Montana Law Review

Volume 3
Issue 1 *Spring 1942*

Article 12

January 1942

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I. HISTORY OF THE STATUTES AND THEIR PROVISIONS

The principle that a man should not be compelled to pay one moment what he will be entitled to recover back the next moment is today well entrenched in legal theory. However, this principle was slow in developing,[1] and its procedural recognition in Montana, as in a majority of the states of the United States, is somewhere between that of the first quarter of the nineteenth century and the more advanced procedure of today.

Originally the common law acknowledged no defense or proceeding on the part of a defendant in the nature of a cross-demand, the primitive notion of an action not admitting the possibility of a defendant's being an actor and interposing a claim against the plaintiff in the one suit.[2] But, between the fourteenth and sixteenth centuries the term "recouper" appeared and there developed a legal doctrine of recoupment, that the defendant was entitled to show that the plaintiff had not sustained damages to the extent alleged, and thus reduce or even defeat the plaintiff's recovery.[3] In the early period of this development, this right of a defendant to recoupment was of very limited application, and could only be resorted to when the defendant insisted upon a deduction from the plaintiff's demand arising from payment in whole or in part, or recovery, or some analogous fact.[4] It was not until the beginning of the nineteenth century that recoupment became recognized as proper when the defendant was claiming damages from the plaintiff either because he had not complied with some cross-obligation of the contract upon which he sued, or because he had violated some duty which the law imposed upon him in the making or performance of that contract.[5]

Some cases are to be found implying that recoupment might be had at common law for damages connected with the subject matter or transaction upon which the suit was brought, but which did not constitute a violation of any duty imposed by law in the making or performance of the contract sued upon. However, apparently they were decided with reference to statutory counterclaim.[6] It seems that recoupment as it was

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[1] Loyd, *The Development of Set-off*, 64 UNIV. PA. L. REV. 541 (1916).
[2] POMEROY, CODE REMEDIES (5th ed. 1929), §605.
[3] 3 SEDGWICK, DAMAGES (9th ed. 1912), §1034.
[4] SEDGWICK, DAMAGES, *op. cit.*, §1035.
[5] Loyd, *The Development of Set-off*, *op. cit.*, note 1, at p. 545.
[6] 3 BOUVIER'S LAW DICTIONARY (Rawle's 3rd rev. 1914), p. 2849.

known at common law was not only confined to a claim connected with the subject matter or transaction sued upon, but it was necessary that that claim originate in a contract.

Equity, under certain circumstances, at an early date allowed the set-off of claims which did not arise out of the transaction sued upon by the plaintiff or which were not connected with the subject matter thereof;[7] but it took legislation to establish such a right in a defendant at law, and after the passage of the set-off statutes equity confined the use of set-off to circumstances where it was permitted by the codes, except where special equitable grounds for relief were shown.[8]

[7] For example, where mutual credits existed, or where the plaintiff was insolvent or had acted fraudulently; and where one joint debtor was surety for the other, he was allowed in equity to set-off debts due his principal from the plaintiff-creditor. CLARK, CODE PLEADING (1928), p. 438; see generally, 3 STORY, EQUITY JURISPRUDENCE (14th ed. 1918), §§1865-1886.

That equitable set-off today rests largely in the discretion of the court, see CLARK, CODE PLEADING (1928), p. 439, note 17.

Also in equity, cross-bills by a defendant against a plaintiff in the same suit, or against other defendants in the same suit, or against both, were recognized to give full relief to all the parties. However, these cross-bills were not permitted to introduce new and distinct matters not embraced in the original suit, but were treated as mere auxiliary suits, or as dependencies upon the original suit. STORY, EQUITY PLEADING (9th ed. 1879), §§389, 392, 395, 398, 399, 401.

[8] 3 STORY, EQUITY JURISPRUDENCE (14th ed. 1918), §1872, p. 473, note 2, §1875. *Cf.* Wells v. Clarsson (1874) 2 Mont. 230, rehearing den., p. 379 (1876): In holding that plaintiff could maintain an action to set off a judgment, which he held against defendant, against a judgment obtained by defendant against plaintiff and which had been assigned, the court said, at pp. 231, 232:

"... The action in which Clarkson obtained his judgment was for unliquidated damages. In that case the plaintiff had no power to set up its claim as a defense. A set-off can be set up only when both demands are choses in action.

"As soon as Clarkson obtained his judgment, it then became a chose in action, and the rule undoubtedly is in an action in equity, that as Clarkson was insolvent the plaintiff had a right to have his demand set off against Clarkson's judgment. This has been termed a natural equity ....

. . . . . .

"The statutes of this Territory provide that the assignment of a thing in action shall be without prejudice to any set-off or other defense at the time of or before notice of the assignment. See Laws of Montana Territory for 1871 - 2, p. 28, §5 .... There might be some doubt as to whether this statute referred to any thing more than a right to set up a set-off or counter-claim upon an action on a chose in action ....

"It may be observed, however, that equity follows the law, and that this statute defines the legal status of the assignee."

Cf. also Stadler v. First National Bank (1889) 22 Mont. 190, 56 P. 111, 74 Am. St. Rep. 582.

It is not the purpose of this article to treat the substantive rights of an assignee. As to that: RESTATEMENT, CONTRACT, MONT. ANNOT., §167.

In the enactment of set-off statutes, providing generally for the set-off of debts, it is interesting to note that several of the American colonies were in advance of the mother country:[9] a Virginia statute of 1645 was apparently the first of its kind;[10] Pennsylvania in 1682 at its first assembly passed such a statute;[11] in 1714 New York passed an act apparently derived from the Pennsylvania act;[12] and in 1722 New Jersey adopted a statute the text of which followed rather closely the language of the New York act.[13] The first English act was enacted in 1729,[14] was made perpetual in 1735,[15] and was adopted in substance by many of the United States.[16]

Under the English statute of 1729 and its American counterparts it was necessary that the demands be due the defendant in his own right as against the plaintiff, or his assignor, and be not already barred by the statute of limitations but existing and belonging to the defendant at the time of the commencement of the action.[17] Also, these statutes permitted the set-off only of "debts", so it was necessary that the claims of both plaintiff and defendant be liquidated;[18] and a defendant was not entitled to a judgment against a plaintiff for any excess over the plaintiff's demand which he migh prove. As was stated by Lord Chief Justice Cockburn in *Stooke v. Taylor*:[19]

> "By the statute of set-off this plea is available only where the claims of both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained. The plea can only be used in the way of defense to the plaintiff's action, as a shield, not as a sword. Though the defendant succeeded in proving a debt exceeding the plaintiff's demand, he was not entitled to recover the excess; the effect was only to defeat the defendant's action, the same as though the debt had been equal to the amount of the claim established and no more."

