A Critical Analysis of the Philippine Law on Counterclaims

By HONESTO K. BAUSA *

(*Continuation*)

V. JURISDICTION AND VENUE

A. In General

We have already seen that a counterclaim is a cause of action. As such it follows that a counterclaim in order to be entertained by the court must be one within its jurisdiction with respect to its amount, its subject-matter, and parties therein. "The proposition may be put more concisely by saying that in pleading a counterclaim the defendant becomes an actor and is governed by the rules which would apply to the plaintiff in a separate action." (Haygood v. Brown 20 S. E. 803; Cooley v. Evans 48 N. E. 459)

The right of the court to pass upon counterclaims was discussed by the Minessota Supreme Court. The question brought up in the case was whether the court could entertain a counterclaim for an amount exceeding $500 when the law authorizes said court to hear and determine "civil actions at law where the amount in controversy does not exceed $500." In disposing of the question the court held, "A counterclaim is a cross-action against the plaintiff and to entitle a defendant to be heard thereon in that court the cause of action stated by him must be within the limit of the court's jurisdiction. The court can no more exceed its jurisdiction on his demand than it can on the demand of the plaintiff, for as remarked by Chief Justice Cassoday in Martin v. Eastman, the limitation to the jurisdiction applies to both parties to the action." (Duressen v. Blackmar 135 N. W. 530). So where several counterclaims are pleaded in the same action it has been said their aggregate amount must be within the jurisdiction of the court. Gen. Electric Co. v. Williams 31 S. E. 288.

B. In Actions before the Justice of the Peace

Sec. 10 of Act No. 1627 provides: "The defendant may interpose any lawful defense orally or in writing but if on appeal it does not otherwise appear he shall be considered as hav-

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ing interposed a general denial only. A set off, counterclaim or reconvencion for an amount within the justice jurisdiction may also be interposed but must be in writing and, if requested by the defendant, the justice shall reduce the same to writing." This Sec. authorizes the defendant to set up a couterclaim for an amount not exceeding ₱600. In actions of forcible entry and detainer the justice of the peace court may not take cognizance of a counterclaim for an amount beyond its jurisdiction. This rule was enunciated by our Supreme Court in a case for forcible entry and detainer, where the defendant interposed a counterclaim for five thousand pesos. The question in that case was whether the justice could take cognizance of such a counterclaim. After citing the above provision the court thru Justice Carson said: "The only argument advanced in support of the proposition that in summary actions the justice of the peace may take cognizance of set-off, counterclaim, and reconvencion without regard to the amount thereof seems to be based on the presumption that since no limit has been placed upon the value of the property or the amount of the damages which may be recovered by the plaintiff in actions of this kind it would be unjust and unreasonable to place a limit on the amount of any set-off or counterclaim which the defendant may set up in such action. * * * But grounds of public policy which led the legislator to place a general limitation upon the jurisdiction of the courts of justices of the peace are so obvious, and the terms in which this general limitation is expressed are so clear and explicit that no attempt to extend the jurisdiction of those courts beyond the general limits thus prescribed can be maintained in the absence of the clearest expression of the will of the legislator. * * *"

In answer to the contention that an insolvent plaintiff may be able to collect a judgment upon his complaint in a summary action before the judgment debtor can secure a right to be heard on his just and lawful counterclaim in excess of the jurisdiction of the justice of the peace the Supreme Court said; "But while this contention is not without merit it must not be forgotten that any real danger of a substantial failure of justice in such a case may always be guarded against a vigilant who under such circumstances would clearly be entitled to an order restraining the enforcement of the judgment in the Court of First Instance upon a set-off or counterclaim in excess of the jurisdiction of the justice of the peace." (Tuason v. Crossfield, 30 Phil. 543).

In the above case however, Justice Moreland wrote a very powerful dissenting opinion. He said that the decision of the majority is absurd because "if a court has power to grant a judgment for ₱10,000 against a defendant that same court must necessarily have jurisdiction to offset plaintiff's claim by a valid counterclaim of ₱10,000 presented by the defendant especially where as in the case at bar the counterclaim arises out of the same contract on which plaintiff predicates his cause of action."

