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RECOUPMENT.

The title at the head of this article is frequently met with in modern reports, and, like most new principles struggling for a place in our jurisprudence, it has not been accepted with the same signification by the different courts that have passed upon it. Chief Justice Redfield, a few years since, in speaking of recoupment, said: "The modern use of this term is confessedly so indefinite as to afford no reasonable grounds upon which it is safe to proceed." [1] Since then there have been some decisions and discussions tending to fix its meaning, or at least to indicate the limits and qualifications within which it must be eventually developed. It is thought that not so much a review of the authorities, (which would extend this article beyond proper limits,) as a plain statement of the results of such review, might aid in determining the true nature of modern recoupment—an undertaking which, in its present accomplishment, may not, we will readily admit, offer the satisfaction which every one has the right to expect from a careful examination of a question or principle of law that has been adjudicated upon as much as this.

The term itself is derived from the French word *recouper*, which

[1] Barber *vs.* Chapin, 28 Vt. 413.

means, to cut again : hence, to defalk, to discount. The use of it in the common law is not new, but it seems recently to have assumed a new signification. In the time of Lord Coke and before, it implied a mere deduction from the damages claimed by the plaintiff, on account of part payment of the demand, or a former recovery, or some analogous fact.[1] This signification prevailed for a long time, and it has been retained in some modern cases, but generally under the name of deduction or reduction of damages,[2] which is perhaps the more proper term for this class of cases.[3] There are a few cases in which the ancient meaning as well as name has been retained.[4] It must be admitted that there is great difficulty sometimes in distinguishing a case of recoupment, under the modern signification, from a case of reduction of damages.

By the right of recoupment, is now most generally understood that right on the part of the defendant, in the same action, to claim damages from the plaintiff, because he has not complied with some duty or obligation imposed upon him by the same contract upon which he sues.[5] It is true that some courts have assumed to extend

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[1] 1 Dyer, 2 b; Pennant's Case, 3 Co. 65; Coulter's Case, 5 Co. 2, 31; Slade's Case, 4 Co. 94; Lifford's Case, 11 Co. 51, 52; note to Iceley *vs.* Grew, 6 Nev. & Man. 467; Vin. Abr. Discount, Pl. 3, 4, 9, 10; Barber *vs.* Chapin, 28 Vt. 413.

[2] Goodsall *vs.* Boldero, 9 East, 72; Dalby *vs.* Life Ins. Co. 15, C. B. 365; Puller *vs.* Stansforth, 11 East. 232; Graham *vs.* Tate, 1 M. & S. 318, 328; Barclay *vs.* Stirling, 5 M. & Sel. 6 and 10; Heckscher *vs.* McCrea, 24 Wend. 304; 2 Denio, 610.

[3] 2 Par. Con. 246.

[4] Saltus *vs.* Everett, 20 Wend. 267; Stearns *vs.* Marsh, 4 Denio. 227.

[5] McAllister *vs.* Reab, 4 Wend. 483; Reab *vs.* McAllister, 8 Wend. 109; Epperly *vs.* Bailey, 3 Ind. 72; Houston *vs.* Young, 7 Ind. 200; Baker *vs.* Railsback, 4 Ind. 533; Heaston *vs.* Colgrove, 3 Ind. 265; Hunter *vs.* Waldron, 7 Ala. 753; Hatchell *vs.* Gibson, 13 Ala. 587; Jones *vs.* Deyer, 16 Ala. 221; Robertson *vs.* Davenport, 27 Ala. 574; Wheat *vs.* Dotson, 12 Ark. 699; Robinson vs. Mace, 16 Ark. 97; Brunson *vs.* Martin, 17 Ark. 270; Allaire *vs.* Guion, 10 Barb. 55; Mayor *vs.* Mabie, 3 Kernan, 151; Deming *vs.* Kemp, 4 Sandf. 147; Peabody *vs.* Bloomer, 5 Duer. 678; Culver *vs.* Blake, 6 B. Mon. 528; Boggs *vs.* Martin, 13 B. Mon. 239; Tinsley *vs.* Tinsley, 15 B. Mon. 454; Ward *vs.* Feller, 3 Mich. 281; Bancroft *vs* Peters, 4 Mich. 619; Rogers *vs.* Humphrey, 39 Maine, 382; Higgins *vs.* Lee, 16 Ill. 495; Batterman *vs.* Price, 3 Hill, 172; Lemon *vs.* Trull, 13 How. Pr. 248; Timmons *vs.* Dunn, 4 O. St. 680; Upton *vs.* Julian, 7 O. 95; Steamer *vs.* Geisse, 3 O. 337; Evans *vs.* Hall, 1 Handy, 434.

the principle of recoupment to actions of tort, but this, we think, can be shown to be unwarrantable. It has also been extended to damages or causes of action arising out of the transaction upon which the plaintiff's action rests, where such damages do not constitute a violation of any contract. But it may be questioned whether this is not an extension of it beyond those limits in which it can be applied with certainty. We shall recur to this part of the subject again.