Thus recoupment was confined to actions upon contracts, and itself had to arise from contract; the set-off of English

[9] For a review of the statutes, see Loyd, *The Development of Set-off*, *op. cit.*, note 1.
[10] February 17, 1644 - 5, 1 HENING'S LAWS 294.
[11] CHARTER AND LAWS OF PENNA., 118.
[12] Act of 1714, BRADFORD'S LAWS (1726), p. 93.
[13] LAWS OF NEW JERSEY (ed. of 1752), p. 98; ALLINSON'S LAWS OF N. J. (1776), p. 66.
[14] 2 GEO. II, ch. 22, §13.
[15] 8 GEO. II, ch. 24, §5.
[16] Loyd, *The Development of Set-off*, *op. cit.*, note 1, at p. 551.
[17] CLARK, CODE PLEADING (1928), pp. 438, 439.
[18] POMEROY, CODE REMEDIES (5th ed. 1929), §607; *cf.* Wells v. Clarkson, *supra*, note 8; Stadler v. First National Bank, *supra*, note 8.
[19] (1880) 5 Q. B. D. 569, 575.

origin was confined to actions upon contracts or debts and had to arise from contract or debt; and, just as at common law the force of the remedy of recoupment was spent in the discount or abatement of the plaintiff's claim, either partially or wholly, so too a defendant invoking the English statutory set-off could only reduce the amount of the plaintiff's recovery.[20]

However, the defenses of recoupment and set-off under the English act were not compulsory but of choice, and a defendant could at his option resort to an independent action and so obtain an affirmative judgment against the plaintiff. The New Jersey statute of 1722 was an exception to the rule, and required that the defendant plead his set-off, "or else forever after be barred of bringing any action for that which he might or ought to have pleaded by virtue of this act." But, this was an unusually stringent rule, and in most American states set-off was optional, not compulsory.[21]

The situation prior to the codes of civil procedure has been summarized as follows:[22]

> "By the first quarter of the nineteenth century it may be said that through statutes, and in some instances the liberal construction of such statutes, the principle has developed to this extent; the right to plead and prove a counter demand, growing out of an independent transaction for which an action might be maintained by the defendant, as an offset to defeat the plaintiff's recovery in whole or part, is generally recognized, and in some states, an affirmative judgment for the defendant is permitted. Under all the statutes liquidated demands can be set off and, very generally, the right is restricted to such demands. Some statutes are so construed as to allow unliquidated claims arising out of contract to be set off, but upon this subject there is regrettable confusion, depending as the cases do, partly on the interpretation of the respective acts and partly on the policy of the courts in enlarging or restricting the right. Limited by statute to actions upon debts and contracts, the almost universal rule is not to permit set-offs in tort actions, and, in a similar manner, in contract actions to disallow set-offs arising out of torts. Recoupment, on the other hand, although frequently confused with set-off, is recognized as a distinct principle, namely, the right to present in opposition to the plaintiff's

[20]The first statute permitting affirmative relief to a defendant for the excess of his claim over the plaintiff's demand seems to have been a Pennsylvania statute of 1705 - 6, passed after the rejection by the queen in council of the earlier Pennsylvania act. 2 STAT. AT LARGE PENNA. 241; 2 P. & L. DIG. (2 ed.) 2844.

[21]Loyd, *The Development of Set-off, op. cit.*, note 1, at p. 560.

[22]Loyd, *The Development of Set-off. op. cit.*, note 1, at pp. 562, 563.

claim, for its reduction or extinguishment, a right of action in the defendant for loss or damage sustained by him in the same transaction through breach of contract or duty on the part of the plaintiff."

With the adoption of codes of civil procedure these earlier devices to permit a defendant to interpose cross-claims were displaced by the "counterclaim," which first appeared in the amendments of the New York Code of 1852.[23] In Montana, the common law system of procedure was never in force. The first legislative assembly of the territory adopted a code of civil procedure abolishing the distinction between suits in equity and actions at law,[24] and defining the defense of "counterclaim." This definition was as follows:

"The counterclaim . . . shall be one existing in favor of the defendant, and against the plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: First, a cause of action arising out of the transaction set forth in the complaint . . . as the foundation of the plaintiff's claim . . . connected with the subject matter. Second, in an action arising on contract, any other cause of action arising on contract, and existing at the commencement of the suit."[25]

This statute was not substantially changed until 1895,[26] when a new statute, apparently following the language of the New York act, [27] was enacted. The definition in the statute of 1895 has remained unchanged to this day. It is as follows:

"The counterclaim, specified in the last section, must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the per-

[23]Act of April 16, 1852, LAWS OF N. Y., ch. 392, pp. 654, 149, 150.
[24]BANNACK STAT., §1, p. 43; R. C. M. 1935, §9008.
[25]BANNACK STAT., §47, p. 52.
[26]Amendment of 1867 (§47, p. 143, LAWS OF MONTANA) added language to make consistent provision for counterclaim by way of reply, which was permitted until 1895, and also made some changes in punctuation; amendment of 1877 (§88, p. 61, LAWS OF MONTANA) inserted the word "or" before "connected with the subject matter."
[27]In Stadler v. First National Bank, *supra*, note 8, the court said, at p. 211 of 22 Mont: "Subdivision 1 of section 692 is, in substance subdivision 8 of section 18, at page 366, of the Revised Statutes of New York of 1867, in force in that state ever since the year 1847, and perhaps from an earlier date. Said subdivision 1 is a copy of subdivision 1 of section 502 of Throop's Annotated Code of Civil Procedure of New York of 1888, and is also identical with subdivision 1 of section 502 of Stover's New York Annotated Code of Civil Procedure of 1897." However, the counterclaim provision was not contained in the original New York codes of 1848 and 1849; it first appeared in the amendments of 1852. See CLARK, CODE PLEADING (1928), p. 439.

son he represents, and in favor of the defendant, or one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

"1. A cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action on contract, any other cause of action on contract, existing at the commencement of the action."[28]

Two differences are to be observed between the definition prior to 1895 and that subsequent thereto. First, after 1895 a requisite of the counterclaim is that it tend, in some way, to diminish or defeat the plaintiff's recovery; and second, after 1895 the first subdivision contains the words "contract or" before the word "transaction." The express requirement that the counterclaim must tend in some way to diminish or defeat the plaintiff's recovery is also found in the Indiana code,[29] was contained in the New York code[30] until 1936[31] and was added to the California code in 1927.[32] However, regardless of such a statute the courts have generally applied such a rule, and have refused to uphold counterclaims unless they meet squarely the judgment the plaintiff claims.[33] It is not difficult to detect the influence of common law recoupment in such a requirement.

The second change effected in 1895 made it clear that it is not necessary that the counterclaim of the defendant arise out of contract. In *Scott v. Waggoner,* the Supreme Court of Montana said:

". . . Subdivision 1, above quoted, specifies three things as possible basis of counterclaim; *viz.,* the contract sued on, the transaction set forth, and the subject of the action. Either these things are different and distinct, or the provision is 'a misleading tautology' . . .

. . . . . .

". . . The statute then in force (codified statutes 1871-

[28]C. Civ. Proc. 1895, §691; R. C. M. 1935, §9138. In justices' courts, under R. C. M. 1935, §9642, the only limitation upon the defense of counter-claim is that it must be one upon which an action might be brought by the defendant against the plaintiff in a justices' court. Walter v. Cox (1907) 36 Mont. 20, 91 P. 1063.

[29]Ind. Ann. Stat. (Burns 1933), §2 - 1018.

[30]N. Y. Civ. Prac. Act (1921), §266.

[31]N. Y. Laws of 1936, ch. 324; Cahills N. Y. Civ. Prac. (7th ed.) §266. The following advanced statute was enacted: "A counterclaim may be any cause of action in favor of the defendants or some of them against the plaintiffs or some of them, a person whom a plaintiff represents or a plaintiff and other person or persons adjudged to be liable."

[32]Stats. & Amdts. (1927), p. 1620.

[33]Clark, Code Pleading (1928), p. 448.

72) authorized a counterclaim which consisted of 'a cause of action arising out of the transaction set forth in the complaint', *etc.*, as distinguished from our present provision that a counterclaim may consist of 'a cause of action arising out of the contract or transaction', *etc.* Whatever reason there might have been, under the statute and under the authorities as they then stood, for construing the term 'transaction' as synonymous with 'contract' can have no effect upon the clear implication of the present law that they are not synonymous.'"[34]

The Montana code also contains a provision, apparently taken from California,[35] for compulsory counterclaim, if it is within the first subdivision of the statute defining counterclaim. It is provided:

"If the defendant omits to set up a counterclaim in the cases mentioned in the first subdivision of section 9138, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."[36]

It is obvious that the code counterclaim is broader than recoupment and set-off, although it includes both.[37] Under the statutory counterclaim the defendant may recover an affirmative judgment, and it is not necessary that the plaintiff's claim be liquidated, or that it arise out of debt or contract.

