6-1933

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COUNTERCLAIMS AND SET-OFFS IN INDIANA

HAROLD W. STARR*

In dealing with the subjects of set-off and counterclaim it must be borne in mind that these procedural devices are created by our civil code and are not limited or defined by common law decisions. It will be evident, however, from an examination of the cases, that the influence of pre-statutory determinations has played some part in the construction placed on the provisions set forth by our codifiers. One of the important purposes of the adoption of the code system of pleadings was to enable the parties to determine their differences in one action.¹ To this end, the following statutes were made a part of the Indiana Civil Code:

The defendant may set forth in his answer as many grounds of defense, counterclaim, and set-off, whether legal or equitable, as he shall have.²

A set-off shall be allowed only in actions for money-demands upon contracts, and must consist of matter arising out of debt, duty or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off.³

Both the need and the desirability of some such procedure was recognized at the common law and in the early chancery practice, but the means used were of a somewhat different na-

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¹ Ruling Case Law Set-Off and Counterclaim, p. 9, and cases cited therein.
² Burns' R. S. (1926), Sec. 370, subsec. 3.
³ Burns' R. S. (1926), Sec. 371.
⁴ Burns' R. S. (1926), Sec. 373.
ture. At common law, a defendant was sued on a contractual obligation either because he had not complied with some cross-obligation of the contract on which he was suing, or because he had violated some duty which the law imposed on him in the making or performing of that contract. This right was known as recoupment, a term of French origin which signifies cutting against or cutting back. By use of this device the defendant might reduce the plaintiff's claim for damages in instances where the reduction claimed sprang immediately from the claim relied on by the plaintiff. It was used as a matter of defense only and was never used as an offensive weapon when employed in a court of law. This remedy of recoupment was so limited in scope and so trammelled originally by technicalities that it was of little use. The principle, however, has been retained and the tendency of modern American courts has been to give recoupment a wider and more extended application. Although the proposition is not without dispute it seems logical that the statutory provisions for counterclaim and set-off do not expressly or impliedly abolish the common-law defense of recoupment. The whole spirit and plan of the codes was to liberalize the procedure, and to extend, instead of curtailing, remedial practices. Recoupment in the code states is important as a defense when it would be unavailing as an affirmative cause of action because of the running of the statute of limitations.

The common law did not countenance the possibility of a defendant being an actor and interposing a claim against the plaintiff in one action. The courts of equity however realized that in order to promote justice the defendant might and should be allowed to assert a claim which he held against the plaintiff when the two parties were mutually indebted. This was accom-

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5 Ruling Case Law, Set-Off and Counterclaim, Vol. 24, Par. 3.
7 Sterling Products Co. v. Watkins-Gray Lumber Co. (1923), 131 Miss. 145, 95 So. 313; Kegan v. Park Bank (1927), 20 Mo. 623, 8 S. W. (2d) 858.
9 Clark v. Wildridge (1854), 5 Ind. 176; Houston v. Young (1855), 7 Ind. 200.
10 24 Ruling Case Law, Set-Off and Counterclaim, Par. 6.
11 State v. Arkansas Brick Co. (1911), 98 Ark. 125, 135 S. W. 843; Burns' R. S. (1926), Sec. 391.
plished by the cross-bill in equity which closely corresponds to the statutory counterclaim, though the latter is more comprehensive.13

The Indiana courts have indulged in a great deal of confusing language in efforts to determine what parts of these pre-statutory provisions are embodied in the code sections of set-off and counterclaim. The Supreme and Appellate tribunals of this state have said that: "The counterclaim is the equivalent of the cross-bill in chancery, and in addition includes common-law recoupment;"14 "a counterclaim is the same thing as a recoupment at common law;"15 "the counterclaim rests on the same footing as the cross bill in equity";16 and "counterclaim relates more to damages for contract breach which may be recouped for part performance. . . ."17 It is submitted that these phrases are in no way helpful to a clear understanding of the statutory provisions and, in addition to causing needless confusion, are for the most part erroneous. The counterclaim is a device created by the code and although it serves a purpose which occasioned the innovation of recoupment it is in no other respect necessarily analogous to the common law defense. The determination of the requirements and availability of the counterclaim and set-off should be limited to a construction of the terms and words used in the statutes and no additional support is necessary.

The Code has separately defined a set-off and a counterclaim and there is neither express nor implied mention in either statute that one is related to the other. On the contrary, it is evident that the codifiers intended that they remain distinct and apart from each other, since they are limited to separate and altogether different fields. Despite this fact, one of the most perplexing problems confronting a reviewer of the cases is to determine whether the court is discussing a pleading as to counterclaim or as a set-off. The courts have had a tendency to use the terms synonymously. The desirable and correct attitude towards the using of these terms interchangeably was displayed by the court in an early case wherein it was said in substance:

Our statutes distinctly define set-off and counterclaim and the two differ materially. A set-off being a separate indebtedness could not be had

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15 Slayback v. Jones (1857), 9 Ind. 470.
16 Douthitt v. Smith, Admr. (1880), 69 Ind. 463.
17 Slayback v. Jones (1857), 9 Ind. 470.
in view in the transaction out of which the cause of action may have arisen and is not therefore within the definition of a counterclaim. The two terms are not synonymous nor is one included in the other.\textsuperscript{18}

It is unnecessary therefore for the purpose of this article to compare the two methods but each should be considered separately and a sharp distinction noted between the availability and effect of each.

