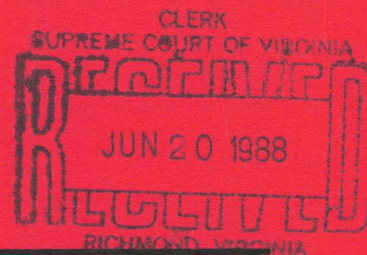


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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 870620

PILAND CORPORATION,

Appellant,

v.

LEAGUE CONSTRUCTION COMPANY, INC.,

Appellee.

JOINT APPENDIX

Michael J. Goergen, Esquire
SCHILLING & McCORMICK, P.C.
6577 Edsall Road
Springfield, Virginia 22151
(202) 842-1746

Counsel for Appellant

John C. Warley, Esquire
6060 Jefferson Avenue
Suite 9010
Newport News, Virginia 23605
(804) 595-2391

Counsel for Appellee

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS
LEAGUE CONSTRUCTION COMPANY, INC.
a Virginia Corporation,
Plaintiff

v.

PILAND CORPORATION,
a Virginia Corporation,
Defendant

Serve: Donald J. Wolf,
Registered Agent
421 North Avenue
Newport News, Virginia 23601

11429-WS

[Handwritten signature]

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MOTION FOR DECLARATORY JUDGMENT

NOW COMES the plaintiff League Construction Company, Inc., a Virginia Corporation, to request this Honorable Court to issue a Declaratory Judgment in plaintiff's favor against defendant based upon the following:

1. Plaintiff is a Virginia Corporation with its principal office and place of business in Hampton , Virginia.
2. Defendant is a general contractor and a Virginia corporation with offices in Newport News, Virginia.
3. Plaintiff is a concrete and cement contractor and as such entered into a contract with defendant on June 3, 1985, hereinafter called "the written contract", a copy of which is attached hereto as Exhibit 1. The contract called for plaintiff to do the concrete work on the Base Supply Complex, Phase II at Langley Air Force Base, hereinafter called "Langley job", for which defendant acted as general contractor. The price for plaintiff's work was to be \$253,000.
4. Plaintiff performed the work called for by the written contract in a skillful and diligent manor to the satisfaction

of both the defendant and the Army Corps of Engineers, which is responsible for acceptance of the work performed by plaintiff.

5. The defendant withheld from payment to plaintiff 10% of the contract price as retainage, or approximately \$25,300, payable in accordance with paragraph 2.4 of the written contract.

6. The plaintiff has completely satisfied and discharged its obligations under the written contract, a fact which defendant has acknowledged to plaintiff, but has refused plaintiff's demand for payment of the retainage.

7. In January, 1986, defendant contacted plaintiff regarding another job on which defendant served as general contractor, which job was located at Old Dominion University in Norfolk, Virginia, hereinafter call the "ODU job". Plaintiff and defendant entered into a verbal contract under which plaintiff would perform concrete work' on the ODU job at a set price per square foot. The plaintiff began work under this verbal contract on or about February 20, 1986.

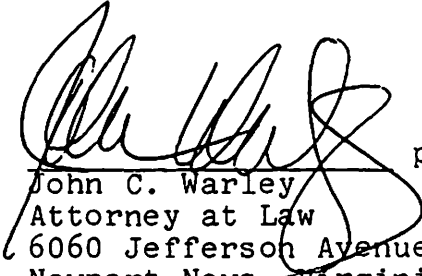
8. Subsequent to plaintiff's commencement of the work on the ODU job, problems developed with the concrete poured by plaintiff and others, and the source of these problems and the parties responsible therefore have been subjects of much debate and dispute among plaintiff, defendant, architects and engineers.

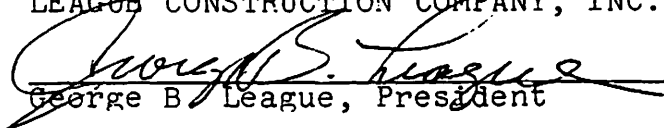
9. Defendant claims to have expended substantial sums of money to rectify the concrete problems on the ODU job, and has attempted to hold plaintiff responsible therefore. Plaintiff denies any liability to defendant on the ODU job and has, or will in the immediate future, file suit against defendant for recovery of the contract price on the ODU job, which defendant has not paid.


10. Defendant attempts to justify his refusal to pay plaintiff's retainage on the Langley job by claiming erroneously that plaintiff will ultimately be shown liable to defendant on the ODU job and that this potential liability of plaintiff to defendant, wholly unrelated to the Langley job, entitles defendant to withhold plaintiff's money.

11. Under the terms of the written contract covering the Langley job, plaintiff and defendants are required to submit matters of dispute to arbitration for resolution, but plaintiff contends that there is no dispute as to the Langley job which requires or justifies arbitration in that defendant's liability to plaintiff on that written contract is admitted by defendant and the amount of the liability is fixed and not in dispute.

WHEREFORE, plaintiff moves this court for a Declaratory Judgment that defendant is not justified or permitted under law to withhold a liquidated debt to plaintiff which is currently due and payable based upon a potential liability of plaintiff to defendant, which liability plaintiff emphatically denies and which is, or will be, the subject of litigation in the future. The plaintiff further moves for attorney's fees, interest and its costs expended, and such other and further relief as the court deems appropriate.


p.q.
John C. Warley
Attorney at Law
6060 Jefferson Avenue
Newport News, Virginia 23605

LEAGUE CONSTRUCTION COMPANY, INC.
By 
George B. League, President

Filed in Clerk's Office the 14th day of Nov., 1986
Fee 5.00 Total 35.00
Lib. F. 2.00
Total Paid 42.00 



STANDARD SUBCONTRACT AGREEMENT FOR BUILDING CONSTRUCTION

This Document has important legal and insurance consequences; consultation with an attorney and insurance consultants and carriers is encouraged with respect to its completion or modification.

THIS AGREEMENT made at **Newport News, Virginia**
this **3rd** day of **June**, 19**85**, by
and between **Piland Corporation**
hereinafter referred to as the Contractor, and **League Construction Company, Inc.**
hereinafter referred to as the Subcontractor, to perform part of the Work on the following Project:

PROJECT: Base Supply Complex, Phase II
Langley Air Force Base
Hampton, Virginia 23665
OWNER: US Air Force

ARCHITECT: US Army Corps of Engineers

Exhibit #1

ARTICLE 1

Scope of Work

1.1 The Contractor employs the Subcontractor as an independent contractor, to perform the following part of the Work which the Contractor has contracted with the Owner to provide on the Project: **Furnish the necessary labor, material, and equipment to complete the concrete work as specified in Section 3A Concrete for Building Construction and as shown on the Contract Drawings.**

The Subcontractor agrees to perform such part of the Work (hereinafter called "Subcontractor's Work") under the general direction of the Contractor and subject to the final approval of the Architect/Engineer or other specified representative of the Owner, in accordance with the Contract Documents. Subcontractor will furnish all of the labor and materials, along with competent supervision, shop drawings and samples, tools, equipment, scaffolding, and permits which are necessary for such performance.

1.2 The Contract Documents are:

DIVISION 1 General Requirements

DIVISION 3 Concrete

Section 3A Concrete for Building Construction

Contract Drawings:

Sheets LF 366-1.1 thru LF 366-1.28

The Subcontractor binds himself to the Contractor for the performance of Subcontractor's Work in the same manner as the Contractor is bound to the Owner for such performance under Contractor's contract with the Owner. The pertinent parts of such contract will be made available upon Subcontractor's request.

1.3 Should any question arise with respect to the interpretation of the drawings and specifications, such questions shall be submitted to the Architect/Engineer and his decision shall be final and binding. If there is no Architect/Engineer for this Project, the Contractor's decision shall be followed by the Subcontractor.

ARTICLE 2

Payments

2.1 The Contractor agrees to pay to the Subcontractor for the satisfactory completion of Subcontractor's Work the sum of **Two Hundred Fifty-Three Thousand** (\$ 253,000.00) in monthly payments of 90 percent of the work performed in any preceding month, in accordance with estimates prepared by the Subcontractor and approved by the Contractor and Corps of Engineers. Payments made on account of materials not incorporated in the work, but delivered and suitably stored at the site, or at some other location agreed upon in writing, shall be in accordance with the terms and conditions of the Contract Documents. Subcontractor will provide monthly completed lien waivers and supplier affidavit forms, in a form satisfactory to the Owner and Contractor. Payment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipt by the Contractor of his payment from the Owner. Approval and payment of Subcontractor's monthly estimate is specifically agreed not to constitute or imply acceptance by the Contractor or Owner of any portion of the Subcontractor's Work.

2.2 In the event the Subcontractor does not submit to the Contractor such monthly estimates by 25 th, then the Contractor may at his option include in his monthly estimate to the Owner for Work performed during the preceding month such amount as he may deem proper for the Work of the Subcontractor for the preceding month and the Subcontractor agrees to accept such approved portion thereof in lieu of monthly payment based upon the Subcontractor's estimate.

2.3 In the event it appears to the Contractor that the labor, material and other bills incurred in the performance of Subcontractor's Work are not being currently paid, the Contractor may take such steps as he deems necessary to insure that the money paid with any progress payment will be utilized to pay such bills

2.4 Final payment shall be paid to the Subcontractor upon approval by the Owner, Architect and the Contractor of the Subcontractor's Work and, upon payment having been received by the Contractor for all of Subcontractor's Work and satisfactory evidence having been received by the Contractor that all labor, including customary fringe benefits and payments due under collective bargaining agreements, and all subcontractors and materialmen have been paid to date and are waiving their lien rights upon the final payment of a specific balance due.

2.5 The Contractor may deduct from any amounts due or to become due to the Subcontractor any sum or sums owing by the Subcontractor to the Contractor, and in the event of any breach by the Subcontractor of any provision or obligation of this Subcontract, or in the event of the assertion by other parties of any claim or lien against the Owner, the Contractor, Contractor's Surety, or the premises upon which the Work was performed, which claim or lien arises out of the Subcontractor's performance of this Agreement, the Contractor shall have the right, but is not required, to retain out of any payments due or to become due to the Subcontractor an amount sufficient to completely protect the Contractor from any and all loss, damage or expense therefrom, until the claim or lien has been adjusted by the Subcontractor to the satisfaction of the Contractor. This paragraph shall be applicable even though the Subcontractor has posted a full payment and performance bond.

ARTICLE 3

Prosecution of the Work

3.1 Time is of the essence for both parties, and they mutually agree to see to the performance of their Work and the Work of their subcontractors so that the entire project may be completed in accordance with the Contract Documents. The Subcontractor shall provide the Contractor with scheduling information and Subcontractor's proposed schedule for the Subcontractor's Work. The Contractor shall then prepare the Schedule of the Work and, as may be necessary, revise such schedule as the Work progresses. Subcontractor acknowledges that revisions may be made in such schedule and agrees to make no claim for acceleration or delay by reason of such revisions so long as such revisions are of the type normally experienced in Work of this scope and complexity.

3.2 The Subcontractor shall prosecute Subcontractor's Work in a prompt and diligent manner in accordance with the Schedule of Work without hindering the Work of the Contractor or any other subcontractor. If work of others is damaged by Subcontractor, the Subcontractor will cause such damage to be corrected to the satisfaction of and without cost to the Contractor and Owner. In the event Subcontractor fails to maintain his part of the Schedule of the Work, he shall, without additional compensation, work such overtime as the Contractor may direct until Subcontractor's Work is in accordance with such schedule.

3.3 The Subcontractor shall be responsible for and will prepare for performance of Subcontractor's Work, including without limitation thereto, the submission of shop drawings, samples, tests, field dimensions, determination of labor requirements and ordering of materials as required to meet the Schedule of Work. Subcontractor shall notify Contractor when portions of his Work are ready for inspection.

3.4 The Subcontractor will furnish periodic progress reports of the Subcontractor's Work as mutually agreed including the progress of materials or equipment to be provided under this Agreement that may be in the course of preparation or manufacture.

3.5 The Subcontractor shall cooperate with the Contractor and subcontractors whose work may interfere with the Subcontractor's Work and participate in the preparation of coordinated drawings and work schedules in areas of congestion, specifically noting and advising the Contractor of any interference by other contractors or subcontractors.

3.6 The Subcontractor shall keep the building and premises reasonably clean of debris resulting from the performance of Subcontractor's Work. If the Subcontractor fails to comply with this paragraph within 48 hours after receipt of notice of non-compliance from the Contractor, the Contractor may perform such necessary clean-up and deduct the cost from any amounts due to the Subcontractor.

3.7 The Subcontractor shall give adequate notices pertaining to the Work of the Subcontractor to proper authorities and secure and pay for all necessary licenses and permits to carry on Subcontractor's Work, the furnishing of which is required by the Contract Documents.

3.8 The Subcontractor shall comply with all Federal, State and local laws, Social Security Laws and Unemployment Compensation Laws, Workers' Compensation Laws and Safety Laws insofar as applicable to the performance of this Agreement. He shall pay all taxes applicable to the performance of Subcontractor's Work. He shall also maintain his own safety program for compliance with such laws.

3.9 The Subcontractor will not assign this subcontract nor subcontract the whole or any part of the Work to be performed hereunder without the prior written consent of the Contractor, with the exception of those subcontractors listed by the Subcontractor and furnished to the Contractor at the time this Agreement is executed.

ARTICLE 4

Changes in the Work

4.1 The Contractor and Subcontractor agree that the Contractor may add to or deduct from the amount of Work covered by this Agreement, and any changes so made in the amount of Work involved, or any other parts of this Agreement, shall be by a written amendment hereto setting forth in detail the changes involved and the value thereof which shall be mutually agreed upon between the Contractor and Subcontractor. The Subcontractor agrees to proceed with the Work as changed when so ordered in writing by the Contractor so as not to delay the progress of the Work, and pending any determination of the value thereof unless Contractor first requests a proposal of cost before the change is effected. If the Contractor requests a proposal of cost for a change, the Subcontractor shall promptly comply with such request.

4.2 Subcontractor shall be entitled to receive no extra compensation for extra Work or materials or changes of any kind regardless of whether the same was ordered by the Contractor or any of his representatives unless a Change Order therefor has been issued in writing by the Contractor. If extra work was ordered by the Contractor and the Subcontractor performed same but did not receive a written order therefor, the Subcontractor shall be deemed to have waived any claim for extra compensation therefor, regardless of any written or verbal protests or claims by the Subcontractor. The Subcontractor shall be responsible for any costs incurred by the Contractor for changes of any kind made by the Subcontractor that increase the cost of the work for either the Contractor or other subcontractors when the Subcontractor proceeds with such changes without a written order therefor.

4.3 The Subcontractor agrees that no claim for additional services rendered or materials furnished by the Subcontractor to the Contractor shall be valid unless notice is given to the Contractor prior to the furnishing of the services or material or unless written notice of the claim therefor is given by the Subcontractor to the Contractor not later than the last day of the calendar month following that in which the claim originated, with the amount of the claim to be given in writing by the Subcontractor as soon as practicable.

4.4 The Subcontractor will make all claims for extra compensation and for extension of time to the Contractor promptly in accordance with this Article and consistent with the Contract Documents.

4.5 Notwithstanding any other provision, if the Work for which the Subcontractor claims extra compensation is determined by the Owner or Architect not to entitle the Contractor to a Change Order or extra compensation, then the Contractor shall not be liable to the Subcontractor for any extra compensation for such Work, unless Contractor agreed in writing to such extra compensation.

ARTICLE 5

Insurance and Indemnity

5.1 Prior to starting Work the Subcontractor shall procure and maintain in force, Workers' Compensation Insurance, Employers Liability Insurance, Comprehensive General Liability Insurance with contractual coverage and Automobile Liability Insurance and such other insurance, to the extent required by the Contract Documents for the Subcontractor's Work.

5.2 The Subcontractor's Comprehensive General and Automobile Liability Insurance, as required by Paragraph 5.1 shall be for not less than limits of liability as follows:

a Comprehensive General Liat.

- 1 Bodily Injury \$ 300,000 Each Occurrence
(Completed Operations)
\$ _____ Aggregate
2. Property Damage \$ _____ Each Occurrence
\$ _____ Aggregate

b. Comprehensive Automobile Liability

1. Bodily Injury \$ 50,000 Each Person
\$ 100,000 Each Occurrence
2. Property Damage \$ 5,000 Each Occurrence

5.3 Comprehensive General Liability Insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability policy.

5.4 The foregoing policies shall contain a provision that coverages afforded under the policies will not be cancelled or not renewed until at least thirty (30) days' prior written notice has been given to the Contractor. Certificates of Insurance acceptable to the Contractor shall be filed with the Contractor prior to the commencement of Work.

5.5 The Contractor and Subcontractor waive all rights against each other and against the Owner, the Architect/Engineer, separate contractors, and all other subcontractors for damages caused by fire or other perils to the extent covered by Builder's Risk or any other property insurance, except such rights as they may have to the proceeds of such insurance.

5.6 To the fullest extent permitted by law, the Subcontractor agrees to indemnify and hold harmless the Contractor, the Owner, the Architect/Engineer and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance, or failure in performance, of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable regardless of whether it is caused in part by a party indemnified hereunder. Such obligations shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph 5.6.

5.6.1 In any and all claims against the Contractor or any of his agents or employees by any employee of the Subcontractor, anyone directly or indirectly employed by him or anyone for whose acts he may be liable, the indemnification obligation under this Paragraph 5.6 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under Workers' Compensation acts, disability benefit acts or other employee benefit acts.

5.6.2 The obligations of the Subcontractor under this Paragraph 5.6 shall not extend to the liability of the Architect/Engineer, his agents or employees, arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (b) the giving of or failure to give directions or instructions by the Architect/Engineer, his agents or employees, providing such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 6

Performance Bond and Labor and Material Payment Bond

A Performance Bond and a Labor and Material Payment Bond in a form satisfactory to the Contractor shall be furnished in the full amount of this Agreement, if required by the Contractor. This obligation shall continue throughout the agreement and may be required at any time during the performance of Subcontractor's Work by a change under Article 4.

ARTICLE 7

Warranty

The Subcontractor agrees to promptly make good without cost to the Owner or Contractor any and all defects due to faulty workmanship and/or materials which may appear within the guarantee or warranty period so established in the Contract Documents, and if no such period be stipulated in the Contract Documents, then such guarantee shall be for a period of one year from date of completion and acceptance of the project by the Owner. The Subcontractor further agrees to execute any special guarantees as provided by the terms of the Contract Documents, prior to final payment.

ARTICLE 8

Contractors' Obligations

8.1 The Contractor agrees to be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Contract Documents and by all provisions thereof affording remedies and redress to the Contractor from the Owner insofar as applicable to this Agreement.

8.2 Upon request, the Contractor will give the Subcontractor written authorization to obtain direct from the Architect-Engineer or Owner's authorized agent, evidence of amount and percentages of completion certified on his account.

8.3 The Contractor shall not issue or give any instruction, order or directions directly to employees or workmen of the Subcontractor other than to the persons designated as the authorized representative(s) of the Subcontractor.

8.4 The Contractor shall make no demand for liquidated damages in any sum in excess of the amount specifically named in this Agreement or the Contract Documents. Liquidated damages shall not be assessed for delays not caused by the Subcontractor. Liquidated damages, when assessed, shall not exceed the Subcontractor's proportionate share of the responsibility for such delay. This provision does not preclude any claim the Contractor may have for direct damages under law.

8.5 The Subcontractor will furnish those temporary facilities and services required by the Subcontractor except for those to be provided by the Contractor set forth in the Attachment A to this Agreement. Adequate storage areas, if available, will be allocated by the Contractor for the Subcontractor's materials and equipment during the course of the Work.

8.6 The Contractor agrees that no claim for services rendered or materials furnished by the Contractor to the Subcontractor shall be valid unless notice is given to the Subcontractor prior to furnishing of the services or material or unless written notice of the claim therefor is given by the Contractor to the Subcontractor not later than the last day of the calendar month following that in which the claim originated, with the amount of the claim to be given in writing by the Contractor as soon as practicable.

ARTICLE 9

Termination

9.1 Should the Subcontractor fail at any time to supply a sufficient number of properly skilled workmen or sufficient materials and equipment of the proper quality, or fail in any respect to prosecute the Work with promptness and diligence, or fail to promptly correct defective Work or fail in the performance of any of the agreements herein contained, the Contractor may, at his option, provide such labor, materials and equipment and to deduct the cost thereof, together with all loss or damage occasioned thereby, from any money then due or thereafter to become due to the Subcontractor under this Agreement.

9.2 If the Subcontractor at any time shall refuse or neglect to supply sufficient properly skilled workmen, or materials or equipment of the proper quality and quantity, or fail in any respect to prosecute Subcontractor's Work with promptness and diligence, or cause by any action or omission the stoppage or interference with the work of the Contractor or other subcontractors, or fail in the performance of any of the covenants herein contained, or be unable to meet his debts as they mature, the Contractor may at his option at any time after serving written notice of such default with direction to cure in a specific period, but not less than two (2) working days, and the Subcontractor's failure to cure the default, terminate the Subcontractor's employment by delivering written notice of termination to the Subcontractor. Thereafter, the Contractor may take possession of the plant and work, materials, tools, appliances and equipment of the Subcontractor at the building site, and through himself or others provide labor, equipment and materials to prosecute Subcontractor's Work on such terms and conditions as

shall be deemed necessary, and shall deduct the cost thereof, including without limitation thereto all charges, expenses, losses, costs, damages, and attorney's fees, incurred as a result of the Subcontractor's failure to perform, from any money then due or thereafter to become due to the Subcontractor under this Agreement.

9.3 If the Contractor so terminates the employment of the Subcontractor, the Subcontractor shall not be entitled to any further payments under this agreement until Subcontractor's Work has been completed and accepted by the Owner, and if payment has been received by the Contractor from the Owner with respect thereto. In the event that the unpaid balance due exceeds the Contractor's cost of completion, the difference shall be paid to the Subcontractor, but if such expense exceeds the balance due, the Subcontractor agrees promptly to pay the difference to the Contractor.

ARTICLE 10

Claims

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be decided by Arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon in accordance with applicable law in any court having jurisdiction thereof.

10.2 In the event the Contractor and Owner or others arbitrate matters relating to this Subcontract, it shall be the responsibility of the Subcontractor to prepare and present the Contractor's case, to the extent the proceedings are related to this Subcontract.

10.3 Should the Contractor enter into arbitration with the Owner or others regarding matters relating to this Agreement, the Subcontractor shall be bound by the result of the arbitration to the same degree as the Contractor.

10.4 The Subcontractor shall carry on Subcontractor's Work and maintain his progress during any arbitration proceedings.

ARTICLE 11

Prevailing Law

This Agreement shall be governed by the law in effect in Virginia

IN WITNESS WHEREOF the parties hereto have executed this Agreement under seal, the day and year first above written.

League Construction Company, Inc.
Subcontractor

ATTEST:

Kimberly P. League
Kimberly P. League

By George B. League
George B. League, President (Title)

PIHANO CORP
Contractor

ATTEST

Lavinia A. Mena

By D. J. Wolf, Pres
(Title)

Subcontractor: League Construction Company, Inc.
Subcontract agreement dated June 3, 1985

Contractor's Job #85-6

Page 1 of 1

A. Specific Inclusions:

1. Install reinforcing, embedded steel and porous fill which is to be furnished by others
2. Finegrading of subgrade. Subgrade to be $\pm .1'$ by others
3. Concrete work for Boiler Dock
4. Concrete curing
5. Concrete testing. *SW 902*

B. Specific Exclusions:

1. Excavation
2. Building backfill
3. Concrete testing
4. Floor hardener
5. Layout
6. Sealants
7. Site concrete work

C. Additional Clarifications:

1. Included is the placing of not more than 127½ tons of reinforcing. Any reinforcing over and above that quantity will be installed at a rate of \$240.00/ton.
2. Terms of progress billings are net 30.
3. Retainage for the concrete to be broken into two categories:
 - a. Foundation concrete - (grade beams, pile caps, walls, etc.)
 - b. Slab concrete - (slab-on-grade)
 Retainage for Category a. to be paid forty-five days after completion and acceptance by the contractor of the work. Retainage for Category b. to be paid forty-five days after completion and acceptance by the contractor. Completion and acceptance of the foundation is once the work is in place and other trades have begun to install their work on the foundation. Completion and acceptance of the slab work is defined when the slab work is completed and all deficiencies that have been identified have been resolved.
4. No bond is to be provided.
5. ~~Concrete is by others.~~ *SW 902*

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

LEAGUE CONSTRUCTION CO., INC.,)	
)	
Plaintiff,)	
)	
v.)	Law No. 11429-WS
)	
PILAND CORPORATION,)	
)	
Defendant)	

ANSWER AND GROUNDS OF DEFENSE

NOW COMES Defendant, Piland Corporation, by and through its undersigned attorney, Michael J. Goergen, and as and for its Answer and Grounds of Defense states as follows:

1. Defendant admits the allegations of paragraph 1.
2. Defendant admits the allegations of paragraph 2.
3. Defendant admits the allegations of paragraph 3.
4. Defendant admits the allegations of paragraph 4.
5. Defendant admits that it is withholding \$25,300, amounting to Plaintiff's final 10% retention, and denies the other allegations of paragraph 5.
6. Defendant denies the allegations of paragraph 6.
7. Defendant admits the allegations of paragraph 7.
8. Defendant admits the allegations of paragraph 8.
9. Defendant admits that it has expended, and continues

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Debra Jones

to expend substantial sums of money to rectify the concrete problems on the O.D.U. job, and that it believes that Plaintiff is liable to Defendant for a substantial sum of money, approximately \$85,000, as a direct result of Plaintiff's faulty workmanship. Defendant is without information sufficient to form a belief as to the remaining allegations of paragraph 9, and therefore denies same.

10. Defendant asserts its common law right of offset, since the amount that Plaintiff owes Defendant on the ODU job exceeds, or may exceed, the amount that Defendant owes Plaintiff on the Base Supply job (See the Counterclaim). The other allegations of paragraph 10 of the Motion for Judgment are hereby denied.

11. Defendant disagrees with Plaintiff in the amount owed under the Base Supply contract, and asserts that the total should be reduced from the amount claimed by Plaintiff due to certain backcharges and delay damages for which Plaintiff is liable to Defendant. The dispute should be arbitrated under the terms of the written contract, and Defendant seeks a stay of proceedings pending arbitration. Defendant denies the remaining allegations of paragraph 11 of the Motion for Judgment.

WHEREFORE, Defendant Piland Corporation asks the Court to deny Plaintiff's Motion for a Declaratory Judgment, and to declare that Defendant is justified under the law in holding

the monies otherwise due on the Base Supply contract pending the outcome of litigation between the parties over the balance due on the O.D.U. project (see the accompanying Counterclaim).

COUNTERCLAIM

NOW COMES Defendant, Piland Corporation, by and through its undersigned attorney, Michael J. Goergen, and as and for its Counterclaim states as follows:

1. Piland Corporation is a Virginia corporation engaged in the general construction contracting business.

2. League Construction Company, Inc. is a Virginia corporation engaged in the construction business as a concrete subcontractor.

3. In early 1986, League orally subcontracted to perform and did perform concrete work for Piland in connection with Piland's construction contract for work at Old Dominion University.

4. League Construction Company, Inc. failed to perform its work at O.D.U. in a workmanlike manner.

5. League's work was unacceptable to the architect and the owner, as well as to Piland, and had to be re-worked and corrected, and Piland is now still attempting to correct League's faulty work, and the expenses for this correction are approximately \$85,000.

6. The need for the corrective work was a direct result

of League's failure to perform its work in a proper manner.

7. League has failed and refused to reimburse Piland for the expenses Piland incurred.

8. Piland has offered to pay League whatever balance could be agreed is due on the Base Supply contract which is the subject of League's Motion for Declaratory Judgment, if League could post any kind of adequate collateral or bond which would secure Piland in the event of a judgment on League's responsibility for the damages on the O.D..U. job, but League has been unable or unwilling to post any such bond or collateral.

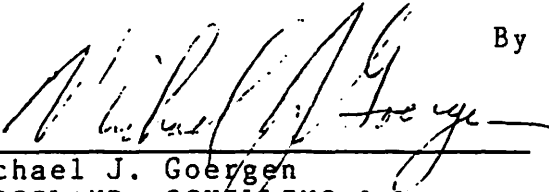
9. League has breached its oral contract with Piland by its performance of unacceptable work and by its failure to correct faulty work.

10. League has been negligent in the performance of its work, and, as a proximate result, Piland was damaged thereby.

WHEREFORE, Defendant and Counterclaimant Piland Corporation moves this Court for judgment against Plaintiff and Counterclaim Defendant League Construction Company, Inc. in the amount of \$85,000.00, plus interest, attorney's fees and costs, plus such other and further relief as to the Court shall seem just under the circumstances.

Piland Corporation

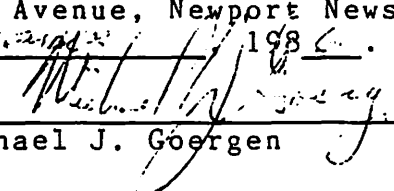
By Counsel:



Michael J. Goergen
CROSSLAND, SCHILLING &
McCORMICK, P.C.
6577 Edsall Road
Springfield, Virginia 22151
(703)941-3030
or (202)833-8127

CERTIFICATE OF SERVICE

I hereby certify that I mailed, First Class postage prepaid, a copy of the foregoing to Plaintiff's attorney, John C. Warley, Esq., 6060 Jefferson Avenue, Newport News, Virginia 23605, this 10th day of December, 1986.



Michael J. Goergen

Tested and sworn to before me this _____ day of _____, 1986.

Teste: James M. Hamilton, Clerk

Total Fee \$ _____ D. C.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS
LEAGUE CONSTRUCTION COMPANY, INC.

Plaintiff

At Law #11429-WS

v.

PILAND CORPORATION

Defendant

ANSWER TO COUNTERCLAIM

NOW COMES the Plaintiff, League Construction Company, Inc., by counsel, and for its answer to Defendant's Counterclaim states as follows:

1. Plaintiff admits the allegations contained in paragraph 1.
2. Plaintiff admits the allegations contained in paragraph 2.
3. Plaintiff admits the allegations contained in paragraph 3.
4. Plaintiff denies the allegations contained in paragraph 4.
5. Plaintiff admits that it received a notice from Defendant to the effect that Plaintiff's work was unacceptable to Defendant; Plaintiff states that as to the remainder of the allegations contained in paragraph 5 it is without information sufficient to form a belief and therefore denies them.
6. Plaintiff denies the allegations contained in paragraph 6.
7. Plaintiff admits that it has not "reimbursed" Defendant but restates its lack of liability to Defendant for "expenses Piland incurred" and further notes that estimate of said expenses has varied from Fifty Thousand (\$50,000) by verbal communication to \$56,250 by written invoice dated October 31, 1986 but received by Plaintiff on December 15, 1986 to the \$85,000 claimed herein.
8. Plaintiff admits offer by Defendant; admits Plaintiff's unwillingness to accept offer, and denies any duty on its part whatsoever to post bond or collateral.

9. Plaintiff denies the allegations contained in paragraph 9.
10. Plaintiff denies the allegations contained in paragraph 10.

WHEREFORE, Plaintiff moves that Defendant's Counter-claim be dismissed and that this court enter judgment for Plaintiff as originally demanded.

LEAGUE CONSTRUCTION COMPANY, INC.

By

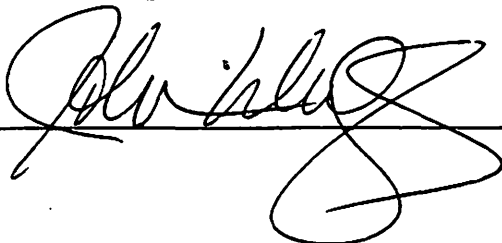


of Counsel

John C. Warley, p.q.
Suite 9010
6060 Jefferson Avenue
Newport News, VA 23605

CERTIFICATE OF MAILING

The Undersigned hereby certifies that he mailed by first class prepaid postage, a copy of the foregoing ANSWER to Defendant's attorney Michael J. Goergen at his address at 6577 Edsall Road, Springfield, VA 22151 this 29th day of December, 1986.



VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS
LEAGUE CONSTRUCTION COMPANY, INC.
a Virginia Corporation,
Plaintiff

v.

PILAND CORPORATION,
a Virginia Corporation,
Defendant

MOTION FOR SUMMARY JUDGMENT

Take Notice that on Thursday, January 29, 1987 at
9:15 a.m., at the 4th Floor Courtroom of Hon. J. Warren Stephens,
Circuit Judge, the undersigned will move for Summary Judgment
against you based upon the following:

1. Plaintiff's Motion for Declaratory Judgment alleged that Defendant was and is holding \$25,300. of money due plaintiff; and
2. Defendant's Answer acknowledges that Defendant is withholding said money and admits Plaintiff's paragraph (4) in which Plaintiff alleged that he had performed the work required by the contract covering "the Langley job" to the satisfaction of the Defendant; and
3. Defendant's Answer fails to state any reason recognized by law for withholding monies which Defendant admits plaintiff has earned.
4. That as to "the Langley job", as opposed to the "ODU job", there is no material fact genuinely in dispute.

WHEREFORE, Plaintiff moves for Summary Judgment
against Defendant for the amount of \$25,300. plus accrued.

11429-WS

RECEIVED
CITY OF NEWPORT NEWS
JAN 14 1987
CLERK OF COURT

W. H. Stephens

interest to date.

LEAGUE CONSTRUCTION COMPANY, INC.

By

Of Counsel

John C. Warley, p.q.
Suite 9010
6060 Jefferson Avenue
Newport News, Va. 23605

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing
to Defendant's attorney, Michael J. Goergen, 1400 20th St., N.W.,
Suite 202 Washington, D.C. 20036, this 13th day of January,
1987.

MEMORANDUM TO FILE

TO FILE: League Construction Company, Inc. v. Piland
Corporation, Law No. 11429-WS

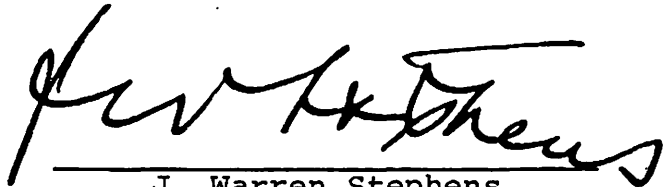
FROM: J. Warren Stephens
Judge

DATE: January 29, 1987

This day came the parties in person and by counsel on the motion of the plaintiff for summary judgment.

It appeared from argument that the defendant has demanded arbitration of dispute allegedly existing between it and the plaintiff, under date of January 20, 1987, with reference to the subject job and the notice indicates that the defendant is alleging compensation in the amount of \$6,655.00, net of interest and costs. The parties concede that the exposure concerning the arbitration claim would not exceed \$10,000.00. Therefore, the issue is whether or not the court based on the pleadings, etc., should grant plaintiff summary judgment in the amount claimed in the motion for declaratory judgment less \$10,000.00 subject to disposition of the arbitration claim.

Counsel for defendant stated he desired an opportunity to file additional memoranda on or before February 6, 1987 with the clerk and, counsel for the plaintiff agreed to file his response thereto on or before February 13, 1987 with the clerk.



J. Warren Stephens
Judge

JWS:lg

cc: Mr. John C. Warley
Mr. Michael J. Goergen

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

LEAGUE CONSTRUCTION CO., INC.,)	
)	
Plaintiff,)	
)	
v.)	Law No. 11429-WS
)	
PILAND CORPORATION,)	
)	
Defendant)	

DEFENDANT'S POST-HEARING BRIEF
IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant, Piland Corporation ("Piland"), by and through its undersigned attorney, Michael J. Goergen, and as, and for its Brief in Opposition to Plaintiff's Motion for Summary Judgment, and states as follows:

1. This matter came on for hearing on January 29, 1987 on Plaintiff League Construction Company's ("League's") Motion for Summary Judgment.

2. The legal question for determination in this summary judgment motion is whether Piland is entitled to hold all the funds otherwise due League on the "Base Supply" contract when Piland has counterclaimed in this action for a greater amount of money as damages arising from League's performance on a separate contract at Old Dominion University.

3. During oral argument, counsel for Piland argued that the only case relied on by League, Phelps Dodge Industries v. Piedmont Electric Supply Corp., 523 F.Supp. 201 (W.D.Va.1981)

incorrectly stated Virginia law on the subject matter of this case.

4. Piland argues that the federal judge in the Phelps Dodge case relied on two old Virginia cases which predated the enactment of the Virginia Rules of Procedure and subsequent statutory amendments which created and recognized the right of a defendant to counterclaim for unliquidated amounts from other contracts.

5. The judge in Phelps Dodge relied upon Dexter-Portland Cement Co. v. Acme Supply Co., Inc., 147 Va. 758, 133 S.E. 788 (1926) and Odessky v. Monterey Wine Co., Inc., 188 Va. 184, 49 S.E.2d 330 (1948), and correctly stated the law as it existed in Virginia in 1948. Under the common law and Virginia statutes there was no right to plead an unliquidated amount on a second contract as an "offset" or "counterclaim".

a. The Dexter-Portland Cement Co. case refers to the Codes of 1887 and 1919 as the statutory basis for disallowing an unliquidated setoff, and quotes a Law Review article by Professor Lile on the subject, distinguishing between "Set-Off" and "Common-Law Recoupment" (at p.790).

b. The Odessky case refers to the Code of 1942 as the statutory basis for disallowing an unliquidated setoff, and cites the Third Edition of Burk's Pleading and Practice (at p.332), and concludes that the case is controlled by the Dexter-Portland Cement Co. decision.

6. The judge in the Phelps-Dodge case overlooked major statutory and procedural changes which occurred in 1954 and 1977.

7. Attached is a lengthy excerpt from the Fourth Edition of Burk's pleading and Practice (and the 1961 pocket parts, which were the most current I could find) which relates to the Code and Rule changes effective since before the Phelps-Dodge decision. Of particular importance in the instant case is the following language from the 1961 Supplement, Page 68, regarding Section 241, page 430, note 2:

In recognition of the drastic procedural changes made by Rules of Court (Va.), 3:8, 3:9 and 3:10, Va.Code, Section 8-239 was rewritten in 1954 (Acts 1954, c.608) to read as follows: "The right of litigants to set off mutually existing claims and demands in a single action is hereby recognized, and in actions at law in courts of record, a defendant may counterclaim against the plaintiff or cross claim against another defendant to the extent permitted and in the manner prescribed, by the applicable Rules of Court adopted fromtime to time by the Supreme Court of Appeals." The rationale of the amendment is explained by the Virginia Code Commission which recommended it, as follows: "Although Section 8-239 is superseded by Rules of Court 3:8, 3:9 and 3:10 which clearly expand the subject matter of counterclaims, it is felt that since the right of set-off was not recognized by the common law, it is advisable to give statutory recognition to the right of set-off as distinguished from the kind of claim which may be so used and the procedure thereon. For this reason it is recommended that the above (referring to the statute as enacted) be enacted as a substitute for the present Section 8-239.

8. In the main volume of the Fourth Edition of Burk's Pleading and Practice, page 432, the authors, in note 9a,

discuss Dexter-Portland and Odesskey, and conclude with the statement: "These distinctions are now of little value in Virginia since the adoption of the Rules of Court, but may be helpful in applying the West Virginia statutes.

9. Indeed, the Fourth Edition quotes an expanded version of the chart by Professor Lile, the earlier version of which was reproduced in the Dexter-Portland Cement Co. case. It is shown on page 447, Section 249 of the main text, and can be compared directly with the earlier chart in the attached copy of the Dexter-Portland case. The newer chart shows that, under the Rules of Court, a counterclaim is allowed for another contract, even if unliquidated.

10. Piland has pleaded an allowable counterclaim under Rule 3:8. Piland has alleged its fears that League would not be able to pay a judgment based on the counterclaim, and seeks the right to hold any funds due to League on the Base Supply contract until the O.D.U. contract dispute is resolved in this action, through a trial on the counterclaim.

11. According to Burk's, the legislature created a procedural right to assert an unliquidated setoff from another cause in an action at law by enacting the Rules of Court. The legislature further created the substantive right, for a defendant to set-off its unliquidated claims from another cause when it amended Section 8-239 of the Code of Virginia in 1954.

12. The legislature completely revised the statutes in 1977, replacing Chapter 8 with Chapter 8.01, and the present statute, Section 8.01-272 states: "Any Counterclaim brought in an action under Part Three of the Rules of Court shall be governed by such Rules."

13. Rule 3:1 states: "A Counterclaim may be pleaded in any action at law to which the Rules...apply."

14. Rule 3:8 states that a defendant may plead as a counterclaim any cause of action he may have against the plaintiff whether or not it is for liquidated damages and whether or not it arises out of the same transaction as the one on which plaintiff's action is based.

15. Michie's Jurisprudence of Virginia and West Virginia, Setoff, Recoupment and Counterclaim, Section 1 states: "The plea of setoff was a creation of statute law, but is now governed by statutes and rules of court concerning counterclaims."

16. The Virginia Rules of Court are more similar to the Federal Rules of Civil Procedure than to the old Virginia methods of pleading. The concept of "setoff" in federal jurisprudence does not include a limitation that the claim be liquidated in order to be a setoff. In First National Bank v. Master Auto Service Corp., 693 F.2d 308,310, n.1 (4th Cir.1982), the court said:

A set-off is a counterclaim arising from an independent claim the defendant has against the plaintiff. Recoupment is the right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very contract giving rise to the plaintiff's claim.

17. Defendant Piland has exercised both its procedural right to file the counterclaim in this action and its substantive right to hold back payment of the funds otherwise due on the contract which is the subject of plaintiff League's motion for summary judgment.

18. One possible explanation for the mistake of law expressed in the Phelps-Dodge case is that the federal judge, interpreting Virginia law, in the Western District of Virginia, may have been misled by the old Virginia cases and the present West Virginia statute, which still bars counterclaims such as that of Piland in the instant case.

19. Piland would be sorely prejudiced by having to pay out thousands of dollars to League that League may never be able to repay to Piland if Piland wins its Counterclaim.

20. Piland is willing to pay the money into court, to preserve the funds pending the outcome of the trial on all the issues in this case.

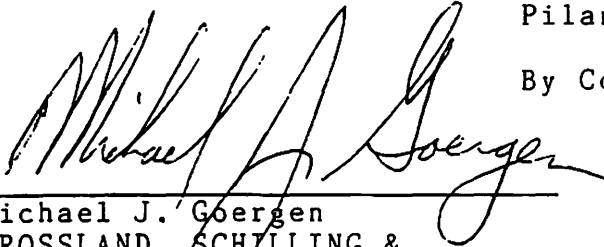
21. Should the court disagree with Piland, and order summary judgment on the claim, Piland prays for an opportunity to appeal such ruling pending payment of the money to League.

WHEREFORE, Piland Corporation prays that the Motion for Summary Judgment be denied.

Respectfully submitted,

Piland Corporation

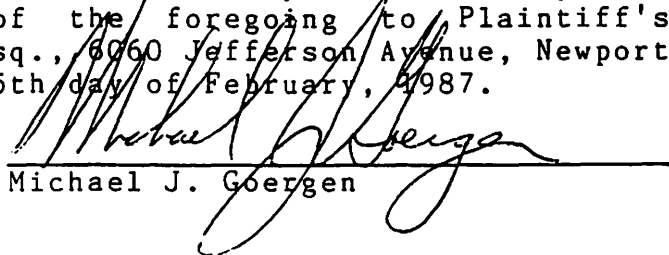
By Counsel:



Michael J. Goergen
CROSSLAND, SCHILLING &
McCORMICK, P.C.
6577 Edsall Road
Springfield, Virginia 22151
(703)941-3030
or (202)833-8127

CERTIFICATE OF SERVICE

I hereby certify that I sent by Federal Express, overnight delivery, a copy of the foregoing to Plaintiff's attorney, John C. Warley, Esq., 6060 Jefferson Avenue, Newport News, Virginia 23605, this 5th day of February, 1987.


Michael J. Goergen

CHAPTER 31.

SET-OFFS, RECOUPMENT, AND COUNTERCLAIM.

- § 241. Set-off—Definition.
- § 242. Actions in which set-offs are available.
- § 243. Subject of set-off.
- § 244. Acquisition of set-offs.
- § 245. Application of set-offs.
- § 246. Pleading set-off.
- § 247. Recoupment—Definition.
- § 248. Common law recoupment.
- § 249. Virginia and West Virginia statutes of recoupment.
- § 250. Who may rely upon the statute.
- § 251. Cross-claims under the Virginia Rules of Court.

§ 241. Set-off—Definition.

Set-off is a counter demand of a liquidated sum growing out of a transaction extrinsic to the plaintiff's demand, for which an action on contract might be maintained by the defendant against the plaintiff and which is now exhibited by the defendant against the plaintiff for the purpose of counterbalancing in whole or in part the plaintiff's demand, and, where it exceeds the plaintiff's demand, of recovering a judgment in his own favor for the excess. Set-offs, as such, were unknown to the common law. They were mere cross demands, and required a separate and independent action. So far as the right to assert them at law exists, it is entirely by virtue of statute.¹ At common law if A and B mutually owe each other \$1000, the demands cannot be set off against each other, but the rule is otherwise by statute.² Where, however, the promissor and the payee agree that a cross demand of the promissor is to be applied as a credit on the debt, the cross de-

1. 34 Cyc. 625; 25 Am. & Eng. Encl. Law (2d Ed.) 488.

2. Va. Code, § 8-239 provides: "In an action for any debt, the defendant may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed with the papers in the cause, as to give the plaintiff notice of its nature, but not otherwise."

Va. Code, § 8-240: "Although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all but only to a part of them, the provisions of the preceding section shall extend to such set-off, if it appear that the persons, against whom such claim is, stand in the relation of principal and surety, and the person entitled to the set-off is the principal."

Va. Code, § 8-240.1: "When the defendant is allowed to file and prove an account of set-off to the plaintiff's demand, the plaintiff shall be allowed to file and prove an account of counter set-off, and make such other defense as he might have made had an original action been brought upon such set-off, and in the issue, the judge, if the case be tried without a jury, or if the jury shall ascertain the true state of indebtedness between the parties and judgment shall be rendered accordingly."

W. Va. Code, § 56-29 is identical with Va. Code, §§ 8-239 to 8-240.1.

mand becomes a payment, and the rules applicable to payments apply instead of those applicable to set-offs.³

§ 242. Actions in which set-offs are available.

The language of the West Virginia Act is that "in an action for any debt" the defendant may prove and have allowed the set-off described in his plea or stated in an account filed with the papers in the cause. As will be seen later, a set-off must be a debt, or at least in the nature of a debt, and that against which it is to be set off must likewise be a debt or in the nature of a debt. It is immaterial what the form of the action may be, whether debt, covenant, assumpsit, or motion, if the thing proceeded for is a debt, then set-off may be allowed against it. The action must be upon some demand which might itself be used as a set-off.

Set-offs cannot be used in purely tort actions. In some cases arising out of tort, the plaintiff has a right to waive the tort and sue in contract. If he sues in tort, no set-offs can be allowed against it. If he waives the tort and sues upon the implied contract, the authorities are in conflict as to whether or not set-offs can be set up against the plaintiff's demand.⁴ The better rule is that the set-off is available.⁵

These principles were also followed in Virginia prior to the adoption of the Rules of Court. Now the defendant may counterclaim with any cause of action at law for a money judgment in personam against the plaintiff "whether or not it grows out of any transaction mentioned in the notice of motion for judgment, whether or not it is for liquidated damages, whether it is in tort or contract, and whether or not the amount demanded in the counterclaim is greater than the amount demanded in the notice of motion for judgment."⁶ The effect of this rule is to permit a tort demand to be set off against a contract demand, a contract against a tort, and a tort against a tort as well as a contract against a contract.⁷

§ 243. Subject of set-off.

It is well settled that under the West Virginia statute the subject of set-

3. *Stegal v. Union Bank, etc., Trust Co.*, 163 Va. 417, 176 S. E. 438, 95 A. L. R. 582.

4. 25 Am. & Eng. Encl. Law (2d Ed.) 508.

5. *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; *Charleston Milling & Produce Co. v. Craighead*, 116 W. Va. 194, 179 S. E. 69.

6. Rule of Court (Va.), 3:8.

7. While Rule of Court (Va.) 3:8 does not specifically say that a counterclaim is available where the plaintiff's cause of action sounds in tort this conclusion seems indicated when Rules of Court, Va. 1:8 and 3:1 are construed together. Rule 3:1 makes the Rules of Court applicable to all actions in personam for money without distinction while Rule 3:8 permits counterclaim to any notice of motion for judgment. See also, Va. Code § 8-136.

off must be a liquidated demand. There must be a debt against a debt and an unliquidated demand cannot be used as a set-off.⁸

It is said that "the cases defining what is a liquidated demand within the meaning of statutes of set-off are very confusing and unsatisfactory and vary according to the disposition of the various courts to extend or restrict the right of set-off and the wording of the statute."⁹ In Virginia the policy is to give the statute of set-off a liberal construction, thus furthering its obvious purpose, namely, to prevent the necessity of a multiplicity of suits, and as far as it can be conveniently done to effectuate in one action complete justice between the parties.^{9a} In West Virginia the statute of set-off has

8. *Case v. Sweeny*, 47 W. Va. 638, 35 S. E. 853; *Hooper-Mankin Fuel Co. v. Shrewsbury Coal Co.*, 94 W. Va. 442, 119 S. E. 176.

9. 34 Cyc. 693.

9a. While the policy in Virginia to give the statute a liberal interpretation is commendable, it has led to confusion as to when the damages are deemed to be liquidated. In some of the cases cited the court has departed from the generally accepted idea on the subject. The difficulty is in the wording of the statute, which seems to contemplate the setting off of a debt against a debt. Some of the Virginia cases cannot be reconciled with that view. If the statute were modernized and allowed the setting off of a contract against a contract, the distinction between liquidated and unliquidated damages would be eliminated, and with it the confusion in the cases. In *Christian v. Miller*, 3 Leigh (30 Va.) 78, 23 Am. Dec. 251, it was correctly held that damages for the breach of contract for the future delivery of goods are unliquidated. Neither debt nor general assumpsit would lie in such case because there is no promise, express or implied to pay a sum certain by the defaulting party. Special assumpsit is the proper action in such case. In *Richardson Co. v. Whiting L. Co.*, 116 Va. 490, 82 S. E. 87, Judge Harrison quoted from § 92 of the text but by not going far enough, wrongly concluded that general assumpsit would lie in such a case, and therefore held that the difference between the contract price and the price the defendant had to pay for the article on the market was liquidated damages. This error was carried still further in *New Idea Spreader Co. v. Rogers*, 122 Va. 54, 94 S. E. 351. In *Dexter-Portland Co. v. Acme Co.*, 147 Va. 758, 133 S. E. 788, there is an excellent summary of the Virginia cases, and the court rightly refused to allow damages for the breach of an executory contract to be used as a set-off. However, the court neither criticises nor distinguishes the case from the cases reviewed. It cannot be reconciled with them, so far as the principles underlying the bringing of debt or general assumpsit are concerned. This is also true of *Baker v. Hartman*, 139 Va. 612, 124 S. E. 425.

Finally in *Odessky v. Monterey Wine Co.*, 188 Va. 184, 49 S. E. (2d) 330, the Court followed the principles enunciated in the *New Idea Spreader Co.*, *Dexter-Portland Co.* and *Baker* cases and rejected a plea of set-off based on unliquidated damages for the breach of an implied warranty. There the Court stated, "The amount of damages has never been fixed or agreed upon by the parties, and it is not fixed by operation of law, but must be ascertained by opinion based upon evidence of circumstances and conditions surrounding the transaction between the parties under rules of law governing breach of contract for failure of warranty of quality." 188 Va. at 192.

These distinctions are now of little value in Virginia since the adoption of the Rules of Court, but may be helpful in applying the West Virginia statutes.

been construed with less liberality than in Virginia. Thus the demand of both the plaintiff and the defendant must be certain or capable of being reduced to certainty by calculation or computation from definite data supplied by the pleading or the evidence.¹⁰

At the risk of repetition it must be pointed out that the Virginia Rules of Court do away with the necessity of distinguishing between liquidated and unliquidated damages. In Virginia the defendant can offset any claim which he has against the plaintiff in the nature of a demand for money.¹¹ Thus in one action complete justice may be effectuated between the parties.

The demand out of which set-offs and counterclaims arise must be due between the same parties, and in the same right.¹² A debt due from a partner cannot be set up against a partnership demand, nor *vice versa*, nor can a debt due to one as executor, administrator, or trustee, be set up against one in his own right, nor *vice versa*.¹³ Where principal and surety, however, are sued in the same action, the Virginia and West Virginia statutes¹⁴ permit the principal to set off against the plaintiff any claim which he may have against him, but the same privilege is not extended to the surety of a solvent principal. The surety may not, while the principal is solvent, set off a demand of his against the plaintiff.¹⁵ Where a contract has been made by an agent of an undisclosed principal and a defendant has dealt with such agent, supposing him to be the sole principal, if the action be brought in the name of the principal, the defendant has the right to be put in the same position to all intents and purposes as if the agent were the principal, and to

10. *Baltimore & O. R. Co. v. Jameson*, 13 W. Va. 833, 31 Am. Rep. 775; *Cook Pottery Co. v. Parker*, 86 W. Va. 380, 104 S. E. 31; *Hooper-Mankin Fuel Co. v. Shrewsbury Coal Co.*, 94 W. Va. 442, 119 S. E. 176.

11. Rule of Court (Va.), Rule 3:8. The Rule uses the term "counterclaim" which includes both set-offs and recoupments as well as other cross demands between defendant and plaintiff.

12. 4 Min. Inst. 787; *Wartman v. Yost*, 22 Gratt. (63 Va.) 595.

In *Hoffman v. Stuart*, 188 Va. 785, 51 S. E. (2d) 239, 6 A. L. R. (2d) 247, however, where plaintiff's action was against the administrator for property damage the Court permitted the defendant to cross-claim for the wrongful death of his decedent under § 8-136, although the Court recognized that the administrator was suing and being sued in a different capacity.

13. 4 Min. Inst. 788, 789; *Edmondson v. Thomasson*, 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301. See *First Nat. Bank of Waynesboro v. Johnson*, 183 Va. 227, 31 S. E. (2d) 581, citing (3d ed.) of text, and *Hoffman v. Stuart*, 188 Va. 785, 51 S. E. (2d) 239, 6 A. L. R. (2d) 247, citing (3d ed.) of text.

In order to warrant a set-off in an action by an executor or administrator, the debts must be mutual—*Hampton Roads Fire & Marine Ins. Co. v. Coburn Motor Car Co.*, 158 Va. 675, 164 S. E. 723, 84 A. L. R. 731. See, note 14 Va. L. Rev. 567.

14. Va. Code, §§ 8-239 to 8-240.1; W. Va. Code, § 5629.

15. *Stimmet v. Benthall*, 108 Va. 141, 60 S. E. 765; *Edmondson v. Thomasson*, 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301. Note, 50 L. R. A. (N. S.) 167.

set off claims against such agent acquired before knowledge of the fact that he was agent.¹⁶

A set-off must be pleaded, or at least a list filed and notice thereof given to the adverse party. In Virginia it is sufficient if a counterclaim is included in the grounds of defense and separately identified.¹⁷ Defendant's claim must have accrued at least at the time of the filing of the set-off. No action could be maintained by the plaintiff unless his claim was due at the time of action brought, and as the defendant is deemed, under the terms of the Virginia and West Virginia statutes, to have brought an action at the time of the filing of his plea or list,¹⁸ of course his set-off must have accrued by that time. Such, undoubtedly, is the rule at law, but in equity, in cases of insolvency or when irreparable injury would be otherwise done a defendant, a debt not due may be set off against an existing demand on the ground of a right of equitable retainer.¹⁹

§ 244. Acquisition of set-offs.

General consideration. As a general rule, under the Virginia and West Virginia statutes, the defendant may, after he is sued and up to the time of filing his plea or list, acquire set-offs against the plaintiff, but if they are acquired after action is brought the plaintiff will be entitled to a judgment for his cost even though the defendant should recover a judgment against the plaintiff for the excess of his set-off over the plaintiff's demand.²⁰ In West Virginia and, prior to the adoption of the Rules of Court in Virginia, the defendant could acquire set-offs up to the time of trial. Now in Virginia the pleading or list, if appropriate, must be filed by the defendant within twenty-one days after service upon him of the notice of motion for judgment.²¹ If the payee or other owner of a non-negotiable instrument assigns it to another, the debtor may acquire offsets against the assignor up to the time that he has notice of the assignment, but not afterwards. However, prior to the enactment of the negotiable instrument law in Virginia it was held that if the paper was negotiable, though transferred after maturity, set-offs acquired after transfer, even without knowledge of the transfer would not avail against the holder, as the holder took the legal title discharged of

16. *Leterman v. Charlottesville Lumber Co.*, 110 Va. 769, 67 S. E. 281; 25 Am. & Eng. Encl. Law (2d Ed.) 538, 539. Text cited, *Dixon Livery Co. v. Bond*, 117 Va. 656, 660, 86 S. E. 106, L. R. A. 1916A, 1211. Note: 53 A. L. R. 417.

17. Rule of Court (Va.), 3:18 (j).

18. Va. Code, § 8-244; W. Va. Code, § 5634.

19. 1 Va. Law Reg. 780; *Ford v. Thornton*, 8 Leigh (30 Va.) 695; *Wayland v. Tucker*, 4 Gratt. (45 Va.) 367, 50 Am. Dec. 78; *Williamson v. Gayle*, 7 Gratt. (48 Va.) 152; *Childress v. Jordan*, 107 Va. 275, 58 S. E. 563; *Peazle v. Dillard*, 5 Leigh (39 Va.) 30; Va. Rep. Ann. and notes.

20. Va. Code, §§ 8-244, 8-245, 8-246; *Allen v. Hart*, 15 Gratt. (59 Va.) 733.

21. Rules of Court (Va.), 3:5, 3:6.

such equities.²² Indeed it had been held in West Virginia that a *bona fide* purchaser for value of an overdue negotiable instrument held it subject only to such equities as attached to the instrument itself at the time of the transfer, not subject to offsets acquired before or after, of which he had no notice.²³ This rule has not been changed in Virginia by § 58 of the Negotiable Instrument Law.²⁴

The law fixes the order in which debts of a decedent shall be paid out of his estate, and if he dies insolvent this order cannot be disturbed, as it would affect the rights of other creditors. Upon this principle, if a creditor becomes bankrupt, or has made a general assignment as an insolvent, one of his debtors cannot set off claims bought up by him for the purpose *after he had notice of the assignment*, as by registration of the deed of assignment, or after adjudication in bankruptcy.²⁵

Set-off as between a bank and general depositor. The relation existing between a bank and its depositor is simply that of debtor and creditor, and hence the bank may acquire set-offs against the deposits of its creditor, and may deduct them from his account. By § 87 of the Negotiable Instruments Act (§ 6-440 of the Virginia Code) it is expressly provided that "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." But even if not payable at the bank which is the holder thereof, but at some other bank, the holder, upon dishonor by nonpayment, may, if the primary debtor is one of its customers, charge the debt to his account. This right results simply from the relation of the parties as debtor and creditor.²⁶

22. *Davis v. Miller*, 14 Gratt. (55 Va.) 1; *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 841.

23. *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 841.

24. Va. Code, § 8-410; *Stegal v. Union Bank, etc., Trust Co.*, 163 Va. 417, 176 S. E. 438, 95 A. L. R. 582.

25. *Finney v. Bennett*, 27 Gratt. (68 Va.) 365; *Edmondson v. Thomasson*, 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301; *State v. Brobston*, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138, and notes.

26. *Scammon v. Kimball (Ill.)*, 92 U. S. 362, 23 L. Ed. 483; 3 Am. & Eng. Encl. Law (2d Ed.) 835; *Durkee v. National Bank (Fla.)*, 102 F. 845; *Ford v. Thornton*, 3 Leigh (30 Va.) 695; *Owsley v. Bank of Cumberland*, 23 Ky. Law 1726, 66 S. W. 33. See also, *Pennington v. Third Nat. Bank of Columbus*, 114 Va. 674, 77 S. E. 455, 45 L. R. A. (N. S.) 781; *Deal v. Merchants', etc., Bank*, 120 Va. 297, 91 S. E. 135, L. R. A. 1917C, 548. The general rule is that a depositor in an insolvent bank may set off his deposit against his own indebtedness to the bank. See Notes: 25 A. L. R. 938; 82 A. L. R. 665; 97 A. L. R. 588.

A debtor of an insolvent bank, however, is not allowed to acquire the rights of a depositor subsequent to the insolvency and then assert those rights by way of set-off against his debt due the bank. To permit a set-off under those circumstances would in effect destroy the equality in the distribution of the assets and permit one creditor to be paid in full to the prejudice of the other creditors. *Mulins v. Breeding*, 167 Va. 85, 187 S. E. 466. On the other hand, the set-off of an endorser, which arose and accrued before the assignment and at the time of in-

§ 245. Application of set-offs.

Where there is a set-off to several bonds or other evidences of debt which have been assigned to different persons, the set-off should be applied to the bonds or other evidences of debt in the inverse order of assignment. This is upon principles of natural justice.²⁷ When the defendant files and proves an account of set-off to the plaintiff's demand, the plaintiff *may* then file and prove an account of counter set-off, and make such other defense as he might have made had an original action been brought upon such set-off. In the issue, the judge (if the case be tried without a jury), or the jury, ascertains the true state of indebtedness between the parties, and judgment is rendered accordingly.²⁸

In Virginia if the plaintiff sues as assignee of another party, and the defendant's set-offs against the assignor exceed the plaintiff's demand, he may waive the excess and simply rely upon his set-off to repel the plaintiff's action, or the statute provides that he may, by rule issued by the court or by the clerk in vacation, or by reasonable notice in writing stating the defendant's claim, make the person under whom the plaintiff claims a party to the suit, and if upon the trial it shall be ascertained that there is an excess in favor of the defendant beyond the plaintiff's demand, for which such person under whom the plaintiff claims as aforesaid is liable, the defendant may have judgment against such person for such excess.²⁹ Parties, by agreement among themselves, may waive the right of set-off.³⁰

§ 246. Pleading set-off.

Generally. The statute *permits* but does not require the defendant's set-off to be pleaded or relied on in the plaintiff's action. The defendant *may* is the language of the statute.³¹ It is a cross demand growing out of an independent transaction for which he may maintain an independent action, but

solvency, makes whatever sum the endorser paid after the insolvency and pursuant to his liability a proper set-off. The element of the time of payment does not figure, if made before the set-off was pleaded. *Belcher v. Bays*, 120 W. Va. 271, 197 S. E. 733, 117 A. L. R. 897.

²⁷ *Armentrout v. Gibbons*, 30 Gratt. (71 Va.) 632.

²⁸ Va. Code, §§ 8-239 to 8-240.1. This provision expressly allowing counter set-offs was inserted by the revisors of Va. Code, 1919. Of it they say in their note: "Whether or not counter set-offs were allowable prior to the revision had not been decided, so far as the revisors were informed, but apparently the right was recognized in *Sexton v. Aultman*, 93 Va. 20, 22 S. E. 838. It was deemed best, however, to settle the question, and the last sentence referred to is taken from the Code of West Virginia (Hogg, 1913), § 4824." W. Va. Code, § 5629.

²⁹ Va. Code, §§ 8-245, 8-246. See *Newberry v. Watts*, 116 Va. 730, 82 S. E. 508. W. Va. Code, § 5634 does not contain a similar provision.

³⁰ *Armour & Co. v. Whitney & Kemmerer*, 164 Va. 12, 178 S. E. 889, 98 A. L. R. 360.

³¹ Va. Code, § 8-239; W. Va. Code, § 5629.

in order to prevent a multiplicity of suits he is allowed to set up this claim in an action by the plaintiff against him. If he does rely on a set-off in the original cause of action, he "shall be deemed to have brought an action, at the time of filing such plea or account, against the plaintiff,"³² and of course should have the burden of proving the same. If he has *several items* of set-off, he may assert part of them in the plaintiff's action and omit the others, but he cannot claim part of an *entire demand* in one action to defeat the plaintiff's claim, and reserve the residue for cross action against the plaintiff. He is deemed to have brought an action on his set-off. He could not divide an entire demand and bring separate actions for the different parcels, neither can he assert a part of such entire demand as a set-off, and reserve the residue.³³

Manner of pleading. Set-offs may be specially pleaded by a formal plea of set-offs, or an account or list of set-offs may be simply filed with the papers in the cause without any plea. In either case the set-offs should be so described as to give the plaintiff notice of their nature.³⁴ Under the Virginia Rules of Court the counterclaim may be asserted by a special plea, by inclusion of the proper averment in the defendant's grounds of defense, or by merely filing a list in accordance with Virginia Code, § 8-239.

If the defendant simply files a list of the set-offs and the plaintiff wishes to rely upon the fact that some or all of them are barred by the act of limitations, this defense would be reached by an instruction from the court as

³² Va. Code, § 8-244; W. Va. Code, § 5634.

³³ *Huff v. Broyles*, 26 Gratt. (67 Va.) 283. See also, *Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502.

³⁴ Va. Code, §§ 8-239 to 8-240.1. Prior to the revision of 1919 it seemed that a mere list, without any plea, did not conform to the requirement of the statute which then provided that the defendant might have allowed any set-off which was "so described in his plea or in an account filed therewith," as to give the plaintiff notice of its nature. (Code 1887, § 3298.) Undoubtedly the statute contemplated a plea of some kind, but Prof. Minor had said that the defense could be either "by plea or by notice merely, which is usually endorsed on the bond, note or account evidencing or containing the particulars of the cross demand stating that the same will be relied on at the trial as a set-off. This notice is usually and prudently accompanied by a plea of general issue, nil debet or non assumpsit, but that does not appear to be necessary." (4 Min. Ins. 790.) And this statement of Prof. Minor accorded with the practice, but it did not seem to accord with the language of the statute. In one case before the revision of 1919 it had been held that the defendant might either "plead the set-off, or give notice of it by filing an account of set-off" but the holding was obiter as to the right of the defendant to rely on the list alone, as the question arose in a case where the defendant had pleaded nil debet and filed an account with his plea, so that whether the account would of itself have been sufficient without the plea was not involved in the case. (*Sexton v. Aufman*, 99 Va. 20, 22 S. E. 838.) The present section settles the question by striking out the word "therewith" and inserting in lieu of it the words "with the papers in the cause." Thus the pre-existing practice is made statutory. W. Va. Code, § 5637.

there is no plea to which the plaintiff can reply.³⁵ If, however, the defendant files a formal *plea* of set-off, or in Virginia any pleading asserting a counterclaim,³⁶ and the plaintiff wishes to rely on the statute of limitations, he must do so by pleading to it as if it were a motion for judgment against him.

§ 247. Recoupment—Definition.

The difference between recoupment and set-off has been illustrated by scales or balances. Ordinarily, the balances will stand even between man and man, but if a plaintiff puts his claim into the balances against the defendant this destroys the equilibrium which had previously existed, and the plaintiff's side of the balances will be pulled down in his favor. In order to restore the equilibrium the defendant may do either of two things. He may either take out part or all of what the plaintiff has put into his side, or he may put something into the other side of the balances. When he takes something from the plaintiff's side this is recoupment, a reduction or diminution of what the plaintiff claims against him; but if, instead of taking something out of the plaintiff's side, he puts some outside, independent matter of his own into his own side of the scales, he may thereby restore the equilibrium; or, if he puts in sufficient, he may have the scales dip on his side, showing that the balance is in his favor. When the defendant does this, it is set-off. The illustration is very good as far as it goes; but in so far as it relates to recoupment, it is inexact in one particular. In order to constitute recoupment, what is taken from the plaintiff's side of the scales must be in consequence of some delinquency or deficiency on his part. Recoupment arises out of mutual and reciprocal duties, and when one of the parties (e. g., the plaintiff) has failed fully to discharge the duty devolved upon him, this failure or delinquency on his part may be given in evidence to reduce or cut down what he would otherwise have been entitled to recover. Hence payment is not recoupment, as it does not represent any delinquency or deficiency on the part of the plaintiff. Recoupment, therefore, is the right of the defendant to cut down or diminish the claim of the plaintiff in consequence of his failure to comply with some provision of the contract sought to be enforced, or because he has violated some duty imposed upon him by law in the making or performance of that contract.³⁷ The delinquency or deficiency which will justify the reduction of the plaintiff's claim must arise out of the same transaction, and not out of a different transaction. In most cases it arises out of some fraud or misrepresentation on the part of the plaintiff in the procurement of the contract, but it is by no means con-

35. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. 838.

36. *Rule of Court* (Va.), § 10.

37. 35 Am. & Eng. Encl. Law (3d Ed.) 846, 57 S. J. 368; 47 Am. Jur. 708.

fined to that. Very frequently it is a mere extension of the doctrine of failure of consideration.³⁸

§ 248. Common law recoupment.

Recoupment is of common law origin, but its use was very much more restricted than it is under modern practice. At common law, the want or failure of consideration, fraud in the procurement of contract, and the like, could be proved under *non assumpsit* or *nil debet* in an action on an unsealed instrument, but the defendant could not recover the excess, if any, of the plaintiff. On sealed instruments the defendant could not show failure of consideration, fraud in the procurement, or a breach of warranty of title, or soundness, of personal property. Indeed, no matter of recoupment could be shown against a sealed instrument. The seal was deemed of such solemnity as to forbid this. Hence for all matters of recoupment against sealed instruments the defendant was driven to a separate action against the plaintiff.³⁹

§ 249. Virginia and West Virginia statutes of recoupment.

The original statute of recoupment in Virginia was enacted in 1831, and the statute of recoupment is frequently referred to as the Act of 1831. It is also sometimes referred to as the statute of equitable defenses, and the plea is frequently spoken of as a plea in the nature of a plea of set-off, but the act, as will appear from reading it, is really a statute of recoupment and bears but little resemblance to a set-off.⁴⁰ The purpose of the act was to en-

38. Note, 40 Am. Dec. 323, and cases cited; 25 Am. & Eng. Encl. Law (2d Ed.) 330, 331; 47 Am. Jur. 713. See 26 W. Va. L. Quart. 263, article by Mr. Russell S. Ritz, on Set-Off and Recoupment in W. Va.

39. 4 Min. Inst. 792; 7 Va. Law Reg. 332.

40. Va. Code, § 8-241 is as follows: "In any action on a contract, the defendant may file a plea, alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other such matter as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit."

Va. Code, § 8-242 is as follows: "If a defendant, entitled to such a plea as is mentioned in the preceding section, shall not tender it, or though he tender it, if it be rejected, he shall not be precluded from such relief in equity as he would have been entitled to if the preceding section had not been enacted. If when an issue in fact is joined thereon, such issue be found against the defendant, he shall be

large the rights of defense in that class of cases, and to enable parties to settle in one action all matters of defense between them growing out of the same transaction⁴¹ or as stated in another case: "The plain purpose of said statute it to give the same measure of relief under it by a plea that could be obtained by the defendant in an independent action brought at law for the same cause, or in equity for relief growing out of the same transaction, and thus to prevent a cause of action from being divided into two; so that to give effect to this plain purpose it is essential that it should include contracts under seal as well as contracts by parol."⁴² It will be observed that the statute enumerates specifically certain matters which may be set up thereunder and also "any other matter as would entitle him either to recover damages at law from the plaintiff, * * * or to relief in equity, in whole or in part, against the obligation of the contract." It has been held very properly that the words "or any other matter" means matters of like kind as the preceding particular enumeration, and hence the defense under the statute is limited to other matters growing out of the contract in suit.⁴³

The Revisors of the West Virginia Code of 1931 took the words "or any other matter" from the Virginia Code and inserted them into the West Virginia Code. The Revisors state in their note that the purpose of the added words was to give the defendant the right to recover any excess to which he might be entitled and that "the revised section as a whole contemplates

barred of relief in equity upon the matters alleged in the plea, unless upon such ground as would entitle a party to relief against a judgment in other cases. Every such issue in fact shall be upon a general replication that the plea is not true; and the plaintiff may give in evidence on such issue any matter which could be given in evidence under a special replication if such replication were allowed."

Va. Code, § 8-247 is as follows: "Nothing in this chapter shall impair or affect the obligation of any bond or other deed deemed voluntary in law upon any party thereto, or his representatives."

41. *Newport News, etc., Ry. & Elec. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011; *Hamilton v. Goodridge*, 164 Va. 123, 178 S. E. 874.

42. *Fisher v. Burdett*, 21 W. Va. 626.

43. *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 272, 21 S. E. 466. In *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666, in holding that the defense that a provision in a note for an attorney's fee was unreasonable and unconscionable might be made under Va. Code, § 8-241 the court said: "The connection of the language of the statute is such that the words 'or any other matter' do not refer to matters of the same kind previously mentioned in the statute except in one particular, namely, in the particular that they must contain the feature of being matters directly connected with and injuries growing out of the contract sued on. As plainly set forth in the statute itself they are 'any other matter as would entitle him' (the defendant) 'to recover damages at law from the plaintiff or to relief in equity, in whole or in part, against the obligation of the contract.' That the matters allowed to be pleaded under such statute must be such as would entitle the defendant to recovery or relief mentioned against the obligation of the contract sued on is, plainly, the only restrictive meaning which is imposed by the ejusdem generis rule when that rule is properly applied to the words 'any other matter'."

the settlement of all differences that are connected with the subject matter of the plaintiff's claim." West Virginia is thus brought into line with the law as it existed in Virginia prior to the adoption of the Rules of Court.

The Virginia statute applies only to "any action on a contract," hence if the plaintiff's action is not "on a contract" the defendant cannot set up statutory recoupment as a defense under the statute.⁴⁴ The statute is purely *cumulative*, and does not purport to be compulsory. The language of the statute is "the defendant *may* file a plea." The first part of the section applies to all contracts, sealed and unsealed, while the second part applies to sealed contracts only. So far as unsealed contracts are concerned, the provisions of that section, disconnected from the right to recover the excess provided by Virginia Code, §§ 8-245 and 8-246, would seem to have been useless, and to have conferred no right which did not exist before. At common law any of the defenses enumerated in these sections could have been set up under the general issues of *nil debet* and *non assumpsit*, but there could have been no recovery of the excess, if any.⁴⁵ Two important changes seem to have been wrought by the statutes:⁴⁶ First, extending the right of recoupment to actions on sealed instruments, which did not exist at common law, and, second, permitting the *excess* over the plaintiff's demand to be recovered *in any case*, whether the plaintiff's demand be upon a sealed or an unsealed contract.⁴⁷ Virginia Code, § 8-242 and West Virginia Code, § 5631 preserve to the defendant equitable recourse in two cases: (1) where no plea is tendered setting up the equitable defense, and (2) where such plea is tendered but is rejected for any cause.⁴⁸ The language of the sections is different in many respects from the original Act of 1831.

It is noticeable that there is no saving of *legal* defenses. Just what is the effect of this is not altogether plain. There was no necessity for any saving of equitable defenses, because the remedy afforded by Virginia Code, § 8-241 is only permissive, and, further, because where equity has once acquired jurisdiction of a subject and is administering relief where none exists at law, it does not lose its jurisdiction simply because a legal remedy is furnished by statute, unless the equity jurisdiction is taken away by statute. It would seem, therefore, that there was no occasion for the saving provided by Virginia Code, § 8-242. It suggests, however, the *possibility* that § 8-241 was intended to take away the common-law defense of recoupment in all other

44. *Odessky v. Monterey Wine Co.*, 188 Va. 184, 49 S. E. (2d) 330.

45. *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009; *Norfolk Hosiery, etc., Co. v. Aetna, etc., Co.* (citing text), 124 Va. 221, 98 S. E. 43; *Cox v. Hagan* (citing text), 125 Va. 656, 100 S. E. 666; *Wing Bros. & Baker v. Lipscombe*, 127 Va. 554, 103 S. E. 623.

46. Va. Code, § 8-241; W. Va. Code, § 5630.

47. *Charleston Milling & Produce Co. v. Craighead*, 116 W. Va. 194, 179 S. E. 69; *Hamilton v. Goodridge*, 164 Va. 123, 178 S. E. 874.

48. It will be noted that W. Va. Code, § 5631 saves the defense in this second case to where the plea is rejected for not being offered in due time.

cases on the principle *expressio unius, exclusio est alterius*. Was it so intended? The language of the statute is, "the defendant *may* file a plea." This seems to be permissive only. He is not compelled to file it, but may file it. Furthermore, the general rule of law is that a statute will not be held to repeal the common law in any case unless it plainly does so. This statute certainly does not *plainly* repeal the common law, and the doctrine of *expressio unius, etc.*, is by no means a safe guide in all cases to determine the legislative intent. For our present purpose we may assume that the common law is still in force. A defendant then in an action on an *unsealed* contract may defend (1) as at common law, or (2) under § 8-241. The relief is the same, except as to the excess over the plaintiff's demand. Such excess could not be recovered in the plaintiff's action at common law. For this he was put to his cross-action. He could recover to the extent of the plaintiff's demand and *surrender the excess*, or else stay out altogether and bring his cross-action for the whole matter of recoupment.⁴⁹ He could not recoup for a part, and sue in a separate action for the residue.⁵⁰ If a defendant desires to recover the excess he must, therefore, make his defense under § 8-241, by a *sworn plea*.

If the plaintiff sues in debt or assumpsit on a simple contract, and the defendant pleads the general issue, he may, under his plea, amongst other things, rely upon matter of recoupment.⁵¹ Suppose, for example, the plaintiff sues in assumpsit for a bill of goods amounting to \$1,000. The defendant claims (1) that he never ordered the goods or accepted them, and (2) that the goods were not as represented, and hence he is damaged to the extent of \$500. Now, clearly either of these defenses could be relied on under the general issue. But suppose he elects to make only the first defense and says nothing as to the other, and there is a judgment against him for the full amount of the plaintiff's claim, can he then bring his separate action for the matter of recoupment? The books are filled with cases holding that the doctrine of *res judicata* "embraces not only what is actually determined in the first suit, but also extends to any other matter which the parties might have litigated in the case."⁵² Now, plainly the matter of recoupment might have been litigated in the plaintiff's suit. How, then, is the defendant to escape from this dilemma? He can only do so, if at all, upon the ground that the rule has no application to matters of set-off, recoupment or counterclaim; that as to these the defendant has his election either to assert them in the plaintiff's action or by cross-action, and show by parol, for there is no other way of showing it, that the matter of recoupment was not set up in the

49. *Huff v. Broyles*, 36 Gratt. (67 Va.) 283.

50. *Hamilton v. Goodridge*, 164 Va. 123, 178 S. E. 874, citing (3d ed.) of text.

51. *Cox v. Hagan* (citing text), 125 Va. 656, 100 S. E. 666.

52. *Fishburne v. Ferguson*, 85 Va. 321, 1 S. E. 361; *Aurora City v. West* (Ind.), 74 U. S. (7 Wall.) 83, 19 L. Ed. 43, 3 Va. Law Reg. 278.

plaintiff's action.⁵³ If the defendant files a plea of statutory recoupment in accordance with § 8-241, he is bound by all the statutory provisions on the subject and § 8-244 places him on the footing of the plaintiff and he is deemed to have brought an action against the plaintiff at the time of the filing of his plea; hence his claim is open to the same grounds of defense to which it would have been opened to an action brought by him thereon.⁵⁴ Any judgment on his plea would be a bar to a separate action on the same demand. At common law the defendant could always assert his matter of recoupment by a separate action, and it has been held that the object of § 8-241 was "to enlarge the right of defense and not to *impair any previous right*, or to take away such defenses where the law previously permitted them to be made."⁵⁵ It, therefore, may be concluded that the right to the cross-action still exists.⁵⁶

The scope of the Virginia Rules of Court is such as to embrace under the broad term "counterclaim" both set-off and recoupment and to render the statutes and their technical distinctions of far less practical importance. Nevertheless, strictly equitable defenses would not be available in actions at law without the aid of the statute. Furthermore the better practice in Virginia would be to verify any pleading or the part thereof which asserts by way of counterclaim matter set out in the statute.^{56a}

Reinvestment of title to real estate. There is one class of cases, however, to which the defense provided by § 8-241 does not apply. Where an action is brought to recover for the purchase price of *real estate* and the defense involves a rescission of the contract *and the reinvestment of the plaintiff with the title*, it has been repeatedly held that § 8-241 does not apply, because the court of law has not the needed machinery either to compel or supervise the making of a conveyance.⁵⁷

It has been insisted that § 8-241 cannot be relied on in any case where the court cannot give *complete relief* in the case in which the plea is offered.⁵⁸ For example, if the legal title has not been conveyed to the defendant and he is sued for a part of the purchase money, it is said that if he were allowed to recoup for a part and the plaintiff recovered the residue, the result of the litigation would be to leave the plaintiff with the balance of the purchase money in his pocket, and the defendant still without the legal title, thus necessitating a suit in equity to obtain the title. This, it is argued, is not complete relief, and hence the defense of statutory recoupment cannot be

53. 19 Encl. Pl. & Pr. 931.

54. Neely v. White, 177 Va. 358, 14 S. E. (2d) 337.

55. Columbia Accident Ass'n v. Rockey, 93 Va. 678, 25 S. E. 1009.

56. Kinzie v. Riely, 100 Va. 709, 42 S. E. 572.

56a. Va. Code, § 8-241.

57. Shiflett v. Orange Humane Society, 111 Gratt. (48 Va.) 297; Mangus v. McClelland, 93 Va. 786, 22 S. E. 366.

58. 4 Min. Inst. 795; Note 3 Va. Law Rev. 280 E.

made under § 8-241. The cases, however, have not gone this far. They have restricted the refusal to the case where it is necessary to reinvest a plaintiff with title to real estate. Indeed, this question has been set at rest, and very properly, by *Watkins v. West Wytheville Land Co.*, 92 Va. 1, 22 S. E. 554. In this case the plaintiff had sold real estate to the defendant, and the defendant had re-conveyed the property to a trustee to secure the balance of the purchase money. A part of the purchase price had been paid in cash. The plaintiff sued on the bonds for the deferred payments, and the defendant sought to recoup a part of the consideration under § 8-241 on account of fraudulent representations made by the plaintiff which induced the contract of sale. These pleas were rejected by the trial court, and, on appeal, it was insisted that they were properly rejected because the defense set up under them was purely equitable and could not be made at law, and that the defendant by his plea sought to rescind and set aside his contract of purchase and to reinvest the vendor with the title to the lots. In dealing with this question, the court said: "We do not understand this to be the purpose or effect of these pleas. On the contrary, they expressly set out the value of the lots in consequence of the false representations complained of and only claim damage by way of offset for the difference. The purchase price of the lots was \$1,000. The pleas alleged that they are now worth \$100, and that the damage sustained, which is filed as an offset, amounts to \$900. No rescission of the contract of sale is asked for, nor is any needed. The defendant has a deed to the lots, and if he were to prevail in his defense, he would only have to move the court, under the statute (Va. Code, §§ 43-67 to 43-69) to have the deed of trust resting on the lots marked 'satisfied' on the deed book and produce the judgment in his favor as evidence of its satisfaction." The court then quotes the statute and examines some of the preceding cases discussing it, and concludes: "In a case, therefore, where the equitable grounds relied on would require a rescission of the contract and a reinvestment of the vendor with the interest alleged to have been sold, a plea by way of special set-off under § 3299 [of the Code of 1887—Va. Code, § 8-241] could not be relied on, but where no rescission is asked for and none is needed—the only purpose of the plea being to ascertain the damage sustained by reason of the default of the vendor—the plea can be relied on and the defense made at law under the statute. The pleas were therefore improperly rejected on the ground that the defense could not be made at law."

The defendant, however, must waive his right to a rescission of the contract in equity, and must, by his plea, go for reimbursement exclusively in the form of damages for the vendor's breach of contract. The defendant is put to his election between two rights. He may either go into equity for rescission, or seek damages at law. He cannot hold to both.⁵⁹

If a plaintiff, having conveyed title to real estate to the defendant, sues at

⁵⁹ *Watkins v. Hopkins*, 13 Gratt. (52 Va.) 743, 4 Min. Inst. 796, 797.

law to recover a part or all of the purchase price, and the defendant files a plea which seeks *rescission merely*, the plea is bad, as it requires a reinvestment of the plaintiff with the title,⁶⁰ and the plea is not aided by a tender of reconveyance, as a court of law has no machinery for supervising such a conveyance and determining whether it is a proper conveyance.⁶¹ Nor is a plea good which offers to rescind.⁶² In each of these cases the plea, if received, would require a court of law to do what it has no power to do, for if title is to be re-conveyed to the plaintiff, a court of law has no machinery by which it can make, or cause to be made, or examine or pass upon, when made, a deed to the plaintiff. For this reason relief by a plea under § 8-241 is refused, and the party is left to his relief, in equity, if any.

Rejection of plea under statute. If the plea authorized by Va. Code, § 8-241 has been rejected, the plaintiff is precluded from instituting a separate action for the same claim on the law side of the court, but, under the express terms of Va. Code, § 8-242 he is not precluded from pursuing his equitable relief in chancery.⁶³ But inasmuch as § 8-242 saves the relief in equity when the defendant does not tender such plea, or, though he tender it, if it be rejected for any cause, it is clear that the relief in equity is not impaired.⁶⁴ Prior to the revision of 1919, if the plea was tendered and rejected for any reason other than because the plea was not offered in due time, no provision was made for any saving in favor of the defendant and the West Virginia statute still retains this restriction.⁶⁵

The section further provides, if, when issue in fact is joined thereon, such issue be found against the defendant, he shall be barred of relief in equity upon the matters alleged in the plea, unless upon such ground as would entitle a party to relief against a judgment in other cases. If equitable defenses which are only available under Virginia Code, § 8-241 and West Virginia Code, § 5631 are not made at law, they may be made in a suit in equity brought to enforce the judgment at law, provided nothing occurred in the action at law which the statute declares precludes the defendant from relief in equity.⁶⁶

If the plea is so framed as to show that the defendant does not seek rescission, but an affirmance, he may lay his damages at any sum he pleases, even though it amounts to the full amount of the purchase money, but this should

60. *Shiflett v. Orange Humane Society*, 7 Gratt. (48 Va.) 297.

61. *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364.

62. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42.

63. *Hamilton v. Goodridge*, 164 Va. 123, 178 S. E. 874.

64. See, in this connection, *Shiflett v. Orange Humane Society*, 7 Gratt. (48 Va.) 297; *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364. See also, *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 602, 98 S. E. 659.

65. Revisors' note to Va. Code of 1919, § 6146; W. Va. Code, § 5631.

66. *Selden v. Williams*, 108 Va. 142, 32 S. E. 390; *Rohrer v. Strickland*, 116 Va. 156, 32 S. E. 711; *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 602, 98 S. E. 659.

be made to *appear clearly*. The value of the property is to be ascertained as of the date of the contract for its purchase, and not as of the date of the plea pleaded,⁶⁷ and it seems well-nigh inconceivable that a purchaser could be found of property *absolutely worthless*, and the plea which claims *complete damages* for false representations with reference to property for which the defendant had contracted to pay a large sum of money would seem of necessity to seek rescission. Such a plea should show very clearly, if not expressly, that the defendant still insisted on *affirmance*, and not on rescission.

Action for purchase price of personal property. If the subject matter of the litigation be personal property, there is no trouble about administering complete justice in a court of law. Here the course is easy. If the purchaser elects to keep the property, he affirms and simply recoups the damages, or he may rescind, and if he does rescind, the contract of sale is by the judgment of the court avoided *ab initio* and thereby the plaintiff is reinvested with the title as fully as the defendant would be upon an execution satisfied in an action of *trover*.⁶⁸

Notice of recoupment. When recoupment is sought to be set up under one of the broad general issues, the courts are in conflict as to the necessity for notice of an intention to rely on such matters.⁶⁹ The West Virginia cases give no intimation of such a requirement, but the practice of demanding a bill of particulars under § 5575 of the West Virginia Code prevents a plaintiff from being taken by surprise. In Virginia since pleas of the general issue are abolished it is necessary either to plead recoupment in a special plea or to set it up in the grounds of defense.⁷⁰

Essentials of a valid plea. There are two essentials of a valid plea under Virginia Code, § 8-241 and West Virginia Code, § 5631. They are: (1) The plea must allege the *amount* to which the defendant is entitled by reason of the matters alleged in the plea,⁷¹ and (2) the plea must be sworn to. But it would probably be too late to object to the want of an affidavit after an issue of law or fact has been taken on a plea not so verified.⁷²

67. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42.

68. See on this point, *Duncan v. Carson* (citing text), 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

69. 19 Encl. Pl. & Pr. 744; 47 Am. Jur. 783.

70. Rule of Court (Va.), 3:5.

71. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42; *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

72. *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466. In *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666, at p. 678 of the Va. Report it is said that the plea should "also allege the facts on which such claim is based with sufficient detail and certainty to advise the plaintiff of the nature of the defense and to enable the court on the facts being found or admitted to decide whether the matter relied on constitutes a valid claim to the relief sought." This is the principle of Rule of Court (Va.) 3:11(d).

It is believed that the better practice under the Virginia Rules of Court is to

Relief in equity. The defendant is not obliged to avail himself of the relief afforded by the statute, but may go into equity for that purpose, and when he does, it is not necessary that he should aver in his bill any reason or excuse for not availing himself of such equitable defense at law.⁷³

Set-off, common-law recoupment, statutory recoupment, and counterclaim under the Virginia Rules of Court may be contrasted by means of the following table:

Set-Off	Com. Law Recoupment	Stat. Recoupment, Va. Code, § 8-241	Counterclaim under Va. Rules of Court
1. Different transactions.	Same transaction.	Same transaction.	Same or different transaction.
2. Must be liquidated.	Need not be liquidated.	Need not be liquidated.	Need not be liquidated.
3. May recover excess, §§ 8-245, 8-246.	No recovery over.	May recover excess.	May recover excesses.
4. Must be pleaded or list filed, §§ 8-239 to 8-240.1.	Shown under general issues of nil debet and non assumpsit.	Special plea sworn to, § 8-241.	Must be specially pleaded or set up in the grounds of defense.
5. May be used against sealed instrument.	Cannot be used against sealed instrument.	May be used against sealed instrument.	May be used against sealed or unsealed instrument.
6. Claims to which the defendant has only an equitable title may be relied on, § 8-94, ante, § 56.	Purely equitable defenses cannot be set up.	Purely equitable defenses relied on. See <i>Kinzle v. Riely</i> , 100 Va. 709, 42 S. E. 872.	Must be for a money judgment in personam.

Professor Lile's excellent comments on this subject are given in the footnote.⁷⁴

include a verification. Attention, however, is invited to Rule of Court 3:14 providing that verification is waived unless objection to the want of it is made within seven (7) days.

73. *Bias v. Vickers*, 27 W. Va. 456; *Selden v. Williams*, 108 Va. 542, 62 S. E. 380; *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 692, 98 S. E. 639.

74. "As between common law recoupment and statutory recoupment, the defendant may still use either at his option, unless (1) he desires a recovery over, or (2) the action is on a sealed instrument. The statute has in nowise abridged the scope of the general issue or the extent of common law recoupment, and the latter may still be set up under the general issue, and with like effect, as at common law. *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009. The object of the statute was to enlarge the scope of the common law recoupment in the two particulars already mentioned, namely, to permit a recovery over against the plaintiff, and to allow recoupment against a sealed instrument.

A few examples may aid some of our younger brethren in comprehending the distinctions mentioned: 1. A sells B a horse for \$250, with warranty of soundness, and takes his note for that amount. The warranty is broken, and the horse is worth only \$100. In an action of debt by A on the note, B may, under the general issue of nil debet, prove the breach of warranty and the extent of his damage, thus reducing A's recovery to \$100. This is common law recoupment. B might have proceeded under § 8299 [of the Code of 1887—Va. Code, § 8-214], and ex-

§ 250. Who may rely upon the statute.

In the absence of the insolvency of the principal, or some other equitable ground, one who is a mere surety on a bond but no party to the contract out of which the bond arose cannot avail himself of the defense given by § 8-241. For instance, if the purchaser of land gives a bond with surety for the purchase price and the grantor conveys the land to the purchaser with a warranty that he has the right to convey, the covenant is broken, if at all, as soon as the deed is made, and the grantee may sue at once without waiting eviction or special damage; or, if the purchaser is sued on his bonds for the purchase price, he may recoup his damages under Virginia Code, § 8-241, or he may stay out and bring his independent action for the breach of the covenant. Where there has been neither eviction nor special damages arising from the breach, if he should set up the breach he could recoup only nominal damages, but this would bar any further recovery if there should be subsequent eviction from the land in whole or in part. For this reason he may, and doubtless would, prefer not to rely upon statutory recoupment, but to stay out and bring a separate action for damages in the event that he should be evicted. This right of election, however, belongs to the principal alone, although the recovery, if any, would inure to the benefit of the surety. The principal alone has the right and power to determine whether he will as-

exercised his right of statutory recoupment, but the result would have been the same, and he would have derived no advantage from the statutory proceeding.

"2. Suppose the same facts, save that B paid \$200 of the \$250 cash, and the action is for the recovery of the balance of \$50. Here, if B relies upon common law recoupment, he repels A's claim of \$50, but his total damage is \$150—so that he is still out of pocket \$100, and it is doubtful whether he has not exhausted his remedy under the doctrine of *res judicata*. The proper step for him, therefore, is to resort to statutory recoupment [Code 1887, § 3299—Va. Code, § 8-241], whereby he would not only repel the claim for \$50, but obtain a judgment over against the plaintiff for the full amount of damages suffered.

"3. Suppose the same facts as in the case first stated, except that B executes his bond (instead of a note) for \$250. Here the breach of warranty could not be set up under the general issue, by reason of the seal, which shuts off all inquiry into the sufficiency of the consideration. Hence B must either suffer judgment, and bring an independent action for his damages, or else proceed by statutory recoupment, in terms giving this right in case of a sealed instrument.

"4. Suppose in any of the foregoing cases that there had been no breach of warranty or other failure of the seller to comply with his contract in the sale of the horse, but that B held A's note for the same, or a greater or less amount, executed, before or after the sale of the horse, as the purchase price of a steam engine. Here, in an action by A against B for the purchase price of the horse, B might use A's note for the steam engine as a set-off, either repelling A's claim in whole or in part, or recovering the excess over against him, according to the relative amounts of the two notes. This would be set-off and not recoupment, since the claim asserted by the plaintiff and that set up by the defendant arise out of distinct transactions, in no way connected with each other. Neither common law nor statutory recoupment would avail in this case. 12 Va. Law Reg. 333, 334.

sert his rights against the creditor in the latter's suit, or will bring a cross-action against him. The surety has no claim for damages against the grantor for a breach of covenant in a deed to which he is no party and under which he acquired no interest, and hence would not be permitted to occupy the position in the suit of claiming damages against the grantor. This right, as stated, belongs to the principal alone.⁷⁵ Nor can a surety set off or recoup against the plaintiff's claim a purely legal demand growing out of an entirely different transaction from the claim asserted by the plaintiff. The provisions of Virginia Code, § 8-241 and West Virginia Code, § 5631 were not intended to alter or modify that provision of Virginia Code, § 8-240 and West Virginia Code, § 5629 which exclude the right of a surety to set off against the plaintiff's demand a claim due to such surety by the plaintiff.⁷⁶

In a common-law action against a principal and surety on a bond, the surety cannot set up a defense under the statute that the plaintiff creditor without the consent of the surety had released a lien which he had on the property of the principal debtor as a security for the debt. Such a defense is a matter of exclusive equitable jurisdiction.⁷⁷ If, however, the matter of relief consists of mere failure of consideration, something showing that the plaintiff has no right to recover anything on account of some defect in the contract, not giving rise to a separate cause of action, then it would seem that the defense may be made by the surety. Failure of consideration here means practically a want of consideration, e. g., if the sale be of a patent right, and the patent is void.⁷⁸

§ 251. Cross-claims under the Virginia Rules of Court.

Prior to the adoption of the Rules of Court a defendant could not in an action at law brought against him assert any claim which he might have against a codefendant. Now the defendant may assert as a cross-claim against one or more codefendants any cause of action arising out of the matter pleaded in the notice of motion for judgment.⁷⁹ It is not believed that the defendant thereby is authorized for the purpose of asserting such a claim to join third parties not joined by the plaintiff as defendants in the original action.⁸⁰ It, moreover, is clear that the matter must grow out of the same transaction or occurrence upon which the plaintiff's cause of action is based.

75. *Kinzie v. Riely*, 100 Va. 709, 43 S. E. 872.

76. *Stimmel v. Benthall*, 108 Va. 141, 60 S. E. 765.

77. *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554.

78. *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355.

79. Rule of Court (Va.), 3:9.

80. *Masters v. Hart*, 189 Va. 969, 55 S. E. (2d) 205.

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have accrued prior to or during the period of such service. This provision is a valid exercise of power by the Federal Government and governs actions in the state as well as federal courts.^{44b} The courts have also uniformly held that the statute applies not only to actions by persons in the military service against civilians, but also to actions by civilians against persons in the military service.^{44c} There, however, are no holdings on this point in Virginia and West Virginia.

44a. 50 U. S. C. A. App., § 323.

44b. *Perkins v. Manning*, 59 Ariz. 60, 122 P. 2d 857; *Blazejowski v. Stadnicki*, 317 Mass. 352, 58 N. E. 2d 164; *Crawford v. Adams*, 213 S. W. 2d 721.

44c. See cases collected in 26 A. L. R. 2d 296-296.

§ 238. New promise or acknowledgment.

Page 422, n. 75. In *Bickers v. Pinnell*, 199 Va. 444, 100 S. E. 2d 20, it was held that a letter written by the decedent shortly before his death, to an officer of the bank which he had appointed as the executor of his will, acknowledging an indebtedness to his daughter, was a sufficient acknowledgment of the debt to have the force of a new promise under the provisions of Va. Code, § 8-25. The contention that the promise was ineffective because not made directly to the creditor (his daughter), was held to be without merit in the circumstances of the case.

CHAPTER 31.

SET-OFFS, RECOUPMENT, AND COUNTERCLAIM.

§ 241. Set-off—Definition.

Page 430. "Set-off is a counter demand of a liquidated sum growing out of a transaction extrinsic to the plaintiff's demand, for which an action on contract might be maintained by the defendant against the plaintiff and which is now exhibited by the defendant against the plaintiff for the purpose of counterbalancing in whole or in part the plaintiff's demand, and, where it exceeds the plaintiff's demand, of recovering a judgment in his own favor for the excess."^{98a}

98a. Text quoted with approval in *National Bank & Trust Co. v. Castle*, 196 Va. 686, 93 S. E. (2d) 228.

Page 430, n. 2. In recognition of the drastic procedural changes made by Rules of Court (Va.), 3:8, 3:9 and 3:10, Va. Code, § 8-239 was rewritten in 1954 (Acts 1954, c. 608) to read as follows: "The right of litigants to set off mutually existing claims and demands in a single action is hereby recognized, and in actions at law in courts of record, a defendant may counterclaim against the plaintiff or cross-claim against another defendant to the extent permitted and in the manner prescribed, by the applicable Rules of Court adopted from time to time by the Supreme Court of Appeals." The rationale of the amendment is explained by the Va. Code Commission which recommended it, as follows: "Although § 8-239 is superseded by Rules of Court, 3:8, 3:9 and 3:10 which clearly expand the subject matter of counterclaims, it is felt that since the right of set-off was not recognized by the common law, it is advisable to give statutory recognition to the right of set-off as distinguished from the kind of claim which may be so used and the procedure thereon. For this reason it is recommended that the above (refer-

ring to the statute as enacted) be enacted as a substitute for the present § 8-239."

Va. Code, §§ 8-239.1 and 8-239.2 were added to the Code in 1954 (Acts 1954, c. 609) to provide for counterclaim procedure in courts not of record. As will be readily observed, these statutes in large measure are adaptations of the procedure prescribed in the Rules of Court.

Va. Code, § 8-240 was rewritten in 1954 (Acts 1954, c. 553) but without substantial change. The purpose of the amendment was to adopt the terminology used in the Rules of Court.

Va. Code, § 8-240.1 was not amended although its terminology would seem to be obsolete in view of the Rules of Court. It may be observed that the Code Commission recommended the repeal of this section as no longer necessary. House Document No. 16, 1954 Session, p. 23.

§ 242. Actions in which set-offs are available.

Page 431. Add, at end of section: In West Virginia the law with respect to set-off has been drastically changed by its Rules of Court. Many of the existing statutes are rendered obsolete, in whole or in part. West Virginia Rule of Civil Procedure 13 is substantially identical with the corresponding Federal Rule.^{6a} The rule speaks in terms of "counterclaims" instead of "set-off". A counterclaim or cross-claim against a co-defendant may be filed in any action. Indeed, if the subject matter of the defendant's counterclaim arose out of the same transaction or occurrence upon which the plaintiff's claim is based, it must be asserted in the plaintiff's action by the terms of the Rule. If the defendant fails to assert such a counterclaim and the plaintiff's action goes to final judgment, that judgment will be res judicata and available to the former plaintiff to bar any subsequent action brought by the defendant against him on the cause of action which he could have asserted by way of counterclaim in the first action. On the other hand, if the subject matter of the defendant's counterclaim did not arise out of the same transaction or occurrence upon which the plaintiff's action is based, he has the option of asserting it as a counterclaim or staying out of the plaintiff's action and bringing his separate suit upon it. This distinction between compulsory and permissive counterclaims, together with the provision in the Rules allowing a defendant to assert a cross-claim against a co-defendant or against a third party brought in by him as a co-defendant, is among the more important changes in the law of "set-off" effected by the new Rules of Court.

^{6a} F. R. C. P. 13.

§ 243. Subject of set-off.

Page 433, n. 14. For changes in Va. Code, § 8-239, see ante, § 241, n. 2 this supplement.

The Virginia Assembly in 1954 (Acts 1954, c. 553), rewrote § 8-240 in order to adopt the "counterclaim" language used by the Rules of Court (Va.), but no substantial change was made in the procedure thereby prescribed.

Page 433, n. 15. The rule announced in *Stimmel v. Benthal*, 109 Va. 141, 60 S. E. 2d 165, that the surety may not assert against the creditor by way of set-off, the surety's personal claim against the creditor as distinguished from a debt due by

the creditor to the principal, unless the principal is insolvent, has long been established in Virginia. See in this connection, *Edmondson v. Thomasson*, 112 Va. 326, 71 S. E. 536. It must be observed, however, that Rule of Court (Va.), 3:8 provides that the defendant may counterclaim against the plaintiff any cause of action at law for a judgment in personam for money that he has against the plaintiff. If this language is literally applied, it would seem that the surety could counterclaim against the creditor upon the individual obligation of the creditor to the surety. The Rule of Court makes no mention of an exception in the case of actions against a surety. On the one hand, it may be argued that since the Supreme Court of Appeals adopted this rule with full knowledge of the principle laid down in *Stimmel v. Benthall*, supra, and of the provisions of Va. Code, § 8-240, its failure to include an exception covering this situation indicated an intention on the part of the court to change the law. On the other hand, it may be argued that since no mention was made in Rule of Court (Va.), 3:8 of the relationship of principal and surety between the defendants in an action, the established practices and procedures would continue in effect, as stated in Rules of Court (Va.), 3:1.

Page 434, n. 18. Va. Code, § 8-244 was rewritten in 1954 (Acts 1954, c. 611). The most important change other than that of terminology in order to conform to the Rules of Court, was that which now has the effect of stopping the running of the statute of limitations as to the defendant's counterclaim by the filing of the plaintiff's motion for judgment, if the subject of the counterclaim arises out of the same transaction or occurrence which is the basis of the plaintiff's claim.

For effect of W. Va. R. C. P., see ante, § 242, this supplement.

§ 244. Acquisition of set-offs.

Page 434, n. 20. For changes in Va. Code, § 8-244, see ante, § 243, n. 18, this supplement.

Va. Code, § 8-245 was rewritten by the General Assembly in 1954 (Acts 1954, c. 619) in order to conform to the Rules of Court (Va.), but without substantial change.

At the same session of the Virginia General Assembly § 8-246 was rewritten (Acts 1954, c. 619) with appropriate changes in language and with one important procedural change. The alternative procedure of impleading the assignor of the contract by merely giving notice to him was eliminated. Under the statute as revised, he must now be impleaded by means of a rule issued either by the court or by the clerk at the instance of the counterclaiming defendant. While the statute is silent on the subject, it is believed that the proper practice is for the defendant filing such a counterclaim to attach a copy of his counterclaim to the rule to be served upon the assignor. The assignor must then reply to the counterclaim as prescribed in Rule of Court (Va.), 3:10.

Page 435, n. 24. The reference in this footnote in the bound volume to Va. Code, § 8-410 should be to Va. Code, § 6-410.

§ 245. Application of set-offs.

Page 436, n. 28. For changes in Va. Code, §§ 8-239 and 8-240, see ante, § 241, n. 2, this supplement.

When the General Assembly of Virginia revised the statutes discussed in this chapter in 1954 in order to make them conform both in terminology and procedure to the Rules of Court, § 8-240.1 was retained. Its retention without change is not explained and seems entirely unnecessary. Rules of Court (Va.), 3:8 and 3:10 would seem to be entirely sufficient to permit the plaintiff to file a counterclaim to the defendant's counterclaim, asserting any matter that might be the subject of a counterclaim against an original motion for judgment. The same is true of a counterclaim by a co-defendant against a cross-claim asserted against him under Rules of Court (Va.), 3:9 and 3:10.

Page 436, n. 29. For changes in Va. Code, §§ 8-243 and 8-246, respectively, see ante, § 244, n. 20, this supplement.

Although Rule of Court (Va.), 3:9.1 expressly forbids a defendant to bring in a new party, and Va. Code, § 8-246 allows the defendant who is sued by the assignee of a claim arising out of contract, to bring in the assignor in order to recover from him any excess over the amount of the assignee's claim, it is believed that Rule of Court (Va.), 3:9.1 was not intended to abolish this procedure. The rules do not purport to deal with this somewhat infrequent situation and provide no substitute for the statutory procedure.

§ 246. Pleading set-off.

Page 436, n. 31. For changes in Va. Code, § 8-239, see ante, this supplement, § 241, n. 2. It is obvious that even when the subject of the counterclaim is a debt, the former practice of merely filing an account is no longer available. The party asserting the counterclaim must either state his counterclaim in his grounds of defense or file a separate plea of counterclaim.

In Virginia, the assertion of a counterclaim is always optional, whether the subject matter upon which it is based arose out of the same transaction or occurrence pleaded in the motion for judgment of the opposing party or not; that is to say, the party in whose favor the counterclaim exists may either assert it in the action brought against him, or may refrain, and make it the subject of a separate action in which he is plaintiff. In West Virginia, however, the distinction between compulsory and permissive counterclaims which is observed in the Federal Rules (W. Va. R. C. P. 13), has been written into its rules. If the subject matter of the counterclaim arose out of the same transaction or occurrence that is the basis of the plaintiff's complaint, it must be asserted in the plaintiff's action, or not at all. W. Va. R. C. P. 13(a). On the other hand, if the subject matter of the counterclaim did not arise out of the same transaction or occurrence as that upon which the plaintiff's complaint is based, its assertion is permissive merely. The party in whose favor the counterclaim exists may either assert it or may bring a separate action upon it.

Page 437, n. 32. Va. Code, § 8-244 was amended in 1954 (Acts 1954, c. 611) to provide that if the subject matter of the counterclaim arose out of the same transaction or occurrence upon which the plaintiff's action is based, the statute of limitations on the counterclaim is tolled from the commencement of the plaintiff's action.

There is no similar provision in the West Virginia statute, and W. Va. R. C. P. 13 is silent on the subject. It would seem, therefore, that in West Virginia the statute of limitations continues to run until the counterclaim is filed, regardless of whether the subject matter upon which it is based arose out of the same transaction as that upon which the plaintiff's complaint is based or not. W. Va. Code, § 5634. In both Virginia and West Virginia the statute of limitations continues to run on a cross-claim until it is filed. Va. Code, § 8-244; Rules of Court (Va.), 3:9; W. Va. Code, § 5634; W. Va. R. C. P. 13.

Page 437, n. 34. The practice of merely filing a list or an account in order to assert a debt by way of set-off is no longer proper either in Virginia or West Virginia. In Virginia former Code, § 8-239, authorizing this practice has been amended so as to eliminate that provision. See ante, § 241, n. 2, this supplement. It is believed that the similar provision in W. Va. Code, § 5629 has been superseded by W. Va. R. C. P. 13.

§ 247. Recoupment—Definition.

Page 438, n. 37. Original text cited in *National Bank & Trust Co. v. Clark*, 106 Va. 686, 85 S. E. (2d) 223.

§ 249. Virginia and West Virginia statutes of recoupment.

Page 439, n. 40. Va. Code, § 8-241 was rewritten in 1954 (Acts 1954, c. 617) principally in order to eliminate certain material in the former statute which seemed to be unnecessary. Perhaps the most important change was elimination of the provision requiring verification of a plea under the statute. Va. Code, § 8-242 was repealed in 1954 (Acts 1954, c. 593) as a result of which, the rejection of a plea filed under § 8-241 may or may not be *res judicata* in a subsequent suit or action, depending upon the grounds upon which it was rejected.

Page 441, n. 46. With respect to changes in Va. Code, § 8-241, see ante, § 249, n. 10, this supplement.

Page 441, n. 48. Ante, n. 40.

Page 442. "If a defendant desires to recover the excess he must, therefore, make his defense under § 8-241, by a *sworn plea*." 50a

50a. By amendment to Va. Code, § 8-241 (Acts 1954, c. 617) the verification is no longer necessary. It will be sufficient if the party counterclaiming under the statute states the grounds of his counterclaim in his grounds of defense or makes it the subject of a special plea. It need no longer be sworn to.

Page 443, n. 56a. See n. 50a.

Page 446, n. 72. Ante, n. 50a.

§ 251. Cross-claims under the Virginia Rules of Court.

Page 449, n. 80. Rule of Court (Va.), 3:9.1.

As to cross-claims under W. Va. Rules of Court, see W. Va. R. C. P. 13(g).

CHAPTER 32.

BILLS OF PARTICULARS AND GROUNDS OF DEFENSE.

§ 252. The statutes and their objects.

Page 450. *Add at beginning of section:* "It must be carefully borne in mind that in order to file a pleading in response under Rule of Court (Va.), 3:5 and thereby not be in default at the expiration of twenty-one days, a defendant must file more than a motion for a bill of particulars. While under Rule of Court (Va.), 3:18 "motions in writings" are pleadings, a motion for particulars is not the pleading in response commanded by Rule of Court (Va.), 3:5." 80a

80a. *Williams v. Service, Inc.*, 199 Va. 326, 99 S. E. (2d) 648.

Page 450, n. 1. For the standards of sufficiency of pleadings under the Virginia Rules of Court, see ante, Ch. 21, §§ 192, 198, this supplement.

In support of the general rule stated in the text, see *State v. Smith*, 134 W. Va. 576, 62 S. E. (2d) 549.

It is believed that W. Va. R. C. P. 12(e) authorizing the motion to make more definite and certain, now supersedes the practice of moving for a bill of particulars in West Virginia.

Page 450, n. 2. The statutory standards supporting a demand for a bill of particulars are merely declaratory of the common law practice. See *Thomason v. Morie*, 154 W. Va. 634, 60 S. E. (3d) 699.

See *Shenandoah River Lodge v. Dovel*, 192 Va. 637, 66 S. E. (3d) 518 (applying Va. Code, § 8-111).

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ODESSKY v. MONTEREY WINE CO., Inc.

Supreme Court of Appeals of Virginia.

Sept. 8, 1948.

1. Set-off and counterclaim \S 28(2)

A special plea of set-off, in effect a statutory plea of recoupment, and an enlargement of common-law right of recoupment, is available under statute only when claim, sought to be set-off, grows out of contract sued on. Code 1942, \S 6145.

2. Set-off and counterclaim \S 35(1)

Under statute authorizing defendant in action for debt to prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed with papers in a cause, that which is the subject of a set-off, must be a liquidated demand, "liquidated" meaning that which can be ascertained by computation or calculation from definite data supplied by evidence and does not lie in mere opinion. Code 1942, \S 6144.

See Words and Phrases, Permanent Edition, for all other definitions of "Liquidated".

3. Set-off and counterclaim \S 35(2)

Damages allegedly suffered by wine distributor growing out of breach of warranty in connection with prior purchases of wine for which he had paid purchase price, based on wine returned to him, wine re-filtered, and loss on account of wines sold, stated claim for "unliquidated damages", which could not be set off against wine manufacturer's claim against distributor upon compromise agreement fixing amount due on a subsequent purchase of wine by distributor. Code 1942, \S 6144.

See Words and Phrases, Permanent Edition, for all other definitions of "Unliquidated Damages".

4. Appeal and error \S 172(1)

Defendant's claim that trial court should not have rejected his plea of set-off because plaintiff was nonresident, being raised for first time on appeal, could not be considered.

5. Set-off and counterclaim \S 35(1)

The rule that unliquidated claim may be pleaded as set-off where plaintiff, as-

serting demand, is insolvent or nonresident, applies only to equity practice.

6. Trial \S 11(2)

Statute does not authorize transfer of purely legal action to chancery side of court because of nonresidence of plaintiff and in order that defendant may assert set-off not pleadable at law. Code 1942, \S 6084.

Error to Court of Law and Chancery of City of Norfolk; Burnett Miller, Jr., Judge Designate.

Action by Monterey Wine Company, Inc., against Morris Odessky, trading as National Wine Distributors, to recover upon compromise agreement fixing amount due on purchase of wine, wherein defendant filed what he termed a special plea of set-off. To review judgment rejecting defendant's special plea of set-off, the defendant brings error.

Affirmed.

Before HUDGINS, C. J., and EGGLESTON, SPRATLEY, BUCHANAN, STAPLES, and MILLER, JJ.

Herman A. Sacks and Norris E. Halpern, both of Norfolk, for plaintiff in error.

Maurice Steingold, of Norfolk, and Israel Steingold and Samuel A. Steingold, both of Richmond, for defendant in error.

SPRATLEY, Justice.

Monterey Wine Company, Inc., hereinafter referred to as the plaintiff, is a manufacturer of wine. Morris Odessky, hereinafter referred to as the defendant, trading as National Wine Distributors, at the time of the transaction hereinafter mentioned, was engaged in the business of bottling and selling wine at wholesale in the city of Norfolk, Virginia.

The defendant purchased from the plaintiff assorted grape and raisin wine on June 17, 1946, July 3, 1946, July 4, 1946, and August 12, 1946, of the value of \$12,179.80 for which he made full payment prior to the institution of this proceeding.

In independent and separate transactions, the defendant purchased from plaintiff on July 19, 1946, 2,012 gallons of

cherry wine for \$4,325.80, and on August 26, 1946, 493 gallons of cherry wine for \$1,099.95. These purchases, plus a federal tax of \$275.75, amounted to \$5,701.50. The defendant failed to pay these items when due. According to the plaintiff, he stated that he was short of funds, but would make payment later. Subsequently, he claimed that the quality of the wine failed to come up to the warranty of the plaintiff, and he was unable to sell it to the retail trade. As a result representatives of the plaintiff had a conference with the defendant at the latter's office in Norfolk on September 23, 1946. The plaintiff agreed to make a reduction of approximately 40 cents per gallon for the wine sold. This was accepted by the defendant, and the parties entered into the following compromise agreement:

"September 23, 1946

"We, the party of the first part, known as National Wine Distributors, agree to pay to the party of the second part, known as Monterey Wine Company, the sum of \$4,580.95 within the period of ninety (90) days from the above date.

"Said amount of \$4,580.95 is for full payment of 2,505 gallons of Cherry Wine. Said amount also includes full payment of Federal Taxes in the amount of 15¢ per gal.

"National Wine Distributors

"(Signed) M. Odessky."

On or about November 8, 1946, the defendant placed the plaintiff on notice that he would not comply with the terms of the above agreement. Thereafter, the plaintiff instituted this proceeding by notice of motion against Morris Odessky and Bessie Odessky, individually and trading as National Wine Distributors, for a judgment for \$4,580.95. A copy of the agreement was attached to the notice of motion.

Bessie Odessky filed an affidavit denying that she owned, operated, or controlled any interest in National Wine Distributors. During the proceedings, a non-suit was taken as to her.

Plaintiff filed a bill of particulars in which it stated that while the complaint of the defendant as to the quality of the cherry wine was without foundation, never-

theless, in view of its belief that the defendant was in financial difficulty, it agreed to accept the sum of \$4,580.95 in full settlement of its claim as evidenced by their written agreement.

The defendant for his grounds of defense stated that the agreement of September 23, 1946, was made upon the condition that the 2,505 gallons of cherry wine would be good and merchantable; that it later developed it was not good and merchantable; that he was unable to sell it; and that he denied liability by reason of a failure of consideration.

In addition, the defendant filed what he termed a "Special Plea of Set-off," verified by affidavit. In this plea he alleged that the *grape* and *raisin* wine purchased on June 17, July 3, July 4, and August 12, 1946, for \$12,179.80, for which he had made payment, did not comply with the warranty of the plaintiff as to quality and alcoholic content; that by reason of the breach of warranty he was required to take back a vast quantity he had sold; that he suffered other expenses in connection with the effort to make it salable; and that as a proximate result he sustained the following damages:

"941 Cases Bottled Wine Returned	\$5,075.38
25 Cases Bottled Wine in Stock	152.50
Freight and rebate to Max Nachman	122.20
Rebate to Tidewater Distributors	25.00
Refiltration of 373 Cases Wine	373.00
Refiltration on shipment to Roanoke Distributors	372.00
Freight on shipment to Roanoke Distributors	496.34
Freight to New Brunswick, N. J., for freezing wine ...	342.70
Cost of freezing wine	894.00
Loss of Federal Tax	268.20
Five days labor	600.00
Labels and caps lost	96.60
Storage charge	200.00
Total	\$9,017.92"

He prayed that the sum of \$9,017.92 be applied as an off-set to the debt claimed by the plaintiff and that the plaintiff pay to him the amount in excess of that debt.

The plaintiff moved to strike out the "Special Plea of Set-off" on the ground that it was a claim for unliquidated damages arising out of a transaction independent of the transaction sued on. The trial court sustained the motion over the objection of the defendant. The case was then presented to the jury solely as to the sum due for the purchase of the *cherry wine*, the defendant being limited to the grounds stated in his grounds of defense. The jury returned a verdict for the plaintiff for the full amount claimed. Since the verdict resolved the issue as to the liability of the defendant for the purchase of the *cherry wine*, we need not set out the evidence in connection therewith.

The defendant's sole assignment of error is to the trial court's rejection of his "Special Plea of Set-off." In his brief, he says:

"Whether or not the plaintiff was entitled to recover on the aforementioned non-negotiable note was a question of fact, and the jury having found in plaintiff's favor we are not questioning the correctness of its verdict. We shall, therefore, confine this argument briefly to the action of the Court in rejecting the special plea of set-off."

We shall accordingly direct our attention only to the action of the court complained of.

[1] The defendant's so-called "Special Plea of Set-off" admittedly embodied a claim for damages arising out of a different transaction from that sued on. A special plea of set-off in Virginia, in effect a statutory plea of recoupment, and an enlargement of the common law right of recoupment, is available under Virginia Code 1942 (Michie), section 6145, Acts 1872-73, page 196, only when the claim sought to be set-off grows out of the contract sued on. *Joseph H. Baker & Co. v. Hartman*, 139 Va. 612, 124 S.E. 425; *Richmond College v. Scott-Nuckols*, 124 Va. 333, 342, 98 S.E. 1; *Dexter-Portland Cement Co. v. Acme Supply Co.*, 147 Va. 758, 766, 133

S.E. 788. In the last cited case the distinction between set-off, common law recoupment and statutory recoupment is clearly stated.

[2] The damages claimed by defendant were clearly not allowable under the special plea of set-off provided by section 6145. The defendant contends, however, that his plea should have been considered as a plea of set-off for liquidated damages under Code, section 6144, which is, so far as material, as follows:

"In an action for any debt, the defendant may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed with the papers in the cause, as to give the plaintiff notice of its nature, but not otherwise. * * *"

It is generally held under statutes similar to Code, section 6144, that that which is the subject of set-off must be a liquidated demand, a debt against a debt. *Bunting v. Cochran*, 99 Va. 558, 39 S.E. 229; *Tide-water Quarry Co. v. Scott*, 105 Va. 160, 52 S.E. 835, 115 Am.St.Rep. 864, 8 Ann.Cas. 736; *Baker & Co. v. Hartman*, supra; and *Dexter-Portland Cement Co. v. Acme Supply Co.*, supra.

The cases defining what is a liquidated demand within the meaning of statutes of set-off in Virginia and elsewhere are confusing and unsatisfactory. The confusion in Virginia arises from an effort to give the statute a liberal interpretation for the purpose of preventing a multiplicity of suits and effectuating in one action complete justice for both of the parties.

Beginning on page 394 in *Burks' Pleading and Practice* (3rd Ed.), the authority of which is evidenced by the frequency of its citation by the bar and the courts of Virginia, there is a clear discussion of the law of set-off, as established in this State.

On page 396, the author says:

"* * * a set-off must be a debt, or at least in the nature of a debt, and that against which it is to be set off must likewise be a debt. It must be a debt against a debt."

In 3 *Blackstone's Comm.*, page 154, it is said: "The legal acceptance of 'debt' is a

sum of money due by certain and express agreement; as by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease, where the quantity is fixed and specified, and does not depend upon any subsequent valuation to settle it."

"Liquidated means that which can be ascertained by computation or calculation from definite data supplied by evidence and does not lie in mere opinion. *New Idea Spreader Co. v. R. M. Rogers & Sons*, 122 Va. 54, 94 S.E. 351.

For definitions of liquidated and unliquidated damages, see 57 C.J., Set-off and Counterclaim, §§ 82(1) and 84(2).

In *Dexter-Portland Cement Co. v. Acme Supply Co.*, *Supra*, the Virginia cases are reviewed and analyzed. There the court refused to allow damages for the breach of an executory contract to be used as a set-off.

In *Joseph H. Baker & Co. v. Hartman*, *supra*, the facts are very similar to those here. Baker purchased three car-loads of potatoes from Hartman. Two cars bought in November were paid for before the last car was purchased. Each sale was an independent transaction. Baker refused to pay for the third car unless plaintiff would allow him damages claimed to have been sustained by reason of the bad quality of the potatoes shipped in the first two cars. In an action by Hartman to recover for the third car, a special plea setting up the items of expense referred to was rejected, except as to that which related to the car of potatoes sued on.

Some of the items attempted to be set off in the above case bear a striking resemblance to those here. There Baker claimed damages as follows:

"Loss account frosted and No. 2 potatoes	\$109.70
"Charged back to you, account of condition of potatoes in this car and back haul of same account of rejection." (Sundry items among them) "labor at Norfolk reworking	57.75
"Loss of rotten potatoes, 46 bags, \$2.37	109.02

"Labor paid Haycock & Lewis account of sorting out frosted and cull potatoes	51.50
"Profits on car	71.94"

etc.

Referring to these items it was said [139 Va. 612, 124 S.E. 427]:

"That these and many other entries of like import set out at length in the plea are speculative, uncertain, and largely dependent upon the wisdom and judgment of the party asserting the claim, and relate to matters about which there will always be the widest differences of opinion among men of equal intelligence and fairness, would seem to us to be self-evident. We think there can be no doubt but that the damages attempted to be recovered against the plaintiff are unliquidated, and that the trial court was clearly right in so holding, and in declining to set aside the verdict of the jury, and its judgment is affirmed."

There, as here, the damages demanded in each plea were either due to the inferior quality of the goods contracted for, the extent of the deficiency, and the amount of damages resulting therefrom, all subjects of inquiry and determination by a jury and dependent upon opinion.

In *New Idea Spreader Co. v. R. M. Rogers & Sons*, *supra*, 122 Va. at page 65, 94 S.E. at page 354, it is said:

"It is true that if the amount of the claim of the defendants is so unliquidated that it cannot be ascertained by computation or calculation from definite data supplied by the evidence, and lies in mere opinion, as for instance, damages for not using a farm in a workmanlike manner; for not building a house in a good and sufficient manner; on a warranty for the sale of a horse; * * *, where the amount to be settled rests in the discretion, judgment, or opinion of the jury—such claim cannot be set off under such statute." (Citing cases.)

[3] In the present case, the plea of set-off sets up no special damages but simply general damages based on wine returned, wine refiltered, and loss on account of refunds for wine sold. There was no mutual agreement between the parties fixing the

measure of damages for a breach of the contract for the sale of the cherry wine. The amount of damages claimed has never been fixed or agreed upon by the parties, and it is not fixed by operation of law, but must be ascertained by opinion based upon evidence of the circumstances and conditions surrounding the transaction between the parties, under rules of law governing breach of contract for failure of warranty of quality.

Odessky did not elect to rescind the contract and return all of the wine. The portion returned was in containers without specified gallonage and based on an arbitrary value. Whether defendant exercised reasonable care and diligence to minimize the damage after being advised of the alleged failure of warranty, but failed to do so was a matter of opinion. Whether it was wise or proper to refilter the wine, and whether or not proper measures were taken in refiltration were matters of opinion. Whether or not it was wise to expend \$600 in labor and the quality of the labor employed were likewise matters of opinion. The necessity and validity of the other items claimed are entirely dependent upon the answer to the above questions.

[4] In this court for the first time the defendant, conceding but not admitting that his plea of set-off was founded upon the plea of unliquidated damages, contends that the trial court should not have rejected his plea because plaintiff was a non-resident. For support, he relies upon *Ex Parte Mechanics Federal Savings & Loan Association (Zimmerman v. Central Union Bank, etc.)* 199 S.C. 23, 18 S.E.2d 592, 139 A.L.R. 714. That case held that, under certain circumstances, equitable damages can be allowed in set-off at law. There was no question there of non-resident parties. In Virginia, equitable damages may be asserted in a plea of statutory recoupment under Code, section 6145.

The defendant also relies upon certain expressions in *Bunting v. Cochran*, supra. That was an equity case, and non-residence was not in issue.

The claim of non-residence of Monterey Wine Company, Inc., was not made in the court below. The record of the trial is devoid of any such suggestion. No bill or certificate of exception was taken to preserve such contention. It was not included in the defendant's claim of defense, nor was there any evidence as to the residence of the plaintiff corporation. The evidence merely showed that it had an office in New York City. The defense now invoked, therefore, could not have been considered by the trial court, and being raised for the first time on appeal, this court cannot take cognizance of it. *Settle v. Browning*, 145 Va. 307, 133 S.E. 769.

[5, 6] Moreover, the rule in Virginia is clearly set out in *Dexter-Portland Cement Co. v. Acme Supply Co.*, supra, 147 Va. at page 774, 133 S.E. at page 792:

"The rule of law that an unliquidated claim may be pleaded as a set-off where the plaintiff asserting the demand is insolvent or a nonresident of the state applies only to equity practice, and is based upon the equitable principle of chancery jurisdiction that the defendant is without adequate remedy at law. This rule has no application to a suit at law. *Bunting v. Cochran*, supra. Nor does section 6084, Code, authorize the transfer of purely legal action to the chancery side of the court because of the nonresidence of the plaintiff, and in order that the defendant may assert a demand as a set-off that is not pleadable in an action at law." *

This case is controlled by what was said in *Dexter-Portland Cement Co. v. Acme Supply Co.*, supra, and *Joseph H. Baker & Co. v. Hartman*, supra, both of which we believe to be sound in principle. In accordance therewith, the trial court did not err in rejecting the plea of the defendant.

For the reasons stated, it follows that the judgment of the trial court must be affirmed. This is without prejudice, however. The defendant may hereafter take such steps to enforce his rights, if any, as appear to him necessary and proper.

Affirmed. ::

* To the same effect, see 47 Am.Jur., Set-off and Counterclaim section 17, pp. 721, 722.

**DEXTER-PORTLAND CEMENT CO. v.
ACME SUPPLY CO., Inc.**

(Special Court of Appeals, of Virginia. May 27, 1928. Rehearing Denied June 24, 1928.)

1. Appeal and error \S 544(1).

Assignment of error as to rulings on evidence need not be noticed, in absence of bill of exception to such rulings.

2. Appeal and error \S 1068(1).

Plaintiff cannot complain of alleged error of trial court with reference to instruction, where verdict was in its favor.

3. Damages \S 6.

Damages which are wholly uncertain cannot be made certain by adoption of arbitrary standard of loss.

4. Set-off and counterclaim \S 5—"Set-off," "common-law recoupment," and "statutory recoupment" distinguished relative to whether they arise out of same transaction as to demand being liquidated and as to recovery over, method of pleading and as to being used in action on sealed instrument (Code 1887, §§ 3298, 3299, 3304).

"Set-off" arises out of transaction other than one sued on, demand must be liquidated, judgment for excess may be recovered over under Code, 1887, § 3304; it must be specially pleaded under section 3298, and may be used in action on sealed instrument; whereas, "common-law recoupment" arises out of contract sued on, amount need not be liquidated, there can be no recovery over, it may be shown under general issue, and, it is not available on sealed instrument; while "statutory recoupment" under section 3299 arises out of contract sued on, amount need not be liquidated, and recovery over may be had, it must be specially pleaded, and may be based on equitable grounds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Recoupment; Set-off.]

5. Set-off and counterclaim \S 35(2)—Unliquidated damages for failure to deliver cement, arising out of independent transaction, held not proper matters of set-off nor of common law or statutory recoupment.

Unliquidated damages for failure to deliver cement according to contract, arising out of independent transaction, held not proper matters of set-off, common law or statutory recoupment.

On Rehearing.

6. Set-off and counterclaim \S 22(1).

Under Code 1919, § 6144, causes of action may be determined in single suit where plaintiff's demand and set-off at law are both in nature of debts.

7. Set-off and counterclaim \S 35(1).

Demand for unliquidated damages cannot be set off against ascertained demand, nor can demands for unliquidated damages be set off against each other.

8. Set-off and counterclaim \S 35(1).

Damages for breach of contract for future delivery of goods are "unliquidated damages," as respects right of set-off.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unliquidated Damages.]

9. Set-off and counterclaim \S 35(1).

Whether damages are liquidated or unliquidated as respects set-off depends primarily on terms of contract itself, and defendant could not make damages for breach of contract of sale of cement liquidated by proof of use of cement from its retail stock.

10. Set-off and counterclaim \S 8(2).

Rule that unliquidated claim may be pleaded as set-off, where plaintiff, asserting demand, is insolvent or nonresident, applies only to equity practice.

11. Trial \S 11(2).

Code 1919, § 6084, does not authorize transfer of purely legal action to chancery side of court because of nonresidence of plaintiff, and in order that defendant may assert set-off not pleadable at law.

12. Pleading \S 411.

Exception to court's action in permitting defendant to file plea of set-off was not waived by going to trial on such issue or because certain evidence was excepted to as too speculative to justify recovery.

13. Judgment \S 199(3).

Power, under Code 1919, § 6251, to enter judgment for defendant notwithstanding verdict depends on there being certain and sufficient evidence in case to decide it on its merits.

14. Set-off and counterclaim \S 35(1).

Demand is not liquidated unless it appears how much is due, and, if there is genuine controversy as to which of two sums is due, it is still an "unliquidated demand."

[Ed. Note.—For other definitions, see Words and Phrases, Unliquidated Demand.]

15. Sales \S 417.

Testimony that there was no market at time of breach of contract for sale of cement, and witness' judgment of profit it would have made on stock used, held not to justify exception to rule that damages are difference between contract and market price.

Error to Corporation Court of Newport News.

Action by the Dexter-Portland Cement Company against the Acme Supply Company, Inc. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

Garnett, Taylor & Edwards, of Norfolk, for plaintiff in error.

J. Winston Read, Nelms, Colona & McMullan, and L. A. McMullan, all of Newport News, for defendant in error.

HOLT, J. The plaintiff in error was plaintiff in the court below. The defendant in error was defendant there, and so for convenience the parties will be designated as they were in the trial court.

For some years prior to the institution of this action the plaintiff had been a cement manufacturer, with its plant located at Nazareth, Pa., and the defendant had been a dealer at Newport News, handling large quantities of cement, lime, plaster, and other building material, and, as such dealer, had been the representative or agent of the plaintiff for the sale of its cement in Newport News and Hampton.

The plaintiff filed its notice of motion for judgment on February 11, 1921, claiming \$1,018.09 to be due from the defendant, with interest from the 31st day of July, 1920. This indebtedness was evidenced by certain protested checks of the defendant and a small balance on account. It grew out of two specific work sale contracts numbered 3228 and 3229, which contracts are not otherwise involved in this litigation. These claims were not denied, and judgment therefor went without protest.

Defendant did, however, claim offsets amounting to \$4,195. They are set up in detail in a plea filed on March 3, 1924, and grow out of transactions known as specific work sales contracts and an open order contract.

Whenever the defendant secured an order to furnish cement to a particular contractor for a particular piece of work, it, on the strength thereof, would place an order with the plaintiff for material necessary. This was a specific work sale contract, and differed in its terms from those contracts in which the defendant bought cement for its own use to be sold by it at retail from its warehouse or otherwise as it might see fit. This last contract was an open order contract.

Three contracts of the first class are set out in the plea. One numbered 1211 bore date of October 20, 1919, and it is charged that the defendant failed to supply 343 barrels of cement at the contract price of \$2.73, and that such failure entailed a loss of \$1.25 a barrel, or \$428.75.

Two other contracts of this class numbered 1407 and 1408 were entered into on February 5, 1920. The cement in this instance was to be furnished to Harwood and Moss, contractors. The price agreed upon was \$2.83 a barrel. There was a shortage here of 750 barrels. The loss claimed was \$1.25 a barrel, or \$937.50.

The last of these contracts numbered 1460 bears date April 19, 1920, and is known as the street railway contract. The price agreed upon was \$2.95 a barrel. There was a shortage of 445 barrels, which, on a like basis of calculation, entailed a loss of \$555.

In addition to these items, there was an open order contract of date July 9, 1920, num-

bered 2074 for ten cars of cement. The contract price being "\$3.33 for 1st car—bal. at market price at time of shipment." Of this order only one car was shipped. It is said that, assuming that the cars were of average capacity, there was a shortage here of 1,818 barrels, and that in this instance, also, a loss of \$1.25 a barrel, or of \$2,272.50, was suffered.

In due course these issues were submitted to the jury, which returned a verdict for the plaintiff in the full amount claimed in its notice. None of the offsets were allowed by it. This verdict the defendant moved to set aside as being contrary to the law and the evidence. That motion the trial court sustained to the extent that it did allow in full every offset claimed in the defendant's plea, and it is in this form that this case comes before us for consideration.

Four errors are assigned. They are:

"(1) To the court's refusal to grant the plaintiff's motion to reject the plea of set-off.

"(2) To certain rulings of the court on the evidence offered.

"(3) To the refusal by the court to grant plaintiff's instructions Nos. 2, 3, 4, 6, 7, and 8 as offered; to the amendment to instructions 3 and 4, and the giving of the same as amended; to the granting of the defendant's instructions Nos. 1, 2, 3, 4, 5, and 6.

"(4) To the granting of the defendant's motion to set aside the verdict of the jury as rendered, and entering up final judgment over against the plaintiff, in the sum of \$3,171.82, with interest as above."

[1] Assignment No. 2 deals with alleged errors on the part of the trial court as to rulings on the evidence offered, but, since no bill of exception was taken as to any ruling of the court on the evidence, this need not be noticed. *Walters v. Norfolk & Western Railway Co.*, 122 Va. 149, 94 S. E. 182.

[2] Likewise assignment No. 3 need not be discussed. Since the verdict of the jury was in favor of the plaintiff for its full claim, it cannot complain of any supposed error of the trial court with reference to the instructions. *Fox v. Mason*, 139 Va. 667, 124 S. E. 405.

The first and fourth assignments involve the same proposition; namely, that the trial court in entering up the judgment on matters set out in the plea applied an improper measure of damages, in that under this plea and the evidence no damages could be recovered at all. These assignments for convenience will be considered together.

It probably sufficiently appears from the plea itself that the damages claimed and therein set up arise out of unrelated contracts in nowise connected with those on which the motion for judgment rests. All that they have in common is that the buyer and seller were in each instance the same. If it be that this does not sufficiently appear from the plea itself, it is made clear by the evidence in the case. The substance of this

defense is that plaintiff did not furnish cement contracted for with reasonable promptness, in fact, that it did not furnish it at all, and that the defendant was forced to supply its customer from stock on hand or from that purchased in the open market at prices not shown. In many instances loss is based upon estimated profit on sales never completed. It is said that this loss always was at the least \$1.25 a barrel. The evidence is that it was in most cases greater. Just how great it is difficult to say from the testimony. But this evidence does strongly tend to support the charge that there was a loss which varied from sale to sale, and was always more than \$1.25 a barrel.

[3] Damages which are wholly uncertain cannot be made certain by the adoption of some arbitrary standard of loss and by charging that loss, at least, was in every instance sustained. We think that the damage here shown is unliquidated, and arises out of contracts independent of those set out in plaintiff's motion.

[4] The difference between set-off, common-law recoupment, and statutory recoupment admirably appears in a note by Prof. Lile, 7 Va. Law Reg. 332. That statement is:

"Set-Off.

"1. Arises out of some transaction dehors the transaction sued on.

"2. The demand must be liquidated.

"3. May not only repel plaintiff's claim, but (in Virginia) judgment whole or in part)—no recovery over against the plaintiff. (Va. Code, sec. 3304.)

"4. Must be specially pleaded, or account thereof filed with the plea. (Va. Code, sec. 3298.)

"5. May be used, though plaintiff's action is on a sealed instrument.

"Common-law Recoupment.

"1. Arises out of the contract sued on.

"2. Amount need not be liquidated.

"3. May only repel plaintiff's claim (in whole or in part)—no recovery over.

"4. May be shown under the general issue.

"5. Will not avail where plaintiff's action is on a sealed instrument.

"Statutory recoupment.

"With these may be contrasted statutory recoupment under Va. Code, § 3290—often mis-called 'plea in the nature of a plea of set-off.' This plea bears no resemblance whatever to a set-off, but is a mere enlargement of the common-law right of recoupment:

"1. Arises out of the contract sued on (never out of a transaction dehors the contract, as in the case of set-off. *Am. Manganese Co. v. Manganese Co.*, 91 Va. 272 [21 S. E. 466].

"2. Amount need not be liquidated.

"3. May not only repel plaintiff's claim (as in common-law recoupment), but defendant may have recovery over against plaintiff for the excess. This is one of the chief purposes and advantages of the statutory proceeding.

"4. Must be specially pleaded (the statute so

declares, [section 3290]), and cannot be availed of under the general issue.

"5. May be used though plaintiff's action is on a sealed instrument. This is another advantage of the statutory recoupment over recoupment at common law.

"6. May be based on equitable (as distinguished from legal) grounds."

This court recently had occasion to consider this question in the case of *Baker v. Hartman*, 139 Va. 612, 124 S. E. 425—a case very much in point. The first paragraph of its syllabus sustained by the text and by authorities cited is as follows:

"In the instant case plaintiff sold defendant three carloads of potatoes. The first two cars were paid for before the last car was purchased, each sale being an independent transaction, with no connection save that the purchaser and seller were the same in each instance. Defendant refused to pay for the third and last car unless plaintiff would allow certain damages claimed to have been sustained by reason of the bad quality of the potatoes shipped in the first two cars. On motion by plaintiff to recover the amount due on the last car, the court refused to allow defendant to plead by way of set-off damages sustained by it in the purchase of the other two cars."

[5] We have seen that unliquidated damages arising out of independent transactions make up in their entirety the claims of the defendant. Under the authorities cited they are not in this case proper matters of set-off nor of common-law or statutory recoupment.

It follows that the judgment of the court below must be reversed, and final judgment entered here in accordance with the verdict of the jury, which is the sum sued for, with proper interest. This is without prejudice. The defendant may hereafter take such steps to enforce its rights as appear necessary and proper.

Reversed.

On Rehearing.

—CHRISTIAN, J. In order to properly discuss the questions raised upon this rehearing, it is necessary to make a brief statement of the facts out of which this controversy arose.

The Dexter-Portland Cement Company is a large manufacturer of cement at Nazareth, Pennsylvania, and the Acme Supply Company, Inc., handles large quantities of builders' supplies, including cement, for sale in Newport News, Va., and the adjacent territory. For several years prior to this suit the Acme Supply Company, Inc., represented the Dexter-Portland Cement Company in this territory, and their dealings were mutually satisfactory.

Beginning in the spring of 1920, there was a serious car shortage upon most of the railroads of the country, and shippers of cement, with others, were allotted cars upon a percentage basis. These transportation restrictions produced a shortage of cement, and

the demands of the building trades could not be supplied; therefore the price of cement advanced considerably by reason of its scarcity. The cement manufacturers had sufficient cement to meet the demand, but could not get cars for its transportation.

In this condition of affairs the Acme Supply Company, Inc., had six specific work contracts for cement with the Dexter-Portland Cement Company, and in June, 1920, placed an open order contract, with it, which was accepted upon the terms therein contained. The Acme Supply Company, Inc., did not receive as much cement as it needed, and was constantly writing to the Dexter-Portland Cement Company to make larger shipments. To these requests the Dexter-Portland Cement Company replied, and claimed that it was shipping upon these contracts the pro rata number of cars that were due thereon.

About July 1, 1920, two of these specific contracts were completed, and for which there was due \$1,018.09 to the Dexter-Portland Cement Company. The Acme Supply Company sent its checks for this cement, but before they were collected stopped payment thereof. It, however, deposited the amount in one of the national banks of Newport News, and wrote the Dexter-Portland Cement Company, complaining that it was not shipping upon its unfilled contracts, because of the price, and was using the cars received to ship upon higher price current orders. Some correspondence took place between the parties, and finally the Dexter-Portland Cement Company revoked all of the specific work contracts between them, upon the ground that stoppage of payment of the checks, in its opinion, impaired the Acme Supply Company's credit, and justified their revocation as provided in the contracts.

The Dexter-Portland Cement Company filed its notice of motion in the corporation court of Newport News to recover the above amount due from the Acme Supply Company, Inc. The parties hereafter will be referred to as plaintiff and defendant, the positions occupied in the trial court. The defendant admitted the amount due the plaintiff, but tendered a plea of set-off against this claim amounting to \$4,195. The plaintiff moved the court to reject the plea, which motion the court overruled, and ordered the plea filed, to which action the plaintiff excepted. There was a jury trial upon the issue thus presented. The jury found for the plaintiff and against the defendant. Upon motion of the defendant, the verdict of the jury was set aside, and the court, by virtue of section 6251, Code 1919, proceeded to enter judgment for the full amount of defendant's claim, less the amount admittedly due the plaintiff. To this action of the court the plaintiff also excepted.

[8] The five contracts set out in the plea of set-off were separate and distinct, unrelated and unconnected with the claim of the

plaintiff or with each other. Under the common-law practice in England and Virginia, the court was without jurisdiction to hear and determine these causes of action in a single suit. By early statute, which is now embodied in section 6144, Code 1919, an exception was made to this rule of practice, where the plaintiff's demand and the set-off at law are both in the nature of debts. *Wartman v. Yost*, 22 Grat. (63 Va.) 595.

[7] Thus we find the rule of established practice in Virginia to be that the courts have authority to entertain pleas of set-off only where the demands on both sides are in the nature of debts. A demand for unliquidated damages cannot be set off against an ascertained demand, nor can demands for unliquidated damages be set off against each other, and the cross demand must appear in the nature of a debt from the plea. *Christian v. Miller*, 3 Leigh (30 Va.) 78, 23 Am. Dec. 251; *Bunting v. Cochran*, 99 Va. 558, 39 S. E. 229; *Webster v. Couch*, 6 Rand. (27 Va.) 519.

[8] The counter demands set up in the plea are based, first, upon the open order. It provided that the price should be the market price of cement at the time of delivery, and shipment was made dependent upon car supply. Second, the specific work contracts fixed the purchase price of cement at from \$2.73 to \$2.93 per barrel. The cement could be used only upon the jobs designated in the contracts, and the shipments were to be made as provided in one contract before the 30th of June, 1920, and in the others, unless extended by the seller before December 30th. For the breach of each of these contracts the usual measure of damages was the difference between the contract price and the market price of cement at the time that delivery should have been made. In the early case of *Christian v. Miller*, supra, the court held that, where the defendant's demand arises out of the breach of a contract to deliver a quantity of corn at a future day, it is strictly a demand for unliquidated damages, and therefore not a proper set-off. This case, which holds that damages for breach of contract for future delivery of goods are unliquidated, has never been overruled.

[9] The pleader, in order to make the breach of these contracts in the nature of a debt, and not unliquidated damages, alleged in the plea of set-off that there was no market for cement in Newport News on account of the disorganization of transportation, and that it had to withdraw cement from the retail stock in its warehouse to supply cement on the contracts breached. The defendant could not by its proof make an unliquidated claim liquidated. Whether damages are liquidated or unliquidated depends primarily upon the terms of the contract itself. *Bouvier's Law Dictionary*, "Liquidated Damages."

It is true that the Supreme Court has held

that to constitute a valid set-off it is not necessary that a fixed price should be agreed on for an article sold and to be delivered. If the damages do not lie in mere opinion or judgment, but can be readily ascertained by calculation or computation, they may be set off against a liquidated demand. An examination of the cases in which this rule was enunciated will show that it is not an exception to the general rule heretofore stated. In the case of Tidewater Quarry Co. v. Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864, 8 Ann. Cas. 736, the plaintiff sued for a debt. When the plaintiff took possession of the quarry, the defendant had thereon a quantity of prepared stone and coal at the quarry which the plaintiff sold and used. The defendant had two remedies: (1) An action of tort for damages for the conversion of the material; or (2) an action of indebitatus assumpsit for goods had and received. The court held, if the defendant elected to waive the tort and rely upon the implied contract to pay the value of the goods, it might be set off against the plaintiff's demand.

In the case of New Idea Spreader Co. v. Rogers & Sons, 122 Va. 54, 94 S. E. 351 the defendant sold under contract 26 manure spreaders which the plaintiff had agreed to deliver at a specific price, and for which defendant was entitled to receive \$19.50 each by way of profit. The contract was breached, and plaintiff refused to ship the spreaders. The amount due could have been recovered as a certain demand in an action of assumpsit, therefore was in the nature of a debt, and the defendant had the right to plead his demand as a set-off.

The case of United Cigarette Mach. Co. v. Brown, 119 Va. 813, 89 S. E. 850, L. R. A. 1917F, 1100 presented this state of facts in the plea of set-off. The Winston Company, of which Brown was the largest stockholder, and controlled and managed the same, had agreed to furnish the United Company Briggs machines at a certain price and gave the latter the exclusive right of sale of these machines, except within the United States. Brown breached this contract, and sold several machines in Canada and other foreign countries. The cost of the machines was not a matter of dispute between the parties, nor the price at which Brown sold them in foreign countries, so that the appellant's damages were a matter of mere computation and calculation; therefore was a proper offset or claim in the nature of a debt due it from Brown, who was seeking to recover dividends due him and unlawfully withheld by the appellant.

In the case of Richardson Company v. Whitney L. Co., 116 Va. 490, 82 S. E. 87, shows when unliquidated damages became a matter of calculation or computation, and therefore the subject of a plea of set-off. This was a case where the vendor sold to the vendee lumber. It furnished part of the

lumber according to contract, but failed to deliver other lumber according to agreement. The vendee bought in the open market the lumber necessary to complete the contract. Upon suit by vendor to recover for lumber delivered, the vendee filed a plea of set-off for the amount it had to pay for lumber not delivered under the contract. The plea of set-off was rejected because of unliquidated damages. This was reversed. Judge Harrison, in the opinion of the court, stated the rule of law in substance as follows: When a vendor fails or refuses to deliver property, the measure of damages is usually the difference between the contract price and the market price, at the time and place of delivery, with interest, and the vendee for his own protection has the right under the circumstances to buy the goods in the open market, and charge the difference in price to the vendor's account. In such case the law implies a promise on the part of the vendor to repay the money which the vendor has been compelled to pay for him, and for it indebitatus assumpsit will lie. The liability of the vendor, whether technically liquidated or not, is so far susceptible of definite proof as to be a valid set-off against a money demand asserted by the vendor against the vendee. The right to maintain indebitatus assumpsit for a claim is a test in favor of its allowance as a set-off, and not whether the demand is liquidated or unliquidated.

[10, 11] The rule of law that an unliquidated claim may be pleaded as a set-off where the plaintiff asserting the demand is insolvent or a nonresident of the state applies only to equity practice, and is based upon the equitable principle of chancery jurisdiction that the defendant is without adequate remedy at law. This rule has no application to a suit at law. Bunting v. Cochran, supra. Nor does section 6084, Code, authorize the transfer of purely legal action to the chancery side of the court because of the nonresidence of the plaintiff, and in order that the defendant may assert a demand as a set-off that is not pleadable in an action at law.

[12] We do not think that the plaintiff waived its exception to the action of the court in permitting the defendant to file its plea of set-off by going to trial upon the issue thus made, nor from the fact that it excepted to certain evidence as too speculative and uncertain to justify recovery, but failed to bring this ruling upon the evidence before this court.

[13] If the evidence was too speculative or uncertain to sustain a verdict, it would unquestionably be a claim for unliquidated damages, and is preserved in the exception to the action of the court in setting aside the verdict and entering judgment for the defendant, especially where the jury had found that the evidence was insufficient to prove the defendant's case. By virtue of section 6251 the court is given no greater control

over the verdicts of juries than it had before its enactment, and the condition of its exercise of the power to enter judgment for the defendant notwithstanding the verdict depends upon there being certain and sufficient evidence in the case to decide it upon its merits. *Kendricks v. City of Norfolk*, 139 Va. 702, 124 S. E. 210.

[14] A demand is not liquidated, even if it appears that something is due, unless it also appears how much is due, and it is not liquidated when it is admitted that one of two or more sums is due. If there is a genuine controversy as to what is due, that is to say, which of said sums is due, it is still an unliquidated demand. *Nassoly v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695. In this case it is argued, and has been elaborately argued, that the damages are uncertain, even if it be admitted that damage at all had been inflicted, and in considering this proposition it was, of course, necessary to consider all questions that were involved in determining whether the damages were liquidated or unliquidated. Thus in the petition for the writ in the instant case the plaintiff in error quotes from *New Idea Sprender Co. v. Rogers & Sons*, *supra*, as follows:

"If the amount of the claim of the defendant is so unliquidated that it cannot be ascertained by computation or calculation from definite data supplied by the evidence, and lies in mere opinion. . . . where the amount to be settled rests in the discretion, judgment or opinion of the jury, such claim cannot be set off under the statute (section 3203 of the Code 1904)."

[15] The defendant's manager in this case testified that there was no market for cement in Newport News, and that it had cement in its warehouse for its retail trade, some of which it had bought from another manufacturer, and, if it had not been forced by the plaintiff's breach of its contract to supply its warehouse cement upon those contracts, it would have made at least \$1.25 per barrel thereon, and that was the amount of damages it should recover from the plaintiff. It purchased its cement from the manufacturers at wholesale, and Beal's opinion and judgment of whether there was a market in Newport News and the amount it would have made on its cement by retail sale did not justify an exception to the rule of law that the measure of damages in case of breach was the difference between the agreed price and the market price at the time of delivery.

There is certainly nothing in the open order contract to show that any other measure of damages than that ordinarily fixed by law for the breach of delivery of the cement sold was in contemplation of the parties. While in the specific work contracts it does not ap-

pear whether the defendant sold the cement to the purchasers from it, at a specific price or market price at the time of delivery, therefore the contracts between the defendant and its purchasers were collateral to the contracts between the parties to this suit, and cannot furnish a different measure of damage for breach of these contracts. In the case of *Trigg v. Clay*, 83 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723, the plaintiff was allowed to recover the profits lost upon resale of the lumber, because the defendant knew it had been resold, and delivery was to be made at a point where other lumber could not be purchased for plaintiff's customer.

But Judge Lewis dissented from the opinion of the court making this exception to the general rule as to the measure of damages.

The evidence in this case is such that the jury would have to base its verdict upon judgment or opinion. Therefore, whether the damages sought to be recovered are denominated unliquidated damages or speculative profits, they do not partake of the nature of a debt, nor are capable of calculation or computation; hence the court could not enter judgment thereon.

For the reasons above set forth, our former judgment is affirmed.

FIDELITY & DEPOSIT CO. OF MARYLAND v. MASON.

(Supreme Court of Appeals of Virginia. June 17, 1926.)

1. Highways \S 113(5)—One furnishing labor and material for construction of highway may sue surety on contractor's undertaking bond for labor and material furnished in construction of highway (Code 1919, \S 5143; *Michie's Code* 1924, \S 1969h).

Code 1919, \S 5143, authorizes one furnishing labor and material for construction of a highway to sue surety on contractor's undertaking bond under *Michie's Code* 1924, \S 1969h, obligating surety to pay for "all labor and material" furnished in construction of the highway.

2. Highways \S 113(5) — Contractor's undertaking bond, obligating surety to pay for all "labor and materials" furnished in construction of highway, is legal.

Contractor's undertaking bond, obligating surety to pay for "all labor and materials" furnished in construction of a highway, is legal, and may contain any conditions not prohibited by statute.

3. Appeal and error \S 843(2) — Contention that action on contractor's undertaking bond was premature in that surety's liability to state had not been fixed held to raise moot question, where there were ample funds within surety's liability on bond to pay all proper claims.

Contention that action on contractor's undertaking bond, obligating surety to pay for

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS
LEAGUE CONSTRUCTION CO., INC.,
Plaintiff

v.

LAW NO. 11429-WS

PILAND CORPORATION,

Defendant

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT

Defendant's brief in support of its opposition to summary judgment misses the point. Plaintiff has not argued, and does not argue, that defendant cannot assert, in response to plaintiff's motion for judgment, any claim it has, liquidated or unliquidated, in tort, contract or other theory of recovery. To so argue would be to condemn defendant to the multiplicity of suits which the Rules of Civil Procedure and Improvements thereto have discouraged.

The plaintiff is arguing not procedure but substance. The Phelps Dodge Industries v. Piedmont Electric Supply Corp., 523 F Supp. 201 (1981) case stands for the substantive proposition that an unliquidated counterclaim will not bar the award to plaintiff of summary judgment for a liquidated debt due from defendant to plaintiff. On that point Phelps Dodge, a 1981 case applying Virginia, not West Virginia, law is a correct statement of the law.

In point of fact, Judge Michael does not even discuss procedural law in his Phelps Dodge opinion. A reasonable inference might be that it was never raised as neither side questioned Piedmont Electric Supply Corp.'s right to counterclaim in response

to Phelps Dodge's original suit. Judge Michael states:

Under a long line of cases beginning with Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 LEd. 1188 (1938) in diversity cases questions of substantive law shall be governed by the law of the state. In this case, of course, this refers to the substantive law of the Commonwealth of Virginia. (Emphasis mine). Phelps Dodge at 202.

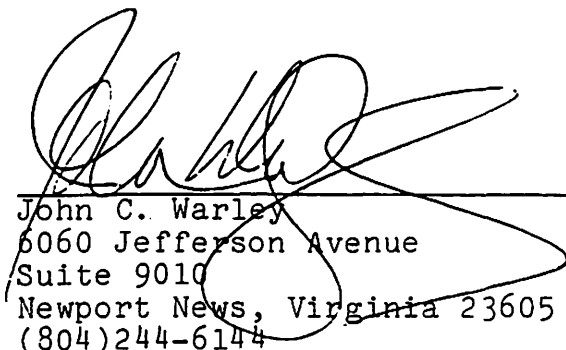
Rather than presume, as defendant does that Judge Michael had either "been mislead by the old Virginia cases" or the "present West Virginia statute" (Defendant's brief at page 5), it is far safer to assume that the Phelps Dodge decision was rendered in full knowledge of procedural changes which date back a full 27 years before the Phelps Dodge decision. If, as defendant asserts in paragraph 16 of its brief, Virginia's Rules more nearly accord the Federal Rules of Civil Procedure, we can at least assume that Judge Michael was familiar with those.

Defendant is now holding plaintiff's money and admits it. It is not simply a disputed claim to the money, it is a right which defendant acknowledges. Defendant seeks to justify this action on the basis of a claim against plaintiff which may or may not have validity. The question is who will hold the money while that claim is litigated, and Phelps Dodge quoting Dexter-Portland Cement Co. v. Acme Supply Co., Inc., 147 Va. 758 (1926), states:

That rule is as follows: ***
a demand for unliquidated damages
cannot be set off against an
ascertained demand***.
Phelps Dodge at 202.

The pleading before the Court demonstrates plaintiff's substantive right to the money held by defendant and summary judgment should be awarded.

Respectfully submitted,
John C. Warley, Of Counsel


John C. Warley
6060 Jefferson Avenue
Suite 9010
Newport News, Virginia 23605
(804)244-6144

CERTIFICATE OF MAILING

I hereby certify that I sent a true copy of the foregoing to Michael J. Goergen at CROSSLAND, SCHILLING & McCORMICK, P.C., 6577 Edsall Road, Springfield, Virginia 22151, on the 13th day of February, 1987, by first class mail, postage prepaid.


FILED

2-13-87





Seventh Judicial Circuit

OF VIRGINIA

2501 HUNTINGTON AVENUE

NEWPORT NEWS, VIRGINIA 23607

CHAMBERS OF
J. WARREN STEPHENS
JUDGE

February 19, 1987

Mr. John C. Warley
6060 Jefferson Avenue
Newport News, VA 23605

Mr. Michael J. Goergen
1400 20th Street, N.W., Suite 202
Washington, D.C. 20036

Re: League Construction Company, Inc. v. Piland Corporation
Law File No. 11429-WS

Gentlemen:

Upon consideration of the pleadings, the proceedings formerly had herein on January 29, 1987, and, memoranda of counsel, the court renders this opinion in letter form.

The pleadings in this action consist of the plaintiff's motion for declaratory judgment (filed November 14, 1986), the defendant's answer and grounds of defense and counter-claim (filed on December 11, 1986), the plaintiff's answer to counter-claim (filed December 30, 1986), and, the plaintiff's motion for summary judgment (filed January 14, 1986).

The plaintiff alleges existence of two contracts between it and the defendant, the so-called "Langley job", a contract in writing dated June 3, 1985, and the so-called "ODU job", a verbal contract. By paragraph 4. of its motion for declaratory judgment, the plaintiff alleges:

- "4. Plaintiff performed the work called for by the written contract in a skillful and diligent manor (sic, manner) to the satisfaction of both the defendant and the Army Corps of Engineers, which is responsible for acceptance of the work performed by plaintiff."

The plaintiff alleges (paragraph 6.) that although it has satisfied its obligations under the written contract with the defendant, the defendant has refused his demand for payment of the re-

Mr. John C. Warley
Mr. Michael J. Goergen
February 19, 1987
Page 2

tainage accruing on the Langley job for the reason (paragraph 9.) that the defendant claims to have expended substantial sums of money to rectify concrete pouring problems on the ODU job and is seeking to hold the plaintiff responsible therefor, and, (paragraph 10.) that the defendant claims it is entitled to withhold the plaintiff's retainage on the Langley job.

By paragraph 4. of its answer and grounds of defense, defendant admitted the allegations set forth in paragraph 4. of the plaintiff's motion for declaratory judgment.

During the hearing held on January 29, 1987 on the plaintiff's motion for summary judgment, the defendant introduced as Exhibit #1 purported copy of its demand against the plaintiff for arbitration under the written, June 3, 1985 contract, i.e., the Langley job, for reimbursement for alleged liquidated damages for alleged delays attributed to the plaintiff in the amount of \$6,655.00, said demand being dated January 20, 1987. The defendant's said exhibit is a belated attempt to vary its unequivocal admission as to the truth of the plaintiff's allegations contained in paragraph 4. quoted above, and, the court finds said exhibit is not only irrelevant but is of no evidentiary or probative value.

The court is of the opinion and finds (1) that the claim of the plaintiff against the defendant for the retainage on the Langley job in the amount of \$25,300.00 constitutes an admitted, liquidated debt due the plaintiff for that job, and, (2) that the alleged claim of the defendant for approximately \$85,000.00 for alleged expense for correcting work of the plaintiff on the ODU job described in the answer and grounds of defense and counter-claim of the former is one for unliquidated damages.

The defendant's reliance on Dexter-Portland Cement Co. v. Acme Supply Co., Inc., 147 Va. 758, 133 S.E. 788 (1926) and Odessky v. Monterey Wine Co., Inc., 188 Va. 184, 49 S. E. 2d 330 (1948), promulgation of Part 3 of Rules of Supreme Court of Virginia, and, enactment of Title 8.01 of the Code of Virginia is misplaced. In Dexter and Odessky, the Supreme Court of Virginia held that Virginia's substantive law compelled conclusion that the claims of the defendants therein not being liquidated, their respective special plea(s) of set off were rejected in Dexter and by the trial court in Odessky. Part 3 of the Rules and Title 8.01 of the Code as they apply to the issues involved in this litigation are pro-

Mr. John C. Warley
Mr. Michael J. Goergen
February 19, 1987
Page 3

cedural and not substantive in nature. In fact, the ruling announced in Dexter-Portland controls (133 S.E. at page 791):

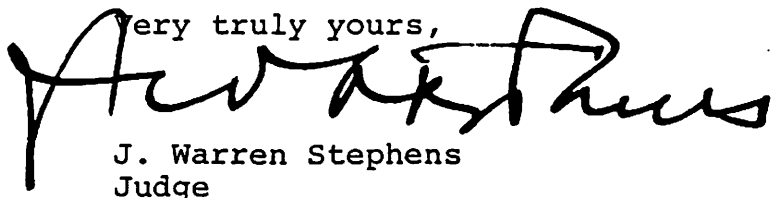
"Thus we find the rule of established practice in Virginia to be that the courts have authority to entertain pleas of set-off only where the demands of both sides are in the nature of debts. A demand for unliquidated damages cannot be set off against an ascertained demand, nor can demands for unliquidated damages be set off against each other, and the cross demand must appear in the nature of a debt from the plea. (cases cited)"

The court finds and concludes that the alleged claim of the defendant for unliquidated damages respecting the ODU job cannot be set off against the admitted debt of the defendant to the plaintiff on the Langley job. See also Phelps Dodge Industries, Inc. v. Piedmont Electric Supply Corp., 523 F. Supp. 201, 202 (W. D. Va., 1981).

It appearing to the court from the pleadings and proceedings had on January 29, 1987 that the plaintiff is entitled to judgment, the motion of the plaintiff for summary judgment against the defendant in the amount of \$25,300.00 and interest thereon as provided by law together with the costs is granted. Rule 3:18, Rules of Supreme Court of Virginia.

Counsel for the plaintiff is requested to prepare, have endorsed and forward to the court for consideration and entry, appropriate sketch for order embodying the foregoing.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. Warren Stephens", is written over the typed name and title.

J. Warren Stephens
Judge

JWS:lg

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS
LEAGUE CONSTRUCTION CO., INC.,
Plaintiff

v.

LAW NO. 11429-WS

PILAND CORPORATION,

Defendant

JUDGMENT ORDER

THIS DAY CAME this cause upon plaintiff's Motion For Declaratory Judgment, the defendant's Answer, Grounds of Defense, and Counterclaim; plaintiff's Answer to Counterclaim, and plaintiff's Motion For Summary Judgment, on which argument was heard January 29, 1987.

It appearing to the Court from the pleadings (1) that the claim of the plaintiff against the defendant for the retainage on the Langley job in the amount of \$25,300. constitutes an admitted, liquidated debt due to the plaintiff for that job, and (2) that the alleged claim of the defendant for approximately \$85,000. for alleged expense for correcting work of the plaintiff on the ODU job described in the Answer and Grounds of Defense and Counterclaim of the former is one for unliquidated damages. The Court further finds that the alleged claim of the defendant for unliquidated damages respecting the ODU job can not be set off against the admitted debt of the defendant to the plaintiff on the Langley job.

Accordingly, it is ADJUDGED, ORDERED and DECREED that the plaintiff is granted Judgment against the defendant in the

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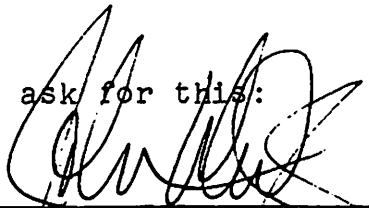
sum of \$25,300. with interest thereon from November 14, 1986
together with its costs expended.

This action is DISMISSED from docket.

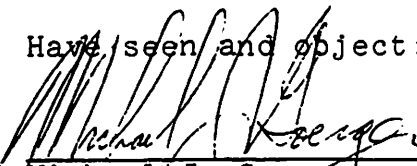
~~TO THE CLERK:~~ Enter this 13th day of March, 1987.


JUDGE

I ask for this:


_____, p.q.
John C. Warley
Suite 9010-6060 Jefferson Avenue
Newport News, Virginia 23605
(804) 244-6144

Have seen and object:


_____, p.d.
Michael J. Goergen
6577 Edsall Road
Springfield, Virginia 22151

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

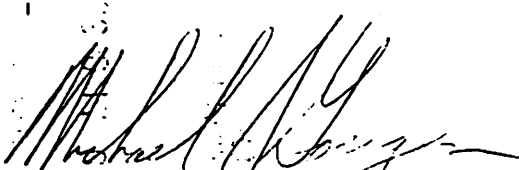
LEAGUE CONSTRUCTION CO., INC.,)	
)	
Plaintiff,)	
)	
v.)	Law No. 11429-WS
)	
PILAND CORPORATION,)	
)	
Defendant)	

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant, Piland Corporation appeals the Order of the Court granting summary judgment to Plaintiff and dismissing the case from the docket without a hearing on Piland's Counterclaim, entered in this case on March 13, 1987. A statement of facts and other incidents of the case will be filed on or before May 6, 1987.

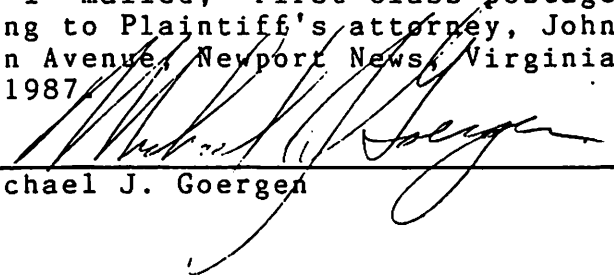
Piland Corporation

By Counsel:


Michael J. Goergen
CROSSLAND, SCHILLING &
McCORMICK, P.C.
6577 Edsall Road
Springfield, Virginia 22151
(703)941-3030
or (202)833-8127

CERTIFICATE OF SERVICE

I hereby certify that I mailed, First Class postage prepaid, a copy of the foregoing to Plaintiff's attorney, John C. Warley, Esq., 6060 Jefferson Avenue, Newport News, Virginia 23605, this 8th day of April, 1987.


Michael J. Goergen

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

LEAGUE CONSTRUCTION CO., INC.,)	
)	
Plaintiff,)	
v.)	Law No. 11429-WS
)	
PILAND CORPORATION,)	
)	
Defendant)	

MOTION FOR REINSTATEMENT OF CASE ON TRIAL DOCKET AND FOR
AN ORDER SETTING THE AMOUNT OF APPEAL BOND AND
GRANTING A STAY OF ENFORCEMENT OF JUDGMENT PENDING APPEAL

NOW COMES Defendant, Piland Corporation, by and through its undersigned attorney, Michael J. Goergen, and as and for its Motion represents as follows:

1. This action was originally commenced by League Construction Co. to obtain payment of a disputed contract balance on its subcontract with Piland Corp. on the "Base Supply" job for the federal government.

2. Piland counterclaimed for a larger sum for damages allegedly caused by League's performance on a second subcontract, at Old Dominion University.

3. Judge Stephens heard oral arguments on League's Summary Judgment motion, issued a letter opinion dated February 19, 1987, then signed and entered an Order on March 13, 1987.

4. The March 13th Order was originally drafted by League's attorney, and the draft was signed by both attorneys and submitted to Judge Stephens. However, at or near the time it was signed, certain words were added that weren't on the

4/28/87

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draft Order at the time it was signed by the attorneys, i.e., "This case is dismissed from the docket."

5. The effect of the added language is to deny Piland any sort of procedural due process on its counterclaim. The Order, as it stands, prevents any discovery or trial of the separate claims Piland has against League on the O.D.U. project, where Piland claims League is responsible to Piland for over \$85,000 in damages.

6. Piland has been denied its constitutional rights to due process by the dismissal of its counterclaim without any hearing.

7. Piland has noted an appeal, and will shortly be filing a statement of facts for the appeal, and requests that this issue of the dismissal of the counterclaim through the note inserted at the end of the Order be addressed before the statement is submitted for the appeal.

8. Pursuant to Code of Virginia, Section 8.01-676.1.B., C., F., and I., Piland Corporation hereby moves for an Order suspending execution of the judgment in favor of League Construction Co., pending the outcome of Piland's appeal to the Virginia Supreme Court.

9. As part of the request for such a suspension, Piland Corp. hereby requests that the Court set an amount for a bond for costs and for a bond for suspension of enforcement. While Section 8.01-676.1.I. states that no appearance before the

trial court need be made, the section seems to contemplate having the trial judge set the amount and the date the bonds need to be filed with the circuit court clerk's office.

10. League Construction Co. has indicated it intends to proceed with enforcement of the judgment unless execution is suspended, therefore, Piland Corp. is requesting the suspension bond amount now, rather than awaiting the granting of a Certificate of Appeal by the Supreme Court.

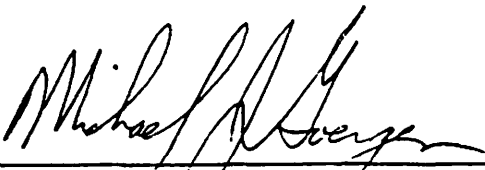
WHEREFORE, Piland Corporation requests that the Court issue an Order:

- (1) Stating that the case is still pending on Piland Corporation's Counterclaim, and that the case is restored to the docket; and
- (2) Setting the amount of the appeal bond for costs;
- (3) Setting the amount of the appeal bond for suspension of execution of the judgment; and
- (4) Setting the date by which Piland must file its bonds, upon which filing the judgment shall be suspended.

Respectfully submitted,

Piland Corporation

By Counsel:


Michael J. Goergen
CROSSLAND, SCHILLING &
McCORMICK, P.C.
6577 Edsall Road
Springfield, Virginia 22151
(703)941-3030 or (202)842-1746

MEMORANDUM TO FILE

TO FILE: League Construction Co. v. Piland Corp.
Law No. 11429-WS

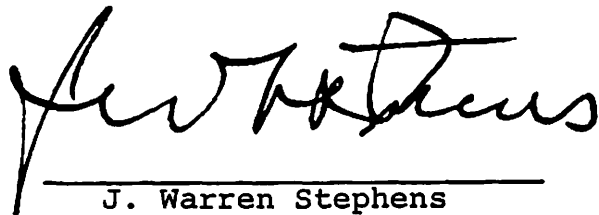
FROM: J. Warren Stephens
Judge

DATE: April 29, 1987

On this day by conference telephone call it was agreed (1) that the court would enter an order specifically providing that the counterclaim of the defendant is retained on the docket and was not dismissed therefrom by judgment order entered on March 13, 1987, (2) that the suspending bond was set in the penalty of \$35,000.00 with corporate surety thereon, and, (3) that the parties are desirous of agreeing on a written statement as a part of the record on appeal.

All questions concerning timeliness of (1) application of the defendant for leave to file suspending bond, and, (2) any of the other proceedings incident to the defendant petitioning for an appeal were left to the judgment of counsel.

Counsel for the defendant agreed to prepare, have endorsed, and forward to the court for consideration and entry sketch for order embodying (1) above.



J. Warren Stephens
Judge

JWS:lg

cc: Mr. Michael J. Goergen
Mr. John C. Warley

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

LEAGUE CONSTRUCTION CO., INC.,)	
)	
Plaintiff,)	
)	
v.)	Law No. 11429-WS
)	
PILAND CORPORATION,)	
)	
Defendant)	

ORDER

THIS MATTER having come before the Court via conference call, with the agreement of counsel for Plaintiff and Defendant, on Defendant's "MOTION FOR REINSTATEMENT OF CASE ON TRIAL DOCKET AND FOR AN ORDER SETTING THE AMOUNT OF APPEAL BOND AND GRANTING A STAY OF ENFORCEMENT OF JUDGMENT PENDING APPEAL", and the Court having been fully informed on the various issues involved, it is, this first day of June, 1987

ORDERED, that the Judgment Order entered herein on March 13, 1987 is hereby clarified to specifically provide that the Defendant's Counterclaim is not dismissed, but is retained on the docket for further proceedings; and it is

FURTHER ORDERED, that the suspending bond for the appeal of said March 13th Order be, and hereby is, set at \$35,000.00 with corporate surety thereon; and it is

FURTHER ORDERED, that the parties shall attempt to submit

Entered ~~7~~ June 1, 1987

~~XXXXXXXXXXXXXXXXXXXX~~XXXXXXXXXXXXXXXXXXXX1987

SEEN/AND AGREED:

79

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

LEAGUE CONSTRUCTION CO., INC.,)	
)	
Plaintiff,)	
v.)	Law No. 11429-WS
)	
PILAND CORPORATION,)	
)	
Defendant)	

STATEMENT OF FACTS FOR APPEAL

NOW COMES Defendant, Piland Corporation, by and through its undersigned attorney, Michael J. Goergen, and as and for its Statement of Facts in this case, states as follows:

1. This action was originally commenced by League Construction Co. ("League") by its filing of a Motion for Declaratory Judgment on November 18, 1986.

2. League was a subcontractor providing concrete and cement work to Piland Corporation ("Piland"), the general contractor, on two projects: (1) the Base Supply Complex contract at Langley Air Force Base ("the Langley job"; and (2) the Old Dominion University job ("the ODU job").

3. League alleged in its Motion for Declaratory Judgment that Piland owed League \$25,300.00 for work it performed on the Base Supply job.

4. Piland filed its Answer and Grounds of Defense on December 10, 1986, in which Piland admitted that it was withholding the \$25,300.00, which represented the

final 10% retention, and that League had performed its subcontract work to the satisfaction of Piland and the government. However, Piland alleged that League owed Piland certain backcharges and delay damages, and that it was entitled to a reduction of the otherwise undisputed subcontract balance. Piland also alleged that the subcontract, which was attached as an exhibit to the Motion for Declaratory Judgment, called for arbitration of disputes, and therefore requested a stay of the proceedings pending the outcome of an arbitration between the parties.

5. At the same time Piland filed its Answer and Grounds of Defense, it also filed its Counterclaim, in which it alleged that League was responsible to Piland for approximately \$85,000.00 for damages from League's allegedly faulty work on the ODU job.

6. In its Answer, Piland asserted a right to offset any amounts due to League on the Langley job because of Piland's claim against League on the ODU job.

7. League filed a Motion for Summary Judgment, which came on for oral argument on January 29, 1987, before the Honorable Judge J. Warren Stephens, who then allowed submission of post-hearing memoranda by the parties.

8. Judge Stephens, after receiving said memoranda, issued a letter opinion dated February 19, 1987, then signed and entered an Order on March 13, 1987, which, in essence,

granted League's Motion for Summary Judgment for \$25,300.00.

9. The March 13th Order was originally drafted by League's attorney, and the draft was signed by both attorneys and submitted to Judge Stephens. However, at or near the time it was signed, certain words were added that weren't on the draft Order at the time it was signed by the attorneys, i.e., "This case is dismissed from the docket."

10. Piland filed its notice of appeal on April 9, 1987.

11. In the notice, Piland stated that one aspect of its appeal was that the Order, as entered, appeared to dispose of Piland's Counterclaim without a hearing on the merits, by dismissing the case from the docket.

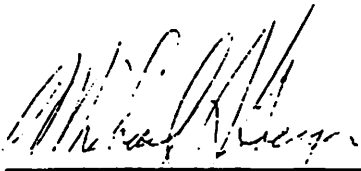
12. Subsequently, on April 28, 1987, Piland filed a "Motion for Reinstatement of the Case on the Trial Docket and for an Order Setting the Amount of Appeal Bond and Granting a Stay of Enforcement of Judgment Pending Appeal".

13. The motion was heard by Judge Stephens in a conference call on April 29, 1987, at which time Judge Stephens stated that he would enter an Order specifically providing that the Counterclaim would be retained on the docket, and that the counterclaim was not dismissed as a result of the judgment order of March 13, 1987. Judge Stephens also set the amount of the suspending bond for the appeal at \$35,000.00.

14. The disputes on appeal are:

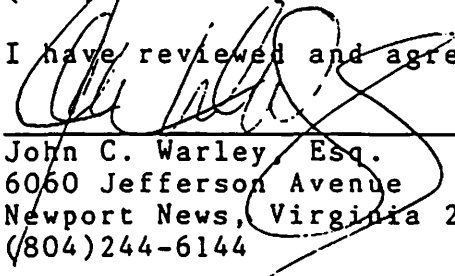
- (a) Whether the granting of the Summary Judgment was appropriate?
- (b) Whether the case should have been stayed pending arbitration?
- (c) Whether Piland has the substantive right to hold any monies which Piland might owe League on the Langley job pending the resolution of Piland's counterclaim against League on the ODU job, when Piland's counterclaim on the ODU job exceeds the amount Piland may owe League on the Langley job?

Respectfully submitted,
Piland Corporation
By Counsel:



Michael J. Goergen
1275 K Street, N.W., Suite 875
Washington, D.C. 20005
(202)842-1746

I have reviewed and agree with Piland's Statement of Facts:



John C. Warley, Esq.
6060 Jefferson Avenue
Newport News, Virginia 23605
(804)244-6144

APPROVED: June 1, 1987



J U D G E

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

LEAGUE CONSTRUCTION CO., INC.,)
)
Plaintiff,)
)
v.) Law No. 11429-WS
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PILAND CORPORATION,)
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Defendant)

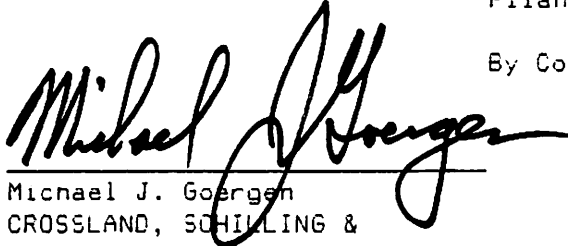
SUPPLEMENTAL NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant, Piland Corporation appeals the Orders of the Court granting summary judgment to Plaintiff League Construction Co., Inc. entered on March 13 and June 1, 1987. The June 1 Order represents a clarification of the previous Judgment Order of the Court granting summary judgment to Plaintiff League entered on March 13, 1987. Defendant Piland timely filed a Notice of Appeal to the March 13 Judgment Order. Because the June 1 and March 13 Orders together represent the final disposition of the case by the trial court, Piland now files this Notice as a Supplement to its original Notice of Appeal. Piland appeals only those provisions of the two Orders having the effect of granting Plaintiff League's Motion for Summary Judgment, and assigns no error to provisions of the June 1 Order reinstating Defendant Piland's Counterclaim on the docket for further proceedings, setting the suspending bond for appeal at \$35,000 and ordering the parties to submit an agreed written statement of facts for purposes of the record on appeal.

Pursuant to the June 1 Order of this Court, a statement of facts and other incidents of the case was filed on June 1, 1987, and was made a part of the record by the Court on that date.

Piland Corporation

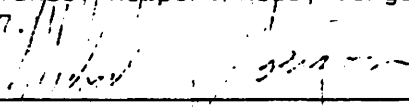
By Counsel:



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Springfield, Virginia 22151
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or (202)833-8127

CERTIFICATE OF SERVICE

I hereby certify that I mailed, First Class postage prepaid, a copy of the foregoing to Plaintiff's attorney, John C. Warley, Esq., 6060 Jefferson Avenue, Newport News, Virginia 23605, this ~~22nd~~ day of June, 1987.



Michael J. Goergen

ASSIGNMENTS OF ERROR

1) The trial judge erred, as a matter of fact and law, in granting appellee League's motion for summary judgment.

2) The trial judge erred, as a matter of fact and law, in refusing to stay proceedings pending disposition of the case in arbitration.

3) The trial judge erred, as a matter of law, in holding that Piland has no substantive right to set off the amount of its counterclaim arising out of the ODU job against monies allegedly due League on the Base Supply subcontract.