No doubt the purpose sought to be accomplished by counterclaim statutes was not only to do justice to defendants, but also to avoid a multiplicity of suits and save public expense.[38] Nevertheless, there is a survival of the doctrines of recoupment and set-off in the requirements that the counterclaim must tend to diminish or defeat the plaintiff's cause of action, that it must be a cause of action against the plaintiff and in favor of a defendant between whom and the plaintiff a sep-

[34](1914) 48 Mont. 536, 544, 547, 139 P. 454, L. R. A. 1916C 491.

[35]CALIF. C. CIV. PROC. (1872), §439. The codes of Nevada and Utah contain similar provisions. NEV. COMP. LAWS (1929), §8604; REV. STATS. OF UTAH (1933), §104 - 9 - 3. Under some codes, if a defendant fails to set up a counterclaim he can't recover costs in any subsequent action thereon. IND. ANN. STAT. (Burns, 1933), §2 - 1019; NEB. COMP. STAT. (1929) §20 - 814; OHIO GEN. CODE (Page, Lifetime ed.) §11624.

[36]R. C. M. 1935, §9144. And see also R. C. M. 1935, §9643, applying to practice before a justice of the peace. Where no such statute exists, the defendant has the option of filing a counterclaim or bringing an independent action, CLARK, CODE PLEADING (1928), pp. 446, 447.

[37]POMEROY, CODE REMEDIES (5th ed. 1929), §§611, 612. See also Galiger v. McNulty (1927) 80 Mont. 339, 360, 260 P. 401. But *cf.* Apple v. Edwards, *infra*, note 101, where the court stated that the affirmative matter did not, strictly speaking, amount to a counterclaim, but that the lien could be enforced by recoupment.

[38]For statements of Montana court as to the purpose of the counterclaim statute, see State v. Waggoner, *supra*, note 34, 48 Mont. at p. 543; Friedrichsen v. Cobb (1929) 84 Mont. 238, 250, 275 P. 267.

arate judgment may be had, that, except when both the action and the counterclaim are in contract, it arise out of the transaction set forth in the complaint or be connected with the subject matter thereof, and that it be in existence at the time of the commencement of the suit.

II. CONSTRUCTION OF THE STATUTORY PROVISIONS

1. *The Pleading of a Counterclaim as a Cause of Action*

The defenses of recoupment and set-off at common law were essentially causes of action which admitted the plaintiff's cause of action and set up affirmative cross-demands, as distinct from true defenses which simply attacked the plaintiff's cause of action and showed that by virtue thereof the plaintiff ought not to recover either at all or all that he demanded.[39] Likewise, the code counterclaim does not comprehend facts pleaded merely in bar of plaintiff's action,[40] and allegations which can be proved under denials are not proper in a counterclaim.[41]

The code defines the counterclaim as a "cause of action";[42] provides that a defendant may set forth as many defenses or counterclaims, or both, as he has, but that each defense or counterclaim must be separately stated and numbered;[43] and that where the defendant deems himself entitled to an affirmative judgment against the plaintiff by reason of his counterclaim, he must demand the judgment in his answer.[44]

The counterclaim, being a cause of action, the defendant in pleading it[45] occupies the position of a plaintiff in stating a cause of action. Thus, in *Babcock v. Maxwell,* it was said, with reference to the matter alleged in an answer:

> ". . . Unless the matter alleged, taken by itself, and without reference to the complaint, would, if proved, entitle defendant to judgment against the plaintiff, a counterclaim is not pleaded; that is to say, a counterclaim is a cause of action existing in favor of defendant, and against the plaintiff, and must therefore contain a statement of such facts as would be requisite to the sufficiency of a complaint, and must, in stating a cause of action, be complete within itself."[46]

[39]POMEROY, CODE REMEDIES (5th ed. 1929), §609.
[40]Babcock v. Maxwell (1898) 21 Mont. 507, 54 P. 943.
[41]Word v. Moore (1923) 66 Mont. 550, 214 P. 79.
[42]R. C. M. 1935, §9138.
[43]R. C. M. 1935, §9146.
[44]R. C. M. 1935, §9148.
[45]The furnishing of a bill of particulars does not constitute a pleading satisfying the requirement that a counterclaim be pleaded. Dolenty v. Rocky Mountain Bell Telephone Co. (1910) 41 Mont. 105, 115, 108 P. 921.
[46]*Supra,* note 40, 21 Mont. at p. 512.

Again, in *Galland v. Galland,* the court said:

> "As to the allegations of his counterclaim the defendant, in effect, became a plaintiff, and whether his pleading states facts sufficient to entitle him to affirmative relief against the plaintiff is determined by the same rules which would be applied to it as an original complaint . . ."[47]

The test, then, of the sufficiency of a counterclaim is whether the facts which it sets up, if admitted to be true, would entitle the defendant to a judgment in his favor against the plaintiff.[48] Failure of the allegations of answers to measure up to this simple rule has resulted in their failure as counterclaims in a number of Montana cases.[49]

The counterclaim being a cause of action, where a defendant in his counterclaim seeks an affirmative judgment against the plaintiff, the issues arising on the counterclaim are triable as if they arose in an action brought by the defendant against the plaintiff. The importance of this is illustrated by *Continental Oil Co. v. Bell.* The plaintiff brought an action to recover the balance due on account for gasoline sold and delivered to the defendants. The defendants filed counterclaims, asserting that they were entitled to certain refunds on gasoline purchased during the year 1929 in excess of the amount due the plaintiff, relying upon oral agreements, and seeking affirmative judgment in their favor. The plaintiff, by its reply as a defense to the counterclaims, pleaded written agreements of sale covering the price to be paid. The defendants' testimony, tending to prove an oral contract to refund portions of the purchase price, was objected to as within the inhibition of the parol evidence rule. The defendants contended that an exception to the parol evidence rule applied, because the written agreements were only collaterally in issue. In holding that the evidence was within the inhibition of the parol evidence rule, the court said:

> ". . . Defendants assert the only issues in the case are those made up by the complaint and the answer; but such is an erroneous construction in view of the fact that where counterclaims are involved and an affirmative judgment is sought against the plaintiff, the issues arising on the

[47](1924) 70 Mont. 513, 515, 226 P. 511.
[48]See POMEROY, CODE REMEDIES (5th ed. 1929), §614.
[49]Erbes v. Smith (1907) 35 Mont. 38, 88 P. 568; Meredith v. Roman (1914) 49 Mont. 204, 141 P. 643; Hillman v. Luzon Cafe Co. (1914) 49 Mont. 180, 142 P. 641; Word v. Moore, *supra,* note 41; Broat Lumber Co. v. Van Houten (1923) 66 Mont. 478, 213 P. 1116; Lappin v. Martin (1924) 71 Mont. 233, 228 P. 763.

> counterclaims are triable as if they arose in an action brought by the defendants against the plaintiff (section 9329, Rev. Codes 1921.) Therefore, in determining the application of this exception to the rule on which defendants rely, the issues which were being tried are those arising on the counterclaim and reply. . . .'[50]

Again, the character of a counterclaim as a cause of action has affected the burden of proof, because, in general, the party who must affirmatively plead a particular matter also has the burden of proving it.[51] And, a counterclaim being subject to the same general rules of pleading as is a complaint, the doctrine of aider is applicable.[52]

A question has arisen as to whether the distinctions between defenses and counterclaims must be formally observed by denominating a counterclaim as such. In *Lappin v. Martin,* the court, as one reason for its position that the answer did not state a counterclaim, said: "The matter alleged . . . is designated as an affirmative defense and further answer, whereas a counterclaim should be pleaded as such.'[53] As authority for this statement, the court cited *Babcock v. Maxwell.* In the *Babcock* case, the court took the position that the counterclaim should be labeled as such, because, under the statute then applicable, the requirement of a reply to avoid the admission as true of averments of facts in an answer extended only to counterclaims. The court said:

> ". . . Defendant having characterized his pleading as a defense, is bound by the choice he makes, and may not afterwards be heard to assert that it is a counterclaim. . . . A counterclaim must be described as such where the question turns on the want of a reply. 'Such a rule is essential to protect a plaintiff from being misled by an answer, and to prevent the snare of a counterclaim lurking

[50](1933) 94 Mont. 123, 132, 21 P. (2d) 65.