\section{The Counterclaim.}

The purpose of the counterclaim is to avoid unnecessary litigation and to prevent circuity or municipality of suits. In construing its birth-giving statute, the furtherance of that purpose, within its limits as bounded by the language of the statute, should at all times be the paramount aim of the courts. It is surprising to note that in some of the cases the court has made no effort to interpret the statute nor to rely upon a previous interpretation, but has in fact disregarded the legislative provisions altogether.\textsuperscript{19} An early case supported a counterclaim by the following language: "We cannot conceive of a better counterclaim nor one better pleaded."\textsuperscript{20} There was no reference to the statute nor any additional reasons cited by the court. Our statute on the counterclaim is one of definition rather than direction. The inference obviously is that if the pleading comes within the definition it is available as a counterclaim. It follows therefore that the method to be followed by all courts in the determination of the validity of a pleading as a counterclaim should be whether or not the pleading comes within the statutory definition. A fair construction of the language used in the Code is the inevitable starting point, but our cases present an immense confusion because in no case has the court seriously attempted a thorough investigation of the proposition.

There is, however, one position which is accepted by such a majority of the cases that it can be said to be settled in the consideration of this subject. The cases agree that a counterclaim is a separate action brought by the defendant against the plaintiff and is not merely a defense to the suit instigated by plain-

\begin{itemize}
\item \textsuperscript{18} Lovejoy \textit{v.} Robinson (1856), 8 Ind. 399.
\item \textsuperscript{19} Kisler \textit{v.} Tinder (1868), 29 Ind. 270.
\item \textsuperscript{20} Mooney \textit{v.} Musser (1870), 34 Ind. 373; also Kisler \textit{v.} Tinder (1868), 29 Ind. 270.
\end{itemize}
We may then begin our interpretation of the statute with the accepted premise that a counterclaim may be considered a "cause of action" pleaded by the defendant against the plaintiff. The counterclaim is therefore necessarily subject to the same rules of pleading as is any other cause of action; that is, it must state sufficient facts without the interposition of legal conclusions; it must allege matter which has not already been adjudicated; it must assert a right which is not irremediable by reason of the statute of limitations, etc.  

The purpose of substituting the phrase "cause of action" for the term "counterclaim" would be useless unless the substituted phrase is itself capable of definition. In a previous issue of this Journal, Professor Gavit has considered the various definitions of the phrase "cause of action." Consideration of only two of the divergent views discussed therein is necessary here. Professor Pomeroy has taken the position that a "cause of action" consists of a primary right (and its correlative duty) plus the wrong (the invasion of the right or the violation of the duty). Professor Gavit assails this position and points out that such a definition is inaccurate since in a suit on one of the so-called primary rights there has been no delict or wrong as yet. For example: P, the owner of real estate, institutes statutory proceedings to quiet title to his realty as against "the whole world". In this situation there is only a possibility that D will assert a claim and it is therefore evident that there has been no invasion of P's primary right, that is, no delict or wrong as yet. Dean Clark has championed the view that a "cause of action" consists of the facts involved in the judicial proceeding in question. Taking issue with this view, Professor Gavit points out that facts alone can never constitute a cause of action but that the facts must be taken together with a rule of law (substantive) in order to constitute a cause of action. When the facts pleaded by a party are taken together with a rule of law not pleaded, they give to the party a substantive right. The cause of action is

21 Campbell v. Routt (1873), 42 Ind. 410; Douthitt v. Smith (1880), 69 Ind. 463; Rucker v. Steelman (1881), 73 Ind. 396.
22 Woodruff v. Garner (1866), 27 Ind. 4; Hinkle v. Margerum (1875), 50 Ind. 240; Kennedy v. Richardson (1882), 70 Ind. 524.
23 6 Ind. L. Journal 203, et seq. (1931).
24 Pomeroy, Code Remedies (5th Ed. 1929), 528 et seq.
therefore defined by Professor Gavit as substantive right. Right is used in its broadest sense and is not limited to the classification of primary and secondary rights as expounded by Professor Pomeroy.

The next phrase of the statute which has escaped uniform interpretation and construction is the one containing the words "arising out of". Professor Gavit points out that when properly interpreted this phrase would read "coming into being," and again the thing to be considered as "coming into being" is the cause of action asserted by facts (matter) plus the operation of a rule of law. The disjunctive phrase in the statute "or connected with" has also caused some confusion. These same words are embodied in the statute permitting the joinder of causes of action and a uniform construction has also been needed but as yet not forthcoming there. The above mentioned article points out that all the statute requires is a causal connection in fact, and suggests that the "but for" test be employed. That is, but for the existence of one fact in the proof of the plaintiff's asserted cause of action, a fact in the defendant's claim would not have existed or arisen; the proof of each contains a common fact. Thus the counterclaim statute would read as follows:

"A counterclaim is a statement of facts which under a rule of law go to make up (or constitute) a specific substantive right as a matter of substantive law, and which right came into being partly out of the contract or factual situation set forth in the complaint as the factual situation of the plaintiff's substantive right, or which facts stated in the answer have a causal connection in fact with the factual situation set out in the complaint."28

The forthcoming review of the principal Indiana decisions will show that this test has never been consciously used by our courts. But it will also be noted that no test has been adopted or used by the courts with any consistency and the statement of a New York judge's estimation of that state's decisions on the construction of a similar statute is likewise applicable to our own. He says:

"This statutory provision of law regulating practice, which has been in force more than sixty years, has frequently been the subject of judicial construction. Thus far, however, no rule has been laid down in its construction by which it can readily be decided in all cases whether or not a given

27 Burns' R. S. (1926), Sec. 286-7.
counterclaim is properly interposed and as might naturally be expected it would be difficult to harmonize all the decisions on that point.”