While the reasoning of Justice Moreland is very convincing and his opinion just and equitable, I believe the majority opinion is in conformity with law. When Act No. 1627 was enacted Sec. 80 of Act No. 190 was already in our statute books, and if the legislator intended to make an exception to the jurisdiction on counterclaims provided for in the later act he would have so expressly stated the same in the law. Besides the most important question passed upon by the justice court in cases of this kind, that which gives it jurisdiction, is the fact of forcible possession or detention, and if damages are awarded at all, the same is only incidental to exercise of jurisdiction. Whereas on the other hand where the defendant set up a counterclaim he is in one sense bringing an ordinary cause of action, and the rules of procedure governing ordinary actions must be applicable to it.

There is a difference in judicial opinions of different states of the Union as to whether the defendant may deduct from or decrease the amount of his counterclaim in order that he may bring the same within the jurisdiction of the court. In one case it was held that he could not do so because that would be an injurious attempt to evade the statute. (Almeida v. Singerson, 20 Mo. 62). On the other hand in another case where a defendant Railroad had a counterclaim of the plaintiff for damages in the sum of $1,200 and pleaded that $200 of this amount be set-off against the plaintiff's claim which amount of $200 is within the court's jurisdiction, it was held that the court committed no error in so allowing it. (Scot v. Mexican Nat. R. Co. 18 S. W. 137). Also Kiezle v. Gardner 63 Atl. 10; Duressen v. Blackmar, supra.

May a defendant under our law who has a counterclaim waive the excess over the jurisdictional amount in order to obtain a right to interpose the same? We believe that in this case he may do it because he is the sole judge on the amount he may deem proper to set up. The question however, is: May he bring a subsequent action upon the excess which he has

waived, or will his waiver constitute a bar? We believe that in this case the defendant can no longer recover the amount which he had not set up. For if that would be permitted it would be an indirect way of evading the statute. The law gives him the right to set up the whole amount of his claim which is beyond the court's jurisdiction as a defense or plea in bar, and he may insist only upon such privilege. The general rule, as was hinted in the case of Howar Iron Works v. Buffalo Elevating Co. 176 N. Y. 1, is that a party cannot split his claim into fragments and have a separate action upon each fragment.

When the counterclaim exceeds the amount within the jurisdiction of the court, the defendant may yet plead the same, in the form of a special defense for the purpose of weakening the plaintiff's cause of action. "In such case the defendant could very well allege before the justice court that for his failure to comply with some of his obligations arising out of the contract, the plaintiff became indebted to the defendant in a sum greater than that prayed for in his complaint and could have asked that for said reason plaintiff's claim be dismissed." (Bernardo v. Genato, 11 Phil. 603). "No reason can be given why A, having a debt of $200 against B who has a debt of $1,000 on him should have judgment on his debt without the right in B to defeat the action by a plea of his larger debt as a set-off in bar." (McClanahan v. Cotten, 83 N. C. 332). Another possible remedy in this case where the plaintiff has sued in justice court which has complete jurisdiction of his case but has not jurisdiction broad enough to enable it to entertain the defendant's counterclaim, which grows out of the same transaction, is to enjoin further proceedings and have the case determined in a court having jurisdiction of the whole controversy. (Gregory v. Diggs, 45 Pac. 261). For the same reason a defendant may yet plead a set-off which is insufficient in amount to give the court jurisdiction over the same. (Freeman v. Seitz, 58 Pac. 690)

C. Right to Interpose on Appeal

As a general rule a counterclaim should be interposed in the court where the case is first tried and it cannot be entertained by the appellate court for the first time on appeal. In a long line of cases it has been held that altho Sec. 75 of Act No. 190 provides that upon appeal from the decision of the justice of the peace the case shall stand for trial *de novo*, and that the parties shall file new pleadings, the provision does not authorize parties to raise a question which is essentially distinct from that

raised in the justice's court. (Yu Lay v. Galmes, 40 Phil. 651; Alonso v. Mplity. of Placer, 5 Phil. 71; Enriquez v. Watson, 6 Phil. 114). In accordance with this theory a counterclaim for damages filed for the first time on appeal to the court of First Instance, not having been filed nor being proper in proceedings for ouster in the court of the justice of the peace was reasonably denied. (Belzunse v. Fernandez, 10 Phil. 452). For the same reason no counterclaim may be urged for the first time on appeal in the Supreme Court.

A different rule holds true however, where the facts upon which the counterclaim is based did not materialize until after the appeal from the justice of the peace has been perfected, and the said counterclaim can be taken cognizance of by either the justice's court or the Court of First Instance. In such case, it may be urged for the first time on appeal to the Court of First Instance. This rule was laid down by the Supreme Court in the case of Trinidad v. Odegimer, (R. G. 28579—July 19, 1928; L. Journal, Aug. 1928 p. 94). The Court argued that while it has been laid down in Yu Lay v. Galmes (supra) that in appeals from the justice of the peace to the Court of First Instance the latter Court is in all cases confined strictly to the issues as they were presented in the court below and that under no circumstances may any additions to such issues be permitted, such holding was mere dicta; "the whole theory seems to be that a cause of action over which the Court of First Instance has exclusive original jurisdiction is an entirely different in nature from that of a cause of action of which the justice of the peace court has original jurisdiction. * * * Under such circumstances, the provisions of Sec. 75 may be applied and the regular proceedings followed; to hold otherwise would only lead to unnecessary litigation and multiplicity of suits."

VI. EFFECT OF FAILURE TO PLEAD COUNTERCLAIM

Sec. 97 of Act No. 190 which we have already quoted above provides that if the defendant fails or omits to plead a counterclaim existing at the time of the commencement of the action and arising out of the transaction set forth in the complaint, or connected with the subject of the action, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor. In order that failure to plead a counterclaim would constitute a waiver, the following elements must appear: first, that the cause of action constituting the counterclaim existed at the commencement of the action; second, that the same arose out of the transaction set forth in the complaint, or necessarily

connected with the subject of the action; and third, that the defendant omitted to set up the same. It has also been said that the counterclaim be within the jurisdiction of the court so that failure to plead the same would constitute a bar to subsequent action upon the same. The purpose of the law is to avoid a duplicity of action when the same might be properly litigated in one suit alone. When failure to plead a counterclaim is urged as a defense to a subsequent suit brought upon it, it must be shown by proper allegations to have been of such a character as to be thus lost. (Brosman v. Framer, 66 Pac. 979). Applying this rule it has been held that a "defendant in an attachment suit must recover his damages for wrongful attachment, if at all, in the action in which the attachment was granted. If the court refuses to allow damages his remedy is by appeal. If he fails to avail himself of this remedy the decision of the court constitutes *res adjudicata* and he cannot thereafter maintain an action for the recovery of such damages." (Tan Suyco v. Javier, 21 Phil. 82). For the same reason, unless damages for deceit in the sale of goods are counterclaimed in an action for the purchase price they are waived. (Collins v. Townsend, 58 Pac. 608). The same principle was laid down in Jap Unki v. Chua Jamco (14 Phil. 602); Pascua v. Sideco (24 Phil. 26); Berses v. Villanueva (25 Phil. 473).

The Supreme Court in the case of Yu Lay v. Galmes (supra) declared that the rule of waiver does not apply to the justice of the peace court inasmuch as Sec. 97 of Act No. 190 refers only to proceedings in the Court of First Instance. In other words, in the justice of the peace court the defendant is at perfect liberty whether to plead a counterclaim or not, which arises out of the transaction set forth in the complaint. For the law does not make his failure to plead a recoupment a waiver thereof.

When a counterclaim falling under the first paragraph of Sec. 97 of Act No. 190 has already been set up, the court does not have the power to grant a motion of the defendant praying for the withdrawal of such a counterclaim with the reservation of presenting it in a separate action. For "such reservation is tantamount to depriving the plaintiff of a defense against the defendant's counterclaim, a defense which this Sec. 97 grants in the event that this counterclaim is not set up in said action. The court cannot arbitrarily deprive the plaintiff of this right, as it would, have done had the motion of the defendant been granted." (Reyes v. Osorio, 39 Phil. 244).

VII. EFFECT OF THE LAW ON COUNTERCLAIM (SECS. 95-97 OF ACT NO. 190) UPON THE LAW OF COMPENSATION OF THE CIVIL CODE

We have learned above that in principle and in effect compensation under the Civil Law and set-off are the same: both effecting the extinguishment of mutual debts up to their respective amounts. As a mater of fact it has been pointed out by text-writers and judicial decisions that set-off has been borrowed from the doctrine of compensation of the civil law. (Fuller v. Steigletz, supra; Holiman v. Roger, 6 Tex. 611). Even our Supreme Court seems to use set-off and compensation interchangeably, attributing to the former the essential requisites of the latter. (Acuña v. Gievas, supra). Strictly speaking however, these two differ in certain essential respects, First of all, counterclaim or set-off must be pleaded to be effectual, while on the other hand compensation takes place by operation of law and extinguishes the two debts at the moment they exist simultaneously to the amount of their respective sums. (Yap Unki v. Chua Jamco, supra). Compensation of the civil law is essentially in the nature of payment; while a set-off is the bringing into the presence of each other two cross-demands and by judicial action of the court make each obligation extinguish each other. (Blount v. Windley, 24 L. Ed. 424). Again a plea of compensation is in the nature of a defense, but counterclaim is itself a distinct action. Moreover, while an allegation of compensation presupposes and impliedly admits a preexisting debt but contends that such debt has already been extinguished or at least reduced by operation of law; a counterclaim may either deny or admit a debt against the defendant, but it always sets up a claim for another debt.

From a comparison of our law with the Civil Code and the Code Civil Procedure of California we observe that while our Code of Civil Procedure does not provide for compensation the Procedural law of California provides, "When cross-demands existed between persons under the circumstances that if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived thereof by assignment * * *." (Sec. 440, C. C. P.). On the other hand, while the Civil Code of California does not provide for the compensation of debts, the Civil Code of the Philippine Islands embodies that principle in its provisions. From this we may infer that our Code of Procedure has not intended

to modify nor to alter or touch upon what our substantive law already provides for. The Philippine Commission in enacting Act No. 190 saw that there was no need for inserting in that Act a provision like the above-quoted section of the California Civil Procedure, for such provision would be superflous. From the comparison we also see in bolder relief that compensation and counterclaim are not two antagonistic principle of law, for both of them are embodied in one single enactment, and work harmoniously together. Speaking of Sec. 440 (supra) the Supreme Court of California said,

"The section, it is true, is found in a code of procedure, but it confers substantial rights. The words 'so far as they equal each other' necessarily imply limitation or exclusion. The compensation for which this section provides takes place just as soon as cross-demands coexist; the greater demand being credited with the smaller and the latter entirely discharged. Each of the demands therefore must be of such a character that they can be mutually applied in the manner indicated. If one of them is for unliquidated damages (that is, uncertain in amount) it is manifestly impossible for the application to take place. The operation of the statute now under consideration is quite different from the judicial procedure by which a claim for unliquidated damages is set-off against a fixed indebtedness. * * *." This decision illustrates the principle which governs the compensation under our Civil Code as enunciated in cases decided thereon. (See Acuña v. Dievas, supra, Luengo v. Herrero, 17 Phil. 29).

There is however, a doubtful question presented under this topic in connection with pleading and jurisdiction. To put the question in a concrete form, let us say for instance that A has claim against B for ₱500, and B in turn has in his favor a debt due by A in the sum of ₱700. Let us also assume, for our purpose that these debts have long become mutual and demandable and liquidated. Now A files an action against B to recover the said ₱500. It will clearly appear from the facts that B cannot set up a counterclaim for the ₱700 due him assuming of course that A's action was brought in the justice of the peace. Now the question is: May the defendant B set up in his answer that compensation has already taken place with respect to the ₱500, and interpose a counterclaim with respect to the balance of ₱200 due by plaintiff in his favor? May the defendant simply set up a general denial with respect to the debt claimed by A and pray for an affirmative relief to recover ₱200?

We have learned that compensation takes place by operation of law without the act or even the knowledge of the parties at the very moment when the two opposite and liquid debts coexist, indeed as Domat remarks, "even tho both the one and the other should be ignorant of the debts they have to compensate. For each of them being at the same time both creditor and debtor to each other, these qualities are in equity and in truth confounded together and annulled." (Domat's Civil Law, Vol. 1, par. 2292). When compensation takes place, the law presumes payment and the balance of the mutual credits, if any, defines the character of creditor and debtor. As a matter of fact there does not have to be a judicial declaration in order that compensation may be said to have taken place. The difficulty of the question is that there is no text nor any authority which show in a practical manner how the defense of compensation is set up. The cases seem to point that compensation of debts is generally set up by means of a counterclaim. The author of this composition in spite of his earnest research has not found authorities which would give light on this question.

We contend however, that the defendant B in our supositious case may set up a general denial as to the ₱500, and counterclaim for the balance of ₱200. From the above remark concerning the principle of compensation we can say that prior to the filing of the suit, the debt no longer existed in law, for by legal fiction it was already paid the moment the respective debts of the parties coexisted. By the same operation of law the defendant B became creditor to the plaintiff A for the balance of his claim. Since no such debt claimed by A existed, A's action may be met by a general denial. Moreover we have seen that compensation does not have to be pleaded like a new matter. (Yap Unki v. Chua Jamco). The law gives to the defendant the right to combine in his answer "as many defenses and counterclaims as he may have whatever their nature." Under this provision the defendant B justly combines in his answer a general denial and a counterclaim.

The question however, becomes more complicated when the plaintiff disputes or denies that compensation of their respective debts has already taken place. In this case there shall be a need of judicial declaration as to the fact of the existence of compensation alleged by the defendant. For as Manresa has observed, while strictly speaking there is no judicial compensation we speak of it when the courts have to declare the same by virtue of a demand of one of the parties who does not recognize the same or when it is set up as a defense by the

other. (Manresa 8, p. 365) Would such declaration of compensation tantamount to awarding a counterclaim of ₱500? In other words would such declaration render the court to be without jurisdiction to grant the prayer in the counterclaim of ₱200? And if the court of the justice of the peace also grants the ₱200, would it amount to a grant of counterclaim of ₱700? We believe that the court's findings for the defendant on his defense of compensation and his counterclaim are legitimately within its jurisdiction. The two are distinct and different, each of them in itself is within the powers of the court to pass upon and determine.

VIII. EFFECT OF ASSIGNMENT ON THE RIGHT TO COUNTERCLAIM

Under this topic two kinds of assignments need be discussed; one under Sec. 97 and another under Sec. 114 of Act No. 190. The first section contemplates of the case where the defendant sets up as a counterclaim a cause of action which had been assigned to him. On the other hand Sec. 114 provides "Every action must be prosecuted in the name of the real party in interest. But in the case of an assignment of a right of action an action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before the notice of assignment, but this last provision does not apply to a negotiable promisory note, etc. * * *." From the above provision we infer that the assignment contemplated here is active; that is, not one made to a defendant or obligor but rather one made by the plaintiff or obligee to a third person. Sec. 114 contemplates of a set-off against an assignee of a chose in action, whether such set-off originally belongs to the defendant or had simply been previously assigned to him; while on the other hand Sec. 97 provides for an assignment that is passive, and the set-off spoken of here is one not originally belonging to the defendant, but has been acquired by him thru assignment and which he sets up against his original obligee.

A. When may a Defendant set up a set-off against an Assignee of a right of action—Requisites

As the section quoted above provides the assignment of a right of action shall not prejudice any set-off or other defense existing at the time of or before the notice of the assignment. This provision finds its counterpart in the codes of various states of the Union. Pomeroy says that this provision should be interpreted as tho it reads as follows: "In the case of the

assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment which would have been available to the defendant had the action been brought in the name of the assignor." (Pomeroy, Rem. and Rem. Rights, p. 252). As to the requisites necessary in order that this set-off may be invoked as against an assignee, let me quote from the cases decided on this point. In the case of Stadler v. First Nat. Bank of Helena (20 Montana 190) the Supreme Court of Montana held:

"The decision is practically unanimous to the effect that while notice of assignment is required to cut off other defenses in favor of the defendant against the assignee, it is not necessary with respect to set-off, either at law or in equity, that a demand against the assignor to be a set-off at law must exist in the form of debt due and payable from the assignor at the date of the transfer, and that a debt owing by the assignor not then due and actionable but which becomes so prior to notice of the transfer is not a legal set-off and not to be available against the assignee, the equitable right to set-off must attach at the time of the transfer and cannot arise afterwards."

And practically the same doctrine was laid down by the Supreme Court of California to the effect that "in an action by the assignee of a chose in action not negotiable, the defendant may successfully plead any set-off which he could have so pleaded against the assignor if he had retained and brought suit on it, provided he acquired it before notice of assignment, and provided further that it was existing at the commencement of the action." (First Nat. Bank v. Gay, 101 Cal. 286).

B. Scope and meaning of set-off provided for in Sec. 114

There is a question as to whether the set-off which the defendant may plead against an assignee may at the same time be made the basis of a prayer for an affirmative relief. To illustrate with an example let us say that A is indebted to B in the sum of ₱200, and B in turn is obliged to A in the sum of ₱400. Their respective debts being liquid, and due A assigns his claim to C, who subsequently brings action against B for the recovery of the said debt. May B set up a counterclaim against the plaintiff-assignee for the amount of ₱200 which is the excess of the debt in his favor against the assignor A? May the court grant such affirmative relief prayed for against the assignee? There is a dicta in the case of Stadler v. First Nat. Bank of Helena (supra) to the effect that the set-off in

this section is purely defensive and that it does not imply affirmative relief.

In our opinion, the set-off allowed by this provision would not permit the defendant to recover anything against the assignee. It is a rule that a contract is enforceable only between the contracting parties. In this case it is clear that there exist no privity between the defendant B and the assignee C with respect to A's debt. Again while it is true that as a general rule, the assignee acquires all the rights of the assignor, certainly in this particular the assignee does not acquire the assignor's obligations unless so expressly agreed in the assignment contract. As Pomeroy observed, "The counterclaim is more than a defense, it assumes a right of action against and demands a recovery of affirmative relief from the plaintiff in the suit and is therefore impossible as against an assignee suing." (Pomeroy, Rem. and Rem. Rights p. 121). We have also learned that set-off is of two kinds, one which is merely defensive, and another which is technically a counterclaim. We therefore conclude that the set-off provided for in Sec. 114 falls under the first division, and that it cannot be a basis for a cross-demand.

C. When may a Defendant set up a Counterclaim Assigned to him

Sec. 97 of our Code of Civil Procedure adopts the rules of various states of the Union recognizing in a defendant the right to set up as a counterclaim a cause of action that has been assigned to him. This principle is founded upon the same reason—to avoid multiplicity of suits. In order that a defendant may avail himself of such a counterclaim it is essential that it be existing at the time of the commencement of the action. It is also necessary that the defendant should own the same at the time the suit is brought, and if he does not prove that the ownership is in him, he cannot avail himself thereof. (Drennen v. Gilmore, supra). The test is whether the defendant has such title to it as will enable him to bring an action in his own name as an assignee upon the cause of action so assigned. (Nix v. Ellis, 118 Ga. 345; Wolf v. Beaks, 9 Am. Dec. 425).

IX. PLEADING OF COUNTERCLAIM

A. In General

We have said before that unlike compensation, counterclaim should be pleaded to be available. From its nature and

function it should be pleaded in the answer. The law authorizes the defendant to plead as many counterclaim as he pleases. (Sec. 95, C. C. P. and Sec. 10, Act No. 1627). Pomeroy describes how to plead the counterclaim saying: "The defendant must in some express and manner indicate a design of treating or relying upon his particular portion of his answer as a counterclaim whether it stands alone and thus constitutes the entire answer, or whether it is united with other defenses or counterclaims, it must be so distinguished by the formal language that the plaintiff and the court may recognize it at once as a counterclaim, and not a simple defense. It is not enough that the defendant state facts which if true would constitute a cause of action against the plaintiff; he must also state his intention to regard those facts as constituting the affirmative cause of action and not to regard them as a defense * * *." Pomeroy, Rem. Rem. Rights p. 864). Under our jurisdiction the usual way of setting up a counterclaim is: "As a counterclaim the defendant alleges." (Fisher's Legal Forms No. 215).

Suppose the defendant characterizes his answer merely as a defense, and not as a counterclaim, may he be heard afterwards to claim that it is a counterclaim? Under the American law, at least from the decisions of the great majority of states, it is settled that when a defendant calls his pleading merely as a defense, he is bound by the choice he makes and may not afterwards be heard to assert that it is a counterclaim. The reason for the rule is to "protect the plaintiff from being misled by an answer and to prevent the snare of a counterclaim lurking under cover of a supposed defense, and unconsciously admitted by a failure to reply." (Bobcock v. Maxwell, 21 Mont. 507). This rule however, is true and the reason for the same is applicable in states where the statute makes the failure to reply to a counterclaim tantamount to a tacit admission of its averments. Under our law we believe, the failure of the defendant to call his defense a counterclaim may yet be so regarded by the court provided it clearly appears that it contains the substantial allegations of a counterclaim and that an affirmative relief is prayed for. (Brighton Irrigation Co. v. Little, 46 Pac. 268; City of Huron v. Hyers, 83 N. W. 553). As was held in an Indiana case, "When the facts averred in an answer present a counterclaim, the fact that it was not properly pleaded as such can make no difference. It will be judged by what it is and not by what it is called." (Mills v. Rosebaum, 2 N. E. 313). The above doctrine, we believe, holds true in our jurisdiction. Besides, under our law, the failure to reply

to a counterclaim does not amount to an admission of its allegations, on the other hand such silence is taken by the law to mean a general denial and a complete refutation of all its averments. (Sec. 104 C. C. P.; Go Tiam v. Di Pong Jo, 10 Phil. 10; Herranz v. Barbudo, 12 Phil. 5; Yu Chin Piao v. Lim Tuaco, 13 Phil. 92).

Counterclaim may also be introduced in evidence under a stipulation of the parties tho not pleaded. In Keating v. Springer (34 S. E. 805), the parties stipulated that the defendant be permitted to introduce under the general issue, "any defense and also any set-off whether matter of contract or tort, that he may have in the same manner * * * as if specially pleaded." The court held in that case that damages intended to be recouped may be given in evidence and proved.

An answer setting up a counterclaim, being a cause of action, must contain all the substantial averments necessary in a complaint based on the same cause of action set out in the counterclaim. (Quin v. Smith, 49 Cal. 163; Fisher's Legal Forms, No. 216). If damages are to be available as a counterclaim the facts and amount of damages must be alleged. (Holton v. Noble, 23 Pac. 58). If a counterclaim is pleaded against an assignee of a right of action the defendant must affirmatively allege that it arose before the assignment or at least before notice of it. (Benham v. Connor, 45 Pac. 258).

B. Time within which to File

The defendant should set up his counterclaim in his answer which must be filed within ten days after he has entered his appearance. (Sec. 5, Rules of Court of First Instance). The plaintiff as a rule should answer or demur to the same within the time provided for by the rules of the court in order to test the legal sufficiency of the answer. So where a "defendant offers to set up a counterclaim which had no connection with the instrument sued upon, after the plaintiffs had closed the testimony; said application comes too late and must be denied." (Faelnar v. Escaño, 11 Phil. 92). It has been held however, that when the plaintiff has not filed his answer to a counterclaim before the rearing, it is optional upon the court whether or not to declare such plaintiff in default on such counterclaim. (Yu Con v. Ipil 41 Phil. 784). If the counterclaim is founded upon a written instrument and a copy thereof is contained or annexed to the answer the plaintiff may deny the same under oath, otherwise in default of such denial the genuiness and due exe-

cution of such instrument shall be deemed admitted. (Sec. 103, C. C. P.).

In Ferazzini v. Gsell (34 Phil. 697) however, the defendant at the opening of the trial offered to amend his answer and set up a counterclaim. The offer was accepted by the court over the exception of the plaintiff urging to proceed with the trial. Testimony in support of the counterclaim was introduced, but the lower court held: "That the defendants so called amendment to his answer dictated by counsel to the official stenographer and not upon motion filed in court and after notice to the adverse party and opportunity to be heard must be disregarded in the consideration of this case." The Supreme Court upon appeal said that this ruling is erroneous, for after such offer was accepted, the answer should have been considered as amended.

As a general rule the counterclaim must be filed for the first time in the lower court and failing to do this it cannot be urged for the first time on appeal. But when the basis of a counterclaim which can be taken cognizance of by both the justice of the peace and the Court of First Instance, does not materialize until after the appeal is perfected to the latter, it may be set up for the first time in the latter court. (Trinidad v. Odegemer, supra).

B. Evidence and Proof

In order to be entitled to judgment on his counterclaim the defendant should adduce proofs to support it in the same manner as if he were suing independently upon the same. The plaintiff on the other hand is bound to interpose objections when those may be necessary, and failure to do so would be a waiver. Thus "while a set-off must be specially pleaded and evidence in support of it is not admissible unless so pleaded, yet tho it is not pleaded, evidence having been adduced without objection, and the right to recover not being confined by the prayers to the pleadings and evidence, the jury or court may find the set-off in favor of the defendant." (Richardson v. Anderson, 72 Atl. 485).

C. May a Plaintiff set up a Counterclaim in his reply to a Counterclaim

It was held in one case that a set-off may be set up in reply to a set-off. (Samuel v. Knnedy 137 Indiana 299). That decision was however, made by virtue of a statute which declares that when any paragraph of the answer contains new matter "the plaintiff may reply to it * * * any new matter which

supports the complaint and avoids the matter in such paragraph in the answer." Under our jurisdiction we believe no set-off may be allowed in reply to a set-off for the law allows the plaintiff to reply to any new matter or special defense in the defendant's answer only by means of an amendment of his complaint, but not to set up any new matter. The doctrine laid down in the case of Hammon v. Downing (64 Pac. 651) is applicable here. That case held that a replication of set-off to a plea of set-off is bad and constitutes a departure in pleading, citing Matteson J. in Heath v. Doyle (27 Atl. 333) who said that, "A replication of set-off is technically known as 'departure' because it does not support the declaration as every subsequent pleading on the part of the plaintiff is required to do by the rules of pleading."

X. OPERATION AND JUDGMENT

The court, in an action where the defendant sets up a counterclaim must make findings both upon the complaint and upon such a counterclaim. "The separation of findings in a single judgment in a suit involving complaint and counterclaim does not signify distinct judgments; it merely constitutes different decisions on the various questions raised in the case and included in the single judgment, which per se finally terminates the dual litigation." (De la Peña v. Hidalgo, supra).

Summarizing the forms of verdict in the case where the defendant files in defense a counterclaim Pomeroy says:

"When the plaintiff's demand is proved and found by the jury or court, the amount of the counterclaim equaling it, the verdict must be for the defendant and a judgment rendered dismissing the action; if the counterclaim as found be less than the plaintiff's demand as found, a verdict should be given for the plaintiff for the excess of his recovery over that of the defendant; finally, if the counterclaim as found is greater than the plaintiff's demand, a verdict should be given for the defendant for the excess. If the plaintiff should fail entirely to prove his cause of action as alleged, the defendant would be entitled to a verdict for the whole amount of his counterclaim as established by proofs. The foregoing rules presuppose that both demands are for the recovery of money, either debt or damages. If the plaintiff's cause of action or the counterclaim is for the recovery of some special relief, legal and equitable, the judgment rendered must be according to the circumstances of the case. * * *" (Pomeroy, Remedies and Remedial Rights, p. 872).