B.R. 64 (Bankr. S.D. N.Y. 1997).

N.J.—*Beneficial Finance Co. of Atlantic City v. Swaggerty*, 86 N.J. 602, 432 A.2d 512 (1981).

[FN7] U.S.—*In re 105 East Second Street Associates*, 207 B.R. 64 (Bankr. S.D. N.Y. 1997).

[FN8] U.S.—*Matter of McDonald*, 224 B.R. 862 (Bankr. S.D. Ga. 1998).

[FN9] U.S.—*In re Slater Health Center, Inc.*, 398 F.3d 98 (1st Cir. 2005).

As to recoupment, see § 36, and as to setoff see, § 37.

[FN10] Conn.—*Hope's Architectural Products, Inc. v. Fox Steel Co.*, 44 Conn. App. 759, 692 A.2d 829 (1997).

[FN11] Neb.—*Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444, 45 A.L.R.5th 855 (1993).

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§ 36. Recoupment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  25 to 27

In recoupment, the defendant's claim must arise out of the same contract or transaction as that on which plaintiff's cause of action is founded.

Recoupment means a diminution or a complete counterbalancing of an adversary's claim based upon circumstances arising out of the same transaction on which the adversary's claim is based.[1] There must be some type of overpayment,[2] whether accidentally or contractually made.[3] Where the plaintiff's claim and the defendant's defense are factually unrelated, the defendant should not be permitted to assert that defense under the rubric of recoupment.[4]

To prevail on a recoupment claim, both the primary damages claim and the claim in recoupment must involve the same litigants.[5]

To invoke the common-law doctrine of recoupment, it is sufficient that counterclaims arise out of the same subject matter and that they are susceptible of adjustment in one action.[6] Specifically, to prevail on a recoupment claim, the defendant must show that: (1) the recoupment claim arises out of the same transaction or occurrence as the plaintiff's suit;[7] (2) the recoupment claim seeks the same type of relief as is sought by the plaintiff; and[8] (3) the claim is purely a defensive set-off and does not seek an affirmative recovery from the plaintiff.[9] Classically, recoupment is permitted only to reduce or eliminate damages, not to gain some other form of relief.[10]

Where the contract itself contemplates the business to be transacted as discrete and independent units, even claims predicated on a single contract will be ineligible for recoupment.[11] Similarly, claims do not necessarily arise out of the same transaction merely because the same two parties are involved and a similar subject matter gave rise to both claims.[12] Thus, one contract alone is not sufficient to establish a "single transaction," for purposes of the requirement under the recoupment doctrine that countervailing demands of parties arise from the same transaction, since separate transactions may occur within the confines of the contract.[13] Moreover, where a debtor and creditor enter into a series of separate contracts for the delivery and purchase of flour, rather than a single transaction, recoupment does not apply and cannot serve as a defense for the creditor in a proceed-

ing by the debtor to recover the outstanding balance due under one of the contracts.[14]

Under some statutes, the subject matter of recoupment is narrowly limited, being confined to claims arising directly from the particular contract sued on,[15] but in many jurisdictions a broader view is taken so that instead of being narrowly confined to the purpose of abating the contract price of goods sold or work done, recoupment is available for the recovery of damages suffered by defendant from any fraud, breach of warranty, or negligence of complainant growing out of and relating to the transaction on which complainant's suit is founded.[16]

If the basis of plaintiff's action is a contract, the defendant may recoup any damages which have resulted to him or her because of a breach thereof by the plaintiff.[17] Further, a defendant may recoup for fraud or deceit which induced the making of a contract.[18]

[FN1] Md.—*Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 744 A.2d 549 (2000).

[FN2] U.S.—*In re Pruett*, 220 B.R. 625 (Bankr. E.D. Ark. 1997).

[FN3] U.S.—*In re Midway Airlines, Inc.*, 221 B.R. 411 (Bankr. N.D. Ill. 1998).

[FN4] Del.—*TIFD III-X LLC v. Fruehauf Production Co., L.L.C.*, 883 A.2d 854 (Del. Ch. 2004).

[FN5] Del.—*TIFD III-X LLC v. Fruehauf Production Co., L.L.C.*, 883 A.2d 854 (Del. Ch. 2004).

[FN6] U.S.—*In re Thompson Boat Co.*, 230 B.R. 815, 38 U.C.C. Rep. Serv. 2d 575 (Bankr. E.D. Mich. 1995).

[FN7] U.S.—*U.S. v. Keystone Sanitation Co., Inc.*, 867 F. Supp. 275 (M.D. Pa. 1994).

N.J.—*Associates Home Equity Services, Inc. v. Troup*, 343 N.J. Super. 254, 778 A.2d 529 (App. Div. 2001).

[FN8] U.S.—*U.S. v. Keystone Sanitation Co., Inc.*, 867 F. Supp. 275 (M.D. Pa. 1994).

[FN9] U.S.—*U.S. v. Keystone Sanitation Co., Inc.*, 867 F. Supp. 275 (M.D. Pa. 1994).

N.J.—*Associates Home Equity Services, Inc. v. Troup*, 343 N.J. Super. 254, 778 A.2d 529 (App. Div. 2001).

[FN10] U.S.—*Bolduc v. Beal Bank, SSB*, 167 F.3d 667 (1st Cir. 1999).

[FN11] U.S.—*Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138 (2d Cir. 2002) (applying New York Law).

[FN12] U.S.—*Reading Co. v. City of Philadelphia*, 155 B.R. 890 (E.D. Pa. 1993).

[FN13] U.S.—*In re Thompson*, 182 B.R. 140 (Bankr. E.D. Va. 1995), subsequently aff'd, 92 F.3d 1182 (4th Cir. 1996).

[FN14] U.S.—*In re Clintondale Mills, Inc.*, 216 B.R. 742 (Bankr. M.D. Pa. 1998).

[FN15] Ga.—*Pittsburgh Plate Glass Co. v. Moulder*, 82 Ga. App. 148, 60 S.E.2d 647 (1950).

[FN16] Haw.—*Mayer v. Alexander & Baldwin, Inc.*, 56 Haw. 195, 532 P.2d 1007 (1975).

[FN17] Ala.—*Scroggins v. Alabama Gas Corp.*, 275 Ala. 650, 158 So. 2d 90 (1963).

Ga.—*Housing Authority of City of Carrollton v. Ayers*, 211 Ga. 728, 88 S.E.2d 368 (1955).

[FN18] Del.—*Travers v. Arctic Roofing*, 42 Del. 41, 27 A.2d 78 (Super. Ct. 1942), judgment aff'd, 42 Del. 293, 32 A.2d 559 (1943).

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§ 37. Set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔗 28, 28(1), 28(2), 33, 33(1)

In set-off, the debts and credits need not arise out of the same transaction, and in fact, the defining characteristic of set-off is that the mutual debt and claim are generally those arising from different transactions.

In set-off, the debts and credits need not arise out of the same transaction,[1] and in fact, the defining characteristic of set-off is that the mutual debt and claim are generally those arising from different transactions.[2] Indeed, set-off means a diminution or a complete counterbalancing of an adversary's claim based upon circumstances arising out of a transaction other than that on which the adversary's claim is based.[3] Thus, claims that are eligible for set-off need not be transactionally related.[4] In fact, set-off is used to discharge or reduce the plaintiff's claim by an opposite claim arising from a transaction extrinsic to the plaintiff's cause of action.[5] In set-off, the parties' mutual debts arise from different transactions.[6] Although set-off refers to the balancing of obligations that the parties incurred in wholly separate transactions,[7] the law also permits a party to offset damages with a claim that arises out of the same transaction or occurrence.[8] Thus, as a general rule statutes of set-off are construed to allow the right of set-off of all mutual debts and demands between the parties, whether independent and unconnected with plaintiff's cause of action,[9] or springing from, and connected with, the contractual transaction on which plaintiff's claim is based.[10] However, under one state's version of the Uniform Commercial Code, damages which the buyer seeks to set off from the amount due under a sales contract must arise from a breach of the same contract under which the seller is attempting to collect.[11]

While set-off is a recognized rescission remedy when the parties adjudicate matters in court, rescission does not require the court to grant restitution for benefits allegedly conferred under a separate and unrelated transaction.[12]

Meaning of "transaction" in setoff.

While the term "transaction," in regard to a contract or transaction on which a setoff may be based, may encompass a contract, it is larger in scope and more comprehensive than a "contract" and may relate to matters entirely in tort.[13]

[FN1] N.Y.—*Matter of Midland Ins. Co.*, 79 N.Y.2d 253, 582 N.Y.S.2d 58, 590 N.E.2d 1186 (1992).

[FN2] U.S.—*Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392 (9th Cir. 1996); *In re 105 East Second Street Associates*, 207 B.R. 64 (Bankr. S.D. N.Y. 1997).

[FN3] Md.—*Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 744 A.2d 549 (2000).

[FN4] Nev.—*Campbell v. Lake Terrace, Inc.*, 111 Nev. 1329, 905 P.2d 163 (1995) (overruled on other grounds by, *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 110 P.3d 59 (2005)).

[FN5] Mo.—*Sveum v. J. Mess Plumbing, Inc.*, 965 S.W.2d 924 (Mo. Ct. App. E.D. 1998).

[FN6] U.S.—*In re Malinowski*, 156 F.3d 131 (2d Cir. 1998).

[FN7] U.S.—*Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236 (D.C. Cir. 1995).

[FN8] N.Y.—*Merritt Meridian Const. Co. v. Paramount Fabricators*, 221 A.D.2d 420, 633 N.Y.S.2d 812 (2d Dep't 1995).

[FN9] Ga.—*Dixie Home Builders, Inc. v. Waldrup*, 146 Ga. App. 464, 246 S.E.2d 471 (1978).

S.C.—*Carolina Mechanical Contractors, Inc. v. Yeargin Const. Co., Inc.*, 261 S.C. 1, 198 S.E.2d 224 (1973).

[FN10] Fla.—*C. I. P. Studios, Ltd. v. Spa Health Club, Inc.*, 337 So. 2d 1009 (Fla. Dist. Ct. App. 3d Dist. 1976).

Idaho—*Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100, 24 U.C.C. Rep. Serv. 1378 (1978).

[FN11] U.S.—*Celex Group, Inc. v. Executive Gallery, Inc.*, 877 F. Supp. 1114 (N.D. Ill. 1995).

[FN12] U.S.—*Marc Development, Inc. v. Wolin*, 904 F. Supp. 777 (N.D. Ill. 1995).

[FN13] Kan.—*Mynatt v. Collis*, 274 Kan. 850, 57 P.3d 513 (2002).

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§ 38. Set-off—In equity

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  28, 28(1), 28(2), 33, 33(1)

Equitable set-off will be allowed when a party seeking it shows some equitable ground therefor and it is necessary to promote justice, to avoid or prevent wrong or irremediable injustice, or to give effect to the clear equity of the party seeking it.

Equitable set-off will be allowed when a party seeking it shows some equitable ground therefor and it is necessary to promote justice, to avoid or prevent wrong or irremediable injustice, or to give effect to the clear equity of the party seeking it.[1] Thus, the equitable remedy of offset that a condominium unit purchaser owed to a vendor to cover a shortfall in the value of stock transferred as part of the purchase price was not an abuse of discretion; where specific performance was impossible since the purchaser had transferred the unit to a third party, and the trial court was constrained by the court of appeals mandate to determine whether the offset was owed and what the proper amount of the offset was.[2] Cross demands and counterclaims, whether arising out of the same or wholly disconnected transactions may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice,[3] but not where it would be inequitable to allow the set-off.[4]

[FN1] Kan.—*Atchison County Farmers Union Co-op Ass'n v. Turnbull*, 241 Kan. 357, 736 P.2d 917 (1987).

[FN2] Utah—*Collard v. Nagle Const., Inc.*, 2006 UT 72, 149 P.3d 348 (Utah 2006).

[FN3] U.S.—*North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 14 S. Ct. 710, 38 L. Ed. 565 (1894); *Brownley v. Peyser*, 98 F.2d 337 (App. D.C. 1938).

[FN4] Ind.—*Lake County Title Co. v. Root Enterprises, Inc.*, 167 Ind. App. 559, 339 N.E.2d 103 (1975) (overruled on other grounds by, *P-M Gas & Wash Co., Inc. v. Smith*, 268 Ind. 297, 375 N.E.2d 592 (1978)).

Wash.—[Coy v. Raabe](#), 69 Wash. 2d 346, 418 P.2d 728 (1966).

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§ 39. Counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  29, 29(1) to 29(3), 34

The distinguishing feature of counterclaim, as opposed to set-off, is that it arises out of the same transaction as that described in the complaint, and under some statutes, although not under others, a counterclaim ordinarily is authorized only where the claim arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or is connected with the subject of the action.

If a claim arises out of the same transaction described in the complaint, it is characterized as a counterclaim.[1] As a general rule, the distinguishing feature of counterclaim, as opposed to set-off, is that it arises out of the same transaction as that described in the complaint.[2]

Some statutes regarding counterclaims require the counterclaims to arise out of the contract or transaction set forth in the petition or be connected with the subject matter of the action.[3] Under statutory provisions presently or formerly in effect authorizing as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, three classes of counterclaims are provided for: (1) a demand which arises out of the contract on which plaintiff has based his or her action; (2) a demand which arises out of the transaction—a broader term than contract—on which plaintiff has based his or her action; and (3) a demand which need not necessarily arise out of either the contract or the transaction involved in the action, but is sufficient if it is connected with the subject of the action.[4] Other statutes, some of which supersede earlier statutes establishing a different rule, broadly authorize the interposition of counterclaims without regard to whether the defendant's claim arises out of the same transaction as the plaintiff's demand,[5] or is connected with the subject of the action,[6] as where it is only required that the counterclaim tends to defeat or diminish plaintiff's claim and consist of a claim of defendant against plaintiff as between whom a several judgment could be given.[7] Under some provisions of this nature, the only test imposed is whether the counterclaim may be conveniently and justly determined in connection with plaintiff's cause of action,[8] and the application of such test may in certain circumstances render it improper to try in the single action a counterclaim based on a wholly separate transaction.[9]

Where a counterclaim is sought to be interposed under statutory provisions authorizing as a counterclaim a

cause of action arising out of the contract or transaction set forth in the complaint or connected with the subject of the action, and the claim arises in favor of the defendant out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim,[10] or is connected with the subject of the action,[11] it may be counterclaimed whatever its nature,[12] whether or not arising out of contract.[13] Counterclaims in an action upon promissory notes are properly severed for set-off where the counterclaims arise apart from the defendant's loan obligation and are not inextricably intertwined with, or inseparable from it.[14]

In some jurisdictions, the defendant in an assumpsit action may set forth under the heading "counterclaim" any cause of action in assumpsit or trespass that the defendant has against the plaintiff at the time the answer is filed, not just counterclaims that arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose.[15]

In equity the court will not dismiss a counterclaim which is shown to be just and compel the claimant to institute another proceeding in order to obtain the relief to which he or she is clearly entitled and which can be granted in a suit between the same parties then in court, even though such counterclaim does not arise out of the same transaction.[16] Equity will not dismiss a counterclaim whether arising out of the same or wholly disconnected transactions if the circumstances are such as to warrant its interference to prevent wrong and injustice.[17]

[FN1] Conn.—*Northwestern Elec., Inc. v. Rozbicki*, 6 Conn. App. 417, 505 A.2d 750 (1986).

[FN2] U.S.—*Matter of Penn Cent. Transp. Co.*, 419 F. Supp. 1376 (E.D. Pa. 1976).

Cal.—*Bewley v. Riggs*, 262 Cal. App. 2d 188, 68 Cal. Rptr. 520 (5th Dist. 1968).

N.Y.—*Judo, Inc. v. Peet*, 68 Misc. 2d 281, 326 N.Y.S.2d 441 (N.Y. City Civ. Ct. 1971).

Distinctions between terms, generally, see § 12.

[FN3] Neb.—*Currie By and Through Currie v. Chief School Bus Service, Inc.*, 250 Neb. 872, 553 N.W.2d 469, 112 Ed. Law Rep. 1043 (1996).

The requirement that the counterclaim be connected with the subject matter of the action, see §§ 43 et seq.

[FN4] Kan.—*Salina Coca-Cola Bottling Corp. v. Rogers*, 171 Kan. 688, 237 P.2d 218 (1951).

Ohio—*Johnson v. Sargent*, 109 Ohio App. 16, 10 Ohio Op. 2d 149, 163 N.E.2d 401 (2d Dist. Darke County 1958).

Connection with subject of action as authorizing counterclaim regardless of whether arising out of same transaction, see § 47.

[FN5] Cal.—*Stephans v. Herman*, 225 Cal. App. 2d 671, 37 Cal. Rptr. 746 (1st Dist. 1964).

Ga.—*Dixie Home Builders, Inc. v. Waldrip*, 146 Ga. App. 464, 246 S.E.2d 471 (1978).

N.Y.—*Norry v. Land*, 44 Misc. 2d 556, 254 N.Y.S.2d 176 (Sup 1964).

[FN6] Counterclaim's connection with the subject matter of the action, see §§ 43 to 47.

[FN7] Cal.—*Dobbins v. Horsfall*, 58 Cal. App. 2d 23, 136 P.2d 35 (2d Dist. 1943).

[FN8] N.Y.—*Panzer v. Panzer*, 274 A.D. 940, 83 N.Y.S.2d 525 (2d Dep't 1948).

[FN9] N.Y.—*Jayell Films v. A.F.E. Corp.*, 67 N.Y.S.2d 77 (Sup 1946).

[FN10] Miss.—*Lister v. Bank of Lucedale*, 349 So. 2d 1056 (Miss. 1977).

S.C.—*Bank of Augusta v. Satcher Motor Co.*, 249 S.C. 53, 152 S.E.2d 676 (1967).

[FN11] Counterclaim's connection with the subject matter of the action, see §§ 43 to 47.

[FN12] Okla.—*Meyer v. Vance*, 1965 OK 135, 406 P.2d 996 (Okla. 1965).

[FN13] S.C.—*Commercial Credit Co. v. Cook*, 165 S.C. 387, 164 S.E. 17 (1932).

Contract or tort character of defendant's claim, see §§ 48 to 54.

[FN14] N.Y.—*Banco Do Estado De Sao Paulo, S.A. v. Mendes Jr. Intern. Co.*, 249 A.D.2d 137, 672 N.Y.S.2d 28 (1st Dep't 1998).

[FN15] Pa.—*CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053 (Pa. Super. Ct. 1999).

[FN16] N.H.—*Van Miller v. Hutchins*, 118 N.H. 204, 384 A.2d 791 (1978).

[FN17] U.S.—*North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 14 S. Ct. 710, 38 L. Ed. 565 (1894); *Brownley v. Peyser*, 98 F.2d 337 (App. D.C. 1938).

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§ 40. Counterclaim—What constitutes "arising from same contract or transaction"

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  29, 29(1) to 29(3), 34

Whether the respective claims asserted by the parties arise out of the same contract or transaction within the limitation on counterclaims imposed by the statutes depends on a consideration of all the facts brought forth by the parties and on a determination of whether there is some legal or equitable relationship between the ground of recovery alleged in the counterclaim and the matters alleged as the cause of action by the plaintiff.

In determining whether the respective claims asserted by the parties arise out of the same contract or transaction, within the limitation on counterclaims imposed by statutes requiring the counterclaim to arise out of, or be connected with, the subject matter of the action,[1] the court is not confined to the facts stated by plaintiff, but may take into account the facts set up by defendant.[2] The question must be determined as each case is presented with a view to promoting justice and dispatching litigated business.[3] There must be some legal or equitable relationship between the ground of recovery alleged in the counterclaim and the matters alleged as the cause of action by plaintiff.[4] It is not enough that the parties are the same[5] or that the transactions were made on the same day.[6]

A "transaction" within the statutes as to counterclaims is defined as the act of transacting or conducting any business, negotiation, management, or proceeding.[7] The word, as used in the counterclaim statutes, is broad and comprehensive,[8] and is construed liberally.[9]

The term "transaction" as used in the counterclaim statutes means that combination of acts and events, circumstances and defaults, which viewed in one aspect results in plaintiff's right of action, and viewed in another aspect results in defendant's right of action.[10] It applies to any dealings of the parties resulting in wrong, without regard to whether the wrong was done by violence, neglect, or breach of contract.[11] Where the facts alleged in a counterclaim arise out of the same transaction as alleged in the complaint, such facts may cover a wider scope than where plaintiff's action is based on a specific contract.[12]

In context of determining whether a counterclaim arises out of the same transaction as gave rise to the plaintiff's complaint, for the purposes of determining whether to permit a counterclaim, the transaction test rests on whether a duplication of judicial effort and resources would result if the subject of the complaint and the

counterclaim were tried in separate actions.[13] Whether the purposes of enhancing judicial economy, avoiding the multiplicity of litigation, and avoiding piecemeal disposition of what is essentially one action are furthered by permitting a counterclaim is a matter of the court's discretion.[14] The transaction test for asserting a counterclaim is one of practicality, and the trial court's determination as to whether that test has been met ought not be disturbed except for an abuse of discretion.[15]

[FN1] Statutes requiring that counterclaims be related in some way to the subject matter of the action, see § 39.

[FN2] U.S.—*Woodley v. Bubendorf*, 11 Alaska 274, 69 F. Supp. 593 (Terr. Alaska 1947).

Or.—*Benton County State Bank v. Nichols*, 153 Or. 73, 54 P.2d 1166 (1936).

[FN3] N.Y.—*County Plains Corp. v. Nosband Corp.*, 234 A.D. 588, 256 N.Y.S. 10 (2d Dep't 1932).

[FN4] Iowa—*Harrington v. Polk County Federal Sav. & Loan Ass'n of Des Moines*, 196 N.W.2d 543 (Iowa 1972).

[FN5] Ind.—*Hege v. Newsom*, 97 Ind. App. 465, 170 N.E. 336 (1930).

[FN6] Ind.—*Muir v. Robinson*, 205 Ind. 293, 186 N.E. 289 (1933).

[FN7] Ind.—*Muir v. Robinson*, 205 Ind. 293, 186 N.E. 289 (1933).

[FN8] Mo.—*Cantrell v. City of Caruthersville*, 359 Mo. 282, 221 S.W.2d 471 (1949).

[FN9] U.S.—*Woodley v. Bubendorf*, 11 Alaska 274, 69 F. Supp. 593 (Terr. Alaska 1947).

Or.—*Benton County State Bank v. Nichols*, 153 Or. 73, 54 P.2d 1166 (1936).

[FN10] Nev.—*Warren v. De Long*, 59 Nev. 481, 97 P.2d 792 (1940).

S.C.—*Gause v. Jones*, 226 S.C. 390, 85 S.E.2d 402 (1955).

[FN11] Ga.—*Hanover Ins. Co. v. Nelson Conveyor & Machinery Co.*, 159 Ga. App. 13, 282 S.E.2d 670 (1981).

Md.—*Nationwide Mut. Ins. Co. v. Webb*, 291 Md. 721, 436 A.2d 465, 24 A.L.R.4th 1001 (1981).

[FN12] Pa.—*United Nat. Ins. Co. v. M. London, Inc.*, 337 Pa. Super. 526, 487 A.2d 385 (1985).

[FN13] Conn.—*Ceci Bros., Inc. v. Five Twenty-One Corp.*, 81 Conn. App. 419, 840 A.2d 578 (2004).

[FN14] Conn.—*Ceci Bros., Inc. v. Five Twenty-One Corp.*, 81 Conn. App. 419, 840 A.2d 578 (2004).

[FN15] Conn.—*Southbridge Associates, LLC v. Garofalo*, 53 Conn. App. 11, 728 A.2d 1114 (1999).

As to the logical relationship test for compulsory counterclaims, see § 102.

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§ 41. Counterclaim—Particular subjects of counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  29, 29(1) to 29(3), 34

Numerous particular counterclaims have been held maintainable or have been held not maintainable within the limitation imposed by statutes authorizing as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, as in actions founded on contract generally, on a note, or on a tort claim.

Under the statutory provisions authorizing as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, certain counterclaims are maintainable as within the limitation imposed,[1] while others are not maintainable because not in compliance with the statute.[2] In an action founded on a contract, the defendant may counterclaim for claims he or she has against the plaintiff which are founded on the contract sued on.[3] Thus, in an action on a contract, the defendant may counterclaim for plaintiff's breach of the contract sued on.[4]

The defendant, in an action by the plaintiff for damages for breach of contract, can counterclaim for damages for a breach of the same contract by the plaintiff.[5] Thus, a dealer's offset claim to recover commissions on the sale of home furnishings is a basis for a counterclaim.[6]

Fraud is a legal action for damages that can be raised as a counterclaim.[7] Moreover, matters germane to a forcible detainer action may be introduced by the defendant through a counterclaim.[8]

In an action on an appeal bond, it is not proper to set up counterclaims based on a tort liability which did not arise out of the bond or the giving of it, and which was not connected with the bond.[9]

In an action on a note, the defendant may counterclaim for damages growing out of the transaction of which the note was a part,[10] such as for damages for false representations inducing defendant to sign the note.[11] However, the defendant may not counterclaim for damages arising from an independent transaction.[12]

The rule that the defendant may plead a counterclaim for damages arising out of the same transaction as that involved in the plaintiff's demand,[13] but not for damages arising out of a different transaction,[14] applies in

actions in tort for damages.

[FN1] Fla.—Hardrives Co. v. East Coast Asphalt Corp., 166 So. 2d 810 (Fla. Dist. Ct. App. 2d Dist. 1964).

N.C.—First Nat. Life Ins. Co. v. Falconer, 272 N.C. 702, 158 S.E.2d 793 (1968).

[FN2] Miss.—Byars v. Austin, 218 So. 2d 11 (Miss. 1969).

N.Y.—Axiom Market Research Bureau, Inc. v. Times Mirror Magazine, Inc., 107 Misc. 2d 118, 433 N.Y.S.2d 523 (Sup 1980).

[FN3] S.C.—Insurance Financial Services, Inc. v. South Carolina Ins. Co., 275 S.C. 155, 268 S.E.2d 113 (1980).

[FN4] Md.—E. J. Smith Const. Co. v. Burton, 262 Md. 62, 277 A.2d 84 (1971).

N.J.—Friedlander v. Gross, 63 N.J. Super. 470, 164 A.2d 761 (App. Div. 1960).

[FN5] Mass.—Minot v. Minot, 319 Mass. 253, 66 N.E.2d 5 (1946).

[FN6] Ga.—Mitchell v. W.S. Badcock Corp., 230 Ga. App. 352, 496 S.E.2d 502 (1998).

[FN7] Fla.—Norris v. Paps, 615 So. 2d 735 (Fla. Dist. Ct. App. 2d Dist. 1993).

[FN8] Ill.—Oak Park Trust & Sav. Bank v. Village of Mount Prospect, 181 Ill. App. 3d 10, 129 Ill. Dec. 713, 536 N.E.2d 763 (1st Dist. 1989).

[FN9] S.C.—Renneker v. Rehkopf, 208 S.C. 72, 37 S.E.2d 138 (1946).

[FN10] Ill.—Midland Sporting Goods Co. v. Ferguson, 25 Ill. App. 2d 477, 167 N.E.2d 437 (1st Dist. 1960).

Mich.—Pacific Coast Capital Corp. v. Research to Reality, Inc., 57 Mich. App. 75, 225 N.W.2d 177, 16 U.C.C. Rep. Serv. 448 (1974).

[FN11] Or.—Benton County State Bank v. Nichols, 153 Or. 73, 54 P.2d 1166 (1936).

[FN12] N.Y.—First Nat. Bank & Trust Co. of Tuckahoe v. Quimby, 241 A.D. 888, 272 N.Y.S. 28 (2d Dep't 1934).

Okla.—Maupin v. Ralston Purina Co., 1964 OK 195, 395 P.2d 562 (Okla. 1964).

[FN13] Ky.—Kramer v. Gough, 310 Ky. 299, 220 S.W.2d 577 (1949).

Ohio—Howe v. Struble, 90 Ohio App. 172, 47 Ohio Op. 47, 104 N.E.2d 197 (6th Dist. Lucas County 1951).

[FN14] N.Y.—[Mateo v. Abad](#), 239 A.D. 376, 267 N.Y.S. 436 (1st Dep't 1933).

N.C.—[Commercial Finance Co. v. Holder](#), 235 N.C. 96, 68 S.E.2d 794 (1952).

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§ 42. Reconvention

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  29(1) to 29(3)

The defendant may claim in reconvention only claims arising out of the same contract or transaction which affords the ground of suit, and if his demand is not connected with, and incidental to, the main demand ordinarily it cannot be reconvened. Demands in compensation must be connected.

A defendant may claim in reconvention claims arising out of the same contract or transaction which affords the ground of suit.^[1] If the defendant's demand is not connected with, and incidental to, the main demand ordinarily it cannot be reconvened.^[2] However, the rule is only applicable, under particular statutory provisions, if the plaintiff and the defendant reside in the same parish,^[3] but if a plaintiff resides out of the state,^[4] or within the state but in a different parish,^[5] the defendant may institute a demand in reconvention against plaintiff for any cause, although such demand is not necessarily connected with, or incidental to, the main cause of action.

Where a law firm sues its client for fees and expenses due, the client's malpractice claim against the firm arises from the same transaction and is to be asserted as a reconventional demand.^[6]

[FN1] La.—[Green v. Norsworthy](#), 17 La. App. 548, 135 So. 713 (2d Cir. 1931).

Tex.—[Service Drilling Co. v. Woods](#), 120 S.W.2d 608 (Tex. Civ. App. Austin 1938).

[FN2] La.—[Thomas v. Thomas](#), 63 So. 2d 468 (La. Ct. App., Orleans 1953) (disapproved of on other grounds by, [Smith v. Smith](#), 239 La. 688, 119 So. 2d 827 (1960)).

[FN3] La.—[Burgin v. Jumonville Pipe & Machinery Co.](#), 211 La. 148, 29 So. 2d 595 (1947).

[FN4] La.—[Dawson v. Frazar](#), 150 La. 203, 90 So. 570 (1921).

[FN5] La.—[Lewis Hardware Co. v. Gremillion](#), 65 So. 2d 807 (La. Ct. App., Orleans 1953).

[FN6] La.—[Sessions & Fishman v. Liquid Air Corp.](#), 642 So. 2d 249 (La. Ct. App. 4th Cir. 1994).

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§ 43. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  29(1) to 29(3)

Generally, new matter not germane to the original subject matter of a suit may not over objection be litigated in that action.

Generally, independent and unrelated causes of action cannot be litigated by cross action,^[1] that is, new matter not germane to the original subject matter of a suit may not over objection be litigated in that action.^[2] Under particular statutes so providing, a cross demand such as a counterclaim may not be interposed where it is not connected with the subject of the action brought by plaintiff, and is not otherwise permissible by virtue of other provisions of law.^[3] However, in set-off it is usually not necessary that defendant's claim be connected with the subject matter of the claim sued on.^[4]

[FN1] Ga.—[Brewer v. Williams](#), 210 Ga. 341, 80 S.E.2d 190 (1954).

N.C.—[Standard Amusement Co. v. Tarkington](#), 247 N.C. 444, 101 S.E.2d 398 (1958).

Tex.—[Skidmore v. Cook](#), 417 S.W.2d 79 (Tex. Civ. App. San Antonio 1967), writ dismissed, (Oct. 4, 1967).

[FN2] Neb.—[Glissmann v. Bauermeister](#), 149 Neb. 131, 30 N.W.2d 649 (1948).

[FN3] Counterclaims arising out of the same transaction or connected with the subject of the action, see §§ 39, 45.

[FN4] Set-off as not being required to arise out of the same transaction as the main claim, see § 37.

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§ 44. Recoupment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  32

Generally, if the claim of the defendant is connected with the subject of the action, it may be recouped.

If the claim of defendant is connected with the subject of the action, it may be recouped.^[1] However, if the defendant's claim is legally distinct from the contract sued on, close connection with it in point of time is not sufficient to allow it to be recouped.^[2]

^[FN1] Ala.—[Cooper v. Reaves](#), 365 So. 2d 670 (Ala. 1978).

Claims arising out of same transaction as subject to recoupment, see [§ 36](#).

^[FN2] Ga.—[Blackshear Mfg. Co. v. Stone](#), 8 Ga. App. 661, 70 S.E. 29 (1911).

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§ 45. Counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  29(1) to 29(3), 34(1)

It is generally a necessary element of a counterclaim that it grow out of, or be connected with, the cause of action asserted by the plaintiff, and, where a statute authorizes as a counterclaim a cause of action connected with the subject of the plaintiff's action, a counterclaim which meets such requirement may be allowed while a counterclaim which does not have the requisite connection and is not otherwise permissible by law will not be allowed.

Some statutes regarding counterclaims require the counterclaims to arise out of the contract or transaction set forth in the petition or be connected with the subject matter of the action.[1] Under such statutes, a necessary element of a counterclaim is that it grow out of, or be connected with, the cause of action asserted by plaintiff.[2] Without reference to any statute, a counterclaim not germane to the issue involved in the plaintiff's suit may not be maintained.[3] Thus, under some practice, a defendant by counterclaim cannot bring in for adjudication any matter which is not so connected with the matter in controversy under the original complaint that its consideration by the court is necessary to a full determination of the rights of the parties as to such matter in controversy, or, if it is of a wholly independent character, is a claim on plaintiff by way of set-off.[4] Moreover, connection with the subject of plaintiff's action or absence thereof may affect the propriety of a counterclaim where the statutes presently or formerly in force authorize as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or "connected with the subject of the action." [5]

Under such statutes, if defendant's claim is connected with the subject of plaintiff's cause of action, it is proper subject matter for a counterclaim,[6] whatever its nature,[7] whether or not it arises out of the contract or transaction set forth in the complaint.[8] On the other hand, if the counterclaim set up by defendant does not arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim,[9] and is not connected with the subject of the action,[10] it is not proper under statutory provisions authorizing it in such cases.

In some jurisdictions, no requirement is imposed with respect to connection of a counterclaim with the sub-

ject of plaintiff's action,[11] it being only necessary that the counterclaim tend to defeat or diminish plaintiff's claim and consist of a claim of defendant against plaintiff as between whom a several judgment could be given[12] or that the counterclaim be such as may be conveniently and justly determined in connection with plaintiff's cause of action.[13] However, even in jurisdictions where such statutes prevail, a counterclaim which has nothing in common with plaintiff's action may in certain circumstances be disallowed.[14]

[FN1] Neb.—*Currie By and Through Currie v. Chief School Bus Service, Inc.*, 250 Neb. 872, 553 N.W.2d 469, 112 Ed. Law Rep. 1043 (1996).

As to the requirement that the counterclaim arise out of the same transaction, see §§ 39 to 41.

[FN2] U.S.—*Matter of Penn Cent. Transp. Co.*, 419 F. Supp. 1376 (E.D. Pa. 1976).

N.Y.—*Sunshine v. Rochester Independent Packers Co., Inc.*, 64 A.D.2d 1009, 409 N.Y.S.2d 463 (4th Dep't 1978).

[FN3] Wis.—*Bolton v. Chicago Title & Trust Co.*, 64 Wis. 2d 714, 221 N.W.2d 911 (1974).

[FN4] Conn.—*Boies v. Matthies*, 23 Conn. Supp. 168, 178 A.2d 865 (Super. Ct. 1960).

Ind.—*Moore v. Boxman*, 144 Ind. App. 252, 245 N.E.2d 866 (1969).

[FN5] As to the necessity of a counterclaim arising out of the same transaction as the main claim, see § 41.

[FN6] Kan.—*Salina Coca-Cola Bottling Corp. v. Rogers*, 171 Kan. 688, 237 P.2d 218 (1951).

Miss.—*Byars v. Austin*, 218 So. 2d 11 (Miss. 1969).

Compulsive counterclaim

D.C.—*Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890 (D.C. 1977).

[FN7] Okla.—*Watson v. American Creosote Works*, 1938 OK 578, 184 Okla. 13, 84 P.2d 431 (1938).

[FN8] Kan.—*Salina Coca-Cola Bottling Corp. v. Rogers*, 171 Kan. 688, 237 P.2d 218 (1951).

N.Y.—*Edelman v. Edelman*, 88 Misc. 2d 156, 386 N.Y.S.2d 331 (Sup 1976).

[FN9] Counterclaims arising out of the same transaction, see §§ 39 to 41.

[FN10] Conn.—*Nuclo v. Associated Realty Corp.*, 22 Conn. Supp. 21, 158 A.2d 604 (Super. Ct. 1960).

Okla.—*Barnett v. Bodley*, 1959 OK 274, 348 P.2d 502 (Okla. 1959).

[FN11] N.Y.—*Valentino v. State*, 44 A.D.2d 338, 355 N.Y.S.2d 212 (3d Dep't 1974).

Wis.—*Arthur v. State Conservation Commission*, 33 Wis. 2d 585, 148 N.W.2d 17 (1967).

[FN12] Cal.—*Buckman v. Tucker*, 9 Cal. 2d 403, 71 P.2d 69 (1937); *Royal Indem. Co. v. Security Truck Lines*, 212 Cal. App. 2d 61, 27 Cal. Rptr. 858 (1st Dist. 1963).

[FN13] N.Y.—*Moser v. Fieland*, 5 Misc. 2d 937, 158 N.Y.S.2d 1020 (App. Term 1956).

[FN14] N.Y.—*Murphy v. Appelli*, 273 A.D. 261, 77 N.Y.S.2d 199 (1st Dep't 1948).

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2. Connection with Subject of Action

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§ 46. Counterclaim—"Subject of the action" defined

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  29(1) to 29(3), 34(1)

The words "subject of the action" as used in statutes authorizing counterclaims connected with the subject of the action should be construed liberally with a view to settling disputes in one action as far as possible, and may be defined as the plaintiff's principal primary right, to enforce or maintain which the action is brought, and as the facts constituting the plaintiff's cause of action; the term has a broader meaning than "cause of action."

The "subject of the action" has been defined as plaintiff's principal primary right, to enforce or maintain which the action is brought,[1] and as the facts constituting plaintiff's cause of action.[2]

As to whether it may also denote the specific physical thing with respect to which the legal controversy is carried on, there is a diversity of opinion. Thus in some cases it is held that the subject of an action is the thing or subject matter to which the litigation pertains,[3] or that it may be regarded as either the property involved or a right alleged to have been violated.[4]

[FN1] Kan.—[Salina Coca-Cola Bottling Corp. v. Rogers](#), 171 Kan. 688, 237 P.2d 218 (1951).

[FN2] Okla.—[Union Nat. Bank of Okmulgee v. Jones](#), 1931 OK 632, 152 Okla. 211, 4 P.2d 62 (1931).

[FN3] Kan.—[U.S. Hoffman Machinery Corporation v. Ebenstein](#), 150 Kan. 790, 96 P.2d 661 (1939), opinion adhered to on reh'g, 152 Kan. 198, 103 P.2d 788 (1940).

N.C.—[Wrenn v. Graham](#), 236 N.C. 719, 74 S.E.2d 232 (1953).

[FN4] N.C.—[Hancammon v. Carr](#), 229 N.C. 52, 47 S.E.2d 614 (1948).

Okla.—[Abbott v. McCoy](#), 1953 OK 61, 208 Okla. 224, 254 P.2d 997 (1953).

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§ 47. Counterclaim—What constitutes connection with subject of action

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  29(1) to 29(3), 34(1)

It is difficult to construe the phrase "connected with the subject of the action," as used in statutes authorizing counterclaims, so that any definite rule can be derived therefrom, but a connection of claims may be shown from their originating in the same contract, or transaction, or both, involving some right or interest in the subject of the action; the connection must be immediate and direct.

The connection of a counterclaim with the subject matter of the action must be more than casual or incidental; it is required to be immediate and direct.[1] A rule sometimes followed for determining the required connection is that the counterclaim must have such a relation to, and connection with, the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action and by one litigation, and that the claim of the one should be offset against, or applied on, the claim of the other.[2] However, some connection between the claims themselves, independent of their being held by the parties to the action, is required, which may be shown from their originating in the same contract, or transaction, or both, involving some right or interest in the subject of the action.[3]

The connection must not be casual or incidental;[4] it must be immediate and direct,[5] such as may be assumed to have been contemplated by the parties in their dealings with each other.[6] The mere fact that the subject matter of defendant's claim grew out of the subject matter of plaintiff's action does not establish a sufficient connection rendering the counterclaim proper,[7] but there must be agreement between such subjects in interest or substance or similarity of causes, and such subjects must be germane.[8] Where the facts set up by defendant constitute a defense to plaintiff's claim, they are connected with the subject of the action.[9]

[FN1] Neb.—*Currie By and Through Currie v. Chief School Bus Service, Inc.*, 250 Neb. 872, 553 N.W.2d 469, 112 Ed. Law Rep. 1043 (1996).

[FN2] Conn.—*United Const. Workers v. H. O. Canfield Co.*, 19 Conn. Supp. 450, 116 A.2d 914 (Super.

Ct. 1955).

S.C.—*Gause v. Jones*, 226 S.C. 390, 85 S.E.2d 402 (1955).

[FN3] Utah—*Workman Motor Co. v. Pacific Finance Corporation*, 83 Utah 19, 26 P.2d 961 (1933).

[FN4] N.C.—*Thompson v. Pilot Life Ins. Co.*, 234 N.C. 434, 67 S.E.2d 444 (1951).

[FN5] Ky.—*Allen v. Chesapeake & O.R. Co.*, 304 Ky. 846, 202 S.W.2d 157 (1947).

N.C.—*Thompson v. Pilot Life Ins. Co.*, 234 N.C. 434, 67 S.E.2d 444 (1951).

[FN6] Ky.—*Allen v. Chesapeake & O.R. Co.*, 304 Ky. 846, 202 S.W.2d 157 (1947).

N.C.—*Thompson v. Pilot Life Ins. Co.*, 234 N.C. 434, 67 S.E.2d 444 (1951).

[FN7] N.C.—*Manufacturers & Jobbers Finance Corporation v. Lane*, 221 N.C. 189, 19 S.E.2d 849 (1942).

[FN8] N.C.—*Manufacturers & Jobbers Finance Corporation v. Lane*, 221 N.C. 189, 19 S.E.2d 849 (1942).

[FN9] La.—*Cox v. Cashio*, 96 So. 2d 872 (La. Ct. App. 1st Cir. 1957).

Utah—*Workman Motor Co. v. Pacific Finance Corporation*, 83 Utah 19, 26 P.2d 961 (1933).

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§ 48. Recoupment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22(2), 34(2), 34(3)

Tort claims as well as contract claims are proper subjects for recoupment, and it is ordinarily not necessary that the opposing claims should be of the same character.

A defendant may recoup a contractual obligation against a contractual obligation.[1] However, in some jurisdictions the defendant cannot recoup a liability arising under a contract against an action sounding in tort,[2] except where equitable principles are involved, such as insolvency or nonresidence of the plaintiff.[3]

Recoupment is allowed of claims arising out of tort as well as of those arising out of contract.[4] Thus, as a general rule, the defendant may recoup a tort claim against a tort claim.[5] However, in some jurisdictions the defendant cannot recoup a liability in tort against a suit maintained on a contract,[6] except where equitable principles are involved, such as insolvency or nonresidence of the plaintiff.[7]

[FN1] Ark.—*Ramsay v. Roberts*, 240 Ark. 943, 403 S.W.2d 57 (1966).

[FN2] Cal.—*Kramer v. Associated Almond Growers of Paso Robles*, 111 Cal. App. 595, 295 P. 873 (4th Dist. 1931).

Ga.—*Gillespie v. Georgian Finance & Inv. Corp.*, 113 Ga. App. 134, 147 S.E.2d 465 (1966).

[FN3] Ga.—*Gillespie v. Georgian Finance & Inv. Corp.*, 113 Ga. App. 134, 147 S.E.2d 465 (1966).

[FN4] Ala.—*Brown v. Patterson*, 214 Ala. 351, 108 So. 16, 47 A.L.R. 1093 (1926).

[FN5] Cal.—*Sylvester v. Soulsburg*, 252 Cal. App. 2d 185, 60 Cal. Rptr. 218 (5th Dist. 1967).

[FN6] Ga.—*Gillespie v. Georgian Finance & Inv. Corp.*, 113 Ga. App. 134, 147 S.E.2d 465 (1966).

[FN7] Ga.—*Gillespie v. Georgian Finance & Inv. Corp.*, 113 Ga. App. 134, 147 S.E.2d 465 (1966).

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§ 49. Set-off for claims based on contract

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22(2), 34(2), 34(3)

Provided other requirements of set-off are complied with, any cause of action arising from contract may ordinarily be asserted as a set-off in an action based on contract; but, in the absence of statutory provision to the contrary, a contract claim cannot ordinarily be asserted as a set-off in an action based on tort.

Set-off is a debt for which an action might be maintained by the defendant against the plaintiff, that is, a debt for a certain specific pecuniary amount, recoverable in an action ex contractu.[1] Under some statutes set-off must be founded on a contract, express or implied, or a judgment.[2] In an action founded on a contract, where the other requirements of set-off are complied with, any cause of action arising from contract may ordinarily constitute a set-off,[3] even though it arises from a contract totally distinct from the one sued on.[4]

A cause of action founded on an implied contract may ordinarily be the subject of set-off.[5]

In accordance with the general rule that excludes set-off in actions sounding in tort,[6] in the absence of statutes permitting it,[7] a claim on a contract is not allowable to defendant as a set-off to a claim based on a tort,[8] at least where the contractual claim is unconnected with the tort claim.[9] This applies as well to claims founded on implied contracts.[10]

[FN1] Neb.—[Davis Erection Co., Inc. v. Jorgensen](#), 248 Neb. 297, 534 N.W.2d 746 (1995).

[FN2] U.S.—[Marks v. Spitz](#), 4 F.R.D. 348 (D. Mass. 1945).

[FN3] U.S.—[Tiger v. Sellers](#), 145 F.2d 920 (C.C.A. 10th Cir. 1944).

Okla.—[Sanders v. Street's of Tulsa](#), 1950 OK 41, 202 Okla. 427, 214 P.2d 910 (1950).

[FN4] Minn.—[Henderson v. Northwest Airlines](#), 231 Minn. 503, 43 N.W.2d 786 (1950).

[FN5] U.S.—[Tiger v. Sellers](#), 145 F.2d 920 (C.C.A. 10th Cir. 1944).

Ky.—[Weinstein v. Rhorer](#), 255 Ky. 179, 73 S.W.2d 25 (1934).

[FN6] The rule prohibiting the use of set-offs in tort cases, see [§ 25](#).

[FN7] Kan.—[Starkey v. Almena State Bank](#), 130 Kan. 568, 287 P. 251 (1930).

[FN8] Ga.—[Gillespie v. Georgian Finance & Inv. Corp.](#), 113 Ga. App. 134, 147 S.E.2d 465 (1966).

[FN9] N.Y.—[Hughes v. Frank M. Murphy, Inc.](#), 169 Misc. 239, 6 N.Y.S.2d 833 (App. Term 1938).

[FN10] Okla.—[Nation v. Planters' & Mechanics' Bank](#), 1911 OK 415, 29 Okla. 819, 119 P. 977 (1911).

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§ 50. Set-off for claims based on tort

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22(2), 34(2), 34(3)

A set-off arising from a tort claim may not ordinarily be asserted against a contract claim, nor may tort claims themselves generally be set-off by other claims.

Statutes of set-off generally, and more particularly those framed only to allow set-off of debts and demands, are usually construed as excluding set-off of claims arising in tort,[1] at least where such claims do not arise out of, and are not incident to, the demand or transaction sued on.[2] Thus, an intentional tortfeasor is generally not able to take advantage of setoff.[3] Accordingly, set-off has been disallowed as to claims arising out of assault,[4] conspiracy,[5] conversion,[6] fraud and deceit,[7] libel,[8] and slander.[9] Similarly, tenants cannot use a tort claim for an injury suffered in a fall on the stairs to set off a landlord's contract claim in a dispossessory action.[10]

However, claims for breach of contract and negligent performance are not incompatible, and a developer is entitled to pursue a claim based on the contractor's negligent performance of contract in the face of a contractor's claim for breach of contract.[11] Moreover, a party is entitled to offset the other party's contract claim with its negligence claim where the negligence claim arises out of the same transaction or occurrence, and the law allows the offset of a contract claim with a tort claim.[12]

In equity damages arising out of tort are not ordinarily the subject of set-off.[13] However, one exception permits interposition of a claim for set-off sounding in tort on equitable grounds,[14] as where the plaintiff is insolvent[15] or nonresident.[16] Where the court has equitable jurisdiction,[17] the exception applies whether plaintiff's action is brought in contract[18] or in tort.[19]

Where the defendant, having a claim against the plaintiff sounding in tort, waives the tort and sets up his or her claim as on an implied contract, the claim is considered to be one arising on contract, within the meaning of the statutes, and may be set off.[20] Thus, where a breach of the contract, which is the subject of the suit, results in a tort, damages for the breach may be set off, although it also constitutes a tort.[21]

[FN1] Ga.—*Gordy Tire Co. v. Dayton Rubber Co.*, 216 Ga. 83, 114 S.E.2d 529 (1960).

La.—*Calvert Fire Ins. Co. v. Lewis*, 231 La. 859, 93 So. 2d 194 (1957).

[FN2] Okla.—*Maupin v. Ralston Purina Co.*, 1964 OK 195, 395 P.2d 562 (Okla. 1964).

Tex.—*Southern Medical & Hospital Service v. Buie-Allen Hospital*, 204 S.W.2d 996 (Tex. Civ. App. Waco 1947).

[FN3] Pa.—*Koken v. Legion Ins. Co.*, 900 A.2d 418 (Pa. Commw. Ct. 2006).

[FN4] Ind.—*Sams v. Kern*, 121 Ind. App. 370, 98 N.E.2d 920 (1951).

[FN5] Ky.—*Big Four Mills v. Commercial Credit Co.*, 307 Ky. 612, 211 S.W.2d 831 (1948).

[FN6] Ga.—*Lewallen v. Dalton Auto & Machinery Co.*, 57 Ga. App. 328, 195 S.E. 305 (1938).

[FN7] U.S.—*Dushane v. Benedict*, 120 U.S. 630, 7 S. Ct. 696, 30 L. Ed. 810 (1887).

[FN8] Tex.—*Yelton v. Bird Lime & Cement Co.*, 161 S.W.2d 353 (Tex. Civ. App. San Antonio 1942), writ refused w.o.m., (June 10, 1942).

[FN9] Mich.—*Cross v. Hickey*, 254 Mich. 330, 236 N.W. 800 (1931).

[FN10] Ga.—*Thomas v. Shapiro*, 189 Ga. App. 268, 375 S.E.2d 282 (1988).

[FN11] Fla.—*Skidmore, Owings and Merrill v. Volpe Const. Co., Inc.*, 511 So. 2d 642 (Fla. Dist. Ct. App. 3d Dist. 1987).

[FN12] N.Y.—*Meritt Meridian Const. Co. v. Paramount Fabricators*, 221 A.D.2d 420, 633 N.Y.S.2d 812 (2d Dep't 1995).

[FN13] U.S.—*Williams Patent Crusher & Pulverizer Co. v. Kinsey Mfg. Co.*, 205 F. 375 (W.D. N.Y. 1913).

[FN14] Ga.—*Altman v. Florida-Georgia Tractor Co.*, 217 Ga. 292, 122 S.E.2d 88 (1961).

[FN15] Ga.—*Gillespie v. Georgian Finance & Inv. Corp.*, 113 Ga. App. 134, 147 S.E.2d 465 (1966).

[FN16] Ga.—*Gillespie v. Georgian Finance & Inv. Corp.*, 113 Ga. App. 134, 147 S.E.2d 465 (1966).

[FN17] Ga.—*Jones v. Coweta Fertilizer Co.*, 32 Ga. App. 730, 124 S.E. 545 (1924).

[FN18] Ga.—*Brewer v. Williams*, 210 Ga. 341, 80 S.E.2d 190 (1954).

[FN19] Ga.—*Porter v. Davey Tree Expert Co.*, 34 Ga. App. 355, 129 S.E. 557 (1925).

[FN20] U.S.—*Stevenson v. Ruth*, 76 F.2d 501 (C.C.A. 3d Cir. 1935).

Ky.—*McFall v. Burley Tobacco Growers' Co-op. Ass'n*, 246 Ky. 278, 54 S.W.2d 922 (1932).

[FN21] U.S.—[Stevenson v. Ruth](#), 76 F.2d 501 (C.C.A. 3d Cir. 1935).

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§ 51. Counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22(2), 34(2), 34(3)

Ordinarily, a claim which arises out of the transaction or is connected with the subject of the action may be counterclaimed, irrespective of whether it or plaintiff's claim arises out of contract or tort.

A claim which arises out of the contract or transaction or is connected with the subject of the action may ordinarily be counterclaimed, whatever its nature,[1] whether contract or tort.[2] However, some courts have held that neither tort nor contract demands can be counterclaimed in a tort action.[3] In those jurisdictions which authorize any claim as a counterclaim, the defendant may set up any counterclaim, whatever its nature,[4] whether contract or tort.[5]

[FN1] Ill.—*Williams v. Johnson*, 8 Ill. App. 2d 99, 130 N.E.2d 123 (2d Dist. 1955).

[FN2] U.S.—*Riverside Memorial Mausoleum, Inc. v. UMET Trust*, 581 F.2d 62, 25 Fed. R. Serv. 2d 943 (3d Cir. 1978).

Ga.—*Dixie Home Builders, Inc. v. Waldrip*, 146 Ga. App. 464, 246 S.E.2d 471 (1978).

[FN3] N.Y.—*Zysman v. 147 and 149 West Fifty-Seventh Street Corporation*, 221 A.D. 84, 223 N.Y.S. 62 (1st Dep't 1927).

[FN4] Ark.—*Missouri & N.A. Ry. Co. v. Bridwell*, 178 Ark. 37, 9 S.W.2d 781 (1928).

[FN5] Fla.—*Du Pont Plaza, Inc. v. Samuel Kipnis Family Foundation*, 132 So. 2d 352 (Fla. Dist. Ct. App. 3d Dist. 1961).

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§ 52. Counterclaim—Claims based on contract

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22(2), 34(2), 34(3)

In an action on contract, a contract claim arising from the transaction on which the plaintiff's cause of action is based, or connected with the subject of the action, may be asserted as a counterclaim.

Under the statutes providing for counterclaims of demands arising out of the transaction on which the plaintiff's cause of action is based, or connected with the subject of the action,[1] where the plaintiff's cause of action is founded on contract, then a contract counterclaim arising out of the transaction on which the plaintiff's cause of action is based, or connected with the subject of the action, may be brought.[2]

Where the counterclaim statutes provide that in actions arising out of contracts defendants may counterclaim against plaintiff any demand also arising out of contract, the rule is well established that any cause of action arising out of a contract, either the one declared on by plaintiff, or some other contract disconnected therefrom, may be counterclaimed in a contract action,[3] provided such claim is in existence at the time of the commencement of the action.[4] A liberal construction is accorded these provisions,[5] and the counterclaim is to be likewise liberally construed to be a contract counterclaim.[6] Where the defendant's claim could be enforced by a contract action, he or she may counterclaim it, even though the defendant could also have recovered on the claim in a tort action.[7]

Where it arises out of the transaction on which the plaintiff's cause of action is based,[8] or is connected with the subject of the plaintiff's action,[9] a demand based on contract may be counterclaimed against a claim founded on tort under some statutes.[10] Where these essential requisites are absent, however, such a counterclaim is improper.[11] Accordingly, contract counterclaims have been disallowed in actions for conversion.[12] Where the plaintiff's action sounds in tort, no counterclaim can be allowed under a statute permitting the counterclaiming of any demand arising out of contract, in an action based on a contract.[13]

[FN1] Counterclaims arising out of the same transaction or connected with the subject of the action, see §§ 39, 47.

[FN2] Ohio—*Braden v. Neubrandner*, 89 Ohio App. 295, 46 Ohio Op. 60, 101 N.E.2d 789 (5th Dist. Ashland County 1951).

Va.—*American Chlorophyll v. Schertz*, 176 Va. 362, 11 S.E.2d 625 (1940).

[FN3] Minn.—*Henderson v. Northwest Airlines*, 231 Minn. 503, 43 N.W.2d 786 (1950).

N.C.—*General Tire & Rubber Co. v. Distributors, Inc.*, 251 N.C. 406, 111 S.E.2d 614 (1959).

[FN4] Defendant's subsisting right of action, see §§ 29 to 34.

[FN5] N.C.—*McClure v. Fulbright*, 196 N.C. 450, 146 S.E. 74 (1929).

[FN6] S.C.—*Coastal Produce Ass'n v. Wilson*, 193 S.C. 339, 8 S.E.2d 505 (1940).

[FN7] Minn.—*Kubat v. Zika*, 186 Minn. 122, 242 N.W. 477 (1932).

[FN8] Statutes requiring that counterclaims arise out of the same transaction as the subject matter of the action, see §§ 35 to 42.

[FN9] Connection with subject of action as authorizing counterclaim, see § 47.

[FN10] Md.—*Great Atlantic & Pacific Tea Co. v. Royal Crown Bottling Co.*, 243 Md. 280, 220 A.2d 598 (1966).

[FN11] Okla.—*Pearce v. Plumer*, 1952 OK 435, 207 Okla. 499, 250 P.2d 846 (1952).

Wash.—*Golmis v. Vlachos*, 34 Wash. 2d 627, 208 P.2d 1204 (1949).

[FN12] Ga.—*Powers v. Wren*, 198 Ga. 316, 31 S.E.2d 713 (1944).

[FN13] N.Y.—*Basch v. Basch*, 240 A.D. 235, 269 N.Y.S. 696 (1st Dep't 1934).

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§ 53. Counterclaim—Claims based on tort

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22(2), 34(2), 34(3)

Under some statutes a tort may be counterclaimed in a contract action, provided it arises out of the transaction on which plaintiff's cause of action is based, or is connected with the subject of the action.

Although generally, a counterclaim in tort cannot be set up in a contract action,[1] a tort may be counterclaimed in a contract action when it is within the statutory requirements that it arise out of the transaction on which the plaintiff's cause of action is based, or is connected with the subject of the action.[2] However, the counterclaim must be so connected with the matter in controversy that its consideration is necessary for a full determination of the rights of the parties,[3] and is improper if it does not arise out of the transaction on which the plaintiff's cause of action is based, or is not connected with the subject of the action.[4] The statutory provisions allowing defendant to counterclaim any claim on a contract in an action on a contract do not permit the defendant to counterclaim a tort in an action ex contractu.[5] Tort-based claims have no place in an equity suit to determine child support.[6]

Although generally, a tort cannot be counterclaimed against a tort,[7] where a tort claim complies with the general requirements of a counterclaim, namely, that it arise out of the transaction on which the plaintiff's cause of action is based, or be connected with the subject of the action, it may be counterclaimed in an action for tort.[8] On the other hand, a tort not connected with the tort on which the plaintiff sues cannot be counterclaimed.[9]

[FN1] La.—*Lees v. Smith*, 363 So. 2d 974 (La. Ct. App. 3d Cir. 1978).

Neb.—*Tilden Bank v. Retzlaff*, 188 Neb. 834, 199 N.W.2d 734 (1972).

[FN2] Ga.—*Elsner v. Cathcart Cartage Co.*, 124 Ga. App. 615, 184 S.E.2d 685 (1971).

Neb.—*Tilden Bank v. Retzlaff*, 188 Neb. 834, 199 N.W.2d 734 (1972).

[FN3] Conn.—*Springfield-De Witt Gardens, Inc. v. Wood*, 143 Conn. 708, 125 A.2d 488 (1956).

N.C.—[Hancammon v. Carr](#), 229 N.C. 52, 47 S.E.2d 614 (1948).

[FN4] Conn.—[Springfield-De Witt Gardens, Inc. v. Wood](#), 143 Conn. 708, 125 A.2d 488 (1956).

N.C.—[Lawing v. Wheeler](#), 232 N.C. 517, 61 S.E.2d 341 (1950).

[FN5] N.M.—[Cassell Motor Co. v. Gonzales](#), 32 N.M. 259, 255 P. 636 (1924).

[FN6] Va.—[Hur v. Virginia Dept. of Social Services Div. of Child Support Enforcement ex rel. Klopp](#), 13 Va. App. 54, 409 S.E.2d 454 (1991).

[FN7] Neb.—[Benes v. Matulka](#), 182 Neb. 744, 157 N.W.2d 382 (1968).

[FN8] Ind.—[Jones v. Castor](#), 140 Ind. App. 342, 214 N.E.2d 180 (1966).

[FN9] N.C.—[Manufacturers & Jobbers Finance Corporation v. Lane](#), 221 N.C. 189, 19 S.E.2d 849 (1942).

S.C.—[Baitary v. Ilderton](#), 214 S.C. 357, 52 S.E.2d 417, 10 A.L.R.2d 1163 (1949).

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§ 54. Reconvention and compensation

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22(2), 34(2), 34(3)

Demands in reconvention may be either in contract or in tort.

Subject to other applicable requirements, demands in reconvention may be either in contract^[1] or in tort.^[2]
Compensation between mutual debtors takes place without distinction between different forms of debt.^[3]

[FN1] Tex.—[Carroll v. Welch](#), 26 Tex. 147, 1861 WL 3909 (1861).

[FN2] La.—[Dixie Mach., Welding & Metal Works v. Boulet Transp. Co.](#), 38 So. 2d 546 (La. Ct. App., Orleans 1949).

[FN3] La.—[Sliman v. Mahtook](#), 17 La. App. 635, 136 So. 749 (1st Cir. 1931).

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§ 55. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22, 35, 35(1), 35(2)

Set-off, counterclaim, and compensation are all founded on liquidated and demandable debts.

Set-off is founded on a liquidated debt.[1] For set-off to be applicable, two distinct debts, equally liquidated and demandable, must exist contemporaneously.[2] A creditor cannot effect a valid set-off against a debtor's preexisting debt to it until the creditor incurs a fixed, noncontingent liability to the debtor.[3] A claim must be currently due to be subject to set-off.[4] The right of set-off comprehends only liquidated damages or those capable of being ascertained by calculation.[5] Though set-off is limited to liquidated damages or damages that do not require any calculation by the fact finder,[6] liquidated damages may be ascertained by computation or calculation with reference to specific data.[7] A proper set-off alleges a debt that is presently due and arising from a liquidated claim,[8] or presently due and payable.[9] Equitable set-off is available only where the debts are mutual, mature, and of such certain and ascertainable character as to be capable of being applied in compensation of each other without the intervention of the court to estimate them.[10] More generally, liquidated damages are generally the subject of cross demands, whether in the form of recoupment,[11] set-off,[12] counterclaim,[13] or compensation.[14]

A counterclaim accrues and is fully matured when damage resulting therefrom is sustained and capable of ascertainment.[15] A counterclaim, to be valid, must be in actual existence at the time an original action is filed.[16]

For compensation to be applicable, two distinct debts, equally liquidated and demandable, must exist contemporaneously.[17] Legal compensation is not available unless two debts are equally liquidated and demandable.[18] Moreover, judicial compensation may be used when a previously unliquidated debt has become liquidated or fixed by the court.[19]

[FN1] Mo.—[Sveum v. J. Mess Plumbing, Inc.](#), 965 S.W.2d 924 (Mo. Ct. App. E.D. 1998).

[FN2] Kan.—*Mynatt v. Collis*, 274 Kan. 850, 57 P.3d 513 (2002).

La.—*Buck's Run Enterprises, Inc. v. Mapp Const., Inc.*, 808 So. 2d 428 (La. Ct. App. 1st Cir. 2001); *Hebert v. Insurance Center, Inc.*, 706 So. 2d 1007 (La. Ct. App. 3d Cir. 1998), writ denied, 716 So. 2d 888 (La. 1998).

[FN3] U.S.—*In re Doug Smith, Inc.*, 133 B.R. 617, 18 U.C.C. Rep. Serv. 2d 524 (Bankr. S.D. Ohio 1991).

[FN4] U.S.—*In re Cabrillo*, 101 B.R. 443 (Bankr. E.D. Pa. 1989).

[FN5] Tenn.—*Howard v. Abernathy*, 751 S.W.2d 432 (Tenn. Ct. App. 1988).

[FN6] Or.—*Rexius Forest By-Products, Inc. v. A & R Lumber Sales, Inc.*, 112 Or. App. 114, 827 P.2d 1359 (1992).

[FN7] Ill.—*Bank of Chicago-Garfield Ridge v. Park Nat. Bank*, 237 Ill. App. 3d 1085, 179 Ill. Dec. 240, 606 N.E.2d 72 (1st Dist. 1992).

[FN8] U.S.—*In re Allen-Main Associates, Ltd. Partnership*, 233 B.R. 631 (Bankr. D. Conn. 1999).

[FN9] Okla.—*Hydro Co-op. Ass'n v. Shantz*, 1993 OK CIV APP 123, 858 P.2d 123 (Ct. App. Div. 4 1993).

[FN10] Ill.—*Bank of Chicago-Garfield Ridge v. Park Nat. Bank*, 237 Ill. App. 3d 1085, 179 Ill. Dec. 240, 606 N.E.2d 72 (1st Dist. 1992).

[FN11] Pa.—*Northwestern Nat. Bank v. Commonwealth*, 345 Pa. 192, 27 A.2d 20 (1942).

[FN12] U.S.—*U. S. for Use and Benefit of A & W Concrete & Bldg. Materials, Inc. v. A. P. Johnson Contractor, Inc.*, 225 F. Supp. 727 (E.D. La. 1964).

La.—*Investor Inns, Inc. v. Wallace*, 408 So. 2d 978 (La. Ct. App. 2d Cir. 1981).

[FN13] N.J.—*McCurnin v. B. & J. Realty Co.*, 11 N.J. Misc. 673, 168 A. 161 (Dist. Ct. 1933).

[FN14] U.S.—*U. S. for Use and Benefit of A & W Concrete & Bldg. Materials, Inc. v. A. P. Johnson Contractor, Inc.*, 225 F. Supp. 727 (E.D. La. 1964).

[FN15] Mo.—*Woodruff v. McMillan*, 752 S.W.2d 493 (Mo. Ct. App. W.D. 1988).

[FN16] S.D.—*Haberer v. First Bank of South Dakota (NA)*, 429 N.W.2d 62 (S.D. 1988).

[FN17] La.—*National Glass & Glazing, Inc. v. Grimaldi Const., Inc.*, 680 So. 2d 56 (La. Ct. App. 5th Cir. 1996), writ denied, 685 So. 2d 146 (La. 1997).

[FN18] U.S.—*In re MMR Holding Corp.*, 199 B.R. 611 (M.D. La. 1996), aff'd, 119 F.3d 1 (5th Cir. 1997).

[FN19] U.S.—*In re MMR Holding Corp.*, 199 B.R. 611 (M.D. La. 1996), aff'd, 119 F.3d 1 (5th Cir.

1997).

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§ 56. What constitutes a liquidated demand

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 35, 35(1), 35(2)

A claim is liquidated when the amount of it has been ascertained or is capable of ascertainment by mere calculation or computation in accordance with established or accepted legal standards or a rule or criterion agreed on by the parties.

Whether damages are liquidated or unliquidated depends primarily on the terms of the contract itself.[1] A debt is liquidated when its existence is certain and its amount is already determined, though it is not necessary that the amount of a debt be fixed in order for the debt to be considered liquidated, since a debt which can be ascertained by mere calculation or computation in accordance with accepted legal standards is considered liquidated.[2] Generally speaking, a claim is liquidated when the amount of it has been determined,[3] or, where the amount is capable of ascertainment, without trial,[4] by mere calculation or computation in accordance with known legal standards[5] or established market values,[6] and, if there is data given from which damages can be so ascertained, they are liquidated, within the meaning of the statutory requirement.[7]

A claim is liquidated, for purposes of determining the applicability of compensation, when the debt is for an amount capable of ascertainment by mere calculation in accordance with accepted legal standards,[8] or when its correctness is admitted by the debtor.[9] Similarly, a counterclaim has accrued and is fully matured when damage resulting therefrom is sustained and is capable of ascertainment, and "ascertainment" refers to the fact of damage rather than to the precise amount.[10]

Under the rule that any claim capable of exact ascertainment is a liquidated demand, there may be a set-off of claims arising on contract, the amount of which can be shown by the testimony of witnesses acquainted with the market.[11]

[FN1] Ky.—[McFall v. Burley Tobacco Growers' Co-op. Ass'n](#), 246 Ky. 278, 54 S.W.2d 922 (1932).

[FN2] La.—[Arkla, Inc. v. Maddox & May Bros. Casing Service, Inc.](#), 671 So. 2d 1220 (La. Ct. App. 2d

Cir. 1996).

[FN3] La.—*Saunier v. Saunier*, 217 La. 607, 47 So. 2d 19 (1950); *Hutchinson v. Trussco, Inc.*, 943 So. 2d 585 (La. Ct. App. 3d Cir. 2006).

[FN4] Ky.—*McFall v. Burley Tobacco Growers' Co-op. Ass'n*, 246 Ky. 278, 54 S.W.2d 922 (1932).

[FN5] U.S.—*Hoffman v. Gleason*, 107 F.2d 101 (C.C.A. 6th Cir. 1940).

Pa.—*In re Gordon*, 317 Pa. 161, 176 A. 494 (1935).

[FN6] U.S.—*Hoffman v. Gleason*, 107 F.2d 101 (C.C.A. 6th Cir. 1940).

[FN7] U.S.—*Marks v. Spitz*, 4 F.R.D. 348 (D. Mass. 1945).

Va.—*Odessky v. Monterey Wine Co.*, 188 Va. 184, 49 S.E.2d 330 (1948).

[FN8] La.—*Sims v. Hays*, 521 So. 2d 730 (La. Ct. App. 2d Cir. 1988).

[FN9] La.—*Sims v. Hays*, 521 So. 2d 730 (La. Ct. App. 2d Cir. 1988).

[FN10] Mo.—*Beasley v. Mironuck*, 877 S.W.2d 653 (Mo. Ct. App. E.D. 1994).

[FN11] La.—*Olinde Hardware & Supply Co. v. Ramsey*, 98 So. 2d 835 (La. Ct. App. 1st Cir. 1957).

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§ 57. Recoupment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22, 35, 35(1), 35(2)

Unliquidated damages may be recouped, provided they arise out of the transaction forming the basis of plaintiff's action.

Recoupment is the right to set off unliquidated damages.[1] Thus, unliquidated damages may be recouped, if they arise out of the transaction forming the basis of plaintiff's action.[2] However, unliquidated damages arising out of an independent transaction,[3] as unliquidated damages arising out of a tort independent of, and disconnected with, the transaction sued on[4] cannot be recouped. Recoupment is generally allowed in cases involving a single contract which called for advance payments based on estimates, subject to correction at a later time.[5]

[FN1] Tenn.—*Howard v. Abernathy*, 751 S.W.2d 432 (Tenn. Ct. App. 1988).

[FN2] Ill.—*Olin Mathieson Chemical Corp. v. J. J. Wuellner & Sons, Inc.*, 72 Ill. App. 2d 488, 218 N.E.2d 823 (5th Dist. 1966).

[FN3] Miss.—*Lancaster v. Jordan Auto Co.*, 185 Miss. 530, 187 So. 535 (1939).

[FN4] Miss.—*Lancaster v. Jordan Auto Co.*, 185 Miss. 530, 187 So. 535 (1939).

[FN5] U.S.—*In re Tri County Home Health Services, Inc.*, 230 B.R. 106 (Bankr. W.D. Tenn. 1999).

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§ 58. Set-off

West's Key Number Digest

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An unliquidated claim for damages may not be used to offset a liquidated debt. In other words, there is no right to set-off of a possible unliquidated liability against a liquidated claim that is due and payable. As a general rule, unliquidated damages cannot be set off in equity, at least in the absence of special equities, such as insolvency or nonresidence of plaintiff.

Ordinarily, an unliquidated claim for damages may not be used to offset a liquidated debt.[1] In other words, there is no right to set off a possible unliquidated liability against a liquidated claim that is due and payable.[2] However, in some states there is no requirement that a debt be liquidated in order to be raised as a set-off in counterclaim.[3] Moreover, since a claim sounding in tort generally is not the subject of set-off,[4] it follows with greater force that a claim for unliquidated damages sounding in tort is unavailable as a set-off.[5] However, in keeping with the object and spirit of the remedy, which is to litigate matters between the parties in one action,[6] so far as is possible, some statutes are construed to allow a set-off, although the claim may be for an unliquidated amount.[7]

As also stated, contingent claims are generally not a proper subject of set-off.[8] While in some states, a contingent or unmatured obligation cannot be the subject of a set-off,[9] in others, debts to be offset can be matured or unmatured but they cannot be contingent.[10] A debt matures on the date it is due.[11] An "unmatured debt" is generally evidenced by a contract and can be expected in the normal course of events to be due and owing in the future, although the obligation has not yet ripened, while a "contingent liability" is marked by uncertainty as to whether any obligation will ever arise.[12]

Damage for failure to secure collateral is an unliquidated claim that cannot be pled as a set-off against a liquidated sum on a promissory note.[13] Moreover, the defendant is not entitled to set-off where it makes a bare allegation of "damages," rather than a precise amount of damages, since it cannot be said that the amount of damages would not require calculation by the fact finder.[14] A borrower is not entitled to use tort claims against a bank as a set-off against the amount the borrower owes the bank on promissory notes where the obligations are not equally liquidated and presently due in that the borrower admits the debt owed on the promissory

notes while the bank denies liability for the debt claimed by the borrower.[15] Also, a bankruptcy debtor's obligation to buy power from a customer when its nuclear power plant became operational was not due before the plant became operational and, therefore, did not give the customer a right of set-off.[16]

In at least one jurisdiction, unliquidated demands may be set off if they do not "sound in damages merely,"[17] and if they "sound in damages merely," they may not be set-off.[18] Within the meaning of this rule, a debt or demand which may be set-off as "not sounding in damages merely" is one which, when the facts on which it is based are established, the law is capable of measuring accurately by a pecuniary standard.[19]

Since, in matters of set-off, equity usually follows the law,[20] and as unliquidated damages ordinarily cannot be set off at law, unliquidated damages generally cannot be set off in equity,[21] unless some special equity intervenes.[22] This rule applies with even greater force to unliquidated damages sounding in tort.[23] Equitable set-offs of unmatured obligations may be allowed under special circumstances, however, such as the insolvency of the obligor or probable difficulty in collecting the obligation at maturity, but such set-offs are largely within the court's discretion.[24] Thus, the insolvency of the plaintiff will move a court of equity to set off claims of the defendant which would otherwise be disallowed, because unliquidated.[25] Moreover, nonresidence of the plaintiff is generally such a circumstance as will move equity to set-off unliquidated demands,[26] provided they arise out of the transaction on which the plaintiff's cause of action is based.[27]

[FN1] La.—*Sentilles v. Kwik-Kopy Corp.*, 618 So. 2d 1133 (La. Ct. App. 4th Cir. 1993), writ denied, 629 So. 2d 348 (La. 1993).

[FN2] N.Y.—*Willett v. Lincolnshire Management, Inc.*, 302 A.D.2d 271, 756 N.Y.S.2d 9 (1st Dep't 2003); *Spodek v. Park Property Development Associates*, 263 A.D.2d 478, 693 N.Y.S.2d 199 (2d Dep't 1999).

[FN3] Va.—*Piland Corp. v. League Const. Co., Inc.*, 238 Va. 187, 380 S.E.2d 652 (1989).

[FN4] Tort claims as setting off a plaintiff's claim, see § 50.

[FN5] Miss.—*Vines v. Perry*, 208 Miss. 869, 45 So. 2d 734 (1950).

N.C.—*Crescent Hat Co. v. Chizik*, 223 N.C. 371, 26 S.E.2d 871 (1943).

[FN6] Purpose of set-off, see § 13.

[FN7] Md.—*H.J. McGrath Co. v. Wisner*, 189 Md. 260, 55 A.2d 793 (1947).

Minn.—*Henderson v. Northwest Airlines*, 231 Minn. 503, 43 N.W.2d 786 (1950).

[FN8] U.S.—*Federal Deposit Ins. Corp. v. Liberty Nat. Bank & Trust Co.*, 806 F.2d 961 (10th Cir. 1986).

[FN9] U.S.—*In re Tower Environmental, Inc.*, 217 B.R. 933 (Bankr. M.D. Fla. 1997); *In re Interstate Graphics, Inc.*, 223 B.R. 116 (Bankr. S.D. Ohio 1998).

[FN10] U.S.—*In re Westchester Structures, Inc.*, 181 B.R. 730 (Bankr. S.D. N.Y. 1995).

[FN11] Ill.—*Bank of Chicago-Garfield Ridge v. Park Nat. Bank*, 237 Ill. App. 3d 1085, 179 Ill. Dec. 240, 606 N.E.2d 72 (1st Dist. 1992).

[FN12] U.S.—*In re Prudential Lines, Inc.*, 148 B.R. 730 (Bankr. S.D. N.Y. 1992), judgment aff'd in part, rev'd in part on other grounds, 170 B.R. 222 (S.D. N.Y. 1994).

[FN13] La.—*Premier Bank, Nat. Ass'n v. Percomex, Inc.*, 615 So. 2d 41 (La. Ct. App. 3d Cir. 1993).

[FN14] Or.—*Rexius Forest By-Products, Inc. v. A & R Lumber Sales, Inc.*, 112 Or. App. 114, 827 P.2d 1359 (1992).

[FN15] La.—*American Bank v. Saxena*, 553 So. 2d 836 (La. 1989).

[FN16] U.S.—*In re Public Service Co. of New Hampshire*, 884 F.2d 11 (1st Cir. 1989).

[FN17] Ala.—*Industrial Sav. Bank v. Greenwald*, 229 Ala. 529, 158 So. 734 (1935).

[FN18] Ala.—*Tidmore v. Mills*, 33 Ala. App. 243, 32 So. 2d 769 (1947).

[FN19] Ala.—*Industrial Sav. Bank v. Greenwald*, 229 Ala. 529, 158 So. 734 (1935).

[FN20] Equitable set-off, generally, see § 5.

[FN21] U.S.—*Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42 (C.C.A. 4th Cir. 1932).

[FN22] U.S.—*North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 14 S. Ct. 710, 38 L. Ed. 565 (1894); *Brownley v. Peyser*, 98 F.2d 337 (App. D.C. 1938); *Stanley v. Clark*, 159 F. Supp. 65 (D.N.H. 1957).

Ky.—*Oglesby v. Prudential Ins. Co. of America*, 259 Ky. 620, 82 S.W.2d 824 (1935).

[FN23] U.S.—*Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42 (C.C.A. 4th Cir. 1932).

[FN24] Kan.—*Atchison County Farmers Union Co-op Ass'n v. Turnbull*, 241 Kan. 357, 736 P.2d 917 (1987).

[FN25] U.S.—*Hoffman v. Gleason*, 107 F.2d 101 (C.C.A. 6th Cir. 1940).

Ariz.—*Nutter v. Occidental Petroleum Land & Development Corp.*, 117 Ariz. 458, 573 P.2d 532 (Ct. App. Div. 2 1977).

[FN26] Ky.—*Kortz v. Union Central Life Ins. Co.*, 264 Ky. 750, 95 S.W.2d 611 (1936).

[FN27] Ky.—*Big Four Mills v. Commercial Credit Co.*, 307 Ky. 612, 211 S.W.2d 831 (1948).

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§ 59. Counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22, 35, 35(1), 35(2)

A claim for unliquidated damages generally may be pleaded as a counterclaim, provided it arises out of the same transaction as plaintiff's cause of action or is connected with the subject of the action.

Generally, a counterclaim which is otherwise available may be interposed, although for unliquidated damages,[1] but to bring in a counterclaim for an unliquidated debt, under a statute allowing counterclaims arising out of the contract or transaction sued on or connected with the subject of the action,[2] the counterclaim must relate to the same transaction,[3] and a claim for unliquidated damages, disconnected with the cause of action sued on, cannot be counterclaimed.[4] A contingent unliquidated counterclaim may be pleaded as a set-off unless the plaintiff can show prejudice or the court finds the counterclaim would make proceedings unwieldy.[5]

A counterclaim for contribution, if the defendants are found liable in the action by the plaintiff, has not matured and cannot be brought before any of the parties become jointly liable.[6] A counterclaim which seeks judgment against the plaintiff, in the event the defendants are liable to a different plaintiff in a currently pending action in another state, is contingent and does not allege a viable cause of action.[7]

[FN1] Cal.—*Hauger v. Gates*, 42 Cal. 2d 752, 269 P.2d 609 (1954).

[FN2] Counterclaims arising out of the same transaction or connected with the subject of the action, see §§ 39, 41.

[FN3] Mo.—*Brandtjen & Kluge v. Hunter*, 235 Mo. App. 909, 145 S.W.2d 1009 (1940).

[FN4] N.J.—*Falkenstern v. Herman Kussy Co.*, 137 N.J.L. 200, 59 A.2d 372 (N.J. Ct. Err. & App. 1948).

N.C.—*Crescent Hat Co. v. Chizik*, 223 N.C. 371, 26 S.E.2d 871 (1943).

[FN5] Wash.—*Warren, Little & Lund, Inc. v. Max J. Kuney Co.*, 115 Wash. 2d 211, 796 P.2d 1263 (1990).

[FN6] U.S.—*Bio-Vita, Ltd. v. Rausch*, 759 F. Supp. 33 (D. Mass. 1991).

[FN7] N.Y.—*Efdey Elec. Contractors, Inc. v. Melita*, 167 A.D.2d 501, 562 N.Y.S.2d 172 (2d Dep't 1990).

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§ 60. Reconvention and compensation

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  22, 35, 35(1), 35(2)

Lack of sufficient liquidity and demandability will preclude a plea of compensation, though a debt offered in compensation need only be equally liquidated with the debt of the plaintiff.

Lack of sufficient liquidity and demandability will preclude a plea of compensation.[1] Thus, a claim for compensation is not sufficient to prevent a summary judgment on a liquidated debt where compensation is not based on a liquidated claim.[2] A debt offered in compensation must be equally liquidated with that of the plaintiff,[3] and, under this rule, in an action on an unliquidated demand, unliquidated damages may be pleaded in compensation.[4] However, in an action on a liquidated demand, the defendant cannot plead in compensation an unliquidated claim.[5]

Damage for failure to secure collateral is an unliquidated claim that cannot be pled as compensation against a liquidated sum on a promissory note.[6]

[FN1] La.—[American Bank v. Saxena](#), 553 So. 2d 836 (La. 1989).

[FN2] La.—[National Gypsum Co. v. Ace Wholesale, Inc.](#), 685 So. 2d 306 (La. Ct. App. 5th Cir. 1996), writ denied, 688 So. 2d 502 (La. 1997).

[FN3] La.—[Beyer Transp. Co. v. Whiteman Contracting Co.](#), 187 So. 143 (La. Ct. App., Orleans 1939).

[FN4] La.—[Walker v. McMurray](#), 12 La. App. 356, 125 So. 486 (2d Cir. 1929).

[FN5] U.S.—[Securities and Exchange Commission v. Affiliated Inv. Corp.](#), 298 F. Supp. 178 (W.D. La. 1968), judgment aff'd, 409 F.2d 570 (5th Cir. 1969).

La.—[Yung v. Magnolia Acceptance Corp.](#), 180 So. 2d 222 (La. Ct. App. 4th Cir. 1965).

[FN6] La.—[Premier Bank, Nat. Ass'n v. Percomex, Inc.](#), 615 So. 2d 41 (La. Ct. App. 3d Cir. 1993).

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§ 61. What constitutes an unliquidated demand

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  35, 35(1), 35(2)

An unliquidated demand is one, the amount of which is unascertained and incapable of ascertainment by mere computation or calculation in accordance with agreed on criteria or established or accepted legal standards.

Generally, a demand is not liquidated unless it appears how much is due.[1] Unliquidated damages are unascertained damages which rest in opinion only,[2] which cannot be ascertained by computation or calculation.[3]

Thus damages are so unliquidated as not to be the subject of set-off when they have not been adjusted, or settled, or agreed on by the parties.[4] If there is a genuine controversy as to which of two sums is due, the demand is unliquidated.[5] Damages for breach of warranty are regarded as unliquidated,[6] as are charges for changes and repairs, made by the purchaser of machinery and billed to the seller,[7] damages for defects in goods sold and delivered,[8] a claim for the market value of work and labor,[9] a claim on an unsettled partnership account,[10] and a claim for breach of a contract to renew or procure insurance.[11]

A claim for damages for alleged discriminatory practices in violation of the Equal Credit Opportunity Act is not a liquidated claim and, thus, set-off or compensation cannot be pleaded, where the validity of the claim is uncertain and the amount of potential damages is not capable of ascertainment by mere calculation.[12]

[FN1] Va.—*Dexter-Portland Cement Co. v. Acme Supply Co.*, 147 Va. 758, 133 S.E. 788 (1926).

[FN2] Va.—*Odessky v. Monterey Wine Co.*, 188 Va. 184, 49 S.E.2d 330 (1948).

[FN3] Va.—*John H. Maclin Peanut Co. v. Pretlow & Co.*, 176 Va. 400, 11 S.E.2d 607 (1940).

[FN4] La.—*Jones v. Davis*, 155 So. 269 (La. Ct. App. 1st Cir. 1934).

[FN5] Va.—*Dexter-Portland Cement Co. v. Acme Supply Co.*, 147 Va. 758, 133 S.E. 788 (1926).

[FN6] W.Va.—*American Sugar Refining Co. v. Martin-Nelly Grocery Co.*, 90 W. Va. 730, 111 S.E. 759 (1922).

[FN7] Mo.—*Hoffman v. Hiram Lloyd Bldg. & Const. Co.*, 204 Mo. App. 539, 223 S.W. 813 (1920).

[FN8] Ill.—*Illinois Glass Co. v. Ozell Co.*, 197 Ill. App. 626, 1916 WL 1821 (1st Dist. 1916).

[FN9] Tex.—*Tolbert v. McSwain*, 137 S.W.2d 1051 (Tex. Civ. App. El Paso 1939).

[FN10] Mo.—*Glaus v. Gosche*, 118 S.W.2d 42 (Mo. Ct. App. 1938).

N.Y.—*Perlman v. Perlman*, 139 Misc. 396, 247 N.Y.S. 453 (Sup 1931).

[FN11] Tex.—*Wise v. Ferguson*, 138 S.W. 816 (Tex. Civ. App. Fort Worth 1911), writ dismissed.

[FN12] La.—*ITT Residential Capital Corp. v. Cheuk*, 656 So. 2d 747 (La. Ct. App. 5th Cir. 1995), writ denied, 661 So. 2d 465 (La. 1995).

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§ 62. Legal and equitable claims or demands

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  33(2)

In the absence of statutes authorizing it, an equitable demand ordinarily may not be set off in an action at law; but under code provisions, statutes, or rules of court to such effect, equitable demands may be asserted by way of set-off and counterclaim.

In the absence of statutes authorizing it, an equitable claim ordinarily may not be set off, counterclaimed, or recouped in an action at law.^[1]

Under a court rule to such effect, an equitable claim which arises out of the transaction which is the subject matter of the suit may be set up as a counterclaim thereto.^[2] Under some statutes or rules of court, an equitable demand may be set off against a claim for money demands on contract,^[3] or counterclaimed regardless of whether it arises from the same transaction as plaintiff's demand and irrespective of the nature of plaintiff's demand.^[4] A claim at law may be set-off against a claim sounding in equity;^[5] and, under a provision to such effect, legal as well as equitable counterclaims may be interposed in an equitable action.^[6] A counterclaim that does not seek damages, but rather, seeks a ruling that the contract was void and never existed because of fraud and duress, is an equitable counterclaim.^[7] On the other hand, under a statute providing that a counterclaim shall be one on which suit might be maintained by defendant against plaintiff, a valid counterclaim in an equity suit must contain matters of equitable, and not legal cognizance.^[8]

Where the code provides that counterclaims may be such as were formerly denominated legal or equitable, a corporate defendant may, in an action on a promissory note, counterclaim for secret profits made in the transaction by its director through the medium of plaintiff as trustee.^[9]

[FN1] Or.—[Jacobson v. Wheeler](#), 191 Or. 384, 230 P.2d 550 (1951).

Va.—[City of Richmond v. Chesapeake & Potomac Tel. Co. of Va.](#), 205 Va. 919, 140 S.E.2d 683 (1965)

Equitable set-off, generally, see § 5.

[FN2] Mass.—*Stuart v. Sargent*, 283 Mass. 536, 186 N.E. 649 (1933).

[FN3] Ind.—*Noblesville Milling Co. v. Johnson*, 116 Ind. App. 437, 65 N.E.2d 250 (1946).

[FN4] Fla.—*Du Pont Plaza, Inc. v. Samuel Kipnis Family Foundation*, 132 So. 2d 352 (Fla. Dist. Ct. App. 3d Dist. 1961).

Ill.—*Rozema v. Quinn*, 51 Ill. App. 2d 479, 201 N.E.2d 649 (1st Dist. 1964).

[FN5] Cal.—*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO*, 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1st Dist. 1964).

[FN6] U.S.—*Tavitoff v. Stepovich*, 9 Alaska 144, 91 F.2d 106 (C.C.A. 9th Cir. 1937).

Cal.—*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO*, 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1st Dist. 1964).

[FN7] U.S.—*Lincoln Ben. Life Co. v. Edwards*, 45 F. Supp. 2d 722 (D. Neb. 1999), *aff'd*, 243 F.3d 457 (8th Cir. 2001).

[FN8] Or.—*Nielsen v. Ferrenburg*, 247 Or. 605, 431 P.2d 841 (1967).

[FN9] N.Y.—*New York Trust Co. v. American Realty Co.*, 215 A.D. 416, 213 N.Y.S. 569 (1st Dep't 1926), *aff'd*, 244 N.Y. 209, 155 N.E. 102 (1926).

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§ 63. Secured claims

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  38

A secured claim may ordinarily be set off or asserted as a counterclaim without first surrendering or exhausting the security; and an unsecured claim may be set off against a secured claim.

A pledgee is as a general rule under no obligation to surrender or enforce collaterals held by him or her before suing on the principal obligation.[1] The defendant is not compelled to realize on the security before setting up the demand as a counterclaim.[2] An unsecured claim may be set off against a secured claim.[3]

The purchaser of collateral is entitled to offset against the amount due its overpayment for a prior shipment to the debtor and the secured party, and its right to set-off is superior to that of the secured party and an unsecured third party.[4]

[FN1] Pledgor defendant's entitlement to set-off against the debt any profits or proceeds realized by the pledgee plaintiff from the collateral, see [C.J.S., Pledges § 54](#).

[FN2] Wash.—[Topline Equipment, Inc. v. Stan Witty Land, Inc.](#), 31 Wash. App. 86, 639 P.2d 825 (Div. 2 1982).

[FN3] N.C.—[Dameron v. Carpenter](#), 190 N.C. 595, 130 S.E. 328 (1925).

[FN4] Alaska—[Security Pacific Bank, N.A. v. Haines Terminal and Highway Co., Inc.](#), 869 P.2d 156, 25 U.C.C. Rep. Serv. 2d 609 (Alaska 1994).

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§ 64. Penalties

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  9

Whether or not a penalty may be set off or counterclaimed depends both on the statute involved and the nature of the penalty.

On the ground that a claim for a statutory penalty is for a sum certain rather than for a tort act, the defendant may set off such a claim under a statute permitting a set-off in a suit for any debt and allowing a debt itself to lie for this set-off.[1] On the other hand, where recovery only by direct action is expressly provided by statute, penalties may not be recovered by way of counterclaim or other defensive pleading.[2]

Under a federal equity rule authorizing a counterclaim arising out of the transaction which is the subject matter of the suit or which may be the subject matter of an independent suit in equity, defendant, sued on secured promissory notes, could not counterclaim for the statutory penalty for failure of plaintiff, as assignee of such notes, to enter the assignment on the margin of the record of the lien.[3]

[FN1] W.Va.—*Beuke v. Boggs Run Min. & Mfg. Co.*, 100 W. Va. 141, 130 S.E. 132 (1925).

[FN2] S.C.—*Globe Indem. Co. v. Cooper Motor Lines*, 206 S.C. 154, 33 S.E.2d 405 (1945).

[FN3] U.S.—*Bankston v. Commercial Trust & Savings Bank*, 250 F. 985 (C.C.A. 5th Cir. 1918).

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§ 65. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  41, 42.5

As a general rule, in order that the defendant may set up a demand in recoupment, compensation, or reconvention to the plaintiff's demand, the demands must be mutual and subsisting between the same parties and must be due in the same capacity or right.

The distinction between recoupment and set-off is that recoupment, unlike set-off, does not involve the concept of mutuality of obligations, and it arises out of a single transaction between the creditor and debtor.[1] Both the primary damages claim and a claim in recoupment must involve the same litigants.[2] As a general rule, in the absence of a statute providing otherwise, in order that a defendant may set up a demand in recoupment to the plaintiff's demand the demands must be mutual and subsisting between the same parties.[3] In accordance with statutory provisions, compensation cannot take place to the prejudice of the rights of a third person.[4]

The courts may use judicial compensation when two parties are mutually indebted to each other by balancing amounts in fixing the judgment.[5]

[FN1] U.S.—*In re 105 East Second Street Associates*, 207 B.R. 64 (Bankr. S.D. N.Y. 1997).

[FN2] U.S.—*Bolduc v. Beal Bank, SSB*, 167 F.3d 667 (1st Cir. 1999).

[FN3] La.—*Pennington v. Campanella*, 180 So. 2d 882 (La. Ct. App. 1st Cir. 1965), writ granted, 248 La. 783, 181 So. 2d 782 (1966).

Tex.—*Brook Mays Organ Co., Inc. v. Sondock*, 551 S.W.2d 160 (Tex. Civ. App. 1977), writ refused n.r.e., (Nov. 2, 1977).

[FN4] La.—*Yung v. Magnolia Acceptance Corp.*, 180 So. 2d 222 (La. Ct. App. 4th Cir. 1965).

[FN5] U.S.—*In re MMR Holding Corp.*, 199 B.R. 611 (M.D. La. 1996), *aff'd*, 119 F.3d 1 (5th Cir. 1997).

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§ 66. Set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑41, 42.5

Set-off requires mutual debts or obligations generally arising out of separate transactions that are two distinct obligations.

Set-off requires mutuality of the parties,[1] with cross demands for money existing between the parties.[2] It requires mutual debts[3] or obligations[4] generally arising out of separate transactions[5] that are two distinct obligations.[6] The right of set-off allows entities that owe each other money to apply their mutual debts against each other,[7] and allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.[8]

Set-off is generally appropriate between mutual debtor-creditors[9] even if one of them is insolvent at the time the right to the set-off is asserted.[10]

The general rule governing set-off provides that the demands to be set off must be mutual,[11] and that debts accruing in different rights cannot be set off against each other.[12] For set-off purposes, debts and credits are mutual when they are due to and from same person in same capacity.[13] "Setoff" allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.[14] Debts between the parties that arise when those parties are acting in different capacities are not considered mutual.[15] The parties may contract to offset mutual debts,[16] and an inquiry into the mutuality for equitable set-off is irrelevant where a contractual basis for set-off exists.[17] A "triangular setoff," when A attempts to offset an obligation owed to B against B's debt to C, is prohibited because there is no mutuality of debt between two parties.[18] The setoff mutuality requirements are strictly construed because setoff is an exception to the orderly procedures for discharging claims against an insolvent debtor.[19]

For a defendant to be entitled to a set-off against the plaintiffs, it is required to prove that there were two distinct obligations and that, with respect to one obligation, the defendant was bound to render performance to the plaintiffs, and with respect to the other, the plaintiffs were bound to render performance to the defendant; in other words, defendant was required to be creditor with respect to one obligation and debtor with respect to the other and vice versa for plaintiffs.[20]

In certain actions or proceedings by a wife against her husband, set-off has been denied.[21] Similarly, in actions by the husband against the wife, set-off has also been denied.[22]

Mutuality required for the exercise of the statutory right of set-off means only that the defendant must have the right to assert a claim against the plaintiff or the plaintiff's assignor which forms the basis for set-off.[23]

Where set-off serves only to discharge a judgment against a nonmutual party, and therefore works that party no prejudice, set-off is permissible.[24]

[FN1] U.S.—*In re Whimsy, Inc.*, 221 B.R. 69 (S.D. N.Y. 1998); *In re Lopes*, 211 B.R. 443 (D.R.I. 1997).

Colo.—*Karg v. Mitchek*, 983 P.2d 21 (Colo. App. 1998).

[FN2] Cal.—*Birman v. Loeb*, 64 Cal. App. 4th 502, 75 Cal. Rptr. 2d 294 (2d Dist. 1998).

[FN3] U.S.—*Transit Cas. Co. v. Selective Ins. Co. of Southeast*, 137 F.3d 540 (8th Cir. 1998); *International Union of Bricklayers and Allied Craftsmen v. Gallante*, 912 F. Supp. 695 (S.D. N.Y. 1996).

[FN4] U.S.—*Adams v. Zimmerman*, 73 F.3d 1164 (1st Cir. 1996).

[FN5] U.S.—*In re Wiener*, 228 B.R. 647 (Bankr. N.D. Ohio 1998).

[FN6] La.—*Ducote v. City of Alexandria*, 670 So. 2d 1378 (La. Ct. App. 3d Cir. 1996).

[FN7] U.S.—*In re Wiener*, 228 B.R. 647 (Bankr. N.D. Ohio 1998).

[FN8] U.S.—*Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 116 S. Ct. 286, 133 L. Ed. 2d 258 (1995); *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392 (9th Cir. 1996); *In re Buckner*, 218 B.R. 137 (B.A.P. 10th Cir. 1998); *In re Colmark I Ltd. Partnership*, 189 B.R. 253 (Bankr. D. Conn. 1995); *In re Alvstad*, 223 B.R. 733 (Bankr. D. N.D. 1998).

[FN9] Cal.—*Birman v. Loeb*, 64 Cal. App. 4th 502, 75 Cal. Rptr. 2d 294 (2d Dist. 1998).

[FN10] Mass.—*Commissioner of Ins. v. Munich American Reinsurance Co.*, 429 Mass. 140, 706 N.E.2d 694 (1999).

[FN11] Mass.—*In re Liquidation of American Mut. Liability Ins. Co.*, 434 Mass. 272, 747 N.E.2d 1215 (2001).

Mo.—*Janes v. Janes*, 242 S.W.3d 744 (Mo. Ct. App. W.D. 2007).

N.H.—*In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 953 A.2d 443 (2008).

Pa.—*Koken v. Legion Ins. Co.*, 865 A.2d 945 (Pa. Commw. Ct. 2004).

S.C.—*Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009).

Tex.—*Alon USA, LP v. State*, 222 S.W.3d 19 (Tex. App. Austin 2005).

[FN12] S.C.—*Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009).

[FN13] Kan.—*Mynatt v. Collis*, 274 Kan. 850, 57 P.3d 513 (2002).

N.H.—*In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 953 A.2d 443 (2008).

N.Y.—*Millenium Environmental, Inc. v. City of Long Beach of State of New York*, 35 A.D.3d 408, 827 N.Y.S.2d 171 (2d Dep't 2006), leave to appeal denied, 12 N.Y.3d 706, 879 N.Y.S.2d 53, 906 N.E.2d 1087 (2009).

[FN14] N.H.—*In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 953 A.2d 443 (2008).

[FN15] U.S.—*International Union of Bricklayers and Allied Craftsmen v. Gallante*, 912 F. Supp. 695 (S.D. N.Y. 1996).

[FN16] U.S.—*Transit Cas. Co. v. Selective Ins. Co. of Southeast*, 137 F.3d 540 (8th Cir. 1998).

[FN17] Ill.—*Fisher v. State Bank of Annawan*, 163 Ill. 2d 177, 205 Ill. Dec. 520, 643 N.E.2d 811 (1994).

[FN18] N.H.—*In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 953 A.2d 443 (2008).

[FN19] Pa.—*Koken v. Legion Ins. Co.*, 900 A.2d 418 (Pa. Commw. Ct. 2006).

[FN20] La.—*Ducote v. City of Alexandria*, 670 So. 2d 1378 (La. Ct. App. 3d Cir. 1996).

[FN21] Cal.—*Williams v. Williams*, 8 Cal. App. 3d 636, 87 Cal. Rptr. 754 (1st Dist. 1970).

Debt or demand of husband or wife of party to action, see § 75.

[FN22] Mass.—*Peteros v. Peteros*, 328 Mass. 416, 104 N.E.2d 149 (1952).

[FN23] Mont.—*F.D.I.C. v. Northern Montana Gas Co.*, 274 Mont. 371, 908 P.2d 1357 (1995).

[FN24] Mo.—*21 West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858 (Mo. Ct. App. E.D. 1995).

Set-off of assigned claims, see §§ 85 et seq.

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§ 67. Counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑41, 42.5

When a plaintiff has brought a suit in one capacity, the defendant may not counterclaim against him or her in any other capacity.

The "opposing party" requirement with respect to counterclaims means that when a plaintiff has brought a suit in one capacity, the defendant may not counterclaim against him or her in any other capacity.[1] A counterclaim may be asserted only against an opposing party and only against that party in the capacity in which that party sued.[2] A party may file as a counterclaim any claim against an opposing party regardless of whether it arises out of a transaction separate from the initial claim.[3]

In an action between the original parties to a note, the defendant may assert counterclaims.[4] The rule that cross demands must be mutual and subsisting between the same parties, in the same capacity or right, and that there must be mutuality as to the quality of the right generally applies when the defendant sets up his or her demand as a counterclaim to the plaintiff's demand.[5] Accordingly, the defendant cannot set up as a counterclaim allegations of such a character that, if they were in the form of a complaint in a separate action, another person, not a party to the pending suit, would be a necessary defendant to such separate action.[6]

A set-off for mutual demands existing at the time of the commencement of a suit must be asserted as a counterclaim, rather than as a defense.[7]

Under some statutory provisions it is unnecessary that a counterclaim exist as between all the parties plaintiff and the defendant,[8] and, in a proper case, one defendant in an action can counterclaim against another defendant therein.[9] However, under other statutory provisions a counterclaim which involves a controversy between the defendants only is not authorized,[10] and a counterclaim must raise issues affecting the plaintiff.[11] Under some statutes one brought into a lawsuit on the theory of securing a complete determination of the issues has been held entitled to proceed by counterclaim against the original plaintiff,[12] or against the original defendant,[13] or against both,[14] provided the nature of his or her claim so warrants,[15] but under other statutes, where an additional defendant is brought into a suit by the original defendant therein, such additional defendant cannot file a counterclaim against the original defendant.[16]

[FN1] N.Y.—*Corcoran v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 143 A.D.2d 309, 532 N.Y.S.2d 376 (1st Dep't 1988).

Ohio—*Quintus v. McClure*, 41 Ohio App. 3d 402, 536 N.E.2d 22 (9th Dist. Medina County 1987).

Okla.—*F.D.I.C. v. Moss*, 1991 OK 116, 831 P.2d 613 (Okla. 1991).

[FN2] Ohio—*Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App. 3d 350, 2006-Ohio-2739, 855 N.E.2d 128 (10th Dist. Franklin County 2006).

[FN3] Okla.—*F.D.I.C. v. Moss*, 1991 OK 116, 831 P.2d 613 (Okla. 1991).

[FN4] Tex.—*Trueheart v. Braselton*, 875 S.W.2d 412, 24 U.C.C. Rep. Serv. 2d 580 (Tex. App. Corpus Christi 1994).

[FN5] Ga.—*Mundy v. Cincinnati Ins. Co.*, 141 Ga. App. 106, 232 S.E.2d 621 (1977).

Iowa—*Frank v. Art's-Way Mfg. Co.*, 262 N.W.2d 584 (Iowa 1978).

[FN6] Ala.—*Corona v. Southern Guaranty Ins. Co., Inc.*, 294 Ala. 184, 314 So. 2d 61 (1975).

Mass.—*Beacon Co-op. Bank v. Glassman*, 3 Mass. App. Ct. 751, 327 N.E.2d 726 (1975).

[FN7] Ga.—*Gouldstone v. Life Investors Ins. Co. of America*, 236 Ga. App. 813, 514 S.E.2d 54 (1999).

[FN8] Iowa—*B-W Acceptance Corp. v. Saluri*, 258 Iowa 489, 139 N.W.2d 399 (1966).

Ohio—*Horvath v. Lefton*, 19 Ohio Op. 2d 68, 86 Ohio L. Abs. 13, 176 N.E.2d 877 (C.P. 1961).

[FN9] N.Y.—*Clarke v. City of New York*, 43 A.D.2d 560, 349 N.Y.S.2d 111 (2d Dep't 1973).

Tex.—*King v. Tubb*, 551 S.W.2d 436 (Tex. Civ. App. Corpus Christi 1977).

[FN10] Miss.—*Rosetti v. Stein*, 272 So. 2d 633 (Miss. 1973).

N.Y.—*John D. Quinn, Inc. v. Inspiration Enterprises, Inc.*, 23 Misc. 2d 433, 200 N.Y.S.2d 253 (Sup 1960).

[FN11] Ga.—*Co-op Mortg. Investments Associates v. Pendley*, 134 Ga. App. 236, 214 S.E.2d 572 (1975).

N.Y.—*John D. Quinn, Inc. v. Inspiration Enterprises, Inc.*, 23 Misc. 2d 433, 200 N.Y.S.2d 253 (Sup 1960).

[FN12] Ga.—*Co-op Mortg. Investments Associates v. Pendley*, 134 Ga. App. 236, 214 S.E.2d 572 (1975).

[FN13] Ill.—*Lutgert v. Schaefflein*, 318 Ill. App. 83, 47 N.E.2d 359 (1st Dist. 1943).

[FN14] Ill.—*Lutgert v. Schaefflein*, 318 Ill. App. 83, 47 N.E.2d 359 (1st Dist. 1943).

[FN15] Ill.—*Lutgert v. Schaefflein*, 318 Ill. App. 83, 47 N.E.2d 359 (1st Dist. 1943).

[FN16] Fla.—*Stark v. Marshall*, 67 So. 2d 235 (Fla. 1953).

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§ 68. In equity

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  41, 42.5

Where there are cross demands between two parties of such a nature that if both were recoverable at law they would be the subject of legal set-off, then if either of the demands is a matter of equitable jurisdiction the set-off ordinarily will be enforced in equity.

An equitable cross-bill is a counterclaim within the meaning of a statute requiring a counterclaim to be in favor of the defendant and against the plaintiff.[1] However, a right to an equitable set-off[2] or counterclaim[3] will be disallowed where to permit it would impair or destroy the rights or equities of a third person.

As a general rule in equity, as at law, the right of set-off is reciprocal, and only mutual claims and such as are in the same right or capacity can be set-off,[4] but this doctrine of mutuality is not permitted to work an injustice, for whenever it is necessary to effect clear equity or to prevent an irremediable injustice, the set-off will be allowed in equity, even though the debts are not mutual.[5]

Equity may, in a proper case, set-off a debt without regard to strict mutuality or whether the debts are due in the same right on a showing of insolvency[6] or in cases of nonresidence.[7]

[FN1] Mo.—*Wanstrath v. Kapel*, 354 Mo. 565, 190 S.W.2d 241 (1945).

[FN2] Ky.—*Supreme Liberty Life Ins. Co. v. Ridley's Adm'r*, 261 Ky. 403, 87 S.W.2d 940, 101 A.L.R. 1511 (1935).

[FN3] U.S.—*Southern Pac Co v. H Moffat Co*, 45 F. Supp. 924 (D. Nev. 1942).

[FN4] U.S.—*Dickens v. Howard*, 67 F.2d 263 (C.C.A. 5th Cir. 1933).

Ga.—*Holmes v. Walker*, 207 Ga. 582, 63 S.E.2d 359 (1951).

Ky.—Greasy Brush Coal Co. v. Hays, 292 Ky. 517, 166 S.W.2d 983 (1942).

[FN5] Mo.—Stewart Title Guar. Co. v. Community Title Co., 924 S.W.2d 62 (Mo. Ct. App. E.D. 1996)

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[FN6] N.D.—Marmarth School Dist. No. 12 of Slope County v. Hall, 65 N.D. 509, 260 N.W. 411 (1935).

Ohio—Black & Decker Mfg. Co. v. Union Trust Co., 53 Ohio App. 356, 5 Ohio Op. 343, 21 Ohio L. Abs. 502, 4 N.E.2d 929 (8th Dist. Cuyahoga County 1936).

[FN7] Ind.—Old First Nat. Bank & Trust Co. of Fort Wayne v. Snouffer, 99 Ind. App. 325, 192 N.E. 369 (1934).

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§ 69. Demands in favor of or against third persons

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  41, 42.5

As a general rule a debt against a third person not a party to the record, or a demand against the plaintiff in favor of a third person not a party to the action cannot be pleaded in recoupment, compensation, or reconvention, or as a counterclaim, cross action, or set-off.

As a general rule a debt against a third person not a party to the record cannot be pleaded in recoupment,[1] compensation,[2] or as a set-off.[3] A debt or demand against a third person not a party to the record ordinarily cannot be pleaded in reconvention[4] or as a counterclaim,[5] but the mere mention of the connection which a third person not a party to the action had with plaintiff in the transaction on which the counterclaim is based does not render the counterclaim defective.[6] Under some statutes the defendant may, in a proper case, seek relief by counterclaim against other persons as well as against the original plaintiff,[7] regardless of whether such other persons are already parties to the action,[8] but relief must also be claimed against the original plaintiff[9] or the matter set up in the counterclaim must also affect the original plaintiff's rights.[10]

In accordance with the rule of mutuality, a demand against the plaintiff in favor of a third person not a party to the action cannot be recouped,[11] set off,[12] counterclaimed,[13] reconvened,[14] or compensated.[15] Payments made to plaintiff by the defendant's agent may be pleaded in reconvention.[16]

[FN1] Ga.—*Peckham v. Metro Steel Co.*, 126 Ga. App. 685, 191 S.E.2d 559 (1972).

[FN2] La.—*Pan American Petroleum Corp. v. Featherstone*, 153 So. 566 (La. Ct. App. 2d Cir. 1934).

[FN3] Cal.—*Advance Indus. Finance Co. v. Western Equities, Inc.*, 173 Cal. App. 2d 420, 343 P.2d 408 (2d Dist. 1959).

[FN4] La.—*Bayley Mfg. Co. v. Wilhelm Moss Co.*, 163 La. 439, 112 So. 38 (1927).

[FN5] Cal.—*Advance Indus. Finance Co. v. Western Equities, Inc.*, 173 Cal. App. 2d 420, 343 P.2d 408

(2d Dist. 1959).

N.Y.—*Scalone v. Talley Motors, Inc.*, 3 A.D.2d 674, 158 N.Y.S.2d 615 (2d Dep't 1957).

[FN6] S.C.—*Farmers' Union Mercantile Co. v. Anderson*, 108 S.C. 66, 93 S.E. 422 (1917).

[FN7] Cal.—*Advance Indus. Finance Co. v. Western Equities, Inc.*, 173 Cal. App. 2d 420, 343 P.2d 408 (2d Dist. 1959).

Tex.—*Stop 'N Go Markets of Texas, Inc. v. Executive Sec. Systems, Inc. of America*, 556 S.W.2d 836 (Tex. Civ. App. Houston 14th Dist. 1977).

[FN8] Fla.—*Hendricks v. Williams*, 151 Fla. 538, 9 So. 2d 923 (1942).

N.Y.—*Chambland v. Brewer*, 51 Misc. 2d 231, 272 N.Y.S.2d 903 (Sup 1966).

[FN9] Fla.—*Hendricks v. Williams*, 151 Fla. 538, 9 So. 2d 923 (1942).

N.Y.—*Ruzicka v. Rager*, 305 N.Y. 191, 111 N.E.2d 878, 39 A.L.R.2d 288 (1953).

[FN10] Fla.—*Hendricks v. Williams*, 151 Fla. 538, 9 So. 2d 923 (1942).

Ga.—*Peckham v. Metro Steel Co.*, 126 Ga. App. 685, 191 S.E.2d 559 (1972).

[FN11] Fla.—*Marianna Lime Products Co. v. McKay*, 109 Fla. 275, 147 So. 264 (1933).

[FN12] La.—*Edwards v. Max Thieme Chevrolet Co.*, 191 So. 569 (La. Ct. App. 2d Cir. 1939).

Okla.—*Security Nat. Bank of Duncan v. Johnson*, 1944 OK 358, 195 Okla. 107, 155 P.2d 249, 169 A.L.R. 790 (1944).

[FN13] Miss.—*Byars v. Austin*, 218 So. 2d 11 (Miss. 1969).

N.Y.—*Rye Psychiatric Hospital Center v. Persky*, 54 A.D.2d 711, 387 N.Y.S.2d 456 (2d Dep't 1976).

[FN14] La.—*Mente & Co. v. Louisiana State Rice Milling Co.*, 176 La. 476, 146 So. 28 (1933).

[FN15] La.—*Pringle-Associated Mortg. Corp. v. Cox*, 258 La. 499, 246 So. 2d 841 (1971).

[FN16] La.—*Williams v. Robinson*, 215 La. 132, 39 So. 2d 848 (1949).

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§ 70. Debts and demands of nominal parties and real parties in interest

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 41, 47

While the apparent legal holder of a claim may plead it in set-off, although the real interest be in another, the rule requiring mutuality of debts or demands refers not merely to the nominal plaintiff and defendant but to the real parties in interest.

While the apparent legal holder of a claim may plead it in set-off, although the real interest be in another,[1] the rule requiring mutuality of debts or demands refers not merely to the nominal plaintiff and the defendant but to the real parties in interest.[2] Further, the court will go outside of the record to find the real party.[3] Thus, a set-off will not be allowed against the plaintiff if he or she is a mere nominal party suing for another beneficially interested.[4]

[FN1] N.Y.—*City of Utica v. Gold Medal Packing Corp.*, 54 Misc. 2d 721, 283 N.Y.S.2d 603 (Sup 1967), order modified on other grounds, 31 A.D.2d 730, 297 N.Y.S.2d 166 (4th Dep't 1968).

[FN2] Cal.—*Dabney v. Shippey*, 40 Cal. App. 3d 990, 115 Cal. Rptr. 526 (1st Dist. 1974).

Fla.—*Proodian v. Plymouth Citrus Growers Ass'n*, 149 Fla. 507, 6 So. 2d 531 (1942).

[FN3] U.S.—*In re First Nat. Bank*, 23 F. Supp. 255 (E.D. Ill. 1938).

[FN4] N.Y.—*Aschkenasy v. Teichman*, 12 A.D.2d 904, 210 N.Y.S.2d 593 (1st Dep't 1961).

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§ 71. Debts and demands in representative and individual capacities

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  46(1), 46(2)

Ordinarily a claim against the plaintiff in a representative capacity cannot be set off in a suit brought in his individual capacity, and vice versa, and an individual demand against a plaintiff suing in a representative capacity cannot be counterclaimed.

In accordance with the general rules requiring mutuality of the debts or demands, ordinarily a claim against the plaintiff in a representative capacity cannot be set off in a suit brought in his or her individual capacity,[1] and vice versa,[2] and an individual demand against the plaintiff suing in a representative capacity cannot be counterclaimed.[3] Thus, the director of a corporation, sued in an individual capacity, cannot assert a derivative claim that could only be asserted by the corporation, itself, as a counterclaim.[4] Similarly, when the cause of action sued on is the defendant's failure to fulfill an official or fiduciary obligation, the defendant cannot set off a debt due from the plaintiff to him or her in an individual capacity.[5]

"Capacity," for the purposes of determining whether set-off may be allowed for a debt due to and from a person in the same capacity, means legal capacity, e.g., principal, agent, trustee, beneficiary.[6]

The necessity of an agency relationship to a viable claim for recoupment is an open question in some jurisdictions.[7]

Although generally, a plaintiff who brings or maintains an action solely in its capacity as the representative of another is not an "opposing party" against whom a counterclaim might be filed and a counterclaim cannot properly be brought or maintained against that plaintiff in its individual capacity,[8] a counterclaim may be made against a plaintiff in a capacity different than that in which he or she sued if principles of equity and judicial economy support such a counterclaim.[9] If a plaintiff has sued in a representative capacity but will benefit individually from any recovery, a counterclaim may be made against the plaintiff in his or her individual capacity.[10]

[FN1] Mo.—*Mercantile Trust Co., Nat. Ass'n v. Mosby*, 623 S.W.2d 22 (Mo. Ct. App. E.D. 1981).

S.C.—*South Carolina Nat. Bank, Greenville v. Hammond*, 260 S.C. 622, 198 S.E.2d 123 (1973).

[FN2] S.C.—*McLeod v. Sandy Island Corp.*, 260 S.C. 209, 195 S.E.2d 178, 12 U.C.C. Rep. Serv. 531 (1973).

[FN3] Fla.—*Nationwide Terminals, Inc. v. MC Const. Group, Inc.*, 964 So. 2d 705 (Fla. Dist. Ct. App. 3d Dist. 2007).

N.Y.—*Grierson v. Wagar*, 78 Misc. 2d 479, 357 N.Y.S.2d 351 (Sup 1974).

[FN4] Fla.—*Acadia Partners, L.P. v. Tompkins*, 673 So. 2d 487 (Fla. Dist. Ct. App. 5th Dist. 1996).

[FN5] U.S.—*Allegaert v. Perot*, 466 F. Supp. 516 (S.D. N.Y. 1978).

Utah—*First Sec. Bank of Utah v. Utah Turkey Growers, Inc.*, 610 P.2d 329 (Utah 1980).

[FN6] N.H.—*In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 953 A.2d 443 (2008).

[FN7] U.S.—*Tibor Mach. Products, Inc. v. Freudenberg-NOK General Partnership*, 967 F. Supp. 1006 (N.D. Ill. 1997).

[FN8] Fla.—*Nationwide Terminals, Inc. v. MC Const. Group, Inc.*, 964 So. 2d 705 (Fla. Dist. Ct. App. 3d Dist. 2007).

[FN9] Vt.—*Pomfret Farms Ltd. Partnership v. Pomfret Associates*, 174 Vt. 280, 811 A.2d 655 (2002).

[FN10] Vt.—*Pomfret Farms Ltd. Partnership v. Pomfret Associates*, 174 Vt. 280, 811 A.2d 655 (2002).

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§ 72. Debts and demands in representative and individual capacities—Executors and administrators

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  46(1), 46(2)

In the absence of a statute or court rule providing otherwise, ordinarily in a suit by or against an executor or administrator claims owed by or owing to him or her in his or her individual capacity may not be asserted as a set-off or counterclaim.

A statute limiting claims against estates bars a claim that has not been timely presented and that arises out of a transaction separate from that on which the estate claims.[1] Moreover, a statute limiting claims against estates does not permit a set-off based on a claim barred by statute, even if the estate's debtor voluntarily seeks to limit the set-off to the amount of the estate's claim.[2]

In the absence of a statute or court rule providing otherwise,[3] ordinarily in an action by an executor as such a claim against him or her in an individual capacity cannot be pleaded as a set-off[4] or as a counterclaim,[5] and the same rule applies to an action by an administrator.[6] In an action by an administrator, the defendant cannot set off a demand against him or her in another capacity.[7]

A claim against one as executor of an estate cannot be set off by the executor with a debt owing to it independently of the other executors.[8] In an action against an executor[9] a demand due the defendant in his or her individual capacity cannot be set off, and in an action against defendant in his own right he cannot set off a debt due him as executor.[10]

[FN1] Md.—*Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 744 A.2d 549 (2000).

[FN2] Md.—*Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 744 A.2d 549 (2000).

[FN3] U.S.—*Turner v. Alton Banking & Trust Co.*, 166 F.2d 305 (C.C.A. 8th Cir. 1948).

Set-off and counterclaim in actions by and against personal representatives, generally, see [C.J.S., Executors and Administrators §§ 875 to 882](#).

[FN4] Ky.—*Rose v. Finley's Ex'r*, 250 Ky. 769, 63 S.W.2d 948 (1933).

[FN5] N.Y.—*Grierson v. Wagar*, 78 Misc. 2d 479, 357 N.Y.S.2d 351 (Sup 1974).

S.C.—*Ellison v. Simmons*, 238 S.C. 364, 120 S.E.2d 209 (1961).

[FN6] N.Y.—*In re Laegen's Estate*, 43 N.Y.S.2d 924 (Sur. Ct. 1943).

[FN7] N.Y.—*In re State of Md. for Use of D'Agostino*, 285 A.D. 1078, 139 N.Y.S.2d 746 (2d Dep't 1955).

[FN8] Pa.—*In re Kenin's Estate*, 346 Pa. 127, 29 A.2d 495 (1943).

[FN9] Pa.—*In re Kenin's Estate*, 346 Pa. 127, 29 A.2d 495 (1943).

Utah—*Cook v. Jones*, 115 Utah 536, 206 P.2d 630 (1949).

[FN10] Md.—*Ghingher v. Fanseen*, 166 Md. 519, 172 A. 75 (1934).

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§ 73. Debts and demands in representative and individual capacities—Trustees

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  46(1), 46(2)

As a general rule claims owed by or owing to a trustee in his individual capacity cannot be set off against a claim owed to or by him in his capacity as trustee.

Setoff is not permitted if the funds involved are trust funds.[1] As a general rule a claim which the defendant has against the plaintiff in the defendant's individual capacity cannot be set off against a claim due the plaintiff as trustee,[2] and such demand cannot be counterclaimed.[3] In a suit by the plaintiff in his or her individual capacity the defendant cannot set off a claim against him or herself as trustee.[4] In a suit against one in an individual capacity he or she cannot set off a debt due to him or her as trustee,[5] and in a suit against a trustee, the trustee cannot set off a claim due to him or her in an individual capacity,[6] but where the demand against the defendant and the demand in favor of the trustee are in his or her capacity as trustee, the trustee may set off the one against the other.[7]

A trustee cannot, as a rule, set off against the trust fund or property his or her individual demand against the creator of the trust[8] or an indebtedness due the trustee individually by the beneficiary,[9] and a debt due a trustee from a beneficiary cannot be set off against a debt owed the beneficiary by the trustee where the demands arise out of different trust estates.[10]

[FN1] Tex.—[Alon USA, LP v. State](#), 222 S.W.3d 19 (Tex. App. Austin 2005).

[FN2] U.S.—[American Brake Shoe & Foundry Co. v. New York Rys. Co.](#), 10 F.2d 920 (C.C.A. 2d Cir. 1926).

Cal.—[Petherbridge v. Prudential Sav. & Loan Assn.](#), 79 Cal. App. 3d 509, 145 Cal. Rptr. 87 (4th Dist. 1978).

[FN3] D.C.—[Stevenson v. Reed](#), 96 A.2d 268 (Mun. Ct. App. D.C. 1953).

N.Y.—*Ronas v. Wildman*, 45 A.D.2d 1047, 358 N.Y.S.2d 178 (2d Dep't 1974).

[FN4] N.Y.—*Diesel Motors Co., Inc. v. Kaye*, 74 Misc. 2d 302, 345 N.Y.S.2d 870 (County Ct. 1973).

S.C.—*South Carolina Nat. Bank, Greenville v. Hammond*, 260 S.C. 622, 198 S.E.2d 123 (1973).

[FN5] U.S.—*Dakin v. Bayly*, 290 U.S. 143, 54 S. Ct. 113, 78 L. Ed. 229, 90 A.L.R. 999 (1933).

Colo.—*Shotkin v. Lindsley*, 118 Colo. 223, 193 P.2d 880 (1948).

[FN6] Cal.—*Garrison v. Edward Brown & Sons*, 28 Cal. 2d 28, 168 P.2d 153 (1946).

N.J.—*Bohlinger v. Ward & Co.*, 34 N.J. Super. 583, 113 A.2d 38 (App. Div. 1955), judgment aff'd, 20 N.J. 331, 120 A.2d 1 (1956).

N.Y.—*Crescenzo v. Rubinow*, 286 A.D. 880, 142 N.Y.S.2d 387 (2d Dep't 1955), judgment aff'd, 1 N.Y.2d 849, 153 N.Y.S.2d 226, 135 N.E.2d 729 (1956).

[FN7] U.S.—*Simon v. Silfen*, 247 F. Supp. 762 (S.D. N.Y. 1965).

Ill.—*Humpa v. Hedstrom*, 345 Ill. App. 289, 102 N.E.2d 686 (1st Dist. 1951).

[FN8] U.S.—*Nedd v. United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977) (disapproved of on other grounds by, *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 113 S. Ct. 2252, 124 L. Ed. 2d 522 (1993)).

Okla.—*Morton v. Beidleman*, 1951 OK 241, 205 Okla. 350, 237 P.2d 421 (1951).

[FN9] N.Y.—*Cohen v. Handelman*, 62 Misc. 2d 801, 312 N.Y.S.2d 866 (N.Y. City Civ. Ct. 1970).

Okla.—*Morton v. Beidleman*, 1951 OK 241, 205 Okla. 350, 237 P.2d 421 (1951).

[FN10] Mo.—*Wittich v. Wittich*, 263 S.W. 1001 (Mo. Ct. App. 1924).

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§ 74. Debts and demands in representative and individual capacities—Public officers

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  46(1), 46(2)

Ordinarily, in an action to recover money received by an officer in his or her official capacity, a debt due from the plaintiff to the officer in his private capacity is not a proper subject of a set-off.

Ordinarily, in an action to recover money received by an officer in his or her official capacity, a debt due from the plaintiff to the officer in the officer's private capacity is not a proper subject of a set-off.[1] A claim against an officer for neglect of duty cannot be set off against a debt due him or her as an individual.[2]

[FN1] Ala.—[Harper v. Howard](#), 3 Ala. 284, 1842 WL 82 (1842).

[FN2] Ky.—[Sternberg Dredging Co. v. Bondurant's Ex'r](#), 223 Ky. 668, 4 S.W.2d 686 (1928).

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§ 75. Debt or demand of husband or wife of party to action

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑46

In an action by a wife to enforce a claim due her as her separate property, the defendant ordinarily cannot set off or counterclaim a claim against the husband.

In an action by a wife to enforce a claim due her as her separate property, the defendant ordinarily cannot set-off[1] or counterclaim[2] a claim against the husband. In an action against a wife she cannot ordinarily plead in compensation[3] a debt claimed in the right of her husband.

In an action on a joint and several obligation or liability of a husband and wife a separate demand in favor of the husband may be counterclaimed.[4]

[FN1] N.Y.—*Goldberg v. Rothman*, 66 Misc. 2d 981, 322 N.Y.S.2d 931, 9 U.C.C. Rep. Serv. 485 (N.Y. City Civ. Ct. 1971).

[FN2] N.Y.—*Goldberg v. Rothman*, 66 Misc. 2d 981, 322 N.Y.S.2d 931, 9 U.C.C. Rep. Serv. 485 (N.Y. City Civ. Ct. 1971).

S.D.—*Christiansen v. Strand*, 81 S.D. 187, 132 N.W.2d 386 (1965).

[FN3] Va.—*Petrus v. Robbins*, 195 Va. 861, 80 S.E.2d 543 (1954), judgment rev'd on other grounds, 196 Va. 322, 83 S.E.2d 408 (1954).

[FN4] N.J.—*Scarano v. Scarano*, 132 N.J. Eq. 362, 28 A.2d 425 (Ch. 1942).

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§ 76. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  42, 43, 44(1), 45

Subject to certain exceptions, as a general rule a joint demand cannot be set off or counterclaimed against an individual demand. Ordinarily, unless otherwise provided by statute, separate demands cannot be set off or counterclaimed against joint demands in the absence of insolvency or some other ground for equitable relief.

As a general rule a joint demand cannot be set off against an individual demand.[1] However, exceptions to the rule, depending on the peculiar circumstances of the particular case, have been recognized.[2]

Ordinarily separate demands may not be set off or counterclaimed against joint demands[3] in the absence of some ground for equitable relief,[4] but this is permissible under statutes which so provide.[5]

As a general rule, when a third person sues a partnership on a partnership obligation that is solely a joint debt, the partnership cannot set off the claims of individual partners, but only the claims of the partnership.[6]

In an action to enforce a joint demand, a joint demand against the plaintiffs in favor of the defendants usually may be pleaded as a set-off.[7]

[FN1] N.Y.—[Schultz v. Wilson](#), 59 Misc. 2d 14, 297 N.Y.S.2d 478 (City Ct. 1969).

Tex.—[Brook Mays Organ Co., Inc. v. Sondock](#), 551 S.W.2d 160 (Tex. Civ. App. 1977), writ refused n.r.e., (Nov. 2, 1977).

[FN2] N.C.—[King v. Libbey](#), 253 N.C. 188, 116 S.E.2d 339 (1960).

[FN3] U.S.—[Federal Deposit Ins. Corp. v. Mademoiselle of Cal.](#), 379 F.2d 660 (9th Cir. 1967).

Mass.—[Goldstein v. Katz](#), 325 Mass. 428, 91 N.E.2d 237 (1950).

[FN4] Kan.—*Ruby v. Baker*, 106 Kan. 855, 107 Kan. 186, 190 P. 6, 10 A.L.R. 1247 (1920).

[FN5] N.Y.—*Katz v. Dykes*, 41 A.D.2d 913, 343 N.Y.S.2d 399 (1st Dep't 1973).

N.D.—*Mahanna v. Westland Oil Co.*, 107 N.W.2d 353 (N.D. 1960).

[FN6] Colo.—*Karg v. Mitchek*, 983 P.2d 21 (Colo. App. 1998).

[FN7] Mass.—*Goldstein v. Katz*, 325 Mass. 428, 91 N.E.2d 237 (1950).

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2. Joint and Separate Demands and Liabilities

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§ 77. Joint and separate debts

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  42, 43, 44(1), 45

As a general rule a joint debt cannot be set off against a separate debt, or counterclaimed. Further, a separate debt generally cannot be set off against a joint debt, and the rule applies with respect to a debt due from a sole plaintiff to one of several joint defendants, and to a debt due from one of the plaintiffs against a joint debt due all plaintiffs.

As a general rule a joint debt cannot be set off against a separate debt,[1] nor can a joint debt, generally, be counterclaimed.[2]

The defendant, in a suit against him or her for a debt owing by the defendant alone, is not entitled to set off[3] or counterclaim[4] a debt due to him or her and another, inasmuch as the demands are not mutual.

Further, a separate debt generally cannot be set off against a joint debt.[5] Thus, a separate debt cannot be set off or counterclaimed[6] unless there are circumstances calling for an application of the rules of equitable set-off.[7]

Ordinarily a debt due from a sole plaintiff to one of several joint defendants cannot be set off[8] or counterclaimed,[9] and in like manner a debt due from plaintiff to one of the defendants and a third person not a party to the suit ordinarily cannot be set off or counterclaimed.[10]

Generally a debt due from one of plaintiffs cannot be set off[11] or counterclaimed[12] against a joint debt due all of the plaintiffs, and separate debts due from several plaintiffs[13] cannot be set off against a debt due all of the plaintiffs jointly.

[FN1] Ga.—[Security Management Co., Inc. v. King](#), 132 Ga. App. 618, 208 S.E.2d 576 (1974).

N.Y.—[Morris v. Government Emp. Ins. Co.](#), 77 Misc. 2d 1057, 353 N.Y.S.2d 879 (Sup 1974).

[FN2] Ariz.—*Ives v. Sanguinetti*, 10 Ariz. 83, 85 P. 480 (1906).

[FN3] N.D.—*Kelly v. Lang*, 62 N.W.2d 770 (N.D. 1953).

[FN4] Mo.—*D'Amato v. Kohlmeyer*, 65 S.W.2d 178 (Mo. Ct. App. 1933).

[FN5] Ga.—*Browning v. Rewis*, 156 Ga. App. 178, 274 S.E.2d 157 (1980).

Ohio—*Cohn v. Krauss*, 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1st Dist. Hamilton County 1943).

[FN6] Minn.—*Wade v. Citizens' State Bank of St. Paul*, 158 Minn. 231, 197 N.W. 277 (1924).

[FN7] Ohio—*Cohn v. Krauss*, 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1st Dist. Hamilton County 1943).

[FN8] U.S.—*White v. Stone*, 78 F.2d 136 (C.C.A. 1st Cir. 1935), judgment aff'd, 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265 (1937).

Ky.—*Daniel v. Wilhoit*, 289 Ky. 79, 158 S.W.2d 153 (1942).

[FN9] Cal.—*Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 P. 130 (2d Dist. 1909).

[FN10] N.M.—*Parker v. Beasley*, 40 N.M. 68, 54 P.2d 687 (1936).

[FN11] Me.—*Barton v. McKay*, 135 Me. 197, 193 A. 733 (1937).

[FN12] Minn.—*Wade v. Citizens' State Bank of St. Paul*, 158 Minn. 231, 197 N.W. 277 (1924).

[FN13] Ark.—*Reynolds v. Bakem Credit Union*, 255 Ark. 322, 500 S.W.2d 355 (1973).

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§ 78. Joint and several debts or demands against separate debts or demands, and vice versa

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 42, 43, 44(1), 45

As a general rule, where action is brought against two or more defendants on a joint and several demand, or on a several demand, a set-off or counterclaim consisting of a demand in favor of one of them against the plaintiff may, if otherwise without objection, be interposed.

Although, under some statutory provisions, a claim due from plaintiff to one of defendants alone cannot be set off in an action on a joint and several demand brought against two defendants jointly,[1] as a general rule, where action is brought against two or more defendants on a joint and several demand,[2] or on a several demand,[3] a set-off or counterclaim consisting of a demand in favor of one of them against plaintiff may, if otherwise without objection, be interposed. It is immaterial in such case that the action is joint in form.[4]

As a general rule, when a third person sues a partnership on a partnership obligation that is joint and several, the individual partner can plead his or her set-off.[5] The mutuality requirement of set-off is met when partners are jointly and severally liable for joint obligations.[6]

In an action on a joint and several demand against one obligor, a payment made by the co-obligor on account of or in part payment of the obligation may be pleaded as a set-off.[7] A demand which is joint and several may be set off or counterclaimed against a separate demand.[8]

CUMULATIVE SUPPLEMENT

Cases:

Under Ohio law, a court may not set off an individual debt from a joint debt absent some special justification. [Lewis v. United Joint Venture](#), 691 F.3d 835 (6th Cir. 2012).

[END OF SUPPLEMENT]

[FN1] Mass.—*Plymouth County Trust Co. v. Thornell*, 291 Mass. 189, 197 N.E. 91 (1935).

[FN2] N.J.—*Scarano v. Scarano*, 132 N.J. Eq. 362, 28 A.2d 425 (Ch. 1942).

N.C.—*Burns v. Gulf Oil Corp.*, 246 N.C. 266, 98 S.E.2d 339 (1957).

[FN3] U.S.—*Messick v. Rardin*, 6 F. Supp. 200 (E.D. Ill. 1934).

Me.—*Barton v. McKay*, 135 Me. 197, 193 A. 733 (1937).

[FN4] N.C.—*Burns v. Gulf Oil Corp.*, 246 N.C. 266, 98 S.E.2d 339 (1957).

Wyo.—*Western Nat. Bank of Casper v. Harrison*, 577 P.2d 635, 23 U.C.C. Rep. Serv. 1383 (Wyo. 1978).

[FN5] Colo.—*Karg v. Mitchek*, 983 P.2d 21 (Colo. App. 1998).

[FN6] U.S.—*In re Larbar Corp.*, 177 F.3d 439, 1999 FED App. 0180P (6th Cir. 1999).

[FN7] U.S.—*Messick v. Rardin*, 6 F. Supp. 200 (E.D. Ill. 1934).

[FN8] U.S.—*First Nat. Bank of Indianola, Iowa v. Malone*, 76 F.2d 251 (C.C.A. 8th Cir. 1935).

S.C.—*Exchange Bank of Meggett v. Bennett*, 193 S.C. 320, 8 S.E.2d 515 (1940).

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§ 79. Equitable set-off of joint and separate demands and liabilities

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  42, 43, 44(1), 45

The general rule in equity is that joint and separate debts cannot be set off against each other, but wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, a set-off of joint and separate debts will be allowed.

The general rule in equity, as at law, is that joint and separate debts cannot be set off against each other.[1] Thus, except under very special circumstances, and where the proof is clear and the equity is very strong, an equity court will not allow a set-off of a joint debt against a separate debt, and vice versa.[2]

On the other hand, wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, a set-off of joint and separate debts will be allowed.[3]

While individual claims may be set off against a joint or joint and several liability where the party asserting the joint liability is insolvent,[4] and on proof of insolvency a several debt may be set off against a joint debt.[5]

[FN1] Cal.—*Eistrat v. Humiston*, 160 Cal. App. 2d 89, 324 P.2d 957 (4th Dist. 1958).

N.J.—*Scarano v. Scarano*, 132 N.J. Eq. 362, 28 A.2d 425 (Ch. 1942).

[FN2] U.S.—*Williams v. Thomas*, 6 F. Supp. 1011 (E.D. Mich. 1934).

[FN3] U.S.—*White v. Stone*, 78 F.2d 136 (C.C.A. 1st Cir. 1935), judgment aff'd, 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265 (1937).

Ala.—*Bay Minette Land Co. v. Stapleton*, 224 Ala. 175, 139 So. 342 (1932).

[FN4] U.S.—*Willing v. Binstock*, 302 U.S. 272, 58 S. Ct. 175, 82 L. Ed. 248 (1937).

[FN5] U.S.—[Roelker v. Bromley-Shepard Co.](#), 73 F.2d 618 (C.C.A. 1st Cir. 1934).

Ohio—[Cohn v. Krauss](#), 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1st Dist. Hamilton County 1943).

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§ 80. In actions by and against individual partners

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  43, 44, 44(2)

In a suit by a partner individually, a firm debt due the defendant cannot be pleaded as a set-off, counterclaim, or in compensation or recoupment, unless all the partners consent.

As a general rule, in a suit by a partner individually, a firm debt due defendant cannot be pleaded as a set-off[1] or recoupment,[2] unless all the partners consent.[3] This is true notwithstanding the plaintiff is insolvent where it is not claimed that the other partners are also insolvent.[4]

On the other hand, a firm debt due the defendant may be allowed as a set-off in a suit by a partner by reason of the terms of an agreement of the parties.[5]

Due to a lack of mutual indebtedness, a general partner is not entitled to a set-off, against their present obligation to reimburse limited partners for amounts paid to a bank as guarantors of loan, for amounts the limited partners received from a bank as a result of a prior settlement of fraud claims, relating to the bank's filing a satisfaction of judgment on the underlying loan.[6]

Ordinarily, in an action against one partner for a debt due by him or her, a debt due to the partnership cannot be pleaded by way of set-off or counterclaim.[7]

Advances made to a plaintiff by a partner acting in his or her individual capacity may be asserted as a set-off against a debt which the partner contracted as an individual acting through the other partner as his or her agent.[8]

[FN1] Ga.—[Security Management Co., Inc. v. King](#), 132 Ga. App. 618, 208 S.E.2d 576 (1974).

Ohio—[Simon v. Rudner](#), 43 Ohio App. 38, 12 Ohio L. Abs. 705, 182 N.E. 650 (5th Dist. Stark County 1932).

[FN2] Ga.—*Metcalf v. People's Grocery Co.*, 24 Ga. App. 663, 101 S.E. 768 (1920).

[FN3] Pa.—*Schalcher v. Bergdoll*, 41 Pa. Super. 547, 1910 WL 3925 (1910).

[FN4] Ind.—*Fleming v. Palmer*, 77 Ind. App. 572, 133 N.E. 926 (1922).

[FN5] Ala.—*Stinson v. Lanier*, 223 Ala. 62, 134 So. 793 (1931).

N.Y.—*Roth v. Ward*, 112 N.Y.S.2d 154 (Sup 1952).

[FN6] Mo.—*Burns v. Plaza West Associates*, 979 S.W.2d 540 (Mo. Ct. App. W.D. 1998).

[FN7] Mo.—*Powell v. Downing*, 225 S.W.2d 952 (Mo. Ct. App. 1950).

S.C.—*White v. Jackson*, 252 S.C. 274, 166 S.E.2d 211 (1969).

[FN8] Cal.—*Hartman v. Humason*, 78 Cal. App. 2d 511, 177 P.2d 988 (4th Dist. 1947).

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§ 81. In actions by and against firm

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  43, 44, 44(2)

Generally, a debt due from an individual partner, or from less than all of the partners, cannot be set off or be made the subject of a counterclaim in an action by the firm unless the other partners consent.

The individual indebtedness of one partner cannot be set off against a debt due the partnership.[1] An independent counterclaim against an individual partner will lie in a suit by a partnership in the court of claims.[2] However, other courts have held that a debt due from an individual partner[3] cannot be set off in an action by the firm. It is of no importance that the defendant may not have had notice of the existence of the partnership.[4]

In accordance with the rule with respect to set-off, a debt due from an individual partner[5] cannot be made the subject of a counterclaim in an action by the firm, or the subject of a plea of compensation.[6]

Where all the partners consent that a debt owing by one of them shall be set off against the debt owing to all of them, such debt may be set off.[7]

In an action to recover on a partnership demand, the defendant cannot set off a demand against another partnership having the same members as the first.[8]

In an action against a partnership for a partnership debt, the general rule, in the absence of a statute otherwise providing, is to the effect that the claim of an individual partner is not available as a set-off or counterclaim, and this is true, although the partner seeking to make use of his or her claim in this manner is the only one served with process.[9] Due to a lack of mutual indebtedness, a partnership and a general partner are not entitled to a set-off, against their present obligation to reimburse limited partners for amounts paid to a bank as guarantors of loan, for amounts the limited partners received from a bank as a result of a prior settlement of fraud claims, relating to the bank's filing a satisfaction of judgment on the underlying loan.[10]

[FN1] Ky.—[Morganfield Nat. Bank v. Damien Elder & Sons](#), 836 S.W.2d 893 (Ky. 1992).

[FN2] U.S.—*Scott v. U.S.*, 173 Ct. Cl. 650, 354 F.2d 292, 9 Fed. R. Serv. 2d 13,212, Case 1 (1965).

[FN3] N.Y.—*Kamer v. ITT Life Ins. Co.*, 33 A.D.2d 682, 305 N.Y.S.2d 825 (1st Dep't 1969).

Tex.—*Rose v. Motes*, 220 S.W.2d 734 (Tex. Civ. App. Galveston 1949).

[FN4] Ga.—*F.E. Nellis & Co. v. Green & Stallworth*, 36 Ga. App. 684, 137 S.E. 843 (1927).

[FN5] Cal.—*Yankelewitch v. Beach*, 115 Cal. App. 629, 2 P.2d 498 (3d Dist. 1931).

N.Y.—*Ruzicka v. Rager*, 305 N.Y. 191, 111 N.E.2d 878, 39 A.L.R.2d 288 (1953).

[FN6] La.—*Thompson v. Crow*, 3 La. App. 158, 1925 WL 3743 (2d Cir. 1925).

[FN7] Ala.—*Stinson v. Lanier*, 223 Ala. 62, 134 So. 793 (1931).

[FN8] Tex.—*Rose v. Motes*, 220 S.W.2d 734 (Tex. Civ. App. Galveston 1949).

[FN9] U.S.—*Evans v. Thompson*, 121 F. Supp. 46 (W.D. Ark. 1954).

[FN10] Mo.—*Burns v. Plaza West Associates*, 979 S.W.2d 540 (Mo. Ct. App. W.D. 1998).

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§ 82. In actions against firm and individual partners

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 43, 44, 44(2)

Ordinarily, where an action is brought on a partnership liability not only against the partnership but also against its members individually, a defendant may plead as set-off a debt due him or her individually.

Ordinarily, where an action is brought on a partnership liability not only against the partnership but also against its members individually, a defendant may plead as a set-off a debt due him or her individually.^[1] In such an action one or more defendants may set up as a counterclaim in their individual answers any claim which the firm has against the plaintiff,^[2] although all the partners are not served in the action and, therefore, do not answer.^[3]

[FN1] Cal.—[Flickinger v. Swedlow Engineering Co.](#), 45 Cal. 2d 388, 289 P.2d 214 (1955).

[FN2] N.Y.—[Alpaugh v. Battles](#), 235 A.D. 321, 257 N.Y.S. 126 (1st Dep't 1932).

[FN3] N.Y.—[Alpaugh v. Battles](#), 235 A.D. 321, 257 N.Y.S. 126 (1st Dep't 1932).

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§ 83. Equitable set-off of partnership and individual debts and demands

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 43, 44, 44(2)

In equity, an individual debt of one of the partners cannot, as a rule, be set-off against a partnership debt, or vice versa, the rule being that equity on this subject follows the law, in the absence of special grounds for equitable interposition.

Equity may take cognizance of crossclaims between litigants, although they are wanting in mutuality, wherever it becomes necessary to effect a clear equity or prevent injustice,[1] and in an action against a partnership and the individual members thereof, the court may permit the individual defendants to plead a counterclaim of which they claim to be joint owners where the court can dispose of all the issues raised by the pleadings and the rights of third persons are not involved.[2] Even where set-off is allowable in equity, a partnership accounting with all the partners made parties is essential in order to adjudicate the interest of the individual partner involved.[3]

In an action by an insolvent debtor of a firm against an individual partner, the plaintiff's indebtedness to the partnership may be set-off where all the partners assent.[4]

[FN1] Ky.—[Bryant Bros. v. Wilson](#), 253 Ky. 578, 69 S.W.2d 1020 (1934).

[FN2] Iowa—[Read v. Ferguson, Barnes & Ferguson](#), 228 Iowa 1191, 293 N.W. 474 (1940).

[FN3] Tex.—[Shaw v. Centerfield Oil Co.](#), 10 S.W.2d 144 (Tex. Civ. App. Austin 1928).

[FN4] N.Y.—[Burns v. Lopez](#), 256 N.Y. 123, 175 N.E. 537 (1931).

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§ 84. Survivorship, and representation of deceased partner

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  43, 44, 44(2)

While it has been held that defendant, in a suit by a surviving partner to recover a debt due to the firm, may set off a debt due to him from the surviving partner alone, it has also been held that in an action by the surviving members of a partnership to recover a debt due the firm, defendant cannot offset debts due him by individual partners.

In a suit by a surviving partner to recover a debt due to the firm, the defendant may set off a debt due to him or her from the surviving partner alone.^[1] On the other hand, it has been held that in an action by surviving members of a partnership to recover a debt due the firm, the defendant cannot offset debts due him or her by individual partners.^[2]

[FN1] Mass.—[Hewitt v. Hayes](#), 204 Mass. 586, 90 N.E. 985 (1910).

[FN2] Ark.—[Sessoms v. Ballard](#), 160 Ark. 146, 254 S.W. 446 (1923).

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G. Assignment

1. Recoupment, Set-off, and Counterclaim Against Assigned Causes of Action

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§ 85. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  48 to 50

A cause of action which is assigned is generally subject to any right of recoupment, set-off, or counterclaim held by the obligor against the assignor at the time of the assignment or notice thereof.

A cause of action which is assigned is generally subject to any right of recoupment,[1] set-off,[2] cross demand or counterclaim.[3] In respect of such claims, the assignee ordinarily has no greater rights than the assignor,[4] and the obligor is not by reason of the assignment put in a worse position than if the action were by the assignor.[5] However, the obligor is not by the assignment placed in a better position.[6] Under some statutes, the defendant is not permitted to set-off against an assignee a claim against the assignor arising from a transaction independent of that which gave rise to the obligation assigned.[7]

Where the cause of action on which the defendant's cross demand is based depends for its existence on the nonexistence of the assigned cause of action, it cannot be urged as a counterclaim against the assignee.[8]

Although the assignee takes without knowing of the outstanding claim, it may still be asserted against him or her as a set-off.[9] The defendant may have recoupment despite the assignee's lack of knowledge of the existence and terms of a supplemental contract on which the defendant's claim is based.[10]

[FN1] Haw.—[Pacific Concrete Federal Credit Union v. Kauanoe](#), 62 Haw. 334, 614 P.2d 936 (1980).

Or.—[Rogue River Management Co. v. Shaw](#), 243 Or. 54, 411 P.2d 440 (1966).

Wyo.—[Pioneer Inv. Corp. v. Kassler & Co.](#), 408 P.2d 803 (Wyo. 1965).

[FN2] U.S.—[Ozanic v. U.S.](#), 188 F.2d 228 (2d Cir. 1951).

Ind.—[Ertel v. Radio Corp. of America](#), 171 Ind. App. 51, 354 N.E.2d 783, 20 U.C.C. Rep. Serv. 792 (1976).

Mich.—[Moore v. Baugh](#), 106 Mich. App. 815, 308 N.W.2d 698 (1981).

[FN3] U.S.—[Ozanic v. U.S.](#), 188 F.2d 228 (2d Cir. 1951).

Miss.—[St. Paul Ins. Companies v. Gentry](#), 340 So. 2d 442 (Miss. 1976).

Okla.—[National Bank of Commerce of Tulsa v. ABC Const. Co.](#), 1966 OK 14, 442 P.2d 269 (Okla. 1966).

[FN4] Ky.—[Whayne Supply Co. v. Morgan Const. Co.](#), 440 S.W.2d 779 (Ky. 1969).

Mass.—[Edmund Wright Ginsberg Corp. v. C. D. Kepner Leather Co.](#), 317 Mass. 581, 59 N.E.2d 253 (1945).

[FN5] Mass.—[Edmund Wright Ginsberg Corp. v. C. D. Kepner Leather Co.](#), 317 Mass. 581, 59 N.E.2d 253 (1945).

N.C.—[Standard Amusement Co. v. Tarkington](#), 247 N.C. 444, 101 S.E.2d 398 (1958).

Scope and extent of relief available to obligor in action by assignee, see § 112.

[FN6] Conn.—[Bridgeport-City Trust Co. v. Niles Bement-Pond Co.](#), 128 Conn. 4, 20 A.2d 91, 135 A.L.R. 690 (1941).

Or.—[Rogue River Management Co. v. Shaw](#), 243 Or. 54, 411 P.2d 440 (1966).

Utah—[Seal v. Carpets, Inc.](#), 17 Utah 2d 270, 409 P.2d 384 (1966).

[FN7] U.S.—[Sterling Const. Co. v. Humboldt Nat. Bank](#), 345 F.2d 994 (10th Cir. 1965).

N.J.—[Marfico, Inc. v. Reliance Ins. Co.](#), 144 N.J. Super. 532, 366 A.2d 709 (App. Div. 1976).

N.Y.—[Sustrin v. Jethmal & Sons, Limited](#), 24 A.D.2d 417, 260 N.Y.S.2d 263 (1st Dep't 1965).

[FN8] N.Y.—[Occidental Ins. Co. v. Herman](#), 179 Misc. 499, 38 N.Y.S.2d 278 (Sup 1942).

Existence of plaintiff's cause of action as condition to recoupment, set-off, or counterclaim, generally, see § 18.

Judgment against assignee for excess over assignee's cause of action, see § 112.

[FN9] Cal.—[Bank of America of Cal. v. Pacific Ready-Cut Homes](#), 122 Cal. App. 554, 10 P.2d 478 (4th Dist. 1932).

[FN10] Cal.—[Stern v. Sunset Road Oil Co.](#), 47 Cal. App. 334, 190 P. 651 (1st Dist. 1920).

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§ 86. Existence and maturity of claim at time of assignment or notice

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 48 to 50

As a general rule, whether or not a claim against the assignor sought to be raised by way of set-off or counterclaim against the assigned cause of action must have been acquired and matured at the time of the assignment or notice thereof is dependent on the terms of the statutes.

Statutory provisions to the effect that, when cross demands have existed under such circumstances that, if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment of the other, and those to the effect that set-off or counterclaim may be had against an assignee if the demand is such as might have been set off against such plaintiff or such assignee while the contract belonged to him or her are substantially the same.[1] The effect of a statutory provision to the effect that, in case of assignment, 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, as respects the defendant's right to interpose a set-off or counterclaim, is that, until the defendant has notice of the assignment, he or she occupies the same position as if the assigned demand was still held by the assignor.[2]

The right of set-off may be asserted if it arises before notification of the assignor's account assignment.[3]

If a claim of set-off arises out of a collateral transaction, it is available against the assignee if it existed as a matured claim at the time of the assignment.[4]

[FN1] N.Y.—*Frank v. Amicale Yarns, Inc.*, 148 N.Y.S.2d 727 (Sup 1956).

[FN2] Cal.—*Royal Indem. Co. v. Security Truck Lines*, 212 Cal. App. 2d 61, 27 Cal. Rptr. 858 (1st Dist. 1963).

N.Y.—*Chatham Sec. Corp. v. J. R. Williston & Beane*, 22 A.D.2d 260, 254 N.Y.S.2d 436 (1st Dep't 1964), order aff'd, 16 N.Y.2d 1016, 265 N.Y.S.2d 900, 213 N.E.2d 311 (1965).

[FN3] U.S.—*In re Metropolitan Hosp.*, 131 B.R. 283, 16 U.C.C. Rep. Serv. 2d 236 (E.D. Pa. 1991).

[FN4] U.S.—*In re Medina*, 177 B.R. 335 (Bankr. D. Or. 1994), *aff'd* in part, *rev'd* in part on other grounds, 205 B.R. 216 (B.A.P. 9th Cir. 1996).

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§ 87. Existence and maturity of claim at time of assignment or notice—Claims arising subsequent to assignment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 48 to 50

As a general rule, claims arising in favor of the defendant against the assignor subsequent to the assignment or notice thereof cannot be set off or counterclaimed against an assigned cause of action.

As a general rule, claims arising in favor of the defendant against the assignor subsequent to the assignment[1] or notice thereof[2] cannot be set-off or counterclaimed against the claim of the assignee, at least where they accrue on independent contracts or transactions separate from that giving rise to the assigned cause of action,[3] even though they had their origin in transactions previous to the giving of notice.[4] The defendant may set off or counterclaim against the assignee claims against the assignor arising or acquired prior to notice of the assignment,[5] even though such claim was not acquired or did not arise until after the assignment.[6] However, a claim against the assignor arising out of an independent contract or transaction after the assignment but before notice thereof is not available as a set-off or counterclaim against the assignee.[7]

[FN1] Cal.—*Hoover v. Agriform Chemical Co.*, 268 Cal. App. 2d 818, 74 Cal. Rptr. 325 (5th Dist. 1969).

N.D.—*Sorenson v. Leslie*, 186 N.W.2d 454 (N.D. 1971).

[FN2] U.S.—*Glassman Const. Co. v. Fidelity & Cas. Co. of New York*, 356 F.2d 340 (D.C. Cir. 1966).

Cal.—*Royal Indem. Co. v. Security Truck Lines*, 212 Cal. App. 2d 61, 27 Cal. Rptr. 858 (1st Dist. 1963).

Fla.—*Nusbaum v. Riskin*, 136 So. 2d 1 (Fla. Dist. Ct. App. 2d Dist. 1961).

[FN3] Fla.—*Nusbaum v. Riskin*, 136 So. 2d 1 (Fla. Dist. Ct. App. 2d Dist. 1961).

[FN4] Conn.—*Bridgeport-City Trust Co. v. Niles Bement-Pond Co.*, 128 Conn. 4, 20 A.2d 91, 135 A.L.R. 690 (1941).

N.Y.—*James Talcott, Inc., v. Weiss*, 153 Misc. 317, 273 N.Y.S. 1003 (City Ct. 1934).

[FN5] Cal.—*Ornbaun v. First Nat. Bank*, 215 Cal. 72, 8 P.2d 470, 81 A.L.R. 1146 (1932).

Pa.—*Northwestern Nat. Bank v. Commonwealth*, 345 Pa. 192, 27 A.2d 20 (1942).

[FN6] Ky.—*Louisa Nat. Bank v. Paintsville Nat. Bank*, 260 Ky. 327, 85 S.W.2d 668, 100 A.L.R. 819 (1935).

Va.—*Armour & Co. v. Whitney & Kemmerer, Inc.*, 164 Va. 12, 178 S.E. 889, 98 A.L.R. 596 (1935).

[FN7] Fla.—*Nusbaum v. Riskin*, 136 So. 2d 1 (Fla. Dist. Ct. App. 2d Dist. 1961).

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G. Assignment

1. Recoupment, Set-off, and Counterclaim Against Assigned Causes of Action

[Topic Summary References Correlation Table](#)

§ 88. Existence and maturity of claim at time of assignment or notice—Claims maturing subsequent to assignment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑48 to 50

Whether or not a claim by the obligor against the assignor, not matured at the time of the assignment or notice thereof, is available as a set-off or counterclaim against the assigned cause of action is largely a question of statutory construction.

The question of the allowance as set-off or counterclaim of a demand unmatured at the time of the assignment against an assigned matured demand is largely one of statutory construction.[1] Under some statutes, as, for example, those providing in effect that, when cross demands have existed under such circumstances, if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment of the other; or those providing in effect that, if an action is founded on an assigned contract, a demand existing against the assignor, or any assignee, at the time of the assignment, and belonging to defendant, in good faith, before notice of such assignment, may be set off if the demand is such as might have been set off against such assignor or assignee, when the contract belonged to him, it is held that a debtor, when sued by the assignee of the claim, cannot set off or counterclaim against such assignee demands which the debtor has against the assignor which matured after the assignment[2] or notice thereof,[3] although such claim became due before suit.[4]

A claim against the assignor not matured at the time of the assignment is not available as a counterclaim or set-off against the assigned cause of action, although it matures before notice of the assignment,[5] though a claim which has matured at the time of the assignment is available as a set-off or counterclaim, even though it is not acquired by defendant until after the assignment, but before notice thereof.[6]

Under some statutes a claim may be set off or counterclaimed against the assignee, in a suit on the assigned obligation, although the claim thus asserted was not due and payable at or before the assignment,[7] and the fact that the demand claimed as an offset has not matured when defendant receives notice of the assignment of his obligation does not render it unavailable as a set-off or counterclaim.[8]

[FN1] Wash.—*King v. West Coast Grocery Co.*, 72 Wash. 132, 129 P. 1081 (1913).

[FN2] N.Y.—*Universal C.I.T. Credit Corp. v. Greyhound Rent-A-Car, Inc.*, 39 Misc. 2d 163, 240 N.Y.S.2d 205 (Sup 1963), judgment aff'd, 20 A.D.2d 635, 246 N.Y.S.2d 1012 (1st Dep't 1964).

[FN3] Tenn.—*Union & Planters Bank & Trust Co. v. Linden St. Christian Church*, 3 Tenn. App. 540, 1926 WL 2081 (1926).

[FN4] Okla.—*Board of Education of Town of Ringling v. State ex rel. Benton*, 1935 OK 586, 172 Okla. 437, 46 P.2d 325 (1935).

[FN5] Okla.—*McMann v. H.F. Wilcox Oil & Gas Co.*, 1926 OK 702, 121 Okla. 167, 250 P. 780 (1926).

[FN6] Availability of assigned claim as against assigned cause of action, see § 98.

[FN7] Cal.—*Harry Hall & Co. v. Consolidated Packing Co.*, 55 Cal. App. 2d 651, 131 P.2d 859 (1st Dist. 1942).

Pa.—*Northwestern Nat. Bank v. Commonwealth*, 345 Pa. 192, 27 A.2d 20 (1942).

[FN8] Pa.—*Northwestern Nat. Bank v. Commonwealth*, 345 Pa. 192, 27 A.2d 20 (1942).

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G. Assignment

1. Recoupment, Set-off, and Counterclaim Against Assigned Causes of Action

[Topic Summary References Correlation Table](#)

§ 89. Existence and maturity of claim at time of assignment or notice—Claims arising from same contract or transaction

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 48 to 50

As a general rule a claim by the defendant against the assignor arising from the same contract or transaction as the assigned cause of action may be availed of by way of recoupment, set-off or counterclaim without regard to the fact that the claim did not exist or mature until after the assignment or notice thereof.

As a general rule, a claim by defendant against the assignor arising from the same contract or transaction as the assigned cause of action may be availed of by way of recoupment, set-off, or counterclaim without regard to the fact that the claim did not exist or mature until after the assignment or notice thereof.[1] Thus, a counterclaim arising out of the same contract or transaction which resulted in the assignment to the plaintiff is assertable by the defendant against the assignee notwithstanding the fact that they matured after the time of the assignment.[2] Where a claim is assigned, the defendant may, in an action by the assignee, have recoupment for a default in performance by the assignor of the assignor's obligations under the executory contract on which the assigned claim was based, although such default occurred after the assignment[3] and after notice thereof to defendant,[4] or for a default which existed at such time, but was discovered subsequent thereto.[5]

[FN1] U.S.—*Standard Acc. Ins. Co. of Detroit, Mich. v. Federal Nat. Bank of Shawnee*, 112 F.2d 692 (C.C.A. 10th Cir. 1940), adhered to, 115 F.2d 34 (C.C.A. 10th Cir. 1940).

Cal.—*Stern v. Sunset Road Oil Co.*, 47 Cal. App. 334, 190 P. 651 (1st Dist. 1920).

N.J.—*Fidelity & Deposit Co. of Maryland v. McClintic-Marshall Corp.*, 115 N.J. Eq. 470, 171 A. 382 (Ch. 1934), aff'd, 117 N.J. Eq. 440, 176 A. 341 (Ct. Err. & App. 1935).

[FN2] N.Y.—*James Talcott, Inc. v. Winco Sales Corp.*, 14 N.Y.2d 227, 250 N.Y.S.2d 416, 199 N.E.2d 499 (1964).

[FN3] Mont.—[Apple v. Edwards](#), 92 Mont. 524, 16 P.2d 700, 87 A.L.R. 179 (1932).

[FN4] Mont.—[Apple v. Edwards](#), 92 Mont. 524, 16 P.2d 700, 87 A.L.R. 179 (1932).

[FN5] Md.—[Schenuit v. International Finance Corp.](#), 148 Md. 403, 130 A. 331 (1925).

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G. Assignment

1. Recoupment, Set-off, and Counterclaim Against Assigned Causes of Action

[Topic Summary References Correlation Table](#)

§ 90. Assigned cause of action not mature at time of assignment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  48 to 50

Dependent on statutory provisions, a claim by the obligor may or may not be available against the assignor of a cause of action which was not mature at the time of the assignment.

Under statutory provisions limiting the availability of set-off or counterclaim to such claims as were allowable against an assigned demand when it could have been asserted against such demand at the time of the assignment and as against the original owner, the defendant cannot set-off or counterclaim for a demand which matured at or before the assignment against a cause of action by the assignee which was not mature at the time of the assignment.[1] If a claim of set-off arises out of a collateral transaction, it is not available against the assignee if the claim was acquired after notice of the assignment.[2]

[FN1] U.S.—[Skinner v. W. T. Grant Co.](#), 642 F.2d 981 (5th Cir. 1981); [Widdows v. Keaton](#), 44 F.2d 839 (N.D. Okla. 1930).

Wash.—[Ropes, Inc. v. Rubinstein](#), 4 Wash. 2d 380, 104 P.2d 329 (1940).

Recoupment, set-off, or counterclaim for claim arising out of same contract or transaction as against assigned cause of action not matured at time of assignment, see [§ 88](#).

[FN2] U.S.—[In re Medina](#), 177 B.R. 335 (Bankr. D. Or. 1994), *aff'd in part, rev'd in part on other grounds*, 205 B.R. 216 (B.A.P. 9th Cir. 1996).

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G. Assignment

1. Recoupment, Set-off, and Counterclaim Against Assigned Causes of Action

[Topic Summary References Correlation Table](#)

§ 91. Claims against assignor and another jointly, assignee, and intermediate assignees

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  48 to 50

Ordinarily a defendant cannot assert as a set-off or counterclaim a demand against the assignor of a cause of action and another jointly, but he or she may set off or counterclaim a claim he holds directly against the assignee. The authorities are not in accord on the question whether claims against intermediate assignees are available as a set-off or counterclaim.

Where the obligation of the assignor and another is joint and several, it may be availed of by the defendant against the assigned cause of action.[1] In an action on a contract by an assignee of the contract, the defendant may set up as a set-off or counterclaim a claim existing directly against the assignee, which the defendant holds,[2] subject to the general rules which may restrict the claims which the defendant may present to those growing out of the same transaction as the plaintiff's claim.[3]

[FN1] Minn.—[Campbell v. State Bank of Litchfield](#), 194 Minn. 502, 261 N.W. 1 (1935).

[FN2] N.Y.—[Segal Lock & Hardware Co. v. Markey](#), 124 N.Y.S.2d 181 (Sup 1953).

[FN3] La.—[Jackson v. Taylor Bros. Garage](#), 4 So. 2d 41 (La. Ct. App. 1st Cir. 1941).

Cross demands arising out of the same transaction as the main claim, see §§ 35 to 42.

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1. Recoupment, Set-off, and Counterclaim Against Assigned Causes of Action

[Topic Summary References Correlation Table](#)

§ 92. Equitable set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  48 to 50

Ordinarily, an assignee takes a contract subject to any defenses or set-offs that the account debtor may have against the assignor, and an equitable right of set-off is not defeated by an assignment of the debt.

Ordinarily, an assignee takes a contract subject to any defenses or set-offs that the account debtor may have against the assignor.[1] As a general rule an equitable right of set-off is not defeated by assignment of the debt.[2] Equity will not allow a set-off against an assignee where to do so would be inequitable.[3]

Equity relaxes the rules of the law regarding the effect of the time of assignment or notice, but goes beyond them only when the departure is necessary to prevent wrong and injustice.[4]

The insolvency of the assignor at the time of assignment is a good ground in equity to authorize a set-off against the assignee of claims against the assignor at the time of assignment.[5]

[FN1] Wash.—[Pacific Northwest Life Ins. Co. v. Turnbull](#), 51 Wash. App. 692, 754 P.2d 1262 (Div. 2 1988).

[FN2] Cal.—[Koffman v. Modern-Imperial Co.](#), 239 Cal. App. 2d 135, 48 Cal. Rptr. 492 (2d Dist. 1966).

Equitable set-off, generally, see [§ 5](#).

[FN3] U.S.—[United States Fidelity & Guaranty Co. v. Levy](#), 77 F.2d 972 (C.C.A. 5th Cir. 1935).

[FN4] N.Y.—[Beecher v. Peter A. Vogt Mfg. Co.](#), 227 N.Y. 468, 125 N.E. 831 (1920).

[FN5] Ohio—[Smith v. Fulton](#), 51 Ohio App. 12, 4 Ohio Op. 291, 20 Ohio L. Abs. 325, 199 N.E. 218 (6th Dist. Lucas County 1935).

Insolvency as ground for equitable set-off, generally, see [§ 7](#).

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[Topic Summary References Correlation Table](#)

§ 93. Contingent or secondary liability

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  48 to 50

A debtor, when sued by the assignee of his or her debt, can set off against the plaintiff a demand against the assignor arising from the defendant's having become secondarily liable as surety, indorser, or guarantor on a debt where the assignor was the principal debtor.

A debtor, when sued by the assignee of his or her debt, can set off against the plaintiff a demand against the assignor arising from the defendant's having become secondarily liable as surety, indorser, or guarantor on a debt wherein the assignor was the principal debtor,[1] although there has been no payment of such contingent claim at the time of the assignment,[2] or at the time of notice of the assignment,[3] especially where such payment has been made at the time that the offer of set-off is made.[4]

A debtor is not entitled to a set-off against an assigned debt which was liquidated and due for funds that the debtor advanced to the assignor in connection with a construction project where the claim regarding advanced funds was contingent upon the outcome of other associated claims between the debtor, assignor and the third party, as the assignee's claim against the debtor and the debtor's claim against the assignor were not equally demandable.[5]

The rule that a claim against the insolvent assignor purchased with knowledge of the insolvency cannot be set off against an assigned cause of action[6] applies where the obligor on the assigned cause of action pays the assignor's debt pursuant to his or her guaranty so that such payment cannot be set off against the assigned cause of action.[7]

[FN1] W.Va.—[Belcher v. Bays](#), 120 W. Va. 271, 197 S.E. 732, 117 A.L.R. 897 (1938).

[FN2] W.Va.—[Belcher v. Bays](#), 120 W. Va. 271, 197 S.E. 732, 117 A.L.R. 897 (1938).

[FN3] W.Va.—[Belcher v. Bays](#), 120 W. Va. 271, 197 S.E. 732, 117 A.L.R. 897 (1938).

[FN4] W.Va.—*Belcher v. Bays*, 120 W. Va. 271, 197 S.E. 732, 117 A.L.R. 897 (1938).

[FN5] U.S.—*In re MMR Holding Corp.*, 199 B.R. 611 (M.D. La. 1996), *aff'd*, 119 F.3d 1 (5th Cir. 1997).

[FN6] Claims against an insolvent assignor purchased with knowledge of the insolvency, see § 98.

[FN7] Ohio—*Pugh v. Conklin*, 44 Ohio App. 272, 14 Ohio L. Abs. 93, 184 N.E. 847 (5th Dist. Delaware County 1932).

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[Topic Summary References Correlation Table](#)

§ 94. Waiver and estoppel

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  48 to 50

A debtor may waive the right to assert a set-off against the assignee, as where by his conduct he induces the assignee to believe that the assigned claim will be met and that there is no defense thereto.

A debtor may waive the right to use a set-off against the assignee.[1] What will amount to such a waiver must depend on the circumstances surrounding each particular case.[2] A waiver of the right to urge a claim arising from a different transaction as a counterclaim or set-off may be inferred where the obligation to the assignor was incurred with the knowledge and understanding that it would be promptly assigned,[3] but this has been denied.[4]

A promise by the debtor to pay the assignee will not preclude the former from asserting a set-off, where it has been made without consideration,[5] or where the assignee has not been induced, by means of the promise made to him, to act to his or her detriment.[6]

In the absence of any element of concealment, a debtor is not estopped to assert demands against the assignor, in set-off against the assignee, merely by reason of the fact that the debtor has not acted affirmatively to notify the assignee of the existence of such demands.[7]

[FN1] Kan.—[Security State Bank of Great Bend v. Midwest Foundry](#), 177 Kan. 151, 277 P.2d 629, 51 A.L.R.2d 882 (1954).

N.C.—[In re Battery King Mfg. Co.](#), 240 N.C. 586, 83 S.E.2d 490 (1954).

Pa.—[Palmer, to Use of Conewango Furniture Co. v. Heath](#), 114 Pa. Super. 256, 174 A. 824 (1934).

Waiver and estoppel as to set-off and counterclaim, generally, see § 17.

[FN2] Tex.—[E. E. Farrow Co. v. U. S. Nat. Bank of Omaha](#), 358 S.W.2d 934 (Tex. Civ. App. Waco

1962), writ refused n.r.e., (Oct. 6, 1962).

[FN3] U.S.—*Reconstruction Finance Corp. v. Globe Wernicke Co.*, 35 F. Supp. 909 (S.D. Ohio 1940), judgment aff'd, 126 F.2d 468 (C.C.A. 6th Cir. 1942).

Pa.—*Palmer, to Use of Conewango Furniture Co. v. Heath*, 114 Pa. Super. 256, 174 A. 824 (1934).

[FN4] Cal.—*Harry Hall & Co. v. Consolidated Packing Co.*, 55 Cal. App. 2d 651, 131 P.2d 859 (1st Dist. 1942).

[FN5] Cal.—*Bank of America of Cal. v. Pacific Ready-Cut Homes*, 122 Cal. App. 554, 10 P.2d 478 (4th Dist. 1932).

[FN6] Cal.—*Bank of America of Cal. v. Pacific Ready-Cut Homes*, 122 Cal. App. 554, 10 P.2d 478 (4th Dist. 1932).

[FN7] Cal.—*Bank of America of Cal. v. Pacific Ready-Cut Homes*, 122 Cal. App. 554, 10 P.2d 478 (4th Dist. 1932).

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2. Assigned Claim as Set-off or Counterclaim

[Topic Summary References Correlation Table](#)

§ 95. Generally

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  51, 52, 52(1), 53

A claim against the plaintiff which is assigned to the defendant before the commencement of the action may be available as a set-off or counterclaim against the plaintiff.

A claim against the plaintiff which is assigned to the defendant before the commencement of the action may be set-off against the plaintiff's cause of action,[1] as fully as though the action were between the original parties,[2] at least if the defendant could bring an action thereon in his or her own name.[3] Similarly, such an assigned demand may be available to the defendant as a counterclaim[4] or in compensation.[5] Thus, a debtor has a right to purchase a cross demand to extinguish a claim against him or herself by set-off.[6]

The claim of a third person not assigned to the defendant is not ordinarily available as a set-off.[7] However, in an action against an ancillary administrator, a claim against the plaintiff held by the principal administrator is available as a set-off, even though the claim has not been assigned to the ancillary administrator.[8]

The doctrine that the insolvency of the party against whom the set-off is claimed may be sufficient ground for the allowance of a set-off in equity[9] does not apply as to claims acquired by the defendant by assignment unless they were acquired without knowledge of the plaintiff's insolvency.[10]

There is authority to the effect that the assignee of an unliquidated claim cannot set it off[11] or counterclaim on it,[12] but there is other authority permitting a counterclaim on an unliquidated assigned demand.[13]

Where the defendant produces an assigned note of the plaintiff as a set-off, the plaintiff may show a total or partial failure of consideration for which the note was given.[14]

[FN1] U.S.—[Browning v. Swift & Co.](#), 388 F.2d 78 (7th Cir. 1967).

Fla.—[Nusbaum v. Riskin](#), 136 So. 2d 1 (Fla. Dist. Ct. App. 2d Dist. 1961).

Wash.—[Lano v. Osberg Const. Co.](#), 77 Wash. 2d 369, 462 P.2d 923 (1969).

[FN2] U.S.—[U. S. v. Industrial Crane & Mfg. Corp.](#), 492 F.2d 772 (5th Cir. 1974).

[FN3] Ga.—[Cox v. Stowers](#), 204 Ga. 595, 50 S.E.2d 339 (1948).

[FN4] U.S.—[Commerce Mfg. Co. v. Blue Jeans Corp.](#), 146 F. Supp. 15 (E.D. N.C. 1956).

Okla.—[Wood & Co. v. Sutton](#), 1936 OK 667, 177 Okla. 631, 61 P.2d 700 (1936).

[FN5] La.—[Lewy v. Wilkinson](#), 135 La. 105, 64 So. 1003 (1914).

[FN6] N.Y.—[Scientific & Hospital Supply Corp. v. Board of Ed. of City of New York](#), 172 Misc. 770, 16 N.Y.S.2d 91 (Mun. Ct. 1939).

[FN7] U.S.—[Saxis S. S. Co. v. Multifacs Intern. Traders, Inc.](#), 375 F.2d 577 (2d Cir. 1967).

Ariz.—[Phoenix Sav. Bank & Trust Co. v. Ellis](#), 50 Ariz. 116, 69 P.2d 796 (1937).

[FN8] Ariz.—[Phoenix Sav. Bank & Trust Co. v. Ellis](#), 50 Ariz. 116, 69 P.2d 796 (1937).

[FN9] Insolvency of the party against which set-off asserted as allowable in equity, see § 5.

[FN10] Fla.—[Durham Tropical Land Corp. v. Sun Garden Sales Co.](#), 106 Fla. 429, 151 So. 327 (1932).

[FN11] N.H.—[Wolf Klein & Sons v. Bronstein](#), 91 N.H. 42, 13 A.2d 149 (1940).

Set-off of unliquidated demands, generally, see §§ 55, 56.

[FN12] Okla.—[Sanditen v. Allied Refining Co.](#), 1921 OK 404, 84 Okla. 47, 202 P. 316 (1921).

[FN13] Colo.—[Michigan Stove Co. v. Pueblo Hardware Co.](#), 51 Colo. 160, 116 P. 340 (1911).

[FN14] Ala.—[J.R. Raible Co. v. City Bank & Trust Co.](#), 220 Ala. 293, 124 So. 866 (1929).

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2. Assigned Claim as Set-off or Counterclaim

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§ 96. Nature and validity of assignment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  51, 52, 52(1), 53

A claim incompletely assigned is not available as a set-off.

A claim incompletely assigned is not available as a set-off.[1] Moreover, the rule that the party who pleads a set-off must be the real party in interest in the matter of such set-off applies to cross demands by assignees.[2] If an assignee for collection should attempt to set off the assigned chose in action against his or her individual obligation, the assignee would be violating the law forbidding a trustee from using trust property for his or her private or individual purposes.[3]

Where only part of a demand is assigned, such part is not available as a set-off,[4] but there is authority to the contrary.[5]

[FN1] U.S.—[Harrison v. Bloomfield Bldg. Industries, Inc.](#), 435 F.2d 1192 (6th Cir. 1970).

[FN2] Cal.—[Norman v. Berney](#), 235 Cal. App. 2d 424, 45 Cal. Rptr. 467 (1st Dist. 1965).

[FN3] Cal.—[Harrison v. Adams](#), 20 Cal. 2d 646, 128 P.2d 9 (1942).

[FN4] Ohio—[Cohn v. Krauss](#), 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1st Dist. Hamilton County 1943).

[FN5] N.Y.—[Scientific & Hospital Supply Corp. v. Board of Ed. of City of New York](#), 172 Misc. 770, 16 N.Y.S.2d 91 (Mun. Ct. 1939).

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G. Assignment
2. Assigned Claim as Set-off or Counterclaim

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§ 97. Demands acquired after commencement of action

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  51, 52, 52(1), 53

As a general rule, demands against the plaintiff acquired by the defendant after the commencement of the action cannot be interposed as set-offs or counterclaims.

Since the defense of set-off is regarded in the nature of a cross action, a set-off can generally be made only of a demand existing and owned by the defendant at the time of commencement of the action in which the set-off is sought to be interposed,[1] and claims acquired by the defendant against the plaintiff after commencement of the action cannot be interposed in an action by the defendant as a set-off[2] or counterclaim,[3] at least where the counter demand is not one arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or one connected with the subject of the plaintiff's action.[4]

If, at trial, it should appear that there are any equitable reasons why a set-off should be allowed of a debt acquired after the action was brought, the court in equity has jurisdiction to direct it to be done.[5]

[FN1] Okla.—[Wood & Co. v. Sutton](#), 1936 OK 667, 177 Okla. 631, 61 P.2d 700 (1936).

[FN2] U.S.—[American Training Service, Inc. v. Commerce Union Bank](#), 415 F. Supp. 1101 (M.D. Tenn. 1976), *aff'd*, 612 F.2d 580 (6th Cir. 1979).

Cal.—[Luders v. Pummer](#), 152 Cal. App. 2d 276, 313 P.2d 38 (2d Dist. 1957).

Ohio—[Cohn v. Krauss](#), 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1st Dist. Hamilton County 1943).

[FN3] N.Y.—[Kalb v. Leff](#), 138 Misc. 830, 246 N.Y.S. 158 (City Ct. 1930).

[FN4] N.Y.—[Kalb v. Leff](#), 138 Misc. 830, 246 N.Y.S. 158 (City Ct. 1930).

[FN5] Ga.—[Nixon v. Nixon](#), 194 Ga. 301, 21 S.E.2d 702 (1942).

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II. Subject Matter
G. Assignment
3. Assigned Claim Against Assigned Cause of Action

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§ 98. Availability of assigned claim as against assigned cause of action

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑52(2)

An assigned claim against the plaintiff's assignor may be available as a set-off or counterclaim against the assigned cause of action.

In an action on an assigned demand, the defendant may set off or counterclaim a claim against the plaintiff's assignor assigned to the defendant before the assignment to the plaintiff, provided the claim is one which is ordinarily available as a set-off or counterclaim.[1]

Where the creditor is insolvent, the defendant cannot set off, in a subsequent action by the creditor's assignee, a claim purchased by the defendant against the creditor subsequent to the insolvency and after the defendant has reasonable cause to believe that the creditor is insolvent.[2]

Where the owner of property, which constituted security for a personal obligation, assigned the property, subject to the outstanding rights of his creditor, to a third person who, prior to such assignment or to the assignment of the obligation by the creditor, held a demand against such creditor, the holder of such demand, when sued by the creditor's assignee, was entitled to set-off the demand held by him or her at the time of acquiring his or her interest in the property.[3]

[FN1] N.J.—[Falkenstein v. Herman Kussy Co.](#), 137 N.J.L. 200, 59 A.2d 372 (N.J. Ct. Err. & App. 1948).

N.Y.—[Perlman v. Perlman](#), 235 A.D. 313, 257 N.Y.S. 48 (1st Dep't 1932).

[FN2] N.C.—[Citizen's Bank v. White](#), 202 N.C. 311, 162 S.E. 736 (1932).

Ohio—[Pugh v. Conklin](#), 44 Ohio App. 272, 14 Ohio L. Abs. 93, 184 N.E. 847 (5th Dist. Delaware County 1932).

S.C.—[Gambrell v. Cox](#), 250 S.C. 228, 157 S.E.2d 233 (1967).

[FN3] N.C.—[Dameron v. Carpenter](#), 190 N.C. 595, 130 S.E. 328 (1925).

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§ 99. Availability of assigned claim as against assigned cause of action—Unliquidated demand

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑52(2)

An assigned claim for unliquidated damages against the plaintiff's assignor may not be available as a set-off or counterclaim against the assigned cause of action where the assigned claim for unliquidated damages can not be conveniently tried with the cause of action for liquidated damages set forth in the complaint.

The court may have the authority to strike a counterclaim that cannot be conveniently tried with the cause of action set forth in the complaint.[1] For example, a cause of action against a plaintiff's assignor for breach of an implied warranty which is assigned to the defendant by third persons is not a proper subject of set-off in actions for money due to a plaintiff's assignor for goods sold and delivered to a defendant, since the cause of action does not arise out of same transaction and is for unliquidated damages while the main case is for liquidated damages.[2] Further, a defendant is not entitled to set-off against a plaintiff's claim for merchandise delivered to the defendant for an unliquidated claim against the plaintiff which is assigned to the defendant by a nonresident which arises out of an entirely different transaction.[3]

[FN1] N.J.—[Falkenstern v. Herman Kussy Co.](#), 137 N.J.L. 200, 59 A.2d 372 (N.J. Ct. Err. & App. 1948).

[FN2] N.J.—[Falkenstern v. Herman Kussy Co.](#), 137 N.J.L. 200, 59 A.2d 372 (N.J. Ct. Err. & App. 1948).

[FN3] Conn.—[General Consolidated, Limited v. Rudnick & Sons, Inc.](#), 4 Conn. Cir. Ct. 581, 237 A.2d 386 (App. Div. 1967).

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§ 100. Compensation between cross demands

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑 55, 57, 58

Generally, absent a contravening statutory provision, in common-law jurisdictions a mutual indebtedness will not extinguish the respective debts of the parties without an application of the debt by the parties.

When parties have legitimate cross demands against each other, the actual debt is the excess of one debt over the other.[1] However, the common law does not recognize the civil-law doctrine of compensation.[2] Thus, as a general rule, absent a statutory provision to the contrary, mutual indebtedness will not extinguish the respective debts by the mere operation of law without an application of the debts to each other by the acts of the parties.[3] Nevertheless, there is ample authority, usually based on statute, that mutual demands compensate and extinguish each other by operation of law.[4] Although, a claim not pleaded will not be considered as a set-off or counterclaim.[5]

A plaintiff is not entitled to recover where a defendant establishes a demand equal to, or greater than, plaintiff's claim.[6] The defendant's claim may be pleaded as a cross demand by set-off,[7] recoupment,[8] or counterclaim.[9] This principle will be applied in courts of equity.[10] Where a cross demand, established under a plea of set-off,[11] recoupment,[12] counterclaim,[13] reconvention,[14] or compensation[15] is less than plaintiff's demand, he or she is entitled to recover the difference.[16] Where the court has found that a set-off is valid, it must apply the amount of the claim to extinguish the judgment.[17] However, the amount which may be offset or recouped in reduction of plaintiff's demand is limited to the amount demanded in the plea of recoupment or counterclaim.[18] In the case of an action and counterclaim for tort arising out of the same transaction, there can be no balancing of fault or offsetting of damage done between the parties.[19]

Judgment.

Where a set-off or counterclaim is pleaded, it becomes part of a single controversy between the parties and only one judgment is required.[20] If there is any evidence in support of a counterclaim, rendition of judgment for plaintiff without passing on the claim constitutes judicial error.[21] However, a failure to decide specifically on a counterclaim, where it is practically decided, is not error.[22] Additionally, it is error for the court to render judgment for the full amount of plaintiff's demand without deducting the amount set up by defendant's counterclaim which plaintiff admitted defendant was entitled to recover.[23] Where defendant establishes a counter-

claim to an amount equal to, or greater than, plaintiff's demand, the judgment must be in favor of defendant.[24] If defendant establishes a counterclaim for an amount less than plaintiff's demand, only one judgment for the plaintiff shall be entered for the difference between the amounts of the findings.[25] Where plaintiff is in default in an action in which a counterclaim is filed, a judgment for defendant on the counterclaim is proper regardless of the propriety of the action of the court in rendering a judgment on the merits of plaintiff's cause of action.[26]

Interest.

A defendant's noninterest-bearing claim should be set off against plaintiff's interest-bearing claim as of the date such claim became due and owing.[27] Thus, interest should be awarded only on the net difference between the principals of the claims allowed.[28] However, where plaintiff sues on a demand bearing interest, and defendant pleads a discount not drawing interest, plaintiff is entitled to calculate interest on his whole demand up to the time of the verdict.[29] Where plaintiff's demand does not bear interest, and defendant pleads a demand drawing interest, the jury must give interest on the set-off to the time the verdict is rendered in the action, and reduce plaintiff's demand by the amount of the set-off and the interest.[30]

When defendant owes plaintiff a much larger amount in damages than plaintiff owes defendant at the time the damages accrued, defendant is not entitled to interest on the amount owed by plaintiff.[31] If defendant's cross demand is for unliquidated damages, the set-off claim will not include any additional amount for interest because no interest is allowable on unliquidated damages.[32] A party indebted on a liquidated demand who claims an unliquidated set-off amounting to much less than the debt is liable for interest on the amount which he admits to be due.[33] Finally, an offset should not be allowed a greater rate of interest than the principal against which it is set off.[34]

[FN1] U.S.—*Capital Concepts Properties 85-1 v. Mutual First, Inc.*, 35 F.3d 170 (5th Cir. 1994).

Cal.—*McDaniel v. City and County of San Francisco*, 259 Cal. App. 2d 356, 66 Cal. Rptr. 384 (1st Dist. 1968).

As to compensation, generally, see § 11.

[FN2] U.S.—*Socony Mobil Oil Co. v. Klapal*, 205 F. Supp. 388 (D. Neb. 1962).

Mo.—*Jackson v. Farmers Union Livestock Com'n*, 238 Mo. App. 449, 181 S.W.2d 211 (1944).

[FN3] U.S.—*Bailey v. C. I. R.*, 103 F.2d 448 (C.C.A. 5th Cir. 1939).

Mo.—*Jackson v. Farmers Union Livestock Com'n*, 238 Mo. App. 449, 181 S.W.2d 211 (1944).

Neb.—*Davis Erection Co., Inc. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995).

[FN4] Cal.—*Jones v. Mortimer*, 28 Cal. 2d 627, 170 P.2d 893 (1946); *Downey v. Humphreys*, 102 Cal. App. 2d 323, 227 P.2d 484 (2d Dist. 1951).

La.—*ITT Residential Capital Corp. v. Cheuk*, 656 So. 2d 747 (La. Ct. App. 5th Cir. 1995), writ denied, 661 So. 2d 465 (La. 1995).

- Wyo.—[Dallas Dome Wyoming Oil Fields Co. v. Brooder](#), 55 Wyo. 109, 97 P.2d 311 (1939).
- [FN5] Cal.—[Brown v. Oxtoby](#), 45 Cal. App. 2d 702, 114 P.2d 622 (3d Dist. 1941).
- Iowa—[National Equipment Rental, Ltd. v. Estherville Ford, Inc.](#), 313 N.W.2d 538 (Iowa 1981).
- [FN6] Ind.—[Ertel v. Radio Corp. of America](#), 171 Ind. App. 51, 354 N.E.2d 783, 20 U.C.C. Rep. Serv. 792 (1976).
- N.M.—[Jones v. McWood Corp.](#), 76 N.M. 709, 418 P.2d 56 (1966).
- [FN7] Ind.—[Ertel v. Radio Corp. of America](#), 171 Ind. App. 51, 354 N.E.2d 783, 20 U.C.C. Rep. Serv. 792 (1976).
- [FN8] Ala.—[Southern Metal Treating Co. v. Goodner](#), 271 Ala. 510, 125 So. 2d 268 (1960).
- [FN9] Ariz.—[Pacific Guano Co. v. Pinal County Land Co.](#), 1 Ariz. App. 34, 399 P.2d 122 (1965).
- N.Y.—[Casale v. August Bohl Contracting Co.](#), 26 A.D.2d 974, 275 N.Y.S.2d 140 (3d Dep't 1966).
- [FN10] Neb.—[Taylor v. Harvey](#), 90 Neb. 770, 134 N.W. 647 (1912).
- [FN11] D.C.—[Matthew A. Welch & Sons, Inc. v. Bird](#), 193 A.2d 736 (D.C. 1963).
- Mont.—[Swecker v. Badura](#), 141 Mont. 329, 377 P.2d 752 (1963).
- [FN12] W.Va.—[Harper v. Clear Fork Coal & Land Co.](#), 80 W. Va. 246, 92 S.E. 565 (1917).
- [FN13] Ill.—[Williams v. Johnson](#), 8 Ill. App. 2d 99, 130 N.E.2d 123 (2d Dist. 1955).
- [FN14] La.—[Payne & Joubert v. Amos Kent Brick & Lumber Co.](#), 110 La. 750, 34 So. 763 (1903).
- [FN15] La.—[Stewart v. Harper](#), 16 La. Ann. 181, 1861 WL 3818 (1861).
- [FN16] U.S.—[U.S. v. Ameco Electronic Corp.](#), 224 F. Supp. 783 (E.D. N.Y. 1963).
- S.C.—[Brasington Tile Co., Inc. v. Worley](#), 327 S.C. 280, 491 S.E.2d 244 (1997).
- [FN17] La.—[Cefalu v. N. Cefalu Co.](#), 253 So. 2d 547 (La. Ct. App. 1st Cir. 1971).
- Tex.—[Montgomery v. Gallas](#), 257 S.W. 956 (Tex. Civ. App. San Antonio 1923), writ refused, (Mar. 26, 1924).
- [FN18] Iowa—[Lewis v. Farmers' Grain Co. of Cambridge](#), 214 Iowa 143, 241 N.W. 469 (1932).
- [FN19] Va.—[Hoffman v. Stuart](#), 188 Va. 785, 51 S.E.2d 239, 6 A.L.R.2d 247 (1949).
- [FN20] Mo.—[Brandtjen & Kluge v. Hunter](#), 235 Mo. App. 909, 145 S.W.2d 1009 (1940).
- R.I.—[Keystone Elevator Co., Inc. v. Johnson & Wales University](#), 850 A.2d 912 (R.I. 2004).

S.C.—[Brasington Tile Co., Inc. v. Worley](#), 327 S.C. 280, 491 S.E.2d 244 (1997).

[FN21] N.J.—[Hobson Const. Co., Inc. v. Max Drill, Inc.](#), 158 N.J. Super. 263, 385 A.2d 1256 (App. Div. 1978).

[FN22] Conn.—[Town of Essex v. Day](#), 52 Conn. 483, 1 A. 620 (1885).

[FN23] Ind.—[American Management, Inc. v. MIF Realty, L.P.](#), 666 N.E.2d 424 (Ind. Ct. App. 1996).

N.Y.—[Fish v. Hahn](#), 124 A.D. 173, 108 N.Y.S. 782 (1st Dep't 1908).

[FN24] Ohio—[Betz v. Timmons](#), 119 Ohio App. 239, 27 Ohio Op. 2d 138, 199 N.E.2d 22 (10th Dist. Franklin County 1963).

Pa.—[Pennsylvania Co., for Insurances on Lives and Granting Annuities v. Lynch](#), 308 Pa. 23, 162 A. 157 (1932).

[FN25] D.C.—[Valanos v. Telecode Corp.](#), 138 A.2d 388 (Mun. Ct. App. D.C. 1958).

R.I.—[Keystone Elevator Co., Inc. v. Johnson & Wales University](#), 850 A.2d 912 (R.I. 2004).

[FN26] Mo.—[Gooding v. Vaught](#), 279 S.W. 208 (Mo. Ct. App. 1926).

[FN27] Cal.—[Willett v. Schmeiser Mfg. Co.](#), 82 Cal. App. 249, 255 P. 529 (1st Dist. 1927).

Kan.—[Phelps Dodge Copper Products Corp. v. Alpha Const. Co.](#), 203 Kan. 591, 455 P.2d 555 (1969).

Ohio—[McLin v. Leigh](#), 74 Ohio App. 3d 127, 598 N.E.2d 731 (2d Dist. Montgomery County 1991).

[FN28] Tex.—[Dines Bldg. Co. v. Cherry](#), 49 S.W.2d 913 (Tex. Civ. App. Dallas 1932), writ dismissed w.o.j., (July 19, 1932).

[FN29] Cal.—[California Lettuce Growers v. Union Sugar Co.](#), 45 Cal. 2d 474, 289 P.2d 785, 49 A.L.R.2d 496 (1955).

[FN30] S.C.—[Morse v. Ellerbe](#), 38 S.C.L. 600, 4 Rich. 600, 1851 WL 2547 (Ct. App. Law 1851).

[FN31] N.J.—[Deerhurst Estates v. Meadow Homes, Inc.](#), 64 N.J. Super. 134, 165 A.2d 543 (App. Div. 1960).

[FN32] Ill.—[Smith v. Gray](#), 316 Ill. 488, 147 N.E. 459 (1925).

[FN33] Colo.—[Henrylyn Orchards Co. v. F.W. Meneray Crescent Nursery Co.](#), 55 Colo. 438, 135 P. 980 (1913).

[FN34] Fla.—[Holly Hill Grove & Fruit Co. v. Wicker](#), 107 Fla. 765, 143 So. 882 (1932).

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§ 101. By set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  60

The failure to urge a claim by way of set-off may constitute laches where it is coupled with delay in asserting the claim.

Generally, the defendant's failure to urge a claim by way of set-off may constitute laches where it is coupled with delay in asserting the claim.[1] Where defendant has used his claim as a set-off, it is satisfied to the extent that it was so used.[2] Where a debtor has a set-off equally applicable to two demands against him, the court will direct the application of the claim according to the equities between the parties.[3]

[FN1] U.S.—[Texas Gulf Citrus and Cattle Co. v. Kelley](#), 591 F.2d 439 (8th Cir. 1979).

Pa.—[Gilberton Fuels v. Philadelphia & Reading Coal & Iron Co.](#), 342 Pa. 192, 20 A.2d 217 (1941).

[FN2] U.S.—[Texas Gulf Citrus and Cattle Co. v. Kelley](#), 591 F.2d 439 (8th Cir. 1979).

Cal.—[Week v. Luthy Co.](#), 123 Cal. App. 427, 11 P.2d 410 (1st Dist. 1932).

[FN3] N.Y.—[Tallmadge v. Fishkill Iron Co.](#), 4 Barb. 382, 1848 WL 5095 (N.Y. Gen. Term 1848).

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§ 102. By counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑60

In many jurisdictions, a counterclaim that is logically related to the plaintiff's cause of action will be deemed waived if not brought.

Counterclaims are either compulsory (required to be made) or permissive (at the option of the defendant or the court).[1] Generally, where a counterclaim is logically related to, or arises out of the common factual background of the cause of action, it will be deemed a compulsory counterclaim.[2] For a counterclaim to be "compulsory," it must arise out of the same transaction and occurrence as the subject matter of the opposing party's claim.[3] Furthermore, in some jurisdictions, the criteria for a compulsory counterclaim includes that the claim must not require parties over whom the court may not assert jurisdiction, must not be the subject of a pending action, and must lie against an opposing party.[4] Where a counterclaim is deemed compulsory, a defendant will be precluded from bringing a later, independent action on that claim.[5] The purpose of the compulsory counterclaim rule is to promote judicial economy by resolving all related claims in one action.[6]

Counterclaims are compulsory only for opposing parties.[7] If an entity was not actually a party to the original lawsuit-nor required to join or be joined thereto-then its claim against one of the litigants to that lawsuit is not a compulsory counterclaim.[8] While a compulsory counterclaim must be brought against an "opposing party," the latter term does not include claims against the same party acting in a different capacity.[9]

If the compulsory-counterclaim rule is not limited to claims by a defendant against a plaintiff; it is possible for coparties in some circumstances to be "opposing parties," for example, when one coparty brings a claim for its own damages against another coparty.[10] If a claim by one coparty against another is only for indemnity, contribution, or allocation of fault, they are not "opposing parties" for purposes of the compulsory-counterclaim rule.[11]

A counterclaim which does not actually exist at the time of the service of an answer cannot be a compulsory counterclaim, even if it arose out of the same transaction or occurrence as the plaintiff's claim, since the existence of a counterclaim is determined at the time of service of the answer.[12] However, a claim that did not exist at the time a counterclaim is filed but arises from subsequent acts can be asserted separately.[13]

A counterclaim is not compulsory when there is no jurisdiction.[14]

Counterclaims that mature or are acquired after a pleading has been served are "permissive counterclaims" rather than "compulsory counterclaims." [15] A cross-claim is always permissive and never compulsory. [16] If the counterclaims are not compulsory, they need not be asserted in the initial pleading. [17]

Logical relationship test.

Compulsory counterclaims must arise out of the same transaction or occurrence and for the purposes of a compulsory counterclaim, a "transaction" may comprehend a series of many occurrences, depending not so much upon their connection as upon their logical relationship. [18] Thus, for the purposes of a compulsory counterclaim, the term "transaction" should be given a broad interpretation by the courts in order to avoid multiple litigation. [19] A logical relationship test is applied to determine whether counterclaims arise out of the same transaction or occurrence that is the subject matter of the opposing party's claim, as an element for a compulsory counterclaim. [20] Under the logical-relationship test, a counterclaim is compulsory if there is any logical relation of any sort between the original claim and the counterclaim. [21] A logical relationship will be found if both the claim and the counterclaim have a common origin and common subject matter. [22] In determining whether a claim is a compulsory counterclaim, the courts look to whether the claims involve all or many of the same factual and legal issues, or offshoots of the same basic controversy between the parties. [23] Thus, a logical relationship between a plaintiff's claims and a defendant's counterclaims arises, so as to make the counterclaims compulsory counterclaims, when: (1) the same aggregate or operative facts serve as the basis for both claims, or [24] (2) the case facts supporting the original claim activate legal rights of the defendant that would otherwise remain dormant. [25]

CUMULATIVE SUPPLEMENT

Cases:

The purpose of the compulsory counterclaim is to promote judicial efficiency by requiring defendants to raise claims arising from the same transaction or occurrence as the plaintiff's claim. [Peterson v. Affordable Homes of Palm Beach, Inc.](#), 65 So. 3d 112 (Fla. Dist. Ct. App. 4th Dist. 2011).

[END OF SUPPLEMENT]

[FN1] Ind.—[Bacompt Systems, Inc. v. Ashworth](#), 752 N.E.2d 140 (Ind. Ct. App. 2001).

No compulsory counterclaims in jurisdiction

Ore.—[G.B. v. Morey](#), 229 Or. App. 605, 215 P.3d 879 (2009), review denied, 347 Or. 608, 226 P.3d 43 (2010).

[FN2] N.C.—[Hudson v. Hudson](#), 135 N.C. App. 97, 518 S.E.2d 811 (1999).

[FN3] U.S.—[Noel v. Hall](#), 341 F.3d 1148 (9th Cir. 2003).

Colo.—[Allen v. Martin](#), 203 P.3d 546 (Colo. App. 2008), cert. denied, 2009 WL 501890 (Colo. 2009).

Okla.—[Valley View Angus Ranch, Inc. v. Duke Energy Field Services, Inc.](#), 497 F.3d 1096 (10th Cir. 2007).

[FN4] U.S.—[Noel v. Hall](#), 341 F.3d 1148 (9th Cir. 2003).

[FN5] Alaska—[Dickerson v. Goodman](#), 161 P.3d 1205 (Alaska 2007).

N.D.—[Security Nat. Bank, Edgeley v. Wald](#), 536 N.W.2d 924 (N.D. 1995).

[FN6] Mo.—[Hemme v. Bharti](#), 183 S.W.3d 593 (Mo. 2006).

N.C.—[Hudson v. Hudson](#), 135 N.C. App. 97, 518 S.E.2d 811 (1999).

Okla.—[McDanel v. Lynn Hickey Dodge, Inc.](#), 1999 OK 30, 979 P.2d 252 (Okla. 1999).

[FN7] Ga.—[EarthLink, Inc. v. Eaves](#), 293 Ga. App. 75, 666 S.E.2d 420 (2008), cert. denied, (Nov. 17, 2008).

[FN8] Ind.—[New Albany Residential, Inc. v. Hupp](#), 872 N.E.2d 627 (Ind. Ct. App. 2007).

[FN9] Tex.—[United States Fidelity and Guar. Co. v. Goudeau](#), 272 S.W.3d 603 (Tex. 2008).

[FN10] Mo.—[Hemme v. Bharti](#), 183 S.W.3d 593 (Mo. 2006).

[FN11] Mo.—[Hemme v. Bharti](#), 183 S.W.3d 593 (Mo. 2006).

[FN12] Ala.—[Bedsole v. Goodloe](#), 912 So. 2d 508 (Ala. 2005).

[FN13] Ga.—[Yates Paving & Grading Co. v. Bryan County](#), 265 Ga. App. 578, 594 S.E.2d 756 (2004).

[FN14] Ga.—[EarthLink, Inc. v. Eaves](#), 293 Ga. App. 75, 666 S.E.2d 420 (2008), cert. denied, (Nov. 17, 2008).

[FN15] Ga.—[Sampson v. Haywire Ventures, Inc.](#), 278 Ga. App. 525, 629 S.E.2d 515 (2006).

[FN16] Mo.—[Hemme v. Bharti](#), 183 S.W.3d 593 (Mo. 2006).

[FN17] Ga.—[EarthLink, Inc. v. Eaves](#), 293 Ga. App. 75, 666 S.E.2d 420 (2008), cert. denied, (Nov. 17, 2008).

[FN18] Ind.—[Village of College Corner v. Town of West College Corner](#), 766 N.E.2d 742 (Ind. Ct. App. 2002).

[FN19] Ind.—[Village of College Corner v. Town of West College Corner](#), 766 N.E.2d 742 (Ind. Ct. App. 2002).

[FN20] Tex.—[Moore v. First Financial Resolution Enterprises, Inc.](#), 277 S.W.3d 510 (Tex. App. Dallas 2009).

[FN21] Ala.—[Ex parte J.C. Duke & Associates, Inc.](#), 4 So. 3d 1092 (Ala. 2008).

[FN22] N.M.—[Adams v. Key](#), 145 N.M. 52, 2008-NMCA-135, 193 P.3d 599 (Ct. App. 2008).

[FN23] Colo.—[Dinosaur Park Investments, L.L.C. v. Tello](#), 192 P.3d 513 (Colo. App. 2008).

Ohio—[Lewis v. Harding](#), 182 Ohio App. 3d 588, 2009-Ohio-3071, 913 N.E.2d 1048 (8th Dist. Cuyahoga County 2009), appeal not allowed, 123 Ohio St. 3d 1509, 2009-Ohio-6210, 917 N.E.2d 811 (2009).

[FN24] Ga.—[Steve A. Martin Agency, Inc. v. PlantersFIRST Corp.](#), 297 Ga. App. 780, 678 S.E.2d 186 (2009).

Ind.—[Centex Home Equity Corp. v. Robinson](#), 776 N.E.2d 935 (Ind. Ct. App. 2002).

[FN25] Ga.—[Steve A. Martin Agency, Inc. v. PlantersFIRST Corp.](#), 297 Ga. App. 780, 678 S.E.2d 186 (2009).

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§ 103. By recoupment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑56

There is no agreement among the courts as to whether a plea of recoupment admits the plaintiff's cause of action.

In some jurisdictions a plea of recoupment admits plaintiff's cause of action^[1] and alleges a cause of action in defendant's behalf.^[2] As such, the defendant cannot deny plaintiff's cause of action and at the same time claim a recoupment arising out of the same transaction on which plaintiff's cause of action is based.^[3] Nevertheless, while a plea of recoupment alone is equivalent to an admission of plaintiff's claim, a plea of nonassumpsit accompanied by a plea of recoupment, or a notice of recoupment, will not have that effect.^[4] In other jurisdictions, a plea of recoupment does not confess plaintiff's cause of action^[5] but asserts that the plaintiff has no demand, or right to demand the amount claimed.^[6] However, where a defendant admits part of the indebtedness under a contract sued on by the plaintiff and claims the right to recoup as to the other part, the court has the power to render judgment for the amount so admitted and submit the issue as to the balance to the jury.^[7]

[FN1] Fla.—*Ness v. Cowdery*, 110 Fla. 427, 149 So. 33 (1933).

[FN2] N.Y.—*Vassear v. Livingston*, 13 N.Y. 248, 1855 WL 6880 (1855); *Nichols v. Dusenbury*, 2 N.Y. 283, 1849 WL 5325 (1849).

[FN3] Mich.—*Meyers v. Jay-Bee Realty Corp.*, 300 Mich. 522, 2 N.W.2d 488 (1942).

[FN4] U.S.—*Hornblower v. George Washington University*, 31 App. D.C. 64, 14 Am. Ann. Cas. 696, 1908 WL 27810 (App. D.C. 1908).

[FN5] Ala.—*Carolina Portland Cement Co. v. Alabama Const. Co.*, 162 Ala. 380, 50 So. 332 (1909).

[FN6] Ala.—*Carolina Portland Cement Co. v. Alabama Const. Co.*, 162 Ala. 380, 50 So. 332 (1909).

[FN7] Ill.—*Severin v. Conway*, 172 Ill. App. 257, 1912 WL 2539 (1st Dist. 1912).

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§ 104. Abandonment or withdrawal of cross demand

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  61

Generally, a defendant may withdraw a set-off or counterclaim before final submission of the cause.

Unless provided otherwise by statute,[1] a defendant who has filed a plea of set-off has the right to withdraw it before proceeding to trial.[2] Where a set-off has been withdrawn, it is in the discretion of the court to permit the withdrawal of the claim to be accomplished without prejudice to reinstatement of the claim.[3] A reinstatement at a subsequent term, when the opposite party might not be prepared to meet the claim, should be refused.[4] A defendant who appears and files an answer of set-off and abandons his or her defense, waives the right with respect to the set-off in that action.[5]

Counterclaim.

While a defendant may abandon or withdraw his or her counterclaim[6] at any time before final submission,[7] a defendant cannot do so and thus keep back a portion of the matter in litigation from adjudication.[8] A defendant, pleading a counterclaim arising out of the contract constituting the basis of plaintiff's action, cannot withdraw his or her counterclaim over plaintiff's objections.[9] Many statutes require a defendant to plead a counterclaim as a defense to the cause of action or the claim will be deemed waived.[10] A defendant may not withdraw or dismiss his or her counterclaim after final submission.[11] However, the refusal to permit defendant to dismiss his or her counterclaim before judgment where plaintiff had been permitted to dismiss his or her case without prejudice was deemed prejudicial to the defendant.[12] The cause of action set up in a counterclaim is considered abandoned where defendant fails to introduce evidence in support of it.[13]

Where defendant's answer contains only a counterclaim, if the defendant withdraws the counterclaim, judgment must be rendered for plaintiff for the amount of his or her claim.[14] A plaintiff is not entitled to the benefit of any admissions contained in an abandoned counterclaim unless it is introduced in evidence.[15]

Reconvention.

A defendant has the right to discontinue a reconventional demand at any time prior to judgment unless some acquired right of the plaintiff would thereby be impaired.[16]

[FN1] Mich.—*People ex rel. Green v. McCutcheon*, 40 Mich. 244, 1879 WL 3055 (1879).

[FN2] Me.—*Theobald v. Colby*, 35 Me. 179, 1853 WL 1793 (1853).

[FN3] Ill.—*Mineral Point R. Co. v. Keep*, 22 Ill. 9, 1859 WL 6809 (1859).

[FN4] Ill.—*Mineral Point R. Co. v. Keep*, 22 Ill. 9, 1859 WL 6809 (1859).

[FN5] Ind.—*Aston v. Wallace*, 43 Ind. 468, 1873 WL 5318 (1873).

As to whether or not defendant is barred from suing on a demand which was the subject of a withdrawn set-off, generally, see *C.J.S., Judgments §§ 776 to 777*.

[FN6] Neb.—*Harbert v. Mueller*, 156 Neb. 838, 58 N.W.2d 221 (1953).

[FN7] Neb.—*Miller v. McGannon*, 79 Neb. 609, 113 N.W. 170 (1907).

[FN8] Mo.—*Snell v. Harrison*, 104 Mo. 158, 16 S.W. 152 (1891).

[FN9] N.C.—*McGee v. Frohman*, 207 N.C. 475, 177 S.E. 327 (1934).

[FN10] Tex.—*McGuire v. Commercial Union Ins. Co. of New York*, 431 S.W.2d 347 (Tex. 1968).

[FN11] U.S.—*Elliott v. Peet*, 202 F. 434 (C.C.A. 3d Cir. 1913).

Neb.—*Harbert v. Mueller*, 156 Neb. 838, 58 N.W.2d 221 (1953).

[FN12] Ohio—*Piesekar v. Eschuk*, 27 Ohio App. 439, 6 Ohio L. Abs. 107, 161 N.E. 355 (8th Dist. Cuyahoga County 1927).

[FN13] Iowa—*Kurtz v. Hoffman*, 65 Iowa 260, 21 N.W. 597 (1884).

Mo.—*Shade v. Brinkopf*, 119 S.W.2d 444 (Mo. Ct. App. 1938).

[FN14] U.S.—*Atlanta Mach. Works v. U.S.*, 114 F. 364 (C.C.N.D. Ga. 1902).

[FN15] Mo.—*Shade v. Brinkopf*, 119 S.W.2d 444 (Mo. Ct. App. 1938).

[FN16] La.—*Barbara, Inc. v. Billelo*, 212 La. 937, 33 So. 2d 689 (1947).

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§ 105. By set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑56

Generally, a plea of set-off admits the plaintiff's cause of action, although a defendant may plead a general denial in addition to the set-off and thereby deny the plaintiff's claim.

Generally, a plea of set-off admits the plaintiff's cause of action^[1] in the absence of a statute providing to the contrary.^[2] This is especially true where the wording of the plea is such that an admission is necessarily implied.^[3] If a defendant fails to establish his or her set-off, the judgment should be rendered against him or her for plaintiff's demand.^[4] However, a defendant may plead a general denial or another defense in addition to the set-off and thereby deny plaintiff's claim.^[5] In that case, a judgment for defendant is not dependent on his or her establishment of the set-off.^[6]

[FN1] La.—*Hill Wholesale Distributing Co., Inc. v. Louis W. Howat & Son*, 666 So. 2d 1252 (La. Ct. App. 2d Cir. 1996).

Fla.—*Ness v. Cowdery*, 110 Fla. 427, 149 So. 33 (1933).

[FN2] Ala.—*Davis v. Evans*, 261 Ala. 548, 74 So. 2d 705, 48 A.L.R.2d 740 (1954).

[FN3] Ill.—*U.S. Fashion & Sample Book Co. v. Schmidt*, 209 Ill. App. 240, 1917 WL 3025 (1st Dist. 1917).

[FN4] Ill.—*Raymond v. Kerker*, 81 Ill. 381, 1876 WL 9999 (1876).

[FN5] Fla.—*Scott v. National City Bank of Tampa*, 107 Fla. 818, 139 So. 370 (1931), on reh'g, 107 Fla. 818, 142 So. 650 (1932).

[FN6] Fla.—*Scott v. National City Bank of Tampa*, 107 Fla. 818, 139 So. 370 (1931), on reh'g, 107 Fla. 818, 142 So. 650 (1932).

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§ 106. By counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  56

While generally, the pleading of a counterclaim does not admit the plaintiff's cause of action, there is also authority to the contrary.

Generally, the pleading of a counterclaim does not admit a plaintiff's cause of action,[1] as where the counterclaim is in the form of an alternative pleading.[2] Additionally, a counterclaim may be set up without conceding the existence of a cause of action.[3] Usually, a defendant need not admit the truth of facts alleged in plaintiff's petition as a condition precedent to his or her maintaining a counterclaim.[4] However, the wording of a counterclaim may constitute an admission of the cause of action set out in the complaint.[5]

[FN1] Fla.—[Cardona v. Lynstar Corp.](#), 955 So. 2d 25 (Fla. Dist. Ct. App. 3d Dist. 2007).

Minn.—[Trainor v. Wouman](#), 34 Minn. 237, 25 N.W. 401 (1885).

[FN2] Fla.—[Cardona v. Lynstar Corp.](#), 955 So. 2d 25 (Fla. Dist. Ct. App. 3d Dist. 2007).

[FN3] Mo.—[Shade v. Brinkopf](#), 119 S.W.2d 444 (Mo. Ct. App. 1938).

[FN4] Ohio—[McCaskey Register Co. v. American Case & Register Co.](#), 8 Ohio N.P. (n.s.) 415, 19 Ohio Dec. 562, 1909 WL 1261 (C.P. 1909).

[FN5] Minn.—[Carlson v. Cohen](#), 302 Minn. 531, 223 N.W.2d 810 (1974).

Tex.—[Radford v. Hutto](#), 113 S.W.2d 563 (Tex. Civ. App. Amarillo 1938).

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§ 107. By compensation and reconvention

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  56

A plea for compensation admits the debt sued on.

Admission of the debt sued upon is an element of the defense of compensation.^[1] However, the pleadings may admit only part of the alleged claim and set up a reconventional demand against such portion.^[2]

[FN1] La.—*Keiser v. Catholic Diocese of Shreveport, Inc.*, 880 So. 2d 230, 191 Ed. Law Rep. 910 (La. Ct. App. 2d Cir. 2004); *Buck's Run Enterprises, Inc. v. Mapp Const., Inc.*, 808 So. 2d 428 (La. Ct. App. 1st Cir. 2001).

[FN2] La.—*Wadlington v. Barron*, 91 So. 2d 448 (La. Ct. App. 2d Cir. 1956).

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§ 108. By recoupment

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑59

The common-law prohibition of an affirmative judgment for damages in the defendant's favor on a claim of recoupment has been changed by statute in many jurisdictions.

Generally, in the absence of a statute providing otherwise, the affirmative defense of recoupment only serves to reduce or extinguish the damages and cannot be made the ground for an affirmative judgment for damages in defendant's favor.[1] The common-law doctrine above stated has been changed by statute in many jurisdictions, and a defendant who successfully sustains a plea of recoupment is entitled to judgment for any excess of his claim over plaintiff's demand.[2] A party who has a defense by way of recoupment will not be permitted to seek affirmative relief by way of subrogation.[3]

CUMULATIVE SUPPLEMENT

Cases:

Recoupment does not allow the defendant to pursue damages in excess of the plaintiff's judgment award. [Schettler v. RalRon Capital Corporation](#), 275 P.3d 933, 128 Nev. Adv. Op. No. 20 (Nev. 2012).

[END OF SUPPLEMENT]

[FN1] U.S.—[Multivision Northwest, Inc. v. Jerrold Electronics Corp.](#), 356 F. Supp. 207, 13 U.C.C. Rep. Serv. 1013 (N.D. Ga. 1972).

Del.—[Floyd v. Ballenger](#), 258 A.2d 911 (Del. Super. Ct. 1969).

[FN2] U.S.—[Stanley v. Clark](#), 159 F. Supp. 65 (D.N.H. 1957).

N.H.—[Varney v. General Enolam, Inc.](#), 109 N.H. 514, 257 A.2d 11 (1969).

[FN3] Ark.—[Lyman v. Corwin](#), 27 Ark. 580, 1872 WL 1069 (1872).

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§ 109. By set-off

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑59

In common-law jurisdictions, a defendant who has pleaded set-off is not entitled to recover the excess of his claim over the plaintiff's demand, however this is contrary to the statutes of many jurisdictions.

In the absence of an expressed statute provision, a defendant who has pleaded set-off is not entitled to recover the excess of his or her claim over plaintiff's demand.[1] However, the statutes of many jurisdictions permit the defendant establishing a set-off to obtain a judgment for the excess amount.[2] Where a defendant pleads a set-off, plaintiff cannot, by refusing to proceed with the case, defeat defendant's right to recover under his set-off.[3] While generally there can be no judgment on a set-off unless some portion of the plaintiff's demand is allowed,[4] where the plaintiff fails to show a right of recovery on his alleged cause of action, a defendant may recover the full amount of his claim.[5] A set-off against a plaintiff's action must be of a matter mutually subsisting between the parties.[6] A debt to one of several defendants, although a good defense to the action, does not authorize a judgment in favor of defendant against plaintiff for the excess.[7]

[FN1] U.S.—*Norwalk Cove Marina, Inc. v. S/V ODYSSEUS*, 64 Fed. Appx. 319 (2d Cir. 2003).

N.Y.—*Schenck v. Coordinated Coverage Corp.*, 50 A.D.2d 50, 376 N.Y.S.2d 131 (1st Dep't 1975).

[FN2] Mo.—*Edmonds v. Stratton*, 457 S.W.2d 228 (Mo. Ct. App. 1970).

[FN3] Ga.—*Simon v. Myers*, 68 Ga. 74, 1881 WL 3554 (1881).

[FN4] Tenn.—*Baker v. Grigsby*, 54 Tenn. 627, 7 Heisk. 627, 1872 WL 3810 (1872).

[FN5] Ala.—*Jordan v. Austin*, 161 Ala. 585, 50 So. 70 (1909).

Pa.—*Snyder v. Rainey*, 198 Pa. 356, 47 A. 998 (1901).

[FN6] Ala.—*Jasper Mercantile Co. v. O'Rear*, 112 Ala. 247, 20 So. 583 (1896).

As to mutuality, generally, see §§ [65](#) to [75](#).

[FN7] Ala.—[Locke v. Locke](#), 57 Ala. 473, 1876 WL 1447 (1876).

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§ 110. By counterclaim

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  59

Generally, where a defendant substantiates a counterclaim which exceeds the plaintiff's demand, the defendant is entitled to a judgment for the excess.

Where a defendant pleads and proves a counterclaim which exceeds plaintiff's demand, the defendant is entitled to a judgment for the excess.[1] A counterclaim, when admitted, will entitle a defendant to a judgment for the full amount less any amount found to be due the plaintiff.[2] A defendant can only recover the excess over plaintiff's recovery where plaintiff succeeds as to some part of his or her claim.[3] Where the plaintiff fails to show a right of recovery, a defendant is entitled to judgment for the full amount of his counterclaim if established by the evidence.[4]

Where a defendant has admitted plaintiff's claim, any judgment awarded to the defendant must be reduced by the amount of the plaintiff's claim.[5] A defendant is limited to a judgment for the amount pleaded in the counterclaim.[6]

[FN1] U.S.—[Multivision Northwest, Inc. v. Jerrold Electronics Corp.](#), 356 F. Supp. 207, 13 U.C.C. Rep. Serv. 1013 (N.D. Ga. 1972).

Mo.—[MFA Co-op. Ass'n of Ash Grove v. Elliott](#), 479 S.W.2d 129 (Mo. Ct. App. 1972).

[FN2] N.Y.—[Lipman v. New York Herald Tribune](#), 114 N.Y.S.2d 7 (Sup 1952).

[FN3] N.Y.—[Lipman v. New York Herald Tribune](#), 114 N.Y.S.2d 7 (Sup 1952).

[FN4] Ill.—[Moore v. Wright](#), 4 Ill. App. 443, 1879 WL 8820 (2d Dist. 1879).

[FN5] N.Y.—[Darlington v. Hamilton Bank of New York City](#), 63 Misc. 289, 116 N.Y.S. 678 (App. Term 1909).

[FN6] N.Y.—[Standard Oil Co. of New York v. Boyle](#), 237 A.D. 471, 261 N.Y.S. 512 (4th Dep't 1933).

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§ 111. By compensation or reconvention

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#) 🔑59

A defendant may recover an affirmative judgment on a plea in compensation or reconvention.

A defendant may recover an affirmative judgment on a plea in compensation or reconvention where the claimed amount exceeds the plaintiff's claim.[1] Where a plea in reconvention is sustained by the evidence, any admissions contained in the plea will be allowed even if plaintiff does not establish his or her claim.[2] However, where a plaintiff takes a nonsuit, the defendant's reconvention will be disregarded.[3] Where a plea in reconvention admits the plaintiff's title to property, but claims damages for a breach of contract, and the defendant has recovered damages under his plea, it is error for the court to enter judgment denying plaintiff the recovery of the property.[4]

[FN1] La.—[Webb v. Hammond](#), 144 So. 2d 283 (La. Ct. App. 1st Cir. 1962).

[FN2] La.—[Gilly v. Logan](#), 2 Mart. (n.s.) 196, 1824 WL 1752 (La. 1824).

[FN3] La.—[McDonough v. Hart](#), 3 La. 457, 1832 WL 715 (1832).

[FN4] Tex.—[Barker v. Broadus](#), 46 Tex. Civ. App. 516, 103 S.W. 191 (1907).

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§ 112. By actions by or against assignee or fiduciary

West's Key Number Digest

West's Key Number Digest, [Set-Off and Counterclaim](#)  59

In an action by an assignee, the defendant cannot recover an affirmative judgment against the assignee on a claim against the assignor.

In an action by an assignee, a claim in favor of a defendant against the assignor can be allowed as a set-off,[1] counterclaim,[2] or reconvention[3] only to the extent of the claim sued on, and judgment cannot be rendered against the assignee for the excess. A defendant is only entitled to use the claim defensively.[4]

[FN1] U.S.—[Manufacturers' Finance Corp. v. Vye-Neill Co.](#), 62 F.2d 625 (C.C.A. 1st Cir. 1933).

N.J.—[Pargman v. Maguth](#), 2 N.J. Super. 33, 64 A.2d 456 (App. Div. 1949).

[FN2] U.S.—[Marley v. U. S.](#), 191 Ct. Cl. 205, 423 F.2d 324 (1970).

N.J.—[Pargman v. Maguth](#), 2 N.J. Super. 33, 64 A.2d 456 (App. Div. 1949).

S.C.—[Bank of Commerce of Charlotte, N. C. v. Waters](#), 215 S.C. 543, 56 S.E.2d 350 (1949).

[FN3] S.C.—[Bank of Commerce of Charlotte, N. C. v. Waters](#), 215 S.C. 543, 56 S.E.2d 350 (1949).

Tex.—[Reese v. Teagarden](#), 31 Tex. 642, 1869 WL 4735 (1869).

[FN4] U.S.—[Riverside Park Realty Co. v. Federal Deposit Ins. Corp.](#), 465 F. Supp. 305 (M.D. Tenn. 1978).

Mo.—[Standard Insulation & Window Co. v. Dorrell](#), 309 S.W.2d 701 (Mo. Ct. App. 1958).

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