It is submitted by the present writer that an adoption of Professor Gavit's construction would permit every satisfactory result so far reached, and in addition it would provide and create simple, workable rules, easy of application and with salubrious results. The favored interpretation will, while staying within the grammatical and intended tenor of the statutes, further the purpose for which they were created, *viz.*, the avoidance of circuity and multiplicity of actions at law and suits in equity.

The decision in which the court came nearer to applying the test urged by this article, and which, in the opinion of the present writer, represents the best efforts of any court to date in the interpretation of the statutes, was rendered by the Appellate Court twenty-five years ago. In that case P and D were adjoining mine owners. P sued D to recover the price of coal taken from P's land by the mistake of D as to the location of the boundary between the lands. D alleged that if any coal had been taken it was through mistake as to the location of the boundary; that the assignor of P had, in a like manner, taken a like amount of coal from D's land and D asked that the two claims be made to compensate each other. After construing D's pleading the opinion of the court may be paraphrased as follows:

Whether the averments of the counterclaim show that the facts upon which it is founded arise out of the same transaction set forth in the complaint is the question determining the counterclaim's correctness. The meaning of the word *transaction* is therefore of controlling importance. The term *transaction* as used in the statute is not synonymous with the word *contract* or with the term *accident* or *occurrence*. A transaction is the management or settlement of an affair; that which is done; conducting of business; negotiation; management; or a proceeding. It is not confined to what is done in one day or at a single time or place. The logical relation of facts determines whether they together constitute a single transaction, and the court is *not confined to the facts stated by P* but may take into account the facts set up by D and will determine from them all whether the claims arise out of the same transaction. P and D were engaged in the transaction of locating a boundary line. In litigating either claim separately an important question, that of location of that boundary, must be investigated. If that question be decided, then a single additional fact—trespass of the party—entitles the other party to a recovery. The object of the statute

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was to prevent multiplicity of suits and is hereby upheld. Where the plain-
tiff may elect to sue either in contract or tort and he sues in tort the de-
fendant may interpose a counterclaim as though the plaintiff had sued in
contract. A liberal construction has been given the counterclaim statute
and the counterclaim is held good if it allege matters connected with the
subject of the original action—and even further, where it reaches the
object of the action. A single controversy and full justice to all concerned
are the results and thus the statutory purpose is accomplished.31

The court here was concerned with a logical sequence of facts
and this is the essence of the “but for” test. If we should apply
that rule to the facts in the present case the result would be as
follows: Proof of the proper location of the boundary line is
common to both the plaintiff and the defendant’s case; “but for”
that fact neither cause of action could be asserted; therefore the
counterclaim was proper. Such a test reaches the result urged
by the court and reaches it by a far simpler method, which, if
commonly used, would greatly aid the judges in their applica-
tion of the statute.32

In a suit wherein P sued to set aside a conveyance of land a
counterclaim alleging that P wrongfully withholds possession of
the land was held to be good within the meaning of the statute.33
The court seems to base the decision on the grounds that the
fraud alleged by P as the reason for setting aside the deed con-
stitutes the cloud on D’s title and that since that cloud is the
aggravation of which D complains the counterclaim states mat-
ter connected with the cause of action within the statutory
definition.

There is a small group of cases wherein the court reached a
rather obviously correct result. It has been held that in an action
on a note given in payment for a lease of land a counterclaim
alleging false representations as to the value of the land is well
pleaded.34 In another case P sued D for trespass over P’s realty
and sought an injunction preventing future trespasses and also
to quiet title to the land in P. By way of counterclaim D alleged
the existence of an easement or public highway over the lots and
sought an injunction preventing P from obstructing such high-

31 The italics are the writer’s.
32 It will be noted that the court has difficulty with Pomeroy’s definition
of the phrase “cause of action.” The defining of a “cause of action” to mean
a substantive right would have solved that difficulty.
33 Grimes v. Duzan (1869), 32 Ind. 361; also see Gillenwaters v. Cam-
bell (1895), 142 Ind. 529.
34 Norris v. Tharp (1878), 65 Ind. 47.
way. The court held the counterclaim good since it involved the same subject and sought affirmative relief which could not be properly granted upon a successful defense of the complaint. 35 The court has sanctioned a counterclaim alleging negligence in the conduct of litigation to a suit brought to recover attorney's fees. 36 In a suit to foreclose a mechanic's lien D pleaded that the lien existed by reason of a contract between the parties wherein P was to construct buildings for D, and that P breached the contract by failing to supply material and workmanship of first quality. The court held that the pleading alleged such grievances growing out of the same contract and transactions which were the basis of the complaint as to constitute a good counterclaim. 38

In a suit wherein P sued D for breach of a contract of employment D was allowed to plead by way of counterclaim a breach of an agreement between P and D which was entered into as a part of the contract set forth in the complaint. 39 In still another case P sued D to obtain a rescission of a deed upon the ground that the deed was induced by the fraudulent representations of D. By counterclaim D pleaded that P wrongfully kept D from possession and also that P committed waste upon the premises to D's damage, etc. The court held that,

The alleged fraud is the important question for litigation and if that question be decided for D, then, a single additional fact being established—wrongful retention of possession—entitles D to recovery. The object of the statute is hereby upheld. 40

A counterclaim has been allowed which sought an injunction against P's suit, and which demanded P to make good an injunction against P's suit, and which demanded P to make good to D the title to land for which D had executed notes to P, and upon which notes P brought the present action. 41

In an action for damages against bailee for negligently allowing injury to bailor's horse the bailee may plead a counterclaim setting up an indebtedness due on the bailment. 42 In a suit on a

35 DeBolt v. Carter (1869), 31 Ind. 355.
36 Rooker v. Bruce (1909), 90 N. E. 86.
38 Blaney v. Postal (1893), 10 Ind. App. 131.
39 Woodruff v. Garner (1866), 27 Ind. 4; see also Kahle v. Crown Oil Co. (1913), 180 Ind. 131.
40 Hinkle v. Margerum (1875), 50 Ind. 240.
41 Griffin v. Moore (1875), 52 Ind. 295; see also Shore v. Ogden (1914), 55 Ind. App. 394.
contract for work and labor D may set up a counterclaim for damages resulting from P's failure to conform to the terms of the contract. A claim by the consignee of coal cars for damages for failure of the railroad company to transport them with promptness may be pleaded as a counterclaim in an action by the company for demurrage. A railway company may counterclaim for damages for breach of contract in an action begun by another railroad for damages for conversion of P's tracks which were constructed pursuant to a contract between P and D. In a suit by P against D upon non-negotiable notes executed by D the latter pleaded that the notes were executed to X in return for stock to X company, that at the time of the execution of the said notes X agreed to employ D in X company, that D was employed for a time and then discharged without notice, and that this breach of agreement resulted in damages for which D asks relief. The court held the pleading good as a counterclaim.

In all the cases thus far noted the result could be reached under the relation of fact test presented above. Such a standard would have afforded the courts a simple rule reaching the desired result in a manner involving little difficulty of explanation or application.

It is well now to consider those cases where the statutory purpose has been disregarded by false interpretation. An alarming number of cases have contained statements that an independent tort cannot be pleaded in a counterclaim to an action in tort. These decisions are undoubtedly the result of a construction of the phrase "cause of action," as set forth in the statute, to mean the legal wrong complained of in the complaint. We have already discussed the fallacy of such a definition and noted that the cause of action is really the facts plus the operation of a rule of law which go to make up a substantive right, and that definition will readily offer a solution to the problem under consideration.

In an early Indiana case P brought an action for the injury done to his land by the trespass of D's cattle. D alleged an injury done to his cattle by P in expelling them from P's land. The court said that the counterclaim was bad since trespasses cannot be made to compensate each other by any form of plead-

43 Cumings v. Pence (1890), 1 Ind. App. 317.
"The fact that one may be consequent upon the other does not so connect them as that they may be blended in the same action since they have no connection with each other, in the sense of the statute." If the "but for" test were applied to the above facts it is obvious that the counterclaim is well pleaded. But for the trespass of D’s cattle P would not have expelled them. In fact it is difficult to see how the court could say that such a result was not within the sense of the statute when there is such an obvious factual relation between the rights asserted by P and D. The error the court makes in this type of case is in seeking to find some connection between the legal wrong done by the plaintiff and the legal wrong done by the defendant. The test, however, is a factual one.

In another action, wherein P sued D for negligently killing a cow belonging to P, D averred in a counterclaim that P was negligent in permitting the cow to wander on D’s tracks, and that by reason thereof, the train struck the cow and the train was injured; the court held the counterclaim invalid. The court said that D’s negligence was one tort and the negligence of P was another tort, and that it was well settled that an independent tort can not be made a defense against another tort, either by set-off or counterclaim. Again the "but for" test would allow the counterclaim. It seems that the result reached by the court actually flouts the purpose of the statute but it was followed in a later case involving practically the same facts.

In an action brought by P for the wrongful conversion of P’s cow by D, the latter pleaded that the cow trespassed on his land and tore down his fence whereby he was injured, etc. The court held the counterclaim bad since it did not arise out of nor was it connected with P’s cause of action. The court said in substance:

We can not see in this case how the trespass of the cow arose out of the sale and conversion of her by D within the meaning of the statute. We are unaware of any case where a counterclaim can arise in any action unconnected with a contract.

Again the "but for" test would allow the counterclaim to stand.

47 Lovejoy v. Robinson (1866), 8 Ind. 399.
48 The Terre Haute and Indianapolis Ry. Co. v. Pierce (1884), 95 Ind. 496.
50 Shelley v. Van Arsdoll (1864), 23 Ind. 543.
In a later case the court held that in an action for damages to P’s traction engine which was struck by D’s interurban car a counterclaim alleging damages to D’s car sustained in the same collision was not well pleaded.\footnote{Hooven v. Meyer (1920), 74 Ind. App. 9.} It is obvious that there is sufficient causation of fact in this instance to warrant the counterclaim if the factual relation test is employed. In a still later case wherein a municipality sued a traction company to recover damages for injuries to a fire truck resulting from a collision with traction company’s car, it was held that an injury sustained by defendant’s car in the same collision was not a proper subject of counterclaim.\footnote{Union Traction Co. of Indiana v. City of Muncie (1921), 133 N. E. 160.} The court again talked about the impropriety of pleading one tort as a counterclaim to a separate tort but the real reason for the holding was probably the fact that D’s pleading did not state a cause of action since it proceeded against the city.

It is submitted that the statute is to be interpreted the same in cases wherein a tort is pleaded against a tort, and where a tort is pleaded to an action on contract. Admitting that the cases related above form the numerical weight of authority, it is still contended that they are not supported by convincing reason and logic. However, the courts have held that one trespass may be pleaded against another if it is shown that a factual relation exists between the right asserted by the plaintiff and that asserted by the defendant, and it is obvious that by that interpretation only can the statutory purpose be accomplished.\footnote{Excelsior Clay Works v. DeCamp (1906), 40 Ind. App. 25.}

Our courts have also said that a counterclaim founded in contract cannot be pleaded to a complaint founded in tort. This conclusion is also based upon an interpretation of the statutory phrase “cause of action” to mean the legal wrong complained of in the complaint and in adopting such a premise it is impossible to find any relationship between the adverse claims.

Soon after the adoption of the counterclaim statute as a part of our Code, the following case arose for decision. P sued D to recover a deposit which D had refused, upon demand, to deliver. By way of counterclaim D alleged that P falsely charged him with stealing the money whereby D was damaged.\footnote{Connor v. Winton (1856), 7 Ind. 523.} The court said in substance,
The words "arising out of or connected with" as used in the statute refer only to those matters having an immediate connection with the transaction. If in this case D had beaten P for the slander, P could not reply with the damages sustained by the battery to those resulting from the slander. If P's words were so connected with the transaction as to show that they were spoken concerning the deposit, they contained not a slander. If they were so unconnected from it as to be actionable they were an independent tort which could not be pleaded as a counterclaim to an action founded upon a contract.

It is readily noted that the court required something more than a factual relationship between the matter set out in the complaint and that set out in the counterclaim. If the causation standard is applied to the above facts the counterclaim would be allowed since the demand and refusal and the subsequent slander were closely fabricated by related facts.

In an action for fraud in falsely representing that certain letters-patent were of great value and for also falsely representing that certain assigned territory was of great value, D set up a counterclaim wherein he alleged that at the time of the assignment of the territory mentioned in the complaint P agreed to canvass the territory assigned to him and that in violation thereof he made no effort to canvass the territory and make sales. The court said that the counterclaim, founded in contract, could not be pleaded to the complaint which sounded in tort. Again the "but for" test would permit the claims being adjudicated in one suit.

In another case P sued to foreclose a mortgage executed by D to secure a loan of money from P. D, by way of counterclaim, alleged that the loan was obtained from P only after he had agreed to enter into a contract of insurance with P; that he had fully complied with all the terms of said contract and was therefore entitled to a paid-up policy of insurance which P refused to recognize. The court disallowed the counterclaim upon the following grounds:

The evidence shows that the two transactions were legally different and distinct. Nothing in law or equity binds the transactions together or authorizes the inference that one grows out of the other. In order to plead a counterclaim it is not enough that the parties are the same, or that the transactions were made on the same day. There must be some legal (using the word legal in its broad sense) relationship between the grounds of recovery alleged in the counterclaim and the matters alleged in the cause of action by the plaintiff.

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55 Hess v. Young (1877), 59 Ind. 379.
56 Standley v. N. W. Mutual Life Ins. Co. (1883), 95 Ind. 254.
Had the court recognized the position that the relation of fact alone would satisfy the statutory requirement the counterclaim would have been allowed and further adjudication eliminated.

In a still later case P sued D upon a note. D alleged that P had uttered false, malicious and willful statements against D, alleging that D was insolvent and in this manner prevented D from obtaining surety for a renewal of the note whereby D was injured, etc. The court would not allow the counterclaim since it sounded in tort and could not be the basis of counterclaim against a contract.\textsuperscript{57} Although this reasoning has been followed in other cases,\textsuperscript{58} it is nevertheless submitted that such a result is not necessitated by the statutory language and that in fact such interpretation hinders the purpose for which the statute was enacted.

The Appellate Court has drawn a distinction between an action in replevin and other tort actions in order to allow a counterclaim sounding in contract to be pleaded to an action based on a tort. In an action wherein P sought to replevin a horse from D the latter pleaded the following facts in a counterclaim: P and D entered into a contract whereby D furnished certain money to P for transporting the horse to various race tracks and that P agreed to ship the horse to D at the end of the racing season so that D might have security for his advancements, that P did not reimburse him, and that D had to pay livery bills in order to obtain the horse as security. D asked that his lien on the horse be foreclosed so that a sale might be made thereof in order to repay D.\textsuperscript{59} The court upheld the counterclaim in substantially the following language:

Replevin is an action sounding in tort but suits in replevin are said to be in some respects \textit{sui generis}, and the inclination of the courts has been to give them a flexibility sufficient to meet exigencies and adjust all equities arising in such actions. The counterclaim sets up facts so connected with the subject of the action that equity requires that the matter alleged in the complaint and in the counterclaim be settled in one litigation.

In a later case wherein P sought to replevin an automobile left for repairs with D it was held that a counterclaim for the

\textsuperscript{57} Blue \textit{v.} Capital \textit{National Bank} (1896), 145 Ind. 518.
\textsuperscript{58} Block \textit{v.} Swango (1894), 10 Ind. App. 600; Crowe \textit{v.} Kell (1893), 7 Ind. App. 683; Comer \textit{v.} Board of Commissioners of Morgan County (1904), 32 Ind. App. 477; Cole \textit{v.} Wright (1880), 70 Ind. 179.
\textsuperscript{59} Reardon \textit{v.} Higgins, \textit{Adm'r} (1906), 39 Ind. App. 363.
cost of the repairs was proper. In that case the court distin-
guished the case from an earlier decision which forbade a coun-
terclaim in contract to an action in replevin by the following
language:

"A counterclaim is proper in an action of replevin when the facts set up
therein are so connected with the subject of the action that equity requires
that the matter alleged in the complaint and the counterclaim should all be
settled in the same litigation."

The result reached by these two cases allowing counterclaims
to actions of replevin is both desirable and correct.

It is urged by the present writer, however, that the stated
reason of equity between the parties is the prevention of multi-
plicity of suits, and that if the latter view is entertained the rule
as respecting replevin and other torts would be no different.
But in any event the question always turns on a proper inter-
pretation of the statute in question, and if a factual connection
makes a counterclaim proper in a contract action it ought to
have the same effect in a tort action. Nothing in the statute
justifies the distinctions which the Indiana courts have made.
Practically every other code state has repudiated them and it is
to be hoped that the Indiana courts will soon clarify the situa-
tion and adopt a clear-cut interpretation of the statute which
will promote the ends for which the statute was adopted.

Having once confirmed the validity of the pleading as a
counterclaim, our courts have had little difficulty with the device.
The counterclaim is considered as a cross-action and the rules
governing the complaint are applied to the counterclaim as if it
were the original action. Thus if the complaint be dismissed
the right to proceed with a trial of the counterclaim is recog-
nized. If the jury find an excess for D over the amount proven
by P, then D shall have judgment for the excess. Likewise
the counterclaim need not be sufficient against the whole com-
plaint. If it tends to reduce the plaintiff's claim or demand for
damages, it is good as far as it goes. The law of misjoinder
of causes of action applies to counterclaim just as it does to any

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60 Shore v. Ogden (1914), 55 Ind. App. 394, 103 N. E. 852.
61 Tabor v. Macklee (1877), 58 Ind. 290; Burns' R. S. (1926), Sec. 376.
62 Gordon v. George (1859), 12 Ind. 408; Love v. Oldham (1866), 22
Ind. 51.
63 Sidener v. Davis (1879), 69 Ind. 336; Campbell v. Routt (1873), 42
Ind. 410.
other cause of action.\textsuperscript{64} It has also been held that a counterclaim may be replied to a counterclaim set up in an answer.\textsuperscript{65}

The above examples point out the ease with which the courts may deal with the counterclaim once it has received the court's approval as being within the statutory definition. The counterclaim is a very convenient and useful means in relieving the congestion which is prevalent in our courts today. It is submitted that the definition of the counterclaim as sponsored by this review will allow its application to a much more extensive field but nevertheless stay within the intention of the codifiers and further the purpose which motivated its inception. The lack of a uniform rule is readily noticeable by this discussion of the cases and although the authority sanctioning the causal relation tests as urged by this article is slight, an adoption by our courts of that standard will best serve the purpose for which the counterclaim was devised. The resulting uniformity would be based on simple rules, easy of application, and reaching desirable conclusions, and at the same time in keeping with the authority of some of the Indiana cases.

\section*{II}

\textbf{The Set-Off}

The set-off is of statutory origin and all questions concerning its availability and effect should be gathered from an interpretation of the legislative enactment which created it. That section of our Civil Code which is concerned with the contents of an answer to the plaintiff's complaint contains this statement:

"The defendant may set forth in his answer as many grounds of defense, counterclaim and set-off, whether legal or equitable, as he shall have."\textsuperscript{66}

Although this provision comes under the heading of the answer it is evident from the tenor of the statement, when read with the inflection which the punctuation therein requires, that the set-off is not a defense and therefore not strictly an answer to the complaint of the plaintiff. The courts have taken cognizance of this distinction and have held, practically without ex-

\textsuperscript{64} Woodruff v. Garner (1866), 27 Ind. 4.
\textsuperscript{65} Small v. Kennedy (1893), 137 Ind. 299.
\textsuperscript{66} Burns' R. S. (1926), Sec. 370, subsec. 3.
ception, that the set-off is not a defense to the original action but a statement of a new cause of action existing in favor of the defendant against the plaintiff.\textsuperscript{67} Since the set-off is correctly viewed as a separate cause of action it is necessarily governed by the laws of pleading which limit and define the manner of asserting a cause of action.\textsuperscript{68} The set-off statute begins:

"A set-off shall be allowed only in actions for money-demands upon contract . . . ."\textsuperscript{69}

This portion of the statute is free from any ambiguity and the courts have had little difficulty with its application and interpretation. The action brought by plaintiff must be a contract action and a set-off is never allowed to an action sounding in tort.\textsuperscript{70} If the original complaint contains more than one paragraph and one of these paragraphs sound in tort and another in contract the set-off cannot be pleaded to the whole complaint but must be directed to the paragraph sounding in contract.\textsuperscript{71} Although the question apparently has never arisen, it seems doubtful that the language employed by the codifiers that a set-off could be pleaded to a suit to compel specific performance of a contract. In view of the fact that the vendor does secure a finding that a sum of money is due, it would seem to come within the purpose of the statute to allow a reduction of that amount by a proper set-off.

Continuing with the examination of the statute it is noted that the set-off must consist of matter "arising out of debt, duty, or contract. . . ." This phrase of the enactment is not so commendable from the standpoint of clarity as is the preceding clause already discussed. The term "contract" is self-explanatory but the disjunctive words "debt" and "duty" re-

\textsuperscript{67} Boil v. Sims (1877), 60 Ind. 162; Kennedy v. Richardson (1880), 70 Ind. 524; Duffy v. England (1911), 176 Ind. 575. Since the court does not regard the set-off as a defense it is not subject to the rule as to partial defenses and it need not answer the whole demand of plaintiff. Dodge v. Dunham (1872), 41 Ind. 186.

\textsuperscript{68} Stockton v. Graves (1858), 10 Ind. 294; Morrison v. Gliddon (1856), 7 Ind. 561; Brake v. King (1876), 54 Ind. 294; Snodgrass v. Smith (1859), 13 Ind. 393.

\textsuperscript{69} Burns' R. S. (1926), Sec. 371.

\textsuperscript{70} Grose v. Dickerson (1876), 53 Ind. 460; Boil v. Sims (1877), 60 Ind. 162; Van Cleave v. Beach (1886), 110 Ind. 269.

\textsuperscript{71} Howlitt v. Dilts (1881), 4 Ind. App. 23; Ross v. Faust (1876), 54 Ind. 471; Allen v. Randolph (1874), 48 Ind. 496.
quire judicial interpretation. It is sufficient for the present purpose to point out that the courts have, for the most part, decided that the term *contract* was intended to modify the two preceding terms so as to read—*contract debt* and *contract duty*.

In all of the cases cited the court has denied the right to interpose a tort claim as a set-off by interpreting the statute to mean *contract duty* or *contract debt*. The court has also said that in cases where the defendant has such a tort claim as he may waive and sue in an independent action for the value of the converted property such a waiver does not bring the action under the provision of the statute allowing set-off.

The statute provides that the claim interposed by the defendant as a set-off may be *liquidated* or *not*. An early Indiana case refused to allow a set-off alleging negligence in the collection of notes. The court held:

The claim against plaintiff was one of tort for negligence and sounds in unliquidated damages. Such a claim is not a proper subject of set-off.

A later case presented the following facts: P sued D on a promissory note executed by D. D alleged that P had maliciously procured the prosecution of a civil action against D which was still pending. After construing the pleading of D as a set-off the court disallowed it and used the following language:

The general rule is that unliquidated damages can not be pleaded by way of set-off, and nothing in this case takes it out of that general rule.

It is obvious that the set-off is bad for the reason that it attempts to set up a tort as a set-off and also that it attempts to assert a claim which has not matured. Despite the court's reference to their holding as reflecting the general rule, all the other cases have held that the matter in the set-off need not be liquidated. It is submitted that these latter cases, in addition to comprising the indisputable weight, evidence the express intent of the statute and must be considered as overruling the two contrary cases. The latter cases could both have been de-

72 Indianapolis and C. R. Co. v. Ballard (1864), 22 Ind. 448; Roback v. Powell (1871), 36 Ind. 515; Zeigelmueller v. Seamer (1878), 63 Ind. 488; Avery v. Dougherty (1885), 102 Ind. 294.

73 Richey v. Bly (1888), 115 Ind. 232.

74 Abbott v. Smith (1853), 4 Ind. 452.

75 West v. Hayes (1885), 104 Ind. 251.

76 Hendry v. Hendry (1869), 32 Ind. 349; Irish v. Snelson (1861), 16 Ind. 365; Bannister v. Jett (1882), 83 Ind. 129; Stockton v. Graves (1858), 10 Ind. 294.
cided on other grounds which are in accordance with the general rule.

The set-off statute further provides that the claim asserted by the defendant must be held by him at the time the suit was commenced, and matured at or before the time it is offered as a set-off. Again the statute is practically free from doubt as to its purport. The claim asserted as a set-off must be held at the time the suit against which it is pleaded was filed. It is not necessary that the claim which is pleaded as a set-off be matured at the time but it must be matured at the time it is offered as a set-off. The court has held that a judgment upon which there had been a stay of execution is not immature within the meaning of the statute since the stay of execution simply delayed its collection.

Our Procedural Code provides that in all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff or any former holder of the note or other contract, may be pleaded as a set-off by the principal or any other defendant. The effect of that statute is illustrated by the following case. P sues D on a note executed by D and his sureties. Any of the sureties or D himself may plead as a set-off a contract executed by P to D. In suits against two defendants, the defendant filing the set-off should allege that he is the principal and the other makers of the note in suit are only sureties.

A set-off will never be allowed when it is shown that to allow it a property, which the Constitution or a statute declares shall be held by the debtor for the benefit of his family, would be destroyed. Thus, if the defendant’s property, including his judgment against plaintiff, does not exceed the amount awarded exemption by statute, the court will not allow the plaintiff to set-off a judgment held against defendant to the judgment held

77 Weader v. First National Bank of Crawfordsville (1890), 126 Ind. 111; Hadley v. Wray (1881), 76 Ind. 476; Blount v. Rick (1886), 107 Ind. 238.
78 Shannon v. Wilson (1862), 19 Ind. 112; Thornton v. Williams (1860), 14 Ind. 518.
79 Hays v. Boyer (1877), 59 Ind. 341.
80 Burns’ R. S. (1926), Sec. 372.
82 Dodge v. Dunham (1872), 41 Ind. 186; Harris v. Rivers (1876), 53 Ind. 216.
against plaintiff by defendant. If P sues D on a note and D pleads as set-off a note executed by P to D, the court will not permit the set-off if P proves an exemption.

An Indiana statute provides that all actions by assignees shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, except actions on negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration before due.

The purpose of the statute is illustrated by the following example. D executes his non-negotiable note to X. Subsequently D becomes the owner of non-negotiable notes executed by X and later hears of the assignment of the note he executed to X to P. In an action by P on the note executed by D to X, D may set-off the notes held by him which were executed by X. Our courts have assigned this rather obvious meaning to the statute. The defendant may set-off to an action brought by plaintiff any contract or note executed by plaintiff to another and assign to D before the suit by plaintiff is commenced. In such cases the claim which is proffered as a set-off must have been unconditionally assigned to defendant and not a mere assignment for collection.

It is provided by statute that if a set-off established at the trial exceeds the plaintiff's claim so established, judgment shall be rendered for the excess; or if it appears that the defendant is entitled to other affirmative relief, judgment shall be given therefor. Although there have been no cases which have applied this statute it is probably because the circumstances have not required its application. The fact that the courts accept the statute at its face value has more than once been reflected in the dicta of opinions.

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83 Carpenter v. Cool (1888), 115 Ind. 134; Butner v. Bowser (1885), 104 Ind. 255.
84 Smith v. Sills (1890), 126 Ind. 205; Coffing v. Dungan (1892), 6 Ind. App. 386; Junker v. Hustes (1887), 113 Ind. 524.
85 Burns' R. S. (1926), Sec. 283.
86 Hoffman v. Zollinger (1872), 39 Ind. 461; Sefton v. Hargett (1888), 113 Ind. 592.
87 Bates v. Prickett (1854), 5 Ind. 22; Hadley v. Wray (1881), 76 Ind. 476.
88 Lewis v. Sheaman (1867), 28 Ind. 427; Claflin v. Dawson (1877), 58 Ind. 408.
89 Burns' R. S. (1926), Sec. 622.
90 Doering v. Davenport (1910), 91 N. E. 43; Crain v. Hilgloss (1863), 21 Ind. 210; Holcraft v. Mellott (1877), 57 Ind. 539.
It has been held that if a set-off is pleaded and then the pleader has suffered default, the rights to such set-off are waived.\textsuperscript{91} The reason advanced for this rule was that the defendant who was asserting the set-off might have taken a rule upon the plaintiff to rely to his answer, and on failure to comply with the rule, judgment might have been taken for want of a reply.

It is well settled that as a general rule a set-off is not allowable unless the demands are mutual.\textsuperscript{92} It is unnecessary for the purpose of this review to consider the doctrine of mutuality at length since the principle is universally accepted. The rule may be briefly stated as follows: matter of set-off, to be valid, must be between the same parties as the matter alleged in the complaint.\textsuperscript{93} A defendant, in a suit against him for debt, cannot set off a debt due to him and another; the demands not being mutual.\textsuperscript{94} Likewise, a claim against a guardian individually cannot be used as a set-off against an action by him as a guardian.\textsuperscript{95} These illustrations represent the theory of the doctrine of mutuality and a further discussion would be more pedantic than useful. It is to be noted that the principle of mutuality may be abrogated by statute and the statute which allows a surety to assert a claim held by his principal against the plaintiff as a set-off to an action brought by plaintiff against the principal and surety illustrates that abrogation.\textsuperscript{96}

III.

**EQUITABLE SET-OFF.**

In addition to the exceptions to the rule requiring that the matter of set-off, to be valid, must be between the same parties as the matter alleged in the complaint, the courts, in order to prevent irremediable injustice, have allowed set-offs between litigants, though wholly disconnected and wanting in mutuality.

\textsuperscript{91} *Aston v. Wallace* (1873), 43 Ind. 468.
\textsuperscript{92} *Blankenship v. Rogers* (1858), 10 Ind. 333; *First National Bank of Danville v. Hill* (1877), 58 Ind. 52; *Knour v. Dick* (1860), 14 Ind. 20; *Kent v. Cantrall* (1873), 44 Ind. 452.
\textsuperscript{93} *First National Bank of Danville v. Hill* (1877), 58 Ind. 52.
\textsuperscript{94} *Parks v. Zeeks* (1876), 53 Ind. 221; *Proctor v. Cole* (1889), 120 Ind. 102.
\textsuperscript{95} *Robertson v. Garshwiler* (1882), 81 Ind. 463.
\textsuperscript{96} Burns' R. S. (1926), Sec. 372; see also note 85, this article.
The following cases are examples of that policy. D owed P $249 for goods sold and delivered. S, a servant of D, owed P $432. S wrongfully converted $195 of D's money and paid the same to P. P, a resident of New York sues D, resident of Indiana, in this state on D's indebtedness. D attempts set off. The court held that set-off was allowed on the grounds that the nonresidence of P justified the interposition of equity in order to prevent an irremediable injustice.97

In another case, P sued D and X on a note made by D. P alleged that D, being insolvent, had assigned his notes to X for the purposes of defrauding creditors. Among the assigned notes was a note of P to D. P asks that the assignment be declared fraudulent and that the amount of his note to D be set off against the one sued upon. The court allowed the set-off.98 In a previous trial of the same cause which occurred before P's note to D was matured, the court refused the set-off since P did not prove the insolvency of D.99 In still another instance the court allowed an equitable set-off. P sued D on notes executed by D to X and assigned by X after maturity and while X was insolvent. D was allowed to set-off payment made on a note which was executed by X and which D had made payments as surety.1

Other cases have tried to invoke the equitable set-off but the courts require the pleadings and proof to bring the case under the recognized exceptions of insolvency or non-residence.2 Although the result of the cases allowing equitable set-offs is desirable the doctrine is a delicate one and will probably be limited to the exceptions already recognized.

It is to be noted that the equitable set-off is not limited by statutory definition but is a product of the courts granting an equity which prevents the working of an irremediable injustice. Any limitations, modifications, or any extension of the equitable set-off will rest on the exercise of the court's discretion and not upon statutory interpretation.

97 Porter v. Roseman (1906), 165 Ind. 255.
98 Keightly v. Walls (1866), 27 Ind. 384.
99 Keightly v. Walls (1865), 24 Ind. 205.
1 Eigenman v. Clark (1898), 21 Ind. App. 129.
Scenes at The Spink Wawasee Hotel
Where The Indiana State Bar Association is Holding Its Annual Convention July 6th and 7th

View of The SPINK WAWASEE from the Lake

The Diving Tower

The luxurious Marine Lounge.

There is an excellent stable adjoining the grounds.

The finely appointed dining room overlooks the lake.

A view on the fine 18-hole golf course.