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COUNTERCLAIM AND EQUITABLE DEFENSE IN VIRGINIA

W. H. MORELAND*

At this time the pressure for procedural reform is very strong. Many enthusiasts wish to adopt procedural changes because they have been adopted elsewhere, without inquiring any too closely into whether their adoption has resulted in real improvement. These views are counter-balanced by those of the more conservative members of the profession who feel that Virginia procedure is all that it should be and that change is inadvisable. It is believed that, as is usually true, neither extreme position is to be taken. There will be no attempt here to go into the broad subject of procedural reform, beyond a statement that in the writer's opinion, Virginia practice is simple and efficient. Certainly, not many Virginia lawyers would agree with the description of Virginia practice as an outmoded system of procedure filled with technical subtleties and archaic asininities, as was recently suggested.¹ There are, no doubt, many improvements that might readily be made in it. It is intended here to discuss our local law on the topics indicated in the title, which are parts of a more or less closely related subject.

The term counterclaim, which is not found in common law, is used here as a convenience to include both recoupment and set-off as these terms are used in Virginia practice. By equitable defense is meant such facts as may sustain a bill in equity to cancel or otherwise condemn a common law cause of action, to enjoin its enforcement while it is being asserted in a common law court, or to enjoin the enforcement of a judgment which might be taken thereon. We exclude from our discussion such sets of facts which might formerly have sustained a proceeding in equity, but which by judicial legislation have passed over and become true legal defenses. These may in some cases have retained the designation "equitable."² As this process is constant, the division here referred to is not entirely accurate.

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¹The Federal Rules of Civil Procedure (1938) 25 Va. L. Rev. 261, 263.

²Equitable Defenses (1940) 1 Wash. & Lee L. Rev. 153, 154.

Recoupment

This is a common law procedure which probably had its origin in equity. Many familiar principles in contract law had their origin in the same manner in the remote past. Recoupment consists of permitting the defendant to set up in his defense portions of the same transaction on which he might bring a separate action, and avail himself of them in the principal action in order to cut down the amount of the plaintiff's recovery. It is closely related to a defense but is clearly distinguishable from payment which, while a defense, is not a cause of action; and it is distinguishable from set-off which, while a cause of action, arises from a separate transaction. Its close kinship to a defense is indicated by the fact that it goes only in mitigation of damages. This is probably why some of the older cases hold that recoupment cannot be specially pleaded but must be shown under the general issue.³ The procedure developed through a long course of years and was applied in various stages of development in the several common law jurisdictions. It is subject to distinct restrictions. First, it must arise from the same transaction, tort or contract. Second, it cannot be availed of against a sealed instrument. Third, it can be used no further than to defeat the plaintiff's claim; it cannot support a recovery for any excess in favor of the defendant.⁴

The common law practice in Virginia is in accord with these principles, except that no case has been found in which recoupment has been used in a tort action. But this practice was supplemented by the adoption of the statute of "Equitable Defenses" passed in 1831, being Sections 61, 63 and 64 of an act to establish "a court of law and chancery in each of the counties of the commonwealth and in certain corporations therein mentioned." This statute, being Chapter 11, Acts of Assembly, 1830-31, passed on April 16, 1831, is a very lengthy piece of legislation which contains 102 sections. It is in the old model familiar to those who find occasion to examine the early Virginia codes.⁵

With the revision which resulted in the Code of 1849, the statute was taken apart and its sections, so far as they were re-enacted, in the code of that year appear in what a modern lawyer would consider their appropriate places.

³Barber v. Rose, 5 Hill 76 (N. Y. 1843); Sterling Organ Co. v. House, 25 W. Va. 64 (1884); Waterman on Set-off (1869) § 554.

⁴Burks, Pleading and Practice (3rd ed. 1934) c. 30 §§ 228-231; 5 Robinson's Practice (1868) 264; Lile, Note (1901) 7 Va. L. Reg. 332.

⁵See also Supplement to Revised Code (1833) p. 136.