The reason upon which it rests is an avoidance of the circuity of action—the obvious convenience of settling opposing breaches of a contract in one action, instead of resorting to the expense of several. It is somewhat singular that a principle so just and equitable as this should have waited so long for recognition in a cultivated system of jurisprudence like our own.

Thus established, it seems to correspond with the reconvention of the civil law, sometimes termed "*demandes incidentes*" by the French writers, in which the defendant was permitted to exhibit his claim of damages against the plaintiff for allowance, provided it arose out of or was incidental to the plaintiff's cause of action.

It seems to have been well established and defined in the civil law, and in the systems of jurisprudence that have emanated from it.[1] But we think that the common lawyer may have the satisfaction of knowing, that our doctrine of recoupment has not been introduced from the civil law. For in no case or discourse upon the subject have we found a single reference to the principle of reconvention as contained in the civil law. Our astonishment, however, is not so great that the principle was not seized upon and transplanted from the Roman law, where it flourished in undoubted efficiency, as, from its obvious convenience and economy in the administration of justice, it should not have found an original and permanent abiding-place with us at an earlier day.

[1] 9 *O'Evres De Pothier*, 39; 1 White's New *Recoplacion*, 285; *Voet. Tit. de Judiciis*, n. 78; Code Pr. La. Art. 375; Boyd *vs.* Warfield, 6 Mart. N. S. 671; La Coste *vs.* Bordere, 7 Mart. N. S. 517; Lanassis Syndics *vs.* Pimpienella, 4 Mart. N. S. 439; Wilcoxon *vs.* Buford's heirs, 10 La. 185; Miller *vs.* Stewart, 12 La. Ann. 170; Knox *vs.* Thompson, 12 La. Ann. 114; Morgan *vs.* Lathrop, Ibid, 257; Zeringer *vs.* Rixner, 14 La. 385; 2 Hennen's Dig. Tit. Pl 8, b.; Walcott *vs.* Hendrick, 6 Tex. 406.

As the doctrine is not universally recognized, it might be a work of profit, as well as curiosity, to glance at the changing phases it has presented in struggling through the barriers of the common law.

It has been regarded by some, as an unliquidated offset, that has crept in, in mitigation of the statutes of offset. Perhaps those statutes have given impulse to it, and in some cases suggested its existence. But we think traces of it will be found prior to the statutes of offset. Indeed, long before those statutes, Chief Justice Hale decided that where there were mutual claims between two parties on account of the same dealings, and one of them became a bankrupt, the other should be held for the balance only.[1] The deduction from damages allowed by the common law courts was also one step towards the doctrine.[2]

Under the common law system of pleading, which aimed at confining the issues in a suit to a single point, the defendant was deprived of those many defenses which at the present day tend to rescue the law from its former opprobrium of circuity, expense, and delay.

It was a well-fixed principle of the common law, that fraud vitiated everything into which it entered.[3] That the plaintiff was guilty of fraud, in the making of a contract, was a perfect defense to an action brought to enforce it. It soon became apparent, however, that, notwithstanding the plaintiff's fraud, the defendant frequently derived profit and advantage from the transaction. This led to the doctrine of the recission of contracts, on the ground of fraud. The defendant was required, on first discovering it, to give notice of his recission of the contract, to return the subject-matter, if it was a sale, and to put matters in the same condition as before the sale or contract, as near as circumstances would admit. After he had done this, his plea of fraud was a perfect defense, inasmuch as it denied the existence and obligation of the contract.[4]

[1] Chapman *vs.* Derby, 1 Vern. 117. [2] Kist *vs.* Atkinson, 2 Cowp. 63.

[3] Fermor's Case, 3 Co. 77; Bright *vs.* Engon, 1 Bur. 390; Dingley *vs.* Robinson, 5 Greenl. 127; Ferguson *vs.* Carrington, 9 Barn. & Cres. 59; 1 Mason, 437; Peak Cas. 206; Story Con. § 495; 2 Par. Con. 264; 12 Ark. 703.

[4] Steel *vs.* Brown, 1 Taunt. 381; Deady *vs.* Harrison, 1 Stark, 60; Marson *vs.* Bovet, 1 Denio, 69; Tisdale *vs.* Buckmore, 36 Maine, 161; Herrin *vs.* Libbey, 36 Maine, 350; Poor *vs.* Woodburn, 25 Vt. 234.