[51]In Yancey v. Northern Pacific Ry. Co. (1910) 42 Mont. 342, 112 P. 533, the counterclaim was on an implied promise to pay for goods taken from defendant and converted by plaintiff's assignor. The court said that the allegation of non-payment in the counterclaim was a material one, and therefore, the burden of proving the same rested upon the defendant. See also Dick v. King (1925) 73 Mont. 456, 236 P. 1093. Defendant counterclaimed for compensation due for the sale of real estate belonging to plaintiff. Evidence introduced in support of the counterclaim was properly stricken, because it disclosed that the entire transaction was in parol.

[52]See Galland v. Galland, *supra,* note 47. Although the counterclaim was technically defective, yet since it stated the jurisdictional facts, it would be considered as having been amended by the findings of the jury which were adopted by the court.

[53]*Supra,* note 49, 71 Mont. at p. 239.

under the cover of a supposed defense, and unconsciously admitted by failure to reply'.'"[54]

It certainly is often difficult to distinguish an affirmative defense from a counterclaim,[55] and the position taken in the *Babcock* case seems to be sound. However, the statutes had been amended by the time of the decision in *Lappin v. Martin*, so that an answer containing either a counterclaim or any new matter necessitated a reply to avoid admission of the facts therein alleged.[56] The statement in the *Lappin* case seems to have overlooked the fact that the reason for the holding in the *Babcock* case no longer existed.

Under the Montana statutes, which require a reply to any defense other than a general or specific denial, it is difficult to see how a plaintiff can be trapped into unconsciously admitting the allegations of any answer by reason of its label or lack of label. No literal denial requires a reply; and all affirmative allegations properly so pleaded do require a reply. Of course, a plaintiff may be in doubt as to whether facts affirmatively alleged in an answer are properly so pleaded, or whether they would be admissible under denials, and therefore may be in doubt as to whether a reply is necessary;[57] but that doubt would not be removed by any label placed upon the allegations. Really, from the fact that the matter is alleged affirmatively, there is an implied label of the allegations as either counterclaim or new matter, and a reply is necessary to avoid admission if the allegations be either. Therefore, although it is true that some authority may be found for the proposition that a counterclaim must be designated as such, irrespective of the necessity for a reply,[58] it would seem that there is no longer good reason for such a requirement. Such a requirement places a considerable burden on a defendant of making a decision at his peril as to whether he has an affirmative defense or a

[54]*Supra*, note 40, 21 Mont. at p. 514.

[55]Particularly is this true of so-called equitable defenses, for discussion of which see Hinton, *Equitable Defenses Under Modern Codes*, 18 MICH. L. REV. 717 (1926); Cook, *Equitable Defenses*, 32 YALE L. J 645 (1923).

[56]§§1 and 2, pp. 131 and 132, LAWS OF MONTANA 1899, amending C. CIV. PROC. 1895, §§720 and 722. Such is the law today. R. C. M. 1935, §§9158, 9160.

[57]In Doichinoff v. Chicago, M. & St. P. Ry. Co. (1916) 51 Mont. 582, 154 P. 924, the court held that facts alleged in an answer denominated "Special and Affirmative Answer and Defense," were not admitted by failure to reply, because the facts could have been proved under a general denial.

[58]See discussion and citation of authorities in POMEROY, CODE REMEDIES (5th ed. 1929), §624; CLARK, CODE PLEADING (1928), pp. 442-4.

counterclaim, a burden which is not necessary for the protection of the plaintiff. Whether a counterclaim is sufficient should depend on the substance of its allegations, and not upon the defendant's conclusion, evidenced by the label which he places upon it, as to its legal character.[59]

Of course, counterclaims must be pleaded in suits in equity as well as in actions at law.[60] Also the requirement that each defense and counterclaim be separately stated and numbered obtains in equity.[61] However, there are some Montana cases containing language perhaps indicating that the provisions of the Code of Civil Procedure with respect to counterclaims do not apply in equity. In *Davis v. Davis,* the plaintiff brought suit to annul certain conveyances. It appears that a defendant, an attorney in fact for the plaintiff, conveyed by virtue of such agency certain property belonging to the plaintiff to his co-defendant, who in turn reconveyed it to the defendant. The defendant pleaded as a separate defense that the premises were purchased by the plaintiff, the defendant and another; that the defendant supplied the money to pay for his share; that the deed was taken in the name of the plaintiff alone; that at the time of and prior to the acts complained of, the legal title to such share was in the plaintiff, but there was a resulting trust in favor of the defendant, and that the defendant had an equitable title to said share in the premises when the power of attorney was made to him; and prayed that the defendant be discharged. The court said that, under the rules of practice in a court of equity, the court will hear an equitable defense or counterclaim, connected with the subject matter of the petition, without regard to the provisions of the Code of Civil Procedure; and held that the new matter was properly pleaded as a defense, and that the prayer that the defendant be discharged did not conclude the pleader, but that the court could enter

[59]In Guthrie v. Holloran (1931) 90 Mont. 373, 3 P. (2d) 406, the court had no difficulty in treating as a cross-complaint an answer denominated a counterclaim, and it would seem that it should have no more difficulty in treating a pleading denominated an affirmative defense, or one without denomination, as a counterclaim. *Cf.* also, Callender V. Crossfield Oil Syndicate (1929) 84 Mont. 263, 275 P. 273: In equity the denomination of an answer as a "further answer and separate defense" does not prevent its being considered as a cross-complaint. And see FEDERAL RULES OF CIVIL PROCEDURE, rule 8(c): ". . . When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

[60]Union Mercantile Co. v. Jacobs, Sulton & Co. (1897) 20 Mont. 270, 554, 50 P. 793, 52 P. 375. See also Galiger v. McNulty, *supra,* note 37; Erbes v. Smith, *supra,* note 49.

[61]Flatt v. Norman (1932) 91 Mont. 543, 11 P. (2d) 798.

a decree adjudging the title to be in the defendant, if it deemed that the dismissal of the action was not sufficient confirmation of his title.[62]

In *Anaconda Mining Co. v. Thomas,* in a suit to quiet title, the answer contained a "further and separate answer and defense," setting up title by prescription and praying that the plaintiff take nothing and that the defendant have his costs. The court entered judgment on the pleadings for the defendant, and in the judgment decreed that the plaintiff take nothing by its action; that the defendant have his costs; and that the claim of the defendant to the premises "shall be and is hereby declared to be established, and . . . that the title to and the right of possession . . . shall be and the same is hereby forever quieted in and to the defendant . . . as against the claim of the plaintiff." The Supreme Court held that the new matter set up in the answer was sufficient to support the decree, saying:

> ". . . If the action were at law, the want of counterclaim complete within itself would be fatal; but the action is in equity, and the pleader is not concluded by his prayer . . . nor by the form of his pleading. . . ."[63]

In *Pittsmont Copper Co. v. O'Rourke,* in a suit to enjoin the sale of certain real property in execution of a judgment, the court held that a "further answer and counterclaim," praying for various affirmative remedies and also for general relief, was sufficient to warrant denial of relief to the plaintiff, and said:

> ". . . We do not deem it of importance to ascertain whether the 'further answer' states a counterclaim, strictly so called, with all the precision requisite in an action at law. The present proceeding is in equity, and the matter set forth in the 'further answer' cannot be ignored if it is sufficient in substance to warrant denial of relief to the plaintiff or to require the imposition of conditions to the granting of the same. . . .
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> . . . . . .
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> "The answer states an equitable defense; but, unless there is a defect in parties, it has other and larger consequences. In a suit in equity the mere pleading of an equitable defense, as such, will authorize the granting of whatever affirmative relief the party shows himself entitled to, consistent with his pleadings and without regard to his prayer. This is under the rule that when a court of equity

[62] (1890) 9 Mont. 267, 23 P. 715.
[63] (1913) 48 Mont. 222, 225, 137 P. 380.

has before it all the parties to any difference, and when it has obtained complete jurisdiction of the subject matter, it will finally settle the whole controversy. . . . '"[64]

If the court in the *Davis, Thomas* and *O'Rourke* cases meant to hold that the provisions of the Code of Civil Procedure with respect to the manner of pleading counterclaims have no application in equity, and that it is not necessary that a counterclaim in equity state a cause of action complete within itself, such holdings are inconsistent with a fundamental principle of the codes of civil procedure, for the fusion of law and equity was a fundamental principle of code reform.[65] However, in spite of the breadth of language used, it would seem that all the court actually held in those cases was that the prayer for relief was not essential to the counterclaims, and that the defendants were entitled to any relief to which the facts stated in the counterclaims showed them to be entitled, irrespective of the prayer.[66]

[64](1914) 49 Mont. 281, 291, 293, 141 P. 849.