The sections having to do with recoupment have been amended many times, but generally speaking retain their old form. They are found in the present code in sections 6145, 6146 and 6147, and are so familiar to the profession that they need not be set out at length here. The statute as it now exists makes the following changes in common law recoupment: It permits recovery beyond the amount of the plaintiff's claim. It permits recoupment in actions on sealed instruments, and it permits defenses to be set up which would entitle the defendant to relief in equity in whole or in part against the obligation of the contract. It may be noted that the statute applies only to actions on contracts. It requires recoupment under the statute to be set up in a sworn plea, and makes no provision whatever for an equitable replication to a plea.⁶ Insofar as the statute applies to true equitable defenses, we shall defer our discussion for the moment. This is recoupment as the Virginia lawyer is familiar with it today. He may recoup as at common law, proving his claim under the general issue or setting it up in a special plea, remembering of course that he cannot recover an excess that he may prove, and that this method of asserting his claim is not available if the plaintiff's action is on a sealed instrument. Or, relying on the statute, he may set up his claim in a sworn plea if the plaintiff's cause of action is on a sealed instrument, or if the defendant wishes to recover an excess over the plaintiff's demand.⁷ But in every case the defendant's claim must arise out of the same transaction. This in Virginia means the same contract, and this requirement is given a very narrow construction. For example, a case arose on a lease of mining property which contained three undertakings, among others—one, for the payment of royalties; another, by the lessee not to damage the property more than was necessary; and third, that at end of the lease the lessor might purchase, at a price to be fixed by third persons, certain property which might be put on the leased premises by the lessee. The lease ended, the lessor purchased this added property at an agreed price of \$9,000; but he failed to make payment, and the lessee, or rather his assignee, sued for the purchase price. The defend-

⁶Burks, *Pleading and Practice* (3rd ed. 1934) c. 30 §§ 228-231; Note (1895) 1 Va. L. Reg. 540.

⁷*Davis v. Baxter*, 2 Patton and Heath 133 (Va. 1856); *Columbia Accident Ass'n. v. Rockey*, 93 Va. 678, 25 S. E. 1009 (1896); *Winn. Bros. v. Lipscomb*, 127 Va. 554, 103 S. E. 623 (1920). While the statute provides for recoupment only in an action on a contract, *Mullins v. Sutherland*, 131 Va. 547, 109 S. E. 420 (1921), the recoupment itself may arise from a tort, *Newport News Ry. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011 (1906).

ant wished to avail itself of causes of action arising on breaches of the covenant to pay royalties and the covenant not to injure premises. Each of these was set up in a special plea, sworn to. Issue was taken on the plea dealing with royalties, and the plea dealing with injury to premises was demurred to. The question was whether this cause of action could be availed of in the principal action and the court held that it could not. The defense was pleaded under the statute and therefore must arise out of the same contract. The plaintiff's cause of action arose out of a contract made pursuant to a covenant in the lease, while the defendant's claim arose out of the failure of the plaintiff to perform a covenant in the lease.⁸ No reason is perceived as to why the same objection was not made to the claim for breach of covenant to pay royalties.

Set-off

This is a very ancient term which probably had its origin in equity. It is fundamental common law that if a defendant has an independent cause of action against the plaintiff not arising out of the same transaction, he must bring a separate action and cannot use his claim against the plaintiff in the action brought.⁹ A defendant so situated, however, might under some circumstances go into equity for relief and, in spite of the modifications of the common law practice, this jurisdiction in equity remains today, though to a very limited extent, as equitable set-off.¹⁰ The first statute permitting set-off at law was passed in Virginia in 1645.¹¹

While Virginia passed the first statute on the subject, it was a later English statute which furnished the model which most jurisdictions have followed.¹² The Virginia statute, passing through many amendments, appears in our code today as section 6144, with essentially the same limitations as those found in the earliest model. They are familiar to the Virginia Bar. The claim on each side, both the plaintiff's cause of action and the defendant's set-off, must be a debt, not a claim for unliquidated damages. It must be due and owing be-

⁸American Mang. Co. v. Mang. Co., 91 Va. 272, 21 S. E. 466 (1895).

⁹Langdell, Summary of Equity Pleading (2nd ed. 1880) § 151; see B. & O. v. Jameson, 13 W. Va. 833 (1878).

¹⁰Waterman on Set-off (1869) 416 et seq.; 2 Story, Equity Jurisprudence (12th ed. 1877) §§ 1435-1437.

¹¹Hennings Statutes 296; 5 Robinson's Practice (1868) 958, 999; see Note (1922) 28 W. Va. L. Q. 139; Kinzie v. Rieley, 100 Va. 709, 712, 42 S. E. 872 (1902).

¹²For English statutes see 29 Halsbury's Laws of England (2nd ed. 1938) 482; 5 Robinson's Practice (1868) 959.

tween the same parties and in the same capacity. Necessarily a set-off arises out of a different transaction.¹³ To cite a few very familiar cases, a defendant who is sued for the purchase price of stock can neither recoup nor set-off damages he sustained in a previous transaction involving the sale of stock between him and the plaintiff in which the plaintiff defrauded the defendant. This is true for the reason that the transactions were different and that the defendant's claim could not be treated as a debt.¹⁴ In another instance, a defendant was not permitted to set-off a debt arising out of a transaction between himself and the plaintiff when the latter was suing on a claim for an undisclosed partnership. The parties were not the same on each side.¹⁵

The strictness of many jurisdictions limiting set-off to a case in which debts were claimed on both sides is probably due to the fact that set-off was originally looked upon as a form of payment. In fact, today our statute on set-off also includes provisions for pleading payment, and while a tort claim or a claim for unliquidated damages could not be regarded as payment, a debt might be so considered. There seems no reason whatever today for maintaining this distinction. Our courts have felt it, and as a result we have cases which are open to serious question as a matter of principle. For example, when the plaintiff sued for the purchase price of a carload of lumber sold and delivered, the defendant was permitted to set-off a claim he had against the plaintiff for the latter's failure to deliver a carload of lumber purchased under a previous contract.¹⁶ Clearly this was not a debt but a claim for unliquidated damages, which to a common law pleader means special assumpsit. While we may very well applaud the conclusion reached by the court in this case, it is impossible to agree with its assumption that the defendant's claim constituted a debt.

In another case when the plaintiff sued for the purchase price of agricultural implements sold and delivered, the defendant set-off a cause of action arising from the following facts: the implements were sold to him under a contract with the plaintiff by which he was made the plaintiff's sole agent in his territory. He, on his part, agreed to take a certain number of implements delivered each year and to pay for them. He claimed that the plaintiff had broken his agreement to give the defendant exclusive agency within the territory and thereby

¹³Lile, Note (1901) 7 Va. L. Reg. 332.

¹⁴Bunting v. Cochran, 99 Va. 558, 39 S. E. 229 (1901).

¹⁵Dixon Livery Co. v. Bond, 117 Va. 656, 86 S. E. 106 (1915); see also Mullins v. Breeding, 167 Va. 25, 187 S. E. 466 (1936).

¹⁶Richardson Co. v. Whiting L. Co., 116 Va. 490, 82 S. E. 87 (1914).

had prevented the defendant from making certain sales which were in process of negotiation at the same time of the plaintiff's breach. Now, here the first question would seem to be whether the damages are sufficiently definite to be recovered in any form of proceeding; and after answering this in the affirmative,¹⁷ the second question is whether the defendant's claim constitutes a debt; and here, strange as it may seem, our court permitted a recovery on the theory that it did. Such a view is impossible to sustain on common law principles.¹⁸ In later cases the court has somewhat receded from this advanced position,¹⁹ but the law still requires that the plaintiff's cause of action be a debt and the defendant's cause of action be a debt in order for the set-off procedure at law to be available. Of course there is no question about recovering the excess, and the cause of action is availed of here by special plea or by an account filed.

Equitable Defenses

Turning again to section 6145, the statute providing for liberalized recoupment, we find that in permitting certain defenses to be made to actions on sealed instruments the statute brings over on the law side causes of action which formerly had to be asserted in equity. This is not true, however, of all defenses to sealed instruments, for while fraud could not be recouped it would support an action on the case for deceit. On the other hand, failure of consideration was relievable only in equity, and perhaps the same may be said of other claims which may be thought of.²⁰ But what we are principally concerned with is the following language found in that section: "The defendant may file a plea alleging ***any other matter as would entitle him to relief in equity in whole or in part against the obligation of the contract." This is the first legislation permitting equitable defenses generally in actions at law. The English statute permitting such defenses was not passed

¹⁷See McCormick, *Damages* (1935) 116; *Wells v. National Life Ass'n. of Hartford*, 99 Fed. 222 (C. C. A. 5th, 1900); *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264 (1886); *Buxbaum v. G. H. P. Cigar Co.*, 188 Wis. 389, 206 N. W. 59 (1925).

¹⁸*New Idea Spreader Co. v. Rogers & Sons*, 122 Va. 54, 94 S. E. 351 (1917). Compare *Sterling Organ Co. v. House*, 25 W. Va. 64 (1884).

¹⁹*Richmond College v. Scott-Nuckols, Inc.*, 124 Va. 333, 98 S. E. 1 (1919); *Baker v. Hartman*, 139 Va. 612, 124 S. E. 425 (1924); *Dexter-Portland Cement Co. v. Acme Supply Co.*, 147 Va. 758, 133 S. E. 788 (1926); *Burks, Pleading and Practice* (3rd ed. 1934) 397, n. 13.

²⁰*Ames, Specialty Contracts and Equitable Defenses* (1895) 9 Harv. L. Rev. 49.

until 1854.²¹ And this is the portion of the statute which has received scant attention from our courts. In a discussion of equitable defenses the writer, in another place,²² has attempted to point out that in code states there is no question about setting up equitable defenses for the very simple reason that all defenses must be availed of in one action. The greater number of common law states, perhaps all, have adopted statutes permitting to a limited degree, at least, equitable defenses in actions at law.²³ In no instance, however, has the writer found, except in the case of West Virginia,²⁴ that the Virginia statute furnished the model for the legislation of other states. They seemed to have followed instead the English Act of 1854, and consequently cases decided under those statutes, as well as cases arising under the English Act, are somewhat weakened as authorities here. But the English cases decided between 1854 and 1873, when the modern English procedure was adopted, are very informative and helpful. They have been reviewed by the writer in another place.²⁵

The bar quickly took advantage of the statute, and cases applying it promptly came before the courts. These for the most part were cases involving defenses to sealed instruments which formerly had to be made in a separate action or even in a suit in equity.²⁶ It was not necessary to consider how far a common law court could go in giving equitable relief until 1851 when defendant, sued on a bond given for the purchase price of land which had been conveyed to him, set up by plea under the statute a defense which would relieve him from liability on the bond, its substance being that the grantor was a trustee who had no authority to sell. Thus, there was an entire failure of consideration for the bond. The court held in a very brief opinion that the plea was properly rejected. Such relief could only be afforded in a court of equity where, upon a rescission of the contract, the plaintiff could be reinvested with the interest sold.²⁷

²¹17 & 18 Vict. c. 125, §§ 83, 85 (1854).

²²Equitable Defenses (1940) 1 Wash. & Lee L. Rev. 153, 169.

²³Equitable Defense (1940) 1 Wash. & Lee L. Rev. 153, 163.

²⁴Code of West Va. (1931) c. 56, art. 5, § 5.

²⁵Equitable Defenses (1940) 1 Wash. & Lee L. Rev. 153, 156.

²⁶Sealed instrument, breach on part of plaintiff, Murray Caldwell & Co. v. Pendleton, 44 Va. (3 Grattan) 91 (1846). Failure of consideration, sealed instrument, Isbell v. Norvell, 45 Va. (4 Grattan) 176 (1847). Debt on bond given for purchase price of land, failure of consideration, Pence v. Huston, 47 Va. (6 Grattan) 304 (1849). Action on bond, damages for false representations, Cunningham v. Smith, 51 Va. (10 Grattan) 255 (1853).

²⁷Shiflet v. The Orange Humane Society, 48 Va. (7 Grattan) 297 (1851).

Shortly after this case was decided, the English courts fixed upon the construction of their statute of equitable defenses. And that construction was that the statute permitted an equitable defense only when the facts would entitle the defendant to an absolute and perpetual injunction against the judgment if one were taken. It was not available when the court in order to give effect to the defense would have to do so in forms of relief which were peculiar to equity. It was not available where an act would be required or where cancellation or specific performance or injunction would be necessary to give the defendant full relief to which he was entitled. While the English courts have been criticized for taking too narrow a view of their statute, it is likely that no other course was open to them, having in mind the strict language of the statute and the history of the debate in parliament which preceded its enactment. Stated in another way the English courts held that the statute permitting equitable defenses (and these; by the way, in England included replications as well) did not apply and was not available unless the relief could be given within the framework of an ordinary common law judgment.²⁸

The Virginia cases to the present time have been decided in accordance with these limitations. If the relief must be supervised, or given in forms which are not available in common law procedure, the defense must be made in a suit in equity. We may note briefly some of these cases. In an action on a note, the defense that by mistake the note was given for too large an amount might be made;²⁹ and a grantee of land who was sued on a bond given for a portion of the purchase price was permitted to set up damages for false representations and to recover an amount in excess of plaintiff's claim. It was not necessary to rescind and revest plaintiff with legal title, as the counterclaim was less than the entire purchase price. The court made the interesting suggestion that the deed of trust given for the purchase price could be marked satisfied on production of the judgment as evidence of its satisfaction.³⁰ If the litigation involves personal property there is no question about revesting legal title.³¹ The judgment itself gives full relief. In these cases no form of relief unfamiliar in common law proceedings is necessary. The judgment itself is enough. The statute permits the defense to be set up at law. But in contrast with these cases,

²⁸See, *Equitable Defenses* (1940) 1 Wash. & Lee L. Rev. 153, 156; 5 *Robinson's Practice* (1868) 389.

²⁹*Brown v. Rice*, 76 Va. 629 (1882).

³⁰*Watkins v. West Wytheville Co.*, 92 Va. 1, 22 S. E. 554 (1895).

³¹*Wallinger v. Kelly*, 136 Va. 547, 117 S. E. 850 (1923).

when to give full relief to the defendant would relieve him of his liability to pay for land but would leave him holding the legal title, the cases deny him relief at law and require a separate proceeding in equity.³² No one would suggest that a common law court could under the statute supervise an accounting, grant an injunction, or order specific performance or cancellation.

To liberalize this procedure, if it be desirable, it is necessary either to expand the scope of the common law judgment, or to permit relief to be given without having recourse to equitable forms. Either course is open. For many years English procedure has provided for injunctions³³ and specific performance in law cases.³⁴ Furthermore, while it may in earlier times have been felt that certain action must be taken under a decree in order to effectuate complete relief, this in many cases is not necessary. Formerly when a suit in equity was brought to cancel a bond because it had been procured by fraud, the bond was surrendered and cancelled. For over a hundred years this defense has been available under our recoupment statute on the law side, and it has never been thought necessary that the bond be surrendered. The judgment condemning the bond is enough.

If a defendant in possession of land under an oral contract which he has performed fully, and for which land he is entitled to a deed, is sued in ejectment by the vendor, to this day in Virginia he has no defense at law, but must go into equity for relief.³⁵ But if he had a written contract for the land and had fully performed it, he is entitled to set up this defense in ejectment, this being one of the cases in Virginia in which an equitable defense has been provided for in a particular instance.³⁶ The statute of 1831, which provided for this equitable defense along with equitable defenses generally, provides for recording the judgment, but it is the judgment itself which settles the title between the plaintiff and the defendant.³⁷ Many other instances might be thought of in which forms of relief might be had at law but which that tribunal has never attempted to exercise, and many

³²*Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364 (1895); *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42 (1899); see full discussion, *Burks*, § 2 (1854), now, *Sales of Goods Act of 1893*, 56 & 57 Vict. c. 71, § 42. See *Uniform Sales Act* § 68.

³³*Common Law Procedure Act of 1854*, 17 & 18 Vict. c. 125, § 79.

³⁴Restricted to sales of goods, 19 & 20 Vict. c. 97, § 2 (1854), now, *Sales of Goods Act of 1893*, 56 & 57 Vict. c. 71, § 42. See *Uniform Sales Act* § 68.

³⁵*Jennings v. Gravely*, 92 Va. 377, 23 S. E. 163 (1895).

³⁶Va. Code Ann. (Michie, 1936) § 5471; Va. Act of Assembly (1831) c. 11, §§ 66, 67.

³⁷Va. Act of Assembly (1831) c. 11, § 67; see Va. Code Ann. (Michie, 1936) § 5216.

other instances may be thought of in which claims may be given effect by the simple effect of the judgment without any supervised action such as specific performance or cancellation. Therefore, the way to expansion is open on both sides, and the need of it is apparent.

It is to be borne in mind that the Virginia statute permitting equitable defenses is permissive only. The defendant is not required to avail himself of it. He may, if he sees fit, go into equity for relief against the plaintiff's claim. It is rather doubtful if he might do this if the defense has come to be looked upon purely as a legal one, such as fraud as a defense to a sealed instrument. It would seem to be slightly absurd to permit a defendant sued on a sealed instrument, the defense to which is fraud, to go over on the equity side and transfer the cause to that forum. But what if the defense is mistake? An instrument is written for \$5,000 when it should have been written for \$4,000. Here, of course, is an orthodox case for relief in equity, but our court held years ago that this defense could be made at law under the statute, and no cancellation or anything of the sort was necessary to complete relief.³⁸ But in a very recent case, an action on a fire insurance policy, when by mistake an exemption had been left out of the policy which would have relieved the insurance company entirely of liability for this particular loss, the company when sued at law on the policy was allowed to go over on the equity side, set up mistake and call for an injunction and cancellation.³⁹ There are two questions to be presented. First, might the defense have been made in the law action? And the answer is clearly that it might.⁴⁰ And the other question is, this being true, should the defendant have been permitted to bring another proceeding when one was already pending in which his defense might be made?

Another case reached an interesting result. The defendant, being sued for an installment due on the purchase price of land, set up by a special plea under the recoupment statute the defense that the sale had been induced by misrepresentation. This plea was stricken out on plaintiff's motion, but apparently not for any cause going to the

³⁸Brown v. Rice, 76 Va. 629 (1882).

³⁹Pulaski & Giles Mutual Insurance Co. v. Downs, 165 Va. 106, 181 S. E. 361 (1935).

⁴⁰Brown v. Rice, 76 Va. 629 (1882).

⁴¹One result of taking the case over on the equity side was that the defendant was deprived of his jury unless he was able to have the fact of mistake tried as an issue out of chancery. [Va. Code Ann. (Michie, 1936) § 6246] or to set up the denial of mistake as a plea and demand a jury. [Va. Code Ann. (Michie, 1936) § 6121.]

merits. Later the former defendant, now the plaintiff, sued the former plaintiff to recover damages for the misrepresentation and was successfully met with the plea that any relief that he might now have must be secured in equity under the provisions of section 6146 of the code. This provides that if the defendant shall not tender plea, or if his plea be rejected, he shall not be precluded from such relief in equity as he would have been entitled to if the statute of equitable defenses had not been enacted. This, said the court, left only an equity court open to the plaintiff.⁴² This conclusion we believe to be clearly wrong. The language of the statute clearly presupposes a case in which the plaintiff originally had a cause of action in equity which he could avail himself of on the law side only by virtue of the statute of equitable defenses. In other words, the statute saved to the defendant his equitable cause of action, and it clearly has no reference to a claim on which the defendant had a remedy at law.⁴³

Thus, in Virginia we continue to distinguish between recoupment and set-off. Recoupment is available under restricted conditions at common law under the statute which was originally enacted in 1831. Set-off, which has been in our law since 1645, is still subject to the rigid limitations which are found in the early statutes on the subject. Our statute permitting equitable defenses has been given the same restricted construction which is found in the English cases decided under the English statute of 1854. That is to say, relief can be given only within the framework of a common law judgment.

As already noted, our statute applies to pleas only. Therefore it has no application to a replication setting up an equitable defense to a plea, though occasions for this application of equitable principles to pleas must arise frequently—e.g., when a defendant pleads release under seal to a tort action, and the plaintiff wishes to set up fraud or mistake to defeat the release. Mistake is plainly equitable. Fraud may be either fraud in execution which has always been a purely legal defense,⁴⁴ or fraud in the inducement which is an equitable defense. No case has been found in which mistake was relied on; fraud in execution gives no trouble; but fraud in inducement is an equitable de-

⁴²Hamilton v. Goodrich, 164 Va. 123, 178 S. E. 874 (1935).

⁴³This has long been a debatable joint. See Burks, Pleading and Practice (3rd ed. 1934) 408; Carlin, Developments in Local Procedure (1941) 47 W. Va. L. Q. 165, 171.

⁴⁴Taylor v. King, 18 Va. (6 Munford) 358, 8 Am. Dec. 746 (1819); George v. Tate, 102 U. S. 564 (1880).

fense and the statute does not provide for setting it up. What is to be done in such a case?

Unfortunately, the cases confuse the two kinds of fraud, and one cannot be sure as to what the court would do in a case in which it was limited to fraud in the inducement.⁴⁵ It might hold that relief must be had in equity, or it might hold that by gradual evolution or development fraud has become a legal defense. This would not be a radical step to take, particularly in view of the general position of the sealed instrument in modern law.⁴⁶ And while mistake is clearly equitable, the common law judgment can easily afford all the relief desired. If mistake is established by the evidence and the jury disregards the release in its verdict, nothing further is necessary; if mistake is not established, the release stands. While legal evolution might not go so far, legislation should.

The legislature has in very recent years provided for what is called a cross-claim in any action for a tort. This permits the defendant to claim damages arising out of the same transaction. Is this recoupment or set-off? It really makes no difference. The important thing is that in an action for tort, defendant may counterclaim damages arising from the same transaction. This brings to the fore in Virginia the troublesome question: what in tort cases is the "transaction?"⁴⁷

Conclusion

Now to return to the reformer whose voice is becoming so loud and insistent in our land, it may not be out of place to consider what improvements might readily be made in Virginia in these three respects. It must be admitted that while our State has first place as an originator of counterclaim procedure, the practice has become definitely outmoded and inadequate. It is well to familiarize one's self with what has been done in the other states in this matter of counterclaim. The provisions in what might be called the conservative codes

⁴⁵*Flowers v. Virginian Ry Co.*, 135 Va. 367, 116 S. E. 672 (1923); *Stallard v. Atlantic Greyhound Lines*, 169 Va. 223, 192 S. E. 800 (1937). Compare *Bedser v. Horton Motor Lines, Inc.*, 122 F. (2d.) 406 (C. C. A. 4th, 1941). Of course release not under seal may be attacked at law for fraud, *The Ferries Co. v. Brown*, 121 Va. 13, 92 S. E. 813 (1917).

⁴⁶Note, *Present Status of the Sealed Obligation* (1939) 34 Ill. L. Rev. 457; see *Nelson v. Chesapeake Construction Co.*, 159 Md. 20, 149 Atl. 442 (1930).

⁴⁷For cases taking extreme positions see *Wrege v. Jones*, 13 N. D. 267, 100 N. W. 705 (1904); *Mulcahy v. Duggan*, 67 Mont. 9, 214 Pac. 1106 (1923); *Clark*, Code Pleading (1928) 451; Notes, L. R. A. 1916C, 445, (1930) 68 A. L. R. 451, (1926) 36 Yale L. J. 148.

divide counterclaim into two divisions. The first, which roughly corresponds with our recoupment, permits the defendant to avail himself of any cause of action that he may have arising out of the same transaction. The second, which corresponds roughly with our set-off, permits in an action of contract any other cause of action in contract to be set-off, thus dispensing with the strict requirement that there be a debt against a debt. Many codes, and the federal rules,⁴⁸ have gone far beyond this, permitting the defendant in any action to counterclaim any other cause of action he may have, and requiring him, at the peril of having it barred by the judgment, to set up any cause of action which he may have arising out of the same transaction. Therefore, we may say, using Virginia terminology, that recoupment is compulsory whereas set-off is permissive.⁴⁹ How far should we go in working out our reforms?

(1) The recoupment statute should be rewritten so as to separate true recoupment from equitable defense. The explanation for mingling the two in one code section is purely historical. In other codes, except that of West Virginia, the two subjects are dealt with separately.

(2) A counterclaim arising from the same transaction, whether tort or contract, should be provided for with no limitation on the amount of defendant's recovery.

(3) We should certainly go so far as to adopt the plan found in the older codes and permit a cause of action in contract to be set off against the plaintiff's cause of action on contract, doing away with strict requirement of debt against debt, and thus rendering unnecessary further questionable decisions as to when the defendant's claim is a debt rather than a claim for unliquidated damages.

(4) The code section should be rewritten and divided so as to separate the defense of payment from set-off, which is a counterclaim. They have only a surface relationship and should appear in different code sections.

(5) The statute having to do with equitable defenses might very well be expanded so as to permit the full litigation of any cause of action available to the defendant provided it arose out of the same general transaction and the same privilege should extend to the plaintiff's defense to a plea. This could be done even though it would require a common law court to give relief in forms with which it had heretofore

⁴⁸Fed. Rules of Civil Proc., Rule 13.

⁴⁹For excellent discussion of code counterclaim see Clark, *Code Pleading* (1928) 436-478.

been unaccustomed or to permit the judgment itself to effect the relief to which the defendant may be entitled. Such may readily be done when it is not practically necessary to take further steps, such as actual cancellation or reparation in some form, to make it effective. Might not the reform go even further and permit equitable forms of relief when such are necessary to enable the court to settle the entire controversy in one proceeding? There is no reason why a judge may not give and supervise such forms of relief when acting as a common law judge when he might do so on the same or the next day when sitting as a chancellor. While today equitable defenses when availed of become law defenses and are tried by the jury with the other issues, it is perfectly feasible to have issues in a law action retain their character as equitable issues to be tried by the court. This is the practice in code states; but an illustration more nearly in point is the practice in federal courts between 1915 and 1938.⁵⁰

In conclusion consider this case: Plaintiff sues in ejectment. Defendant claims the land is his. He also claims that plaintiff, who is insolvent, has trespassed upon and injured the land, and threatens to continue to trespass. Should not our practice permit defendant to litigate the trespass, secure damages therefor and in addition obtain an injunction against future trespasses, all in the one proceeding brought by plaintiff?⁵¹ Or if plaintiff's claim to the land is based on documents, if it be thought necessary to do so should not the court be able to compel their surrender, cancellation or reformation? And if equitable relief is available, should not the defendant be compelled to apply for it rather than bring a separate suit?

It is believed that the modifications here suggested would bring Virginia practice more closely in accord with the ideal expressed by our court years ago; that is, the settlement of all differences connected with the subject-matter of the plaintiff's claim.⁵²

⁵⁰Judicial Code, 274 B, 38 Stat. 956 (1915), 28 U. S. C. A. § 398 (1928); Fed. Rules Civil Proc. adopted in 1938. For discussion of cases during this period see *Equitable Defenses* (1940) 1 Wash. & Lee L. Rev. 153, 173.

⁵¹See *Yellowday v. Perkinson*, 167 N. C. 144, 83 S. E. 341 (1914).

⁵²*Newport News Ry. Co. v. Bickford*, 105 Va. 182, 186, 52 S. E. 1011 (1906).