Thus the law was established which regards contracts not as void, but voidable only, on the ground of fraud, at the option of the innocent party. If he failed to manifest his choice of recission by such acts as we have mentioned, his plea of fraud was no defense, unless it went to show that, in consequence of the fraud, he had received no benefit whatever from the contract, or, in other words, that there had been a total failure of consideration. This could always be pleaded without any notice of recission. But if the failure of consideration was only partial, and there was no recission, the defendant was driven to his action on the warranty, if there was one, or to an action for fraud and deceit.[1] Now, in this country, the courts have been more ready to admit a partial failure of consideration as a defense *pro tanto*, without any notice of recission, where it has been caused by fraud, than where it is the result merely of a breach of warranty.[2] This is admitted by way of recoupment, or reduction of damages, to avoid circuity of action. In England, it seems that, for some reason or other, this principle of reduction of damages for failure of consideration in cases of fraud was not recognized as soon in such cases as in some others.

In an action on a contract for the price of labor, it was of course always admitted, that where the defendant received no benefit at all, there was a total failure of consideration, which was a good defense.[3] But, it was originally held, that where any benefit at all was received by the employer, he could not plead the unskilfulness or negligence of his employee in the performance of his contract, when sued for the stipulated price of the labor,[4] but had to resort to an independent action to avail himself of this circumstance. The defense was allowed in this class of cases as early as 1806, in abatement of dam-

[1] Solomon *vs.* Turner, 1 Stark. 51; Archer *vs.* Bamford, 3 Stark, 175; Kimball *vs.* Cunningham, 4 Mass. 502; Tye *vs.* Gwynne, 2 Campb. 346; Pulsifer *vs.* Hotchkiss, 12 Conn. 234; Harlan *vs.* Reed, 3 Ham. O. 285.

[2] Hills *vs.* Bannister, 8 Cow. 31; Sill *vs.* Rood, 15 John, 230; McAllister *vs.* Reab, 4 Wend. 483; Pulsifer *vs.* Hotchkiss, 12 Conn 234; Lewis *vs.* Cosgrove, 2 Taunt. 2.

[3] Templar *vs.* McLachlan, 5 Bos. & P. 136; Shaw *vs.* Arden, 9 Bing. 287; Day *vs.* Nix, 9 Moore, 159; Pulsifer *vs.* Hotchkiss, 12 Conn. 234; McAlpine *vs.* Lee, 12 Conn. 129.

[4] Basten *vs.* Butter, 7 East. 479.

ages to the extent of the injury suffered through the negligence of the plaintiff in depreciating the value of the consideration. The rule was established in *Fisher* vs. *Samuda*, 1 Campb. 190, and has met with pretty general approval in this country, that the employee should recover only for the value of what he has done.[1] It was in this class of cases that we find the first recognition in England of the justice and economy of recoupment.

Courts have differed as to the manner in which the evidence of this failure of consideration should be admitted, and the doctrine itself was extended with some reluctance to other classes of cases in which it was equally applicable.

It was admitted by some courts only on the *quantum meruit* counts,[2] and not on the express contract.

A distinction was also taken by some courts, between an action for the contract price and one upon a note or other security given to cover the price, the defense of recoupment or reduction not being allowed in the latter case, on the ground that the security was an entire and different contract.[3] This distinction has not been generally observed in this country.[4] Again, the defense of a failure of consideration was not formerly allowed, when the action was brought on a sealed instrument, on the ground that the seal imported a consideration which could not be contradicted.[5] This distinction, too, has disappeared.

In the sale of a chattel with warranty the defendant, when sued for the price, was not formerly allowed to found any defense on a breach of the warranty. The sale and the warranty were looked

[1] Fisher *vs.* Samuda, 1 Campb. 190; Farnsworth *vs.* Garrard, 1 Camp. 40; Grant *vs.* Burton, 14 John. 377; Spalding *vs.* Vandercook, 2 Wend. 431; Crowninshield *vs.* Robinson, 1 Mason, 93; 7 East, 479.

[2] Basten *vs.* Butter, 7 East. 479; Crowninshield *vs.* Robinson, 1 Mason, 93; Draher *vs.* Randolph, 4 Harring. 454; Hunt *vs.* Otis Company, 4 Metc. 464; Thornton *vs.* Wynn, 12 Wheat, 183; Crookshank *vs.* Mallory, 2 Greene, 257; 8 Humph. 678; 6 Barb. 387.

[3] Farnsworth *vs.* Garrard, 1 Campb. 40; 2 Campb. 346; 2 Burr, 1802; 5 Bing. 533; 6 Mes. & W. 278; Moody, 483.

[4] McAllister *vs.* Reab, 8 Wend. 109; 23 Pick. 284; 22 Pick. 510.

[5] 5 Hill, 63; 6 Barb. 386; 2 John. 178; 11 Wend. 106; 14 Wend. 195; 25 Wend. 107.

upon as two distinct contracts. The right of suit attached as soon as the sale was effected. The warranty was regarded as an executory undertaking, which the plaintiff, in his declaration, was not bound to aver. Nor to maintain his action was he held to a proof of its performance.[1] But the warranty is now regarded as a part of the sale, and as entering into the consideration for which the price is to be given.[2]

There seem to have been some traces at an early day of the doctrine of recoupment in the Law Maritime, in the form of a custom of merchants to deduct from the freights due any damage ensuing to the goods through the neglect or default of the carrier.[3]

But, in regard to this class of cases, it has never obtained any footing in the English Maritime Law: for it was decided in the leading case of *Davidson* vs. *Gwynne*, 12 East. 381, that the owner could not recoup for any damage or deterioration of the goods, on account of the negligence in the master or carrier. If the cargo arrived, the freight became due, and the owner had to resort to an independent action for any redress he might be entitled to on account of the carrier's negligence. This decision has been confirmed in the modern English cases.[4] But in this country the damage to goods, resulting from the carrier's negligence or misconduct, has generally been allowed to be offset or recouped against his claim for freight.[5] This makes our law more consistent than the English.

In England, as well as in many of the States, it will be found that the doctrine of recoupment has been recognized only in a limited form. Under the name of reduction of damages, the defendant

[1] Thornton *vs.* Wynn, 12 Wheat. 183; Pulsifer *vs.* Hotchkiss, 12 Conn. 234; 1 J. J. Wilson, 282.

[2] 4 C. B. 899; Becker *vs.* Vrooman, 13 John. 302; 2 Wend. 431; 3 Wend. 236; 4 Wend. 483; 8 Wend. 109; 22 Pick. 510; 1 Mason, 437; 1 Stew. & P. 71; 9 How. U. S. 203.

[3] Malyn's Lex Mercatorio, 102, (1687 Ed.;) Bellamy *vs.* Russell, 2 Show. 167.

[4] Shield *vs.* Davies, 4 Campb. 119; Shield *vs.* Davies, 6 Taunt. 65; Gibson *vs.* Sturge, 29 Eng. L. & E. 460; S. C. 10 Ex. 622; Thomson *vs.* Gillespy, 5 E. & B. 209; S. C. 32 Eng. L. & E. 153.

[5] Edward *vs.* Todd, 1 Scam. 462; Leech *vs.* Baldwin, 5 Watts, 446; Hinsdell *vs.* Weed, 5 Denio. 172; Waring *vs.* Morse, 7 Ala. 343; 1 Par. Mar. L. 172.

is allowed to show all such violations of the contract on the part of the plaintiff as go to render the consideration less valuable; but if he wishes to recover damages affecting his interest in other other respects, he must resort to an independent action.[1] The position taken in these cases regards recoupment only as a defense, and not as a cross-action. The damages recouped must be for a depreciation of the consideration. The drift of American cases, as we have already intimated, allows the defendant to recoup for any injury which is an immediate consequence of the plaintiff's violation of his contract, whether that violation cuts down the stipulated consideration, or affirmatively injures the defendant in other respects.

It has been maintained by some, that the law of recoupment is not applicable to conveyances of real estate. The cases are quite numerous in which it is laid down that the purchaser of real estate, in defense of a suit for the purchase money, cannot recoup for a partial failure of consideration, so far as it relates to title. It is said, that if he obtains possession of the land, he acquires a partial title, which is growing stronger all the time, and may eventually become perfect; that the consideration of the conveyance, while the title is thus perfecting, cannot be said to have failed wholly; that it would be difficult to estimate the damages of any such partial failure, because, if he is not actually disturbed in his possession, the title may not prove a failure after all. It has also been maintained by some, that the purchaser should not be allowed to recoup for such partial failure, because a court of equity, in most cases, can afford a more complete remedy, by compelling the vendor to perfect the title he has assumed to convey.[2]

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[1] Mondel *vs.* Steel, 8 M. & W. 858; Stuart *vs.* Lovell, 2 Stark. 93; Kist *vs.* Atkinson, 2 Campb. 63; O'Kill *vs.* Smith, 1 Stark. 107; Denew *vs.* Doverell, 3 Campb. 450; Montrio *vs.* Jeffreys, 2 Car. & P. 113; Hamond *vs.* Holiday, 1 Car. & P. 384; Robson *vs.* Godfrey, 1 Stark. 274; McCullough *vs.* Cox, 6 Barb. 387; Culver *vs.* Blake, 6 B. Mon. 528; Rooker *vs.* Norton, Burnett, 33; McAlpin *vs.* Lee, 12 Conn. 129; Runyan *vs.* Nichols, 11 John. 547; Grant *vs.* Button, 14 John. 377; Dodge *vs.* Tilson, 12 Pick. 330; Harrington *vs.* Stratton, 22 Pick. 512; Costigan *vs.* Mohawk, & H. R. R. 2 Denio, 609; Hening *vs.* Vanhook, 8 Humph. 678; Withers *vs.* Greene, 9 How. U. S. 231; Britton *vs.* Turner, 6 N. H. 481.

[2] Frisbee *vs.* Hoffnagle, 11 John. 50; Greenleaf *vs.* Cook, 2 Wheat. 13; Wheat. *vs.* Dotson, 12 Ark. 709; Key *vs.* Henson, 17 Ark. 254.

A good deal of unnecessary confusion has been caused upon this subject by regarding title and consideration as convertible terms. After they are properly distinguished, the conflict of authorities will prove more specious than real.

The consideration of a deed without any covenants does not, in the absence of fraud, extend beyond the delivery of the instrument.[1] If the title turns out to be worthless, this is no failure of consideration, and, therefore, there is no ground for recoupment, inasmuch as the purchaser has obtained all the right and title the vendor had, and this was all the latter assumed to convey. This title, which may turn out to be defective and worthless, the vendee has taken at his own risk. The consideration for the purchase money of a deed, with covenants of warranty and quiet enjoyment, consists not only in the actual title which the vendor has and conveys, but in the covenants accompanying it, and guaranteeing it to be what it purports to be. The vendor's compliance with his warranty is a part of the consideration for the contract price.[2]

Now, if it turns out that the vendor had no title at all, the consideration for the purchase money has not failed till the vendor has failed to comply with his warranty, or, in other words, till the covenants are broken. But it is well settled that they are not broken till the vendee has been either actually evicted from the premises, or constructively evicted, by having been compelled to remove an incumbrance or purchase in an outstanding title. Until this has happened, the vendee has no cause of action on the covenants. Therefore, however morally certain the title may have failed, the consideration for the purchase money has not even partially failed, till the vendee has been legally evicted. All those cases that deny recoupment before eviction, on the ground that there has been only a partial failure of title till then, do not establish the proposition that recoupment is refused because there has been only a partial failure of consideration. Until eviction, there is no actual failure of consideration, and therefore no ground for recoupment. Till then no action on the covenants will lie, and no damages regarded as such

[1] Rawle Cov. 489, 1 Ed; Rawle Cov. 614 n. 1, 641 n. 2, 3d Ed.

[2] Street *vs.* Blay, 2 Barn. & Adol. 456.

by the law have been sustained. But after eviction or breach of the covenants, the vendee, in an action for the purchase money, is pretty generally allowed to recoup for any failure of consideration, resulting from the plaintiff's non-compliance with his covenants. And thus the distinction between real and personal contracts is fast disappearing.[1]

If the deed contains a covenant of seisin, the right to recoup would depend upon the construction given to that covenant. If, as in a few States, it is regarded as a covenant merely, that the grantor is possessed of the land he conveys, it would be broken, if at all, as soon as made, the damages would then accrue, and the right to recoup also. But if, as in most of the States, it is construed to be a covenant that the grantor is seized in fee of an indefeasible estate, although, if broken at all, it is broken as soon as made, yet as nothing but nominal damages can be recovered till eviction,[2] it is evident that the right to recoup before then would be a barren defense, and there would be no injustice in denying it till substantial damages incident to an eviction had been sustained, when the right of cross-action substantially accrues.

It has been more generally admitted that where there is a failure of consideration as to the quantity or quality of the land, the purchaser may recoup upon the covenants.[3]

It would seem that in actions of replevin, the defendant could not recoup in damages. That action consists in a claim for certain specific chattels. The right of possession is the subject of controversy, and it is evident that such right is not answered or in any way affected by an offset or counter-claim for damages.[4] In so far as the action of replevin, after the decision of the right of possession, consists in a claim for damages for detention of the property, it is

[1] Talmage *vs.* Wallis, 25 Wend. 107; Whitney *vs.* Lewis, 21 Wend. 131; Mayor *vs.* Mabie, 3 Kern. 151; Lamerson *vs.* Marvin, 8 Barb. 11; Knapp *vs.* Lee, 3 Pick. 459; Rice *vs.* Goddard, 14 Pick. 293; Pense *vs.* Huston, 6 Grath. 305; Grand Lodge *vs.* Knox, 20 Mo. 433; 21 Mo. 415; Rawle Cov. 516, 1 Ed.

[2] Dickson *vs.* Desire, 23 Mo. 151.

[3] Wheat *vs.* Dotson, 12 Ark. 699; Key *vs.* Henson, 17 Ark. 254; 2 Kent Com. Lec. 39, 470; House *vs.* Marshall, 18 Mo. 368; Grand Lodge *vs.* Knox, 20 Mo. 433.

[4] De Leyer *vs.* Michaels, 5 Abbott Pr. 203.

not so clear but that the defendant might in some such cases exercise the right of recoupment. A denial of it in such case might imply a denial in all actions of tort, a question to which we shall now devote a few remarks.

It will be observed that our definition of recoupment confines the doctrine entirely to actions of contract. This definition undoubtedly covers the majority of cases. The defendant can recoup only for a breach of the contract upon which suit is brought. Such is the import of the definition.

Now, where suit is brought upon a contract, and the defendant answers that the plaintiff is guilty of fraud in the making of the contract, whereby the consideration has partially failed, and the defendant been greatly injured in other respects, for which he claims damages, it is evident that such a case does not fall strictly within our definition, while it is equally evident, from an examination of the authorities, that the principle of recoupment has been applied to this very class of cases, although the damages for the recoupment are incident to a tort connected with the contract, rather than a breach of the contract. The law imposes the obligation of good faith and honesty in the making of contracts, as it does in all other transactions. But it can hardly be said that a fraud perpetrated in the making of a contract is a breach of the contract itself. It is a breach of duty in regard to the contract. But however this may be, the cases are unanimous in this country in allowing the defendant to recoup for damages incident to a fraud perpetrated by the plaintiff in making the contract upon which he brings suit.

But this possible departure of the doctrine of recoupment from our definition cannot be taken as authorizing it for torts generally. The authorities are not so clear or satisfactory as might be expected upon this, owing perhaps to the fact that as yet they are not very numerous.

They may be classified, 1st, into actions on contracts where the defendant has sought to recoup for some positive tort or tresspass of the plaintiff; 2d, into actions *ex delicto*, where the defendant has sought to recoup for some claim, *ex contractu*, connected with the

subject-matter of the suit; 3d, into actions of tort, where he has attempted to recoup for some tort of the plaintiff connected with the tort upon which suit is brought. As to the first class. In the case of *Allaire Works* vs. *Guion*, 10 Barb. 55, the plaintiff sued upon promissory notes given for work and labor done for the defendant. The defense was, that while the plaintiff was in the employ of defendant as his servant, he was in possession of the defendant's plans, models, and patterns of steam engines, which, contrary to his duty, he destroyed. The defendant was allowed to recoup for damages incident to this wrongful act. But the tort was also a breach of the plaintiff's contract of hiring, and the damages allowed the defendant were measured by that breach, and all evidence of malice excluded. So that the recoupment after all was for a breach of contract.

In *Brigham* vs. *Hawley*, 17 Ill. 38, the plaintiff declared on a special contract, and the general counts for work and labor, and a *quantum meruit* count. The defendant pleaded the general issue, and gave special notice that the work was in quarrying stone, and that the plaintiff, to whom quarrying tools had been delivered, refused, on discontinuing the work, to return them, to the damage of defendant. Recoupment for this tort was allowed, the court putting it upon the vague ground that the demand for the tools was connected in some way with the plaintiff's cause of action. But it is quite as evident in this as in the previous case that the plaintiff's refusal to deliver up the tools constitued a breach of duty imposed upon him by his contract of hiring.

In *Cram* vs. *Dresser*, 2 Sandf. 120, the plaintiff sued for rent. The defendant sought to recoup for the tortious and negligent acts of the landlord, committed by him while repairing the premises. But the Court held that as they did not constitute a breach of any contract, they must be regarded as independent and disconnected with the action for rent.

So in *Drake* vs. *Cockroft*, 10 How. Pr. 377, which was an action for rent, the defendant was not allowed to recoup for the tortious acts of the landlord in trespassing upon the premises, and in destroying the defendant's personal property.

In *Connor* vs. *Winton*, 7 Ind. 523, the plaintiff sued for a

deposit of money. The defendant pleaded a recoupment in damages, on account of a slander uttered by the plaintiff, to the effect that the defendant had stolen the deposit. The plea was not allowed, although the tort was evidently connected with the subject-matter of the suit. The Court, regarding the counter-claim of the code as taking the place of recoupment, took occasion in this case to give a definition which restricts it to contracts. "A counter-claim is that which might have arisen out of, or could have had some connection with, the original transactions in view of the parties, and which at the time the contract was made they could have intended, might, in some event, give one party a claim against the other for compliance or non-compliance with its provisions." In *Slayback* vs. *Jones*, 9 Ind. 470, which was a suit on a note for land and crops sold to the defendant, he pleaded in defense the trespass of plaintiff in carrying off the crops which formed a part of the consideration of the note. The defense was not admitted, the doctrine of recoupment being considered by the Court as applicable to contracts only.

In *Tinsley* vs. *Tinsley*, 15 B. Mon. 454, a suit on an injunction bond given by defendant to stay execution of a writ of restitution, he was allowed to plead in recoupment the torts of the plaintiff, in depreciating the benefits of the stay, by threats of trespass, which prevented the defendant from renting the premises. The doctrine was considered applicable to any cause of action connected with that of the plaintiff's. Now, the objection we have to this extension of the doctrine to torts is, that no principle has yet been found by which it can be determined how a tort must be connected with the plaintiff's cause of action, so as to constitute a proper foundation for recoupment. Where it amounts to a breach of the contract, the application is very plain. The recoupment, then, as we have already said, is not for the tort, but for the breach.

Next, as to actions arising *ex delicto*. In *Stow* vs. *Yarwood*, 14 Ill. 424, the plaintiff sued for a wrongful conversion of an engine. The defendant was allowed to recoup a claim arising, *ex contractu*, for repairs done upon the engine.

In *De Leyer* vs. *Michael*, 5 Abbott Pr. 203, it was said by the Court, that a lien for charges upon property might be the fit subject for a counter-claim in an action for the conversion. But, in most cases falling under this division, the defenses arising, *ex contractu*, will be found to amount to nothing more than a reduction or mitigation of damages, by admitting in evidence the defendant's equitable interest in or claim to the property converted. If a disseizor erects permanent improvements, when called upon to respond in damages, he may recoup the value of his improvements, and yet he has no action for such improvements.[1]

As to the third class. It may be said that very few actions have arisen where, in an action for a tort, the defendant has sought to affect the claim of the plaintiff by a recoupment in damages for another tort committed by the plaintiffs. In *Lovejoy* vs. *Robinson*, 8 Ind. 399, we have such a case. The plaintiff sued the defendant for a trespass caused by his cattle breaking plaintiff's close, and destroying his crops. The defendant, by way of counter-claim, proved that the plaintiff in driving them from the close injured them by beating them. The damages claimed for this injury were seventy dollars. But the recoupment was not allowed by the Supreme Court. It was held, that torts could not be liquidated by torts, however closely they might be connected. The proposition that contracts cannot be liquidated by torts commands our assent with equal reason.

But even in some of the most recent cases, the doctrine of recoupment has not been admitted to the full scope and bearing of its merits, while in others, as we have already seen, it has been extended beyond the limits of safe and proper application. It has been held, that, in the absence of statutory provisions, the Court cannot give the defendant judgment for any excess his claim for damages may have over the demand of the plaintiff; nor is he allowed to maintain an independent action for that excess.[2] If

[1] Coulter's case, 5 Coke, 131.

[2] Britton *vs.* Turner, 6 N. H. 481; 14 Ill. 424; Ward *vs.* Fellers, 3 Mich. 281; McLane *vs.* Miller, 12 Ala. 643; Batterman *vs.* Price, 3 Hill, 171; Brunson *vs.* Martin, 17 Ark. 270.

recoupment be regarded as a cross-action, as it is in modern cases, we can see no reason why the defendant's cross-claim for damages should not be recognized to its full extent, and judgment given for any excess it may justly have over the plaintiff's. The contrary rule certainly curtails materially the usefulness of the doctrine, by discouraging it whenever the balance of damages may be greatly in favor of the defendant. In such case, if circuity of action is avoided, it is only at the defendant's sacrifice of a part of his demand.

He is allowed judgment for excess in Louisiana under the law of reconvention.[1] This is now the practice in New York, and it will probably become the practice in those States whose laws allow the Court to render affirmative relief to the defendant.[2]

It seems to be well settled that, in the absence of statutory provisions, it is optional with the defendant whether he shall plead his cross-claim by way of recoupment, or resort to an independent action for its enforcement. It is a privilege, and he is not estopped in one suit by having failed to exercise it in another.[3] Where the action is upon a *quantum meruit*, it may be difficult sometimes to determine whether an exercise of the privilege is not so implied in the nature of the case as to estop its further employment.[4] Indeed, it has been laid down by some Courts, that recoupment is not applicable at all to actions on the *quantum meruit* counts.[5]

Payment after action brought, although never pleadable in defense of the action, was usually admitted in reduction of damages.[6] But the defendant can never recoup for damages suffered since action

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[1] Miller *vs.* Stewart, 12 La. An. 170.

[2] Ogden *vs.* Codington, 2 E. D. Smith, 310; Moore *vs.* Caruthers, 7 B. Mon. 681.

[3] Naylor *vs.* Schenck, 3 E. D. Smith, 135; McKinney *vs.* Springer, 3 Ind. 59; Rankin *vs.* Harper, 4 Ind. 585; McLane *vs.* Miller, 12 Ala. 643; Grant *vs.* Button, 14 John. 379; Cook *vs.* Mosely, 13 Wend. 277; Fabricotti *vs.* Launitz, 3 Sandf. 743; Hall *vs.* Clark, 21 Mo. 415.

[4] Bellinger *vs.* Craigne, 31 Barb. 534.

[5] Steamer Wellsville *vs.* Guisse, 3 O. St. 333.

[6] Pemigewassett *vs.* Brocket, 4 N. H. 557; Bischoff *vs.* Lucas, 6 Ind. 26; Shirly *vs.* Jacobs, 2 Bing. N. C. 88; Ledoir *vs.* Boucher, 7 Car. & P. 1; Richardson *vs.* Robinson, 1 M. & W. 463.

brought.[1] This restriction seems to be adopted in analogy to the common law rule, that the plaintiff could not give evidence of or declare for damages suffered since the suit was instituted.[2] It may be questioned whether this is not a misapplication of the rule. If the doctrine of recoupment is to be restricted to a mere reduction of the plaintiff's claim, as in England, we see no reason why evidence of injury sustained or contract broken since action commenced should not be admissible in reduction of damages, on the same ground that payment is admitted. And, on the other hand, if recoupment is to be regarded as a cross-action, the rule that damage suffered after action brought is not admissible in evidence, would not necessarily restrain the defendant from pleading any breach of the contract happening before he filed his plea or answer, or gave notice of special matter, which is the commencement of his action.

There has been some difference of opinion in regard to the mode in which the defense or claim of recoupment should be pleaded. Under the old common law system of pleading, the evidence of the facts relied upon for recoupment, if going to show a total failure of consideration, might be given under the general issue without any notice. But if it went to show only a partial failure of consideration, notice of it was required to prevent surprise.[3]

Under that system, it seems to have been recognized only in the form of a reduction of damages, and not as a defense or cross-action. It was neither a plea in bar nor in abatement. Nor could it be made a plea in bar by an allegation of damages sustained equal to the plaintiff's claim, for it admitted the cause of action. It was only a partial defense, and therefore did not constitute a plea. And, like all partial defenses that went to a reduction or mitigation of the plaintiff's claim, it was always admitted under the general issue. In other words, although a recoupment of damages, if pleaded, would not

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[1] 20 Eng. L. and Eq. 277, Bartlett *vs.* Holmes; Harger *vs.* Edmunds, 4 Barb. 256.

[2] Chitty Pl. 339; Gordon *vs.* Kennedy, 2 Binn. 287; 4 Barb. 256.

[3] McCullough *vs.* Cox, 6 Barb. 386; Mayor *vs.* Trowbridge, 5 Hill, 71; Batterman *vs.* Price, 3 Hill, 171; Barber *vs.* Rose, 5 Hill, 76; Whilbeck *vs.* Skinner, 7 Hill, 53; Stearns *vs.* Marsh, 4 Denio. 227; Eldridge *vs.* Mather, 2 Coms. 157; Britton *vs.* Turner, 6 N. H. 497; Estep *vs.* Morton, 6 Ind 489; Heaston *vs.* Colgrove, 3 Ind. 265.

constitute a denial of the action brought, yet it was always admitted in evidence to sustain such denial.[1] But, under the new system of practice prevailing in many of the States, and fashioned more or less after the New York Code, there is no general issue. The defendant is required to set out the facts which constitute his defense. There being no general issue to which a notice is subsidiary, he is required to plead his defense, whether it be a perfect or partial one. If partial, it is held good as a defense *pro tanto*.[2]

Where a recoupment of damages has been pleaded by the defendant, it is not always within the discretion of the plaintiff to dismiss his action so as to terminate the prosecution of the defendant's cross-claim.[3] A discontinuance will not be allowed where it results in materially prejudicing the rights of the defendant.

Recoupment proper stops with the right of cross-action arising out of the same contract upon which suit is brought. Under the name of counter-claim, this right has been extended by statutes in some of the States to causes of action arising upon any other contract, and existing at the time suit is instituted. It will be found that very different views have been taken of the scope and meaning of these statutes. In their present unsettled state a reference to them will be sufficient.[4] A. M.

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[1] Wilmarth *vs.* Babcock, 2 Hill, 194; 5 Hill, 76; Herkimer *vs.* Small, 21 Wend. 273.

[2] 6 How. Pr. 433; Bush *vs.* Prosser, 1 Kern. 352; Houghton *vs.* Townshend, 8 How. Pr. 441; McKerying *vs.* Bull, 16 N. Y. Rep. 299; House *vs.* Marshall, 18 Mo. 368.

[3] Van Alen *vs.* Schermerhorn, 14 How. Pr. 287; Cockle *vs.* Underwood, 1 Ab. Pr. 1; Seaboard & Roanoke R. R. *vs.* Ward, 18 Barb. 595.

[4] Hill *vs.* Butler, 6 O. St. 207; Lemon *vs.* Trull, 13 How. Pr. 248; Gleason *vs.* Mean, 2 Duer, 642; 9 Ind. 470; 8 Ind. 401; 10 How. Pr. 377. Seney's O. Code Pr. 94; Nash. Pl. and Pr. 75; Ky. Code Pr. 95.