[65]Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1 (1925); Taylor, *The Fusion of Law and Equity*, 66 U. PA. L. REV. 17 (1917); Taylor, *Law Reform*, 11 ILL. L. REV. 402 (1917); POMEROY, CODE REMEDIES (5th ed. 1929) §§4 to 15, incl.

[66]Some of the language in Galiger v. McNulty, *supra*, note 37, seems to be inconsistent with such holding. In that case, the court said, at pp. 360, 361 of 80 Mont.:

"In pleadings in equity, as stated by Blackstone, the rule was: 'A defendant cannot pray anything in this, his answer, but to be dismissed the court, and, if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a cross-bill.' (2 Cooley's Blackstone, 3d ed., book 3, star page 448.)

"The terms 'set-off' and 'recoupment' are by some authorities included in the term 'counterclaim.' (*St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 35 Pac. 876; Raymond v. State, 54 Miss. 562, 28 Am. Rep. 382.) And they must be pleaded in some form, or there is nothing on which to base a judgment. The rule as stated in Blackstone above has been consistently followed by both English and American courts . . . .

"The provision of section 9137, Revised Codes 1921, that, if relied upon, the answer must contain 'a statement of any new matter constituting a defense or counterclaim,' and the provisions of section 9148 of the same Code that 'where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counterclaim interposed by him, he must demand the judgment in his answer,' are but expressions of the common law and were a part of our statutory law long prior to the commencement of said cause . . . .

"*Hungarian Hill Gravel Min. Co. v. Moses*, 58 Cal. 168, was a much stronger case, so far as the allegations of the answer are concerned. The trial court in that case granted the defendant affirmative relief, but the supreme court struck it from the decree, for the reason that: 'The answer of the defendants contained none of the elements of a cross-complaint, as distinguished from a de-

It is submitted that the rule that the defendant is not precluded by the prayer of his counterclaim is sound, but the same rule should be applicable whether the original suit is in equity or at law, and regardless of whether the counterclaim is legal or equitable in character. It is true that the code provides that a defendant who deems himself entitled to an affirmative judgment by reason of his counterclaim must demand the judgment in his answer; also that a complaint must contain "a demand of the relief which the plaintiff claims."[67] Yet the supreme court has held, without distinction between suits in equity and actions at law, that the prayer is no part of the statement of a cause of action in a complaint, and, if the complaint entitles the plaintiff to any relief, a general demurrer will not lie, no matter what may be the form of the prayer, or, indeed, whether there is any prayer at all.[68] The holding in *Hageman v. Arnold,* that the amount of damages awarded a plaintiff cannot exceed the amount asked,[69] apparently overlooked R. C. M. 1935, Section 9316, which provides:

> "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."[70]

fense to plaintiff's action, and contained no prayer for affirmative relief. That part of the decree awarding affirmative relief should be stricken out.'"

[67]R. C. M. 1935, §9129, sub. 3.

[68]Donovan v. McDevitt (1907) 36 Mont. 61, 92 P. 49 (complaint prayed for injunction; the court held it sufficient on demurrer, as it stated facts entitling plaintiff to a money judgment). See also Merk v. Bowery Mining Co. (1904) 31 Mont. 298, 78 P. 519; Rohr v. Stanton (1927) 78 Mont. 494, 254 P. 869; Blackwelder v. Fergus Motor Co. (1927) 80 Mont. 374, 260 P. 734; Murray v. Creese (1927) 80 Mont. 453, 260 P. 1051. And see First National Bank of Glendive v. Conner (1929) 85 Mont. 229, 278 P. 143, in which case the court apparently was of the opinion that the rule that a prayer is no part of the cause of action applies to cross-complaints.

[69](1927) 79 Mont. 91, 95, 254 P. 1070. The court held an instruction to be erroneous which did not limit the amount of damages, actual and punitive, to that asked by plaintiff. There was no appearance in behalf of respondent, and the court cited no authority for its position.

[70]The wording of the code is unfortunate in applying the restriction to the case where no *answer* has been filed. It seems that the codifiers contemplated the case where the defendant did not appear and defend, but the decisions have been conflicting. CLARK, CODE PLEADING (1928), pp. 181, 182.

The code adheres closely to the former rule in equity. In case of default, relief is confined to relief demanded in the complaint, as was the rule under prayer for special relief in equity, while in other cases it is extended to granting relief similar to that granted under prayer

The better view is that a plaintiff is entitled to any judgment consistent with the facts alleged in his complaint and embraced within the issues, regardless of whether it is a different type of relief than has been prayed or more damages;[71] and it is submitted that the same rule should apply to the relief to which a defendant is entitled on his counterclaim.

The only substantial difference between an original cause of action and a counterclaim, as we have seen, is that the first is filed by the plaintiff and the second by the defendant. In effect, a defendant who files a counterclaim becomes a plaintiff, and his counterclaim becomes a complaint; consequently, the provisions of R. C. M. 1935, Section 9316, would seem applicable to counterclaims as well as to original complaints. If, therefore, the plaintiff has replied, the demand in the counterclaim should not limit the judgment. Under the code, the proper question would seem to be simply whether the defendant has stated facts constituting *a* cause of action; the prayer is merely his legal conclusion as to the relief to which he is entitled.[72]

2. *Necessary Parties to Counterclaim; Mutuality between Plaintiff's Cause of Action and Defendant's Counterclaim.*

It has been stated as a general rule that the cause of action constituting a counterclaim must be one in favor of a defendant and against a plaintiff in the same capacity in which he sues.[73] No counterclaim against a co-defendant is contemplated by the Montana statute,[74] although in 1919 the legislature adopted a

for general relief in courts of chancery. Johnson v. Polhemus (1893) 99 Calif. 240, 33 P. 908; Mock v. City of Santa Rosa (1899) 126 Calif. 330, 58 P. 826.

[71]CLARK, CODE PLEADING (1928), pp. 183, 184. And see FEDERAL RULES OF CIVIL PROCEDURE, rule 54(c): "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

[72]Of course, the counterclaim may be so indefinite that it does not appear that the defendant is entitled to any judicial relief, in which case it would be subject to demurrer, but it would seem that this should be determined by the facts alleged and not the pleader's conclusion from those facts. *Cf.* CLARK, CODE PLEADING (1928), p. 185, with respect to the prayer in a complaint.

[73]POMEROY, CODE REMEDIES (5th ed. 1929) §630. In an action against an agent for rents collected on a married woman's separate estate, a claim against her as administratrix of her husband for a debt due from him cannot be set up. Rutherford v. Talent (1886) 6 Mont. 132, 9 P. 821.

[74]Alywin v. Morley (1910) 41 Mont. 191, 206, 108 P. 778. See also Meredith v. Roman, *supra*, note 49: R. C. M. 1035, §9177, which pro-

statute providing for similar relief by cross-complaint against a co-defendant and also new parties.[75] It has even been held in

vides, "Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer. The controversy between the defendants must not delay a judgment, to which plaintiff is entitled, unless the court otherwise directs," does not permit the adjustment of the rights of defendants *inter sese* in a case where they are wholly independent of and not in any way connected with the rights of the plaintiff.

[75]Ch. 177, §1, LAWS OF MONTANA 1919; R. C. M. 1935, §9151.

". . . A cross-complaint should be as distinct and separate from an answer as any other independent pleading; it must state facts sufficient to entitle cross-complainant to affirmative relief, and also all facts sufficient to show that the demand is a proper subject of cross-complaint." Callender v. Crossfield Oil Syndicate, *supra*, note 59, 84 Mont. at p. 274.

It does not have to state a cause of action against all parties to the action; "any defendant who desires relief against any party if he has a cause of action which is properly the subject of cross-complaint may prosecute his cause of action by cross-complaint and obtain relief against any party." State *ex rel* Union Central Life Ins. Co. v. District Court (1936) 102 Mont. 371, 377, 58 P. (2d) 491.

If the defendant puts in issue the amount due to plaintiff, he may by cross-complaint make others who are adverse claimants parties to the action. "The relief permitted differs from that obtainable under interpleader, in that it permits defendant to contest with plaintiff the extent of his liability, and when that liability is determined it authorizes the court to decide to which of the adverse claimants the liability extends or to apportion the amount found to be due to the several claimants according to their respective rights." Security State Bank of Roy v. Melchert (1923) 67 Mont. 535, 543, 216 P. 340. However, in State *ex rel* Bedord v. District Court (1941) —— Mont. ——, 114 P. (2d) 265, the court held that a cross-complaint cannot be used for the sole purpose of bringing into the case additional parties, or securing a substitution of parties, but "the basis of a cross-complaint must be a demand which may be carried forward as a cause of action and which might have been the subject of an independent action, and upon which there may be a recovery." The court discountenanced Zunchich v. Security Bldg. & Loan Assn. (1929) 85 Mont. 341, 278 P. 1011, where defendant who was denied relief by way of interpleader under R. C. M. 1935, §9087, was permitted to substitute a new party as a party defendant by means of a cross-complaint, although the court stated that the Zunchich case was correct on the record. Angstman, J. dissenting: "He should have the right to have the plaintiff and the defendants in the cross-complaint litigate their respective rights so that he would not be subject to two actions for the same money. This he may do without depositing the money [a requirement under the interpleader statute, R. C. M. 1935, §9087] where, as here, he remained in the case and subjected himself to whatever judgment the court saw fit to pronounce in the light of the facts."

There are three classes of cases: (1) where the relief sought relates to or is dependent upon the contract, transaction or subject matter upon which the action is brought; (2) where the relief sought affects the property to which the action relates; (3) where the judgment in the action may determine the ultimate rights of the defendants to an action between themselves. In the first two classes, the relief sought by the cross-complaint must to some extent affect the plaintiff's action or interfere with the relief sought by him, but this

some jurisdictions that, in the absence of special statutory provision, where the plaintiff is an assignee, no demand accruing to the defendant against the assignor can be enforced as a counterclaim, although it may under certain circumstances be a good defense in bar of recovery.[76] However, in Montana the statute expressly permits the defendant to plead a claim against the plaintiff's assignor as a counterclaim under the contract clause of the counterclaim statute, for the purpose of diminishing the recovery by the assignee.[77]

is not necessary in the third class. State *ex rel* Union Central Life Ins. Co. v. District Court, *supra*, limiting Callendar v. Crossfield Oil Syndicate, *supra*, and holding that in an action to foreclose a real estate mortgage, in which the plaintiff claimed to be entitled to a crop of wheat, a cross-complaint against an intervenor was proper to obtain a determination of title to the purchase price and wheat as between the defendant and the intervener.

It is not necessary that the cause of action stated in the cross-complaint be in existence at the commencement of the action, even though the cause of action be one based on contract, R. C. M. 1935, §9151, unlike the counterclaim statute, containing no such limitation. Callender v. Crossfield Oil Syndicate, *supra*; State *ex rel* Union Central Life Ins. Co. v. District Court, *supra*.

The defendant has his election to plead a cross-complaint or reserve it for a future independent action, an election which he does not have as to counterclaims within the first subdivision of R. C. M. 1935, §9138. Stockgrowers' Finance Corp. v. Nett (1931) 91 Mont. 334, 7 P. (2d) 540.

[76]See POMEROY, CODE REMEDIES (5th ed. 1929), §628; CLARK, CODE PLEADING (1928), p. 475.

[77]R. C. M. 1935, §9139:

"*Counterclaim—rules thereof.* But the counterclaim, specified in subdivision 2 of the last section, is subject to the following rules:

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand, existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of the plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested."

Not only must the counterclaim be in favor of a defendant and against a plaintiff, but it must be in favor of all the defendants and against all the plaintiffs, except where a separate judgment can be had. Thus, in the early case of *Kemp v. McCormick,* plaintiff brought an action on a promissory note against two joint makers. One of the defendants attempted to set up as a counterclaim a claim due him individually from the plaintiff. The court held that such a counterclaim was not permissible under the provision of the statute that the claim "shall be one existing in favor of the defendant . . . , and against a plaintiff . . . , between whom a several judgment might be had in the action."[78] The court said:

> "This is the same as the California statute on the subject of set-off, and in a judicial construction of the same (20 Cal. 281), the converse of the proposition here was there held, where a joint debt was sought to be set off against an individual debt.
>
> "And upon the same principle an individual debt cannot be set off against a joint debt or liability."[79]

Again, in *Collier v. Ervin,* decided in 1878, the court took the position that, "An individual claim cannot be set up as a counter-claim to a joint indebtedness without alleging that the plaintiff is insolvent."[80]

However, in an action on a joint obligation of partners, one partner may avail himself of a counterclaim in favor of the partnership, even though such partner is separately sued or answers separately, "the fundamental principle being that, if the demands are mutual, one may be counterclaimed as against an action upon the other."[81]

And, if a plaintiff sues two or more defendants on a joint and several obligation, severance in judgment may be had and a counterclaim by one of the defendants for an obligation to him individually is proper.[82] In general, severance in recovery is possible whenever the right sought to be maintained on the one

[78]Since 1895 the statute has required the counterclaim to be a cause of action "against the plaintiff, or, in a proper case, against the person he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action." This change in terminology would not seem to change the sense of the statute. It may be observed that the statute uses the singular number, "the plaintiff"; but R. C. M. 1935, §16, expressly provides that the singular includes the plural.

[79](1872) 1 Mont. 420, 423.

[80]3 Mont. 142, 146.

[81]First National Bank of Butte v. Silver (1912) 45 Mont. 231, 236, 122 P. 584.

[82]See Scott v. Waggoner, *supra,* note 34, 48 Mont. at p. 548.

side, and the liability to be enforced on the other, are not originally joint.[83]

Of course, the common law doctrine of joint rights and liabilities, which was the basis of the decisions in *Kemp v. McCormick* and *Collier v. Ervin,* has under-gone considerable change as a result of the enactment in 1895 of the provision of what is now R. C. M. 1935, Section 7398, that "All joint obligations and covenants shall hereafter be taken to be joint and several obligations and covenants." Apparently the only case in Montana holding a counterclaim improper on the ground of lack of severability of judgment, since the enactment of this statute, is *Heinrich v. Kirby.* In that case, plaintiff brought an action against an individual defendant to recover the price of livestock sold to him. Defendant set up as a counterclaim claims for services rendered to plaintiff by a partnership consisting of defendant and another, and proof of the consent of the latter to the counterclaim was offered at the trial. The court held that the defendant could not maintain the counterclaim, saying:

> " . . . A separate judgment could not be had between plaintiff and defendant upon the defendant's counterclaim in this case, because the counterclaim is in favor of the partnership and the partnership is not a defendant in the case; and for the further reason that the partnership is not indebted to the plaintiff, so the plaintiff could not have in this case a judgment against the co-partnership. There is no mutuality between the cause of action pleaded by the plaintiff and the counterclaims set up by the defendant.
>
> . . . . . .
>
> " . . . The consent . . . does not bring it within the definition of a counterclaim."[84]

If partnership rights remain joint, the result reached by the court would follow, for no person other than a defendant can join with a defendant in filing a counterclaim, and if a claim is owned jointly by a defendant and another the common law doctrine of joint rights would prevent the defendant from asserting it as a counterclaim.[85] However, if the claim is in reality joint and several, so that the plaintiff is liable to the defendant individually, then the counterclaim would seem to be proper regardless of whether the other obligee is a party to the suit or not. Nevertheless, the court in *Heinrich v. Kirby* made no reference whatever to R. C. M. 1935, Section 7398, and did not discuss the

[83]POMEROY, CODE REMEDIES (5th ed. 1929), §631.
[84](1922) 64 Mont. 1, 5, 6, 208 P. 897.
[85]POMEROY, CODE REMEDIES (5th ed. 1929), §627.

extent to which the common law doctrines of joint rights and liabilities have been changed.

In such a discussion, it would seem that two questions would arise: first, whether the statute making joint obligations joint and several applies to partnership obligations, a question which is not free from doubt in Montana;[86] second, whether the statute makes joint rights, as well as joint obligations, joint and several, a question which has yet to receive adequate consideration.[87] However, regardless of the applicability of R. C. M. 1935, Section 7398, to a situation such as that presented in the *Heinrich* case, it is not apparent how its applicability could be avoided in situations such as those presented in the *Kemp* and *Collier* cases. It is submitted that the *Kemp* and *Collier* cases are no longer controlling authorities on the matter here under discussion, and that in an action by a single plaintiff against several defendants on their joint obligation, at least if it is not a partnership obligation, there should be no objection to a counterclaim by one of the defendants on an individual claim of his against the plaintiff.[88]

[86]Toelle, *Joint and Several Liability of Parties in Montana*, 1 ROCKY MT. L. REV. 142 (1928-29).

[87]R. C. M. 1935, §9083, reqiring the joinder as plaintiffs or defendants of all parties united in interest, may indicate joint rights are to be considered differently than joint obligations. However, there seems little reason for making the severability of judgment depend upon which of the parties are plaintiffs and which are defendants.

[88]The question of how far the common law doctrine of joint rights and joint obligations has been changed by provisions of the codes of civil procedure, such as R. C. M. 1935, §9314, providing: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves," has been a matter upon which the courts have not been in agreement. POMEROY, CODE REMEDIES (5th ed. 1929), §633 states:

> "... The judges of one school have denied *any* modification in these *legal* notions, and have restricted the language of the statute to equitable proceedings. Another school have gone to the opposite extreme, and have declared the ancient rules as to joint right and liability to be utterly abolished, so that a severance among the plaintiffs or defendants in the recovery may be had in all cases. This loose or liberal interpretation has, however, been utterly repudiated by other cases, which, as it seems to me, establish, by a very decided preponderance of judicial authority, the doctrine as now generally accepted in those States whose codes compose the two groups mentioned at the commencement of the section. The doctrine established by these decisions is, that if the demand in suit was originally joint and several, although the action upon it is joint, and *a fortiori* if it was several, a several judgment *might* have been recovered, and the counter-claim against part of the plaintiffs, or in favor of a part of the defendants, is possible: when the demand in suit is originally joint, a severance is impossible."

3. *Limitation That the Counterclaim Diminish or Defeat Plaintiff's Recovery.*

The reason for the limitation in the statute, that a counterclaim "must tend, in some way, to diminish or defeat the plaintiff's recovery," has been stated by the Supreme Court of Montana to be that the law contemplates but one judgment disposing of the issues in a case, and does not contemplate that there be two separate judgments, neither of which interferes with the execution of the other.[89] Construing the limitation in the light of this purpose, the court has treated it as applicable to counterclaims under the transaction clause of the first subdivision, as well as to those under the contract clause of the second subdivision, of R. C. M. 1935, Section 9138.[90]

Applying the limitation, it has been held that a defendant in a condemnation proceeding cannot set up his claim for damages, either special or general, in a counterclaim;[91] that a counterclaim for a money judgment is not available in an action for forcible entry,[92] in a claim and delivery action,[93] in a proceeding to enjoin interfering with harvesting operations,[94] or in a suit to set aside a transfer of property;[95] and that a counterclaim to foreclose a chattel mortgage and recover attorney fees and expenses is not available in a suit to enjoin the sale of the property under the mortgage pursuant to a power of sale contained in it.[96] In such cases, the position is taken that, as the plaintiff merely seeks possession of property, a judgment for defendant for money would not interfere with the execution of a judgment for the plaintiff, and therefore defendant's claim does not tend to defeat or diminish plaintiff's recovery.[97]

[89]Osmers v. Furey (1905) 32 Mont. 581, 81 P. 345; Spellman v. Rhode (1905) 33 Mont. 21, 81 P. 395; Friedrichsen v. Cobb, *supra*, note 38.
[90]Osmers v. Furey, *supra*, note 89, and see cases, *infra*, notes 91 to 96, inclusive.
[91]Yellowstone Park Railroad Co. v. Bridger Coal Co. (1906) 34 Mont. 545, 87 P. 963.
[92]Spellman v. Rhode, *supra*, note 89.
[93]Osmer v. Furey, *supra*, note 89.
[94]Cook-Reynolds Co. v. Wilson (1923) 67 Mont. 147, 214 P. 1104.
[95]Hanrahan v. Anderson (1939) 108 Mont. 218, 90 P. (2d) 494.
[96]Stockgrowers' Finance Corp. v. Nett, *supra*, note 75. The court did not specifically state that the objection to the counterclaim was that it did not tend to diminish or defeat the plaintiff's recovery, but did say: "The case of Friedrichsen v. Cobb, 84 Mont. 283, 275 Pac. 267, clearly lays down the rule that such a cause of action as is set out in plaintiff's complaint herein would not have been available as a counterclaim in the former action for injunction."
[97]In Hillman v. Luzon Cafe Co., *supra*, note 49, in a suit to recover the balance of the purchase price of a machine, the court said that the allegation in an answer if regarded as a counterclaim for return of the purchase price paid, was obnoxious to the elementary rule that the

However, it seems that in an action to foreclose a real estate mortgage, a counterclaim for real estate commissions due from the plaintiff is available.[98] If the suit were merely to obtain possession of the property and no money judgment were sought, apparently a counterclaim for a money judgment would not be proper;[99] although in *Friedrichsen v. Cobb*,[100] the court took the position that a counterclaim for breach of the contract sought to be foreclosed is proper, if the establishment of the counterclaim is sufficient to defeat the plaintiff's right to recover possession.[101]

matter alleged must tend to diminish or defeat the plaintiff's recovery, and must constitute a cause of action complete within itself. Of course, it is self evident that if a counterclaim does not state a cause of action complete within itself, it cannot defeat or diminish plaintiff's recovery. If the court meant that such a counterclaim although stating a cause of action complete within itself would not be available, because it does not tend to diminish or defeat plaintiff's recovery, it is submitted that such a holding is unsound. If there is any situation where a counterclaim tends to diminish or defeat plaintiff's recovery, it is where both parties are seeking money judgments.

[98]See Flatt v. Norman, *supra*, note 61, holding that the answer was not subject to a motion to strike. See also Griffiths v. Thrasher (1933) 95 Mont. 210, 26 P. (2d) 995, holding, in an action to foreclose a chattel mortgage, that a "cross-complaint" for damages for fradulent misrepresentation in the sale leading to the execution of the mortgage was not subject to demurrer on the ground that the claim did not come within the transaction set forth in plaintiff's complaint. Of course, in the usual action to foreclose a mortgage the plaintiff obtains a money judgment and a decree that the property be sold to satisfy the same, subject to redemption by the mortgagor; and the action is not an action to obtain possession of the property.

[99]See cases *supra*, notes 91 to 96, inclusive; CLARK, CODE PLEADING (1928), p. 448.

[100]*Supra*, note 38. The court took the position, in a suit to foreclose a contract for the sale of land, that a cause of action which would not have been sufficient to entitle plaintiff to rescission or equitable relief from foreclosure would nevertheless have been sufficient to state a cause of action for damages for breach of the contract and to bar recovery by plaintiff. Angstman, J., dissenting: The cause of action of the defendant in the foreclosure action was for damages based on alleged fraud of plaintiff with respect to his ownership of certificates of purchase. Defendant "could not have retained possession of the land and asserted as a defense that the title was defective, and neither could he, while retaining possession, have filed a cross-complaint for money paid under the contract."

[101]See also Apple v. Edwards (1932) 92 Mont. 524, 16 P. (2d) 700, holding that, in a suit by an assignee of a conditional sales vendor in claim and delivery to recover animals from a conditional sales vendee, it was error to strike a defense, designated an "affirmative defense in the nature of a cross-complaint and counterclaim," which alleged fraud in the inception of the contract by the seller and prayed that defendant be adjudged to have a lien upon the animals for what they had paid and for expense in caring for them, the defendant having a right to rescind the contract for fraud and having an equitable lien on the animals which he could enforce by "recoupment." The court said at p. 537 of 92 Mont.: "The defense thus asserted challenges plaintiff's

Thus the court has construed the limitation that the counterclaim tend to diminish or defeat plaintiff's recovery as a requirement that it be of such a character as that the judgment upon it will interfere with the execution of the judgment sought by the plaintiff. Except for the qualification of *Friedrichsen v. Cobb*, such a requirement prevents any cross-demand for an affirmative judgment, as distinct from a defense, in any suit to recover or enforce a right to possession of specific property, a result which seems foreign to the purpose of the counterclaim statute to enable and require the parties to adjust in one action their differences growing out of any given transaction and to prevent the multiplicity of suits. Furthermore, such a requirement seems inconsistent with the provisions of the code with respect to the relief to which a defendant is entitled on a counterclaim. The code not only provides that, where a counterclaim is established which exceeds the plaintiff's demand, the defendant must have judgment for the excess,[102] but it also provides that "where a counterclaim is established, which entitled the defendant to an affirmative judgment, demanded in the answer, judgment must be rendered for the defendant accordingly.'"[103] It would seem to be much more in accord with the purpose and scope of the code provisions if the limitation were construed as requiring merely that the counterclaim be of such a character as that either the judgment upon it and the judgment sought by the plaintiff relate to the same subject matter, or that the judgment upon it interfere with the execution of the judgment sought by the plaintiff. So construed, the limitation has no practical application except to counterclaims under the second subdivision of the statute; and it is true that the position of the limitation in Section 9138 seems to make it applicable to both subdivisions, as a limitation not to be found in either subdivision itself. However, a construction which results in a conclusion that there is a certain amount of duplication in a section of the code is to be preferred to one which is out of harmony with its purpose and

right of possession, and will not necessitate the entry of two judgments. . . . The equitable lien, if established, would entitle defendants to retain possession of the pigs until the lien was discharged. . . . "

And *cf.* Fleming v. Consolidated Motor Sales Co. (1925) 74 Mont. 245, 240 P. 376, holding that, in an action to cancel incompetent's contract for purchase of automobile and purchase money notes, defendant is entitled to recover, by way of "cross-complaint or counterclaim," principal and interest on purchase money notes due and payable and reasonable attorney's fees as provided in said notes.

[102]R. C. M. 1935, §9140.

[103]R. C. M. 1935, §9141.

inconsistent with the scope of other sections relating to the same subject.[104]

4. *Limitation That the Counterclaim Exist at the Commencement of the Action.*

In *McGuire v. Edsall,*[105] decided in 1894, the Supreme Court of Montana, without indicating the character of the counterclaim involved, laid down the broad rule that a counterclaim to be available must be one existing and matured for action in favor of the party asserting the same at the time the action was commenced wherein such counterclaim is sought to be pleaded. Strangely enough the court made no reference to the explicit provision of the second subdivision of the statute, dealing with contract counterclaims and providing that the counterclaim be a cause of action "existing at the commencement of the suit"; but relied upon the general language preceding the subdivisions, that the counterclaim "shall be one existing in favor of defendant . . . and against a plaintiff, . . . between whom a several judgment may be had in the action . . . ." It may be inferred, therefore, that the rule thus stated was intended to be applicable alike to counterclaims under the first subdivision and those under the second subdivision of the statute.

In support of the rule thus stated, the court cited thirteen cases. Two of these cases did not deal with the specific question;[106] and the others, except one,[107] were cases involving either contract counterclaims or set-offs. As to the one exception, the only indication of the character of the counterclaim involved is in the syllabus of the case, from which it appears that it was

[104]Clauses of a statute should be interpreted with reference to the context; one section of a statute may stand as context to another, provided it bears upon the general subject matter; and courts will transpose clauses or even sentences so as to place them in their just connection with the context to which they relate. BLACK, INTERPRETATION OF LAWS (1911), pp. 242-244. Further, that construction of a statute should be adopted which promotes and carries out to the fullest extent the legislative purpose, and if that purpose is only to effect a particular class of persons, the generality of language will not have the effect of including one not belonging to this class. BLACK, *op. cit.*, pp. 76-80. The same rule would seem applicable when dealing with a class of cases as when dealing with a class of persons.

The limitation that a counterclaim tend to diminish or defeat the plaintiff's recovery has been imposed by many courts in the absence of express statutory provision. For a criticism of the limitation as applied to other than counterclaims under the second subdivision of the statute, see POMEROY, CODE REMEDIES (5th ed. 1929), §621. See also CLARK, CODE PLEADING (1928), p. 449.

[105]14 Mont. 359, 36 P. 453.

[106]Smith v. Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49; Gregg v. James, Breese, 143, 12 Am. Dec. 152.

[107]Jeffreys v. Hancock, 57 Cal. 646.

a transaction counterclaim; but, in holding that the counterclaim was not available, the court gave no reason, and the argument of counsel preceding the opinion was not only that the claim did not exist at the commencement of the action but also that the facts alleged did not arise out of the transaction set forth in the complaint and were not connected with the subject of the action and did not arise on contract. Therefore, it seems that that case was hardly authority for a position that a transaction counterclaim is not available unless it is in existence at the time the plaintiff commences his action.

When one looks to the purpose sought to be accomplished by the limitation, it is evident that there was no good reason for the interpolation of the words "at the commencement of the suit" after the word "existing." As was said by the Supreme Court of North Carolina, when dealing with a statute similar to that relied upon in *McGuire v. Edsall:*

> ". . . It will be noted that the requirement restricting a counterclaim to one that exists at the time the action was commenced is only stated in reference to the second class of counterclaims described in the statute—those wherein an action on a contract, the breach of an entirely different and distinct contract, is set up by defendant. This, for the very just and obvious reason that when a plaintiff rightfully sues a defendant who owes him at the time the action is commenced, he shall not be put in the wrong and subjected to cost by allowing defendant to buy up claims sufficient or more than sufficient to offset his debt. But this limitation is not expressed with reference to counterclaims in the first subdivision of the statute. These must be existent and continue to exist between the same parties in the same right at the time they are offered, and they must be then due—that is, not demands to become due in the future . . . "[108]

Nevertheless, apparently stemming from *McGuire v. Edsall,* and without any real examination of the question, subsequent Montana cases have applied the limitation stated in that case to all counterclaims, without distinction as to their character as transaction or contract counterclaims.[109] