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A Critical Analysis of the Philippine Law on Counterclaims

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I. INTRODUCTION

A. Nature and Scope

A counterclaim is defined to be a cause of action existing in favor of the defendant and against the plaintiff which the former pleads to diminish, defeat, or otherwise affect the plaintiff's claim. (Bryant, Law of Pleading, p. 248). This defense is very broad and it includes within its scope, the statutory set off and the common law counterclaim. As was held in St. Louis Bank v. Gay (35 Pac. 876) in interpreting the provisions of the California Code of Civil Procedure which provisions are very similar to those found in our Code, "Counterclaim as used in the Code includes both recoupment and set off, and is strictly a pleading by which the matters arising out of recoupment and set off are averred." The same opinion is enunciated by our Supreme Court in Lopez v. Gloria (40 Phil. 26) holding that counterclaim is broad, and "embraces as a general rule, both recoupment and set off, although broader and more comprehensive than either." After defining the various defenses which the counterclaim embraces, the Supreme Court went further, "From the foregoing it is inferred that both recoupment and set off are counterclaims, the first differing from the second in that the former arises out of the same transaction upon which the plaintiff's action is based, and the latter of a transaction distinct from that on which said action is based." A complete study therefore of the Philippine law on counterclaim demands a thorough understanding of the defenses which it embraces.

Let us examine the concept of these defenses. Set off as a defense is a counter-demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of the plaintiff's cause of action, the object of which is to liquidate the whole or a part of plaintiff's demand, according to the amount of the set off. (Lopez v. Gloria, supra; Waterman on Set Off,

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p. 3). It signifies the subtraction or taking away of one demand from another opposite and cross-demand so as to extinguish the smaller demand and reduce the greater amount by the less, or if the opposite demands are equal to extinguish both. (Waterman on Set Off, p. 1). In its broadest sense it is that right which exists between two parties each of whom, under an independent contract, owes an ascertained amount to the other to set off their respective debts by way of mutual deduction so that in any action brought for the larger debt, the residue only after such deduction shall be recovered. (Samson v. Kimbal, 92 U. S. 362).

Under the old procedure, however, set-offs are of two classes: "first, those in which the defendant might recover an affirmative judgment, and second those in which the demand in his favor could only be used defensively to diminish or perhaps defeat the recovery of the plaintiff". (Pomeroy, Remedies and Remedial Rights, p. 816). Our law on counterclaim certainly does not include the second class of set off for as we have seen above the counterclaim is a source of an affirmative relief.

Recoupment on the other hand is a common law term which signifies "cutting again" or "cutting back", and is the cutting back on the plaintiff's claim by the defendant. "At common law it is the right of the defendant in the same action to claim damages from the plaintiff either because he has not complied with some cross obligation of the contract on which he sues, or because he has violated some duty which the law imposed on him in the making or performance of the contract." (Davenport v. Hubbard, 14 Am. Rep. 620).

B. History

Set off as a defense is purely of statutory origin and was not known at common law. This was probably borrowed from the civil law doctrine of compensation. (Fuller v. Steigletz, 22 Am. Rep. 312). "At common law", says Bryant, "if A had a cause of action against B, and B another cause of action in debt against A, each may bring his action; one could not be set off against the other." (Bryant, Law of Pleading, p. 250). The primitive notion of an action did not permit the possibility of a defendant being an actor and interposing a claim against the plaintiff to be tried in one suit. (Wilson v. Bank, 50 S. E. 357) " 'The common law', says Judge Story, 'in rejecting it from its bosom seems to have reposed upon its own sturdy independence or its own stern indifference'. Lord Mansfield undertook to give the reason for that objection. He said, 'Natural equity

says that cross demands should compensate each other by deducting the less from the greater and the difference is the only sum which can be justly due. But positive law for the sake of its forms of proceedings and convenience of trial has said that each must sue and recover separately in separate actions". (Butler, J. in Spurr v. Snyder, 35 Conn. 172).

This defense originated in the bankruptcy act of 4 and 5 Ann c. 17, but it was given a general application only by the statutes of 2 Geo. II c. 22 and 8 Geo. c. 24 which enact that "where there are mutual debts between the plaintiff and the defendant one debt may be set off against the other, and either pleaded in bar or given in evidence upon the general issue at the trial which shall operate as payment, and extinguished so much of the plaintiff's demand. (Gen. Electric Co. v. Williams 31 Pac. 288).

Recoupment on the other hand is distinctively a common law term. This right was anciently confined within very narrow limits, and so trammeled by technicalities that it was of little use and the term was for a time obsolete. Recently however the doctrine has been revived, and the remedy came to be applied whenever the demands of both parties sprung out of the same contract or transaction. (Baltimore and Ohio R. Co. v. Jameson, 31 Am. Rep. 775) Pomeroy in reviewing the development and origin of this defense says, "While set off is of purely statutory origin the doctrine and practice of 'recoupment of damages' had their inception in the law of judicial decision. From the notion of absolute performance as a total defense, the progress was easy and natural thru the partial defenses of part performance, and the reduction of damages by means of unskillful or negligent performance, to the admission of a cross demand in favor of the defendants for damages resulting from the acts or omission of the plaintiff that amounted to a breach of the contract sued upon. In this manner the doctrine of recoupment took its rise and it was developed by decision after decision until it became established in the courts of England and in the American states." (Pomeroy, Remedies and Remedial Rights, p. 842).

C. Purpose of the Law

As we have seen, at common law parties who have antagonistic cross-demands had to file a separate action to recover his respective claim. That procedure necessarily resulted in multiplicity of suits and unnecessary litigations. More than that it often times resulted in palpable injustice if the plaintiff happened to be in circumstances of insolvency. In such case the

bankrupt may in some cases procure and enforce the collection of a judgment upon his complaint before the defendant can secure a judgment on his just and righteous claim. "Lord Mansfield remarked that the natural sense of mankind was first shocked at this doctrine in the case of bankrupts. They thought it hard that a person should be bound to pay the whole that he owed to a bankrupt and receive only a dividend of what the bankrupt owed him." (Boyles on Bills, Notes p. 18, Waterman on Set Off). Hence, to do justice and to avoid multiplicity of suits, the law on counterclaim was adopted. "The policy of the law is always to prevent unnecessary litigation; whenever in a pending suit entire justice can be done to both parties by an adjustment of their mutual claims without a violation of any of the settled rules or forms of law, it ought to be done." (Avery v. Brown, 31 Conn. 398; Meriwether v. Bird, 9 Ga. 594).

II. DISTINCTIONS BETWEEN SET OFF AND RECOUPMENT

To have a clear understanding of these various defenses, let us now examine how, in what way, one differs from the other. Our Code of Civil Procedure does not define the distinctions between these various classes of counterclaims. Sec. 95 of the Code provides that the "the defendant may set forth as many defenses and counterclaims as he may have whatever their nature." Again Sec. 10 of Act No. 1627 also provides in general terms that "a set off, counterclaim, or reconvention for an amount within the justice's court jurisdiction" may be interposed by the defendant. Indeed our courts seem to use the defenses of recoupment and set off without regard to their technical distinctions and the same observation is true in other jurisdictions. As the court in the case of State v. Arkansas Brick Mfg. Co. (135 S. W. 843) has expressed it, "the distinctions between the several kinds of cross demands such as recoupment, set off, and counterclaim are sometimes lost sight of by the courts which often use the term interchangeably without regard to their technical meaning, which results in a confusion of terms which can be elucidated only by a close reading of the facts and the pleadings in the cases decided. Thus the statute of Texas allowed, 'set off or counterclaim'. Even the same term has a variety of meanings in different jurisdictions".

As we have said our law on counterclaim includes both recoupment and set off. The Supreme Court of California has held in a case that the distinctions between counterclaim, recoupment, and set off are no longer of much importance since

under most of the codes set off and recoupment are embraced in counterclaims. (Krausse v. Greenfield, 123 Pac. 292).

In practically the same terms our Supreme Court has confirmed the above doctrine. Hence the distinction between counterclaim on the one hand, and set off or recoupment on the other is of no moment to this discussion. Technically speaking, however, counterclaim is different from set off, and resembles more recoupment especially when the matter set up arises out of the contract or transaction set forth in the complaint. The Supreme Court in deciding the case of Lopez v. Gloria (40 Phil. 26) has laid down the distinctions between these defenses:

"Recoupment (reconvención) is the act of rebating or recouping a part of a claim upon which one is sued by means of a legal or equitable right resulting from a counterclaim arising out of the same transaction. (34 Cyc. 623).

"Set off (compensación) is a counter-demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of a plaintiff's cause of action, the object of which is to liquidate the whole or a part of plaintiff's demand, according to the amount of the set off, and like the modern recoupment is in the nature of a cross action." (34 Cyc., 625).

"From the foregoing it is inferred that both recoupment (reconvención) and set-off (compensación) are counterclaims (contrareclamaciones), the first differing from the second in that the former arises out of the same transaction upon which the plaintiff's cause of action is based, and the latter of a transaction distinct from that on which said action is based."

Again from a reference to Sec. 97 of the Code of Civil Procedure we also see that recoupment is barred for failure to plead the same, while a set off may be availed of at any time. The Supreme Court of Mississippi made the distinctions between recoupment and set off saying that recoupment has no regard as to whether or not the matter to be counterclaimed be liquidated or not; that it is confined only to matters arising out or connected with the transaction or contract upon which the action is brought; and that recoupment, unlike the set off is controlled by the rules of common law. (Raymond v. State 28 Am. Rep. 382).

III. ESSENTIAL ELEMENTS OF COUNTERCLAIMS

In order that it may be validly pleaded, a counterclaim, whether in the nature of set off or in the form of recoupment must possess the following elements:

A. It must be a Cause of Action

Our Supreme Court has held in the above case of Lopez v. Gloria that "counterclaim, set off, and recoupment have the character of a genuine action in favor of the defendant and against the plaintiff in such a manner that independent of any other consideration, a genuine action is constituted for the defendant which could be employed separately against the plaintiff; wherefore if they only tend to oppose or destroy the action of the plaintiff, they would constitute a good defense but not a counterclaim." So that when properly stated as such the defendant becomes in respect to the matters stated by him an actor, and there are two simultaneous action pending between the same parties wherein each is at the same time a plaintiff and defendant. (Francis v. Edwards, 79 M. C. 86) (De la Peña v. Hidalgo, 20 Phil. 323). The test according to Pomeroy to determine whether a counterclaim is proper or not is: "Would the facts averred taken by themselves, if admitted, entitle the defendant to a judgment in his favor against the plaintiff. If not, they do not constitute a counterclaim." (Pomeroy, Rem. and Rem. Rights, p. 845).

Being a cause of action, an answer setting up a counterclaim must contain the substantial requisites of a complaint and allege facts which may legally entitle the defendant to recover in a suit instituted by him for that purpose against the plaintiff and "if his pleading omits any allegation that would be necessary to state a cause of action, it will be vulnerable to a demurrer." (Le Clare v. Thibault, 69 Pac. 552).

Again a counterclaim to be validly pleaded must be a cause of action which is legally enforceable. For no one can rely upon an action which cannot be enforced in the courts. The rules of action and procedure must be applicable in this matter to the plaintiff and to the defendant alike; the defendant can no more enforce an illegal action by means of a counterclaim than he would by means of an ordinary complaint. Hence, for example, if a defendant relies for his counterclaim upon a gambling debt, it is clear that such counterclaim cannot be sustained for the gambling law makes gambling debts unrecoverable. (Sec. 9 Act No. 1757). For the same reason if the contract is void because of coverture, or because it has not followed the formalities laid down by law for its execution, said contract may not be the basis of set off or recoupment. The same is true with cases which are unenforceable because of a statute of frauds, or because barred by the statute of

limitations. "The court is bound to take judicial notice of the fact that the dealings recited in the counterclaim are forbidden by law, and of its own motion should direct a verdict against the defendant thereon. And if the defendant avers that the counterclaim is founded upon a transaction which the law forbids and makes a crime, it cannot be maintained even if the plaintiff in setting for his cause of action founded on the same thing avers the transaction to be legal." (Stiggins v. McCrea 116 U. S. 671; 29 L. Ed. 754). And also where the demand is simply conditional or contingent it cannot be set off. (U. S. v. Wells, 2 Wash. CCR 116).

There are cases, however, which hold that where the cause of action which forms the basis of a counterclaim is pleaded and proven without objection on the part of the plaintiff, such failure to object is a waiver, and the plaintiff will be estopped to attack the same on the ground that it is barred. Thus in McDougal v. Hulet (64 Pac. 278) it was held that a "plaintiff who without objection permits a counterclaim to be interposed and litigated and findings thereon to be made, is estopped to contend for the first time on appeal and after the subject-matter of the counterclaim is barred, that the counterclaim is improper." The same rule we believe applies in our jurisdiction. If for instance, a defendant sets up a counterclaim which is unenforceable because of statute of frauds, and the defendant is permitted to prove the same without objection, there would be no ground whatsoever for the court to disregard the same.

B. That the same should have for its object to defeat wholly or partially that which the plaintiff is trying to obtain

Our Supreme Court has declared that in order that a counterclaim may be pleaded it must be antagonistic to the claim of the plaintiff and must tend to neutralize the plaintiff's recovery. (Lopez v. Gloria, supra). In some states of the Union the law on counterclaim specifically provides this requisite. As Pomeroy puts it: "The doctrine is maintained in several cases that as an essential feature or element of every counterclaim, the cause of action which it sets up must be of such nature that the relief obtained by its means will necessarily interfere with, defeat, lessen, or modify the relief granted to the plaintiff by virtue of the cause of action alleged in his complaint or petition. In other words the two demands must be, to some extent at least, antagonistic, and tending to destroy and limit each other." (Pomeroy Rem. and Rem. Rights, p. 864).

As a corollary to the above doctrine it is essential therefore that the action of the plaintiff and the defendant's claim must in some way be related to each other. The Supreme Court of California, in a case in which it had occasion to discuss the provisions of Secs. 438 and 439 dealing with the California law on counterclaims elucidated this element we are discussing now. That case was for quieting the plaintiff's title to a certain land in which the defendant claimed an adverse interest. The defendant in a cross-demand set forth a contract by which he had agreed to dig a well for the plaintiff in the land and the plaintiff agreed to pay every inch of water developed therein at a certain price, or in cash at his option and that after making certain developments plaintiff had refused to proceed with the contract whereby he was damaged to a certain extent. The question was, whether defendant's counterclaim was proper. The court answered the question negatively, saying:

"The two cases have no relation to each other. The relief to which he would be entitled upon the one claim would not affect, modify or change in any way the decree to which the other party would be entitled. It was not the intention of the reformed procedure to allow persons having independent claims against each other, the relief authorized in one having no relation to that which could be given in the other, nor in any manner affecting it, to settle them all in one action upon the sole ground that as they have been brought into court to contend against each other with respect to one case or dispute, they should at that time and place settle all other matters of controversy existing between them." (Meyer v. Giggle, 74 Pac. 40).

It has also been held that it is necessary that the defendant's claim be such as can be adjudged by a single judgment in the case; if a separate judgment is required affecting that to which plaintiff is entitled, it is not a counterclaim. Thus in an action by plaintiff to recover possession of cattle the defendant cannot set up a counterclaim for a trespass on land and injuries to defendant's crops by plaintiff's cattle for the two "would be complete and entire each by itself and thus there would be in effect two judgments not modifying or interfering with each other and not relating to the same subject-matter." (Glide v. Kayser, 76 Pac. 50).

It is not necesary that a counterclaim should be a complete bar to the action, it is sufficient if it entitles the defendant to relief which will qualify to some extent the relief which the plaintiff would otherwise be entitled under his complaint.

C. That the same does not have for its Object to Destroy directly the Action of the Plaintiff

The above element was also enunciated by our Supreme Court in the case of Lopez v. Gloria (supra). Unlike a defense the counterclaim does not deny the facts upon which the action of the plaintiff is based, nor bases the same on facts which directly destroy the plaintiff's cause of action. On the other hand it sets up a cause of action, and whether he may recover on it or not is immaterial.

In some states like Minnesota it is settled that a counterclaim must of necessity admit the cause of action set up by the plaintiff and that the defendant cannot deny this cause of action and at the same time plead a counterclaim. Under our jurisdiction, however, this doctrine would not apply for the law gives to the defendant the right to combine in his answer a general denial of the plaintiff's claim, and a counterclaim.

D. Mutuality of Claims and Parties Claimant

As we have seen a counterclaim must be a cause of action in favor of the defendant and against the plaintiff. The Code of Civil Procedure (Sec. 96) provides: "A counterclaim to be available as a defense in an answer, must be one in favor of all the substantial defendants and against the substantial plaintiffs." The law of counterclaim in the States provides that in order that a counterclaim may be validly pleaded "it must be existing in favor of the defendant and against the plaintiff between whom a several judgment might be had in the action." The above quoted provision of our Code seems to imply the same principle as that expressed in the codes of the States; in other words if there is one defendant and one plaintiff the defendant's counterclaim must be directly against the plaintiff. As was enunciated in Kaye v. Metz (198 Pac. 1047) "in order to warrant a set off the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person but in the same capacity." Our Supreme Court has confirmed to the fullest extent the foregoing doctrine by laying down the rule that, "set off between two credits mutually claimed by the parties to a suit shall take place where both credits conform to the conditions required by Art. 1195 and 1196 of the Civil Code; in such a case compensation or set off shall produce the effect of off-setting the one and the other credit in the concurrent amount, with right on the part of the creditor for the larger sum to recover the resulting difference." (Acuña v. Dievas

12 Phil. 250). The test to determine whether mutuality exists or not is whether it is "such a demand as that the defendant in his own name or in the names of the defendants sued may maintain an action of debt, or *indebitatus assumsit,* on it against the party or all the parties suing as the case may be. Less than that is not mutuality." (Drennen v. Gilmore 31 So. 90; 24 R. C. L. 859).

It is not enough that the debts and the parties be mutual, it is also necessary that the defendant or defendants must own and possess the right of action in his own name and right; in other words they must be mutual debtors and creditors to each other. Hence, a claim of A against B cannot be compensated or set off against an indebtedness in favor of B against C. (Escaño v. Escaño 28 Phil. 73). For the same reason an action by a beneficiary to recover his share of a trust fund his indebtedness to another beneficiary cannot be set off against his claim against the trustee. (Hirshfeld v. Weill, 53 Pac. 402).

E. It must only Pray for the Payment of Money

In the same case of Lopez v. Gloria (supra) the Supreme Court declared that the counterclaim "ought not to pray for a positive remedy distinct from the payment of money." For when a defendant prays in his answer for an affirmative relief like the writ of injunction or specific performance then the said answer would not constitute a couterclaim but a cross-complaint falling under Sec. 98 of the Code of Civil Procedure which provides that, "whenever the defendant seeks affirmative relief aside from the payment of money against any part he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint."

IV. WHAT MAY BE PLEADED AS COUNTERCLAIM

We have seen from the above provisions that the term counterclaim as used in our Code, and in all the codes of the Union includes both recoupment and set off. Sec. 97 (C. C. P.) provides, "If the right out of which the counterclaim arises exists at the time of the commencement of the action and arises out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or is necessarily connected with the subject of the action, neither the defendant nor his assignee can afterwards maintain an action against the plaintiff therefor, if the defendant omits to set up a counterclaim for the same. But if the counterclaim arises out of transactions distinct from those set forth in the complaint as the foundation of the plaintiff's claim and not connected with the subject of the

action the defendant shall not be barred from any subsequent action upon such counterclaim by reason of his failure to set it up in his answer to the pending action." Interpreting the above provision the Supreme Court in Lopez v. Gloria said: "It is unquestionable that recoupment (reconvención) is a counterclaim arising out of the same transaction upon which the plaintiff's cause of action is based, and that Par. 1 of Sec. 97 of the Code of Civil Procedure treats of a counterclaim of this kind existing at the time of the presentation of the action of the plaintiff; while par. 2 of the said Sec. 97 treats of a counterclaim based upon a transaction distinct from the plaintiff's cause of action; therefore, it follows that par. 1 of the said section refers to recoupment (reconvención) and par. 2 to set-off (compensación)."

In resumé we may say that under our law the following may be pleaded as counterclaims:

a. Counterclaim arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim.

b. Counterclaim which is necessarily connected with the subject of the action.

c. Counterclaim which arises not out of the transaction set forth in the complaint and not connected with the subject of the action.

The first two are embraced in recoupment and the last is the set-off.

A. Counterclaim Arising Out of the Transaction Set Forth in the Complaint as the Foundation of the Plaintiff's Claim

The word 'transaction' found in our law has no strict well-defined meaning. The Century Dictionary defines 'transaction' as any matter or affair whether completed or in the course of completion. It has been held in New York that the term is broader than 'contract'. A contract is a transaction but a transaction is not necessarily a contract. (Xenia Bank v. Lee 7 Abb. Pr. 372; Roberts v. Donnovan 9 Pac. 180). On the other hand it was held in Barhyte v. Hughes (33 Barb. 320) that 'transaction' and 'contract' are synonymous; in other words that no cause of action can arise out of a transaction unless it springs from a contract.

Interpreting the word 'transaction' in section 438 of the California Code of Civil Procedure authorizing a defendant in an action to set up a counterclaim "arising out of the transaction set forth in the plaintiff's complaint" the Supreme Court

of that State said: "A transaction as the term is here used has been said to be 'that combination of acts and events and circumstances and defaults, which viewed in one aspect result in the plaintiff's right of action and viewed in the other aspect result in the defendant's right of action. As these two opposing rights of action cannot exactly be the same, it follows that there may be and generally must be facts, acts, events, and defaults in the transaction as a whole which do not enter into each cause of action, but are confined to one of them alone. The term 'transaction' is not limited to the facts set forth in the complaint, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which form the basis of the agreement." (Story Com. Co. v. Story, 34 Pac. 671).

"In order that causes of action may arise out of the same transaction, there must be a negotiation or a proceeding, or a conduct of business between the parties of such a nature that it produces, as necessary results, two or more different primary rights in favor of the plaintiff and wrongs done by the defendant which are violations of such rights. The proceeding or negotiation, or conduct of business must of course be a unit, one affair, or else it would not be a single transaction, and yet it must be in its nature complex for it must be the origin of two or more separate primary rights and of the wrongs which violate them." (Pomeroy, Rem. Rts. 489).

Under the law of some states the counterclaim may arise "out of the contract or transaction set forth in the complaint." Under such a provision it has been said that "the term transaction being placed in immediate connection with the word 'contract' and separated therefrom by the conjunctive or, one conclusion is certain at all events; namely that the legislature intended by it something different from and additional to 'contract'. The most familiar rules of textual construction are violated by the assumption that no such signification was intended." (Pomeroy, Rem. and Rem. Rts. p. 865). Under the Philippine law, however, the term transaction should in all justice and to give effect to the purpose of the law be interpreted to include contract for as we have seen a defendant may base his counterclaim upon tort.

B. Counterclaim which is Necessarily Connected with the Subject of the Action

The scope and meaning of the terms 'arising out of' and 'be connected with the subject of the action' were analyzed by

the Supreme Court of Indiana. The question brought up for the consideration of the court was;

"What is the legal effect of the words 'arising out of' or 'connected with'? Do they refer to those matters which have an immediate connection with the transaction?, or do they include those which have a remote relation with it by a change of circumstances which were not had in view at its inception? * * * We do not think the statute contemplates any such practice. A counterclaim is that which might have arisen of, or could have some connection with the original transaction in the view of the parties and which at the time the contract was made, they could have intended might some event give one party a claim against the other for compliance or non-compliance with its provisions." (Conner v. Winton, 7 Ind. 523).

It is interesting to note that while our law provides that the counterclaim must be 'necessarily connected' with the subject of the action other laws do not qualify the connection with the word 'necessarily'. We may infer from this that under our law the connection must not simply be incidental but essential.

The test for determining as to whether a cause of action set forth in the counterclaim is so connected with the plaintiff's cause of action as to be allowable under this section is that the counterclaim "must have such a relation to or connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action and by one litigation, and that the claim of one should be off-set against or applied upon the claim of the other. But some connection between the claims themselves, independent of their being held by the same parties to the action is required, which may be shown from their originating in the same contract or transaction or both involving some right or interest in the subject of the action." (Advanced Threasher v. Klein 133 N. W. 51, quoting from 34 Cyc. 686).

There is so far no exact definition either by statute or judicial construction of the term subject of the action. And the authorities give to it a variety of meaning, confusing it with the terms 'object of action' or 'Cause of action'. The term, however is different from both. The most widely accepted definition is that given by Pomeroy, who observes: "It seems to me, to be correct to say in all cases, legal and equitable, that the subject of the action is the plaintiff's primary right which has been broken and by means of whose breach a remedial right exists. Thus the right of property and possession in ejectment

and replevin, the right to possession of money in all cases of debts and the like would be the 'subject' of the respective actions." (Pomeroy, Rem. and Rem. Rts. p. 905; Steinmetz v. Cosmopolitan Range Co., 94 N. Y. Supp. 456; McArthur v. Moffett, 143 Wis. 564).

C. Counterclaim which Arises not out of the Transaction Set Forth in the Complaint and not Connected with the Action

This species of counterclaims is what is technically called set off. This portion does not need further elucidation for it simply serves as a mere explanation of the first, and sets up the rule which one must necessarily infer from reading the first paragraph of Sec. 97. Indeed whatever does not fall within the first must come within this second portion.

By way of comparison we may remark that while the first part of Sec. 97 is similar to the provision found in the law of counterclaims in American States our law on set off is peculiar. It is distinct and different from the set off which a defendant is allowed to set up under the law of the States. The majority of the codes provide that a defendant may set up a counterclaim: "(2). In an action arising upon contract, any other cause of action also arising upon contract and existing at the commencement of the action." The decisions of the Supreme Court of New York seem to point out that under such provision in order that a defendant may set up a set off it is essential that the plaintiff's action must be based upon a contract and the set off founded upon another contract. That doctrine makes such set-off different from ours for under our law it is expressly provided that a set off may be based upon a contract or transaction, whatever may be the foundation of the plaintiff's complaint.

(To be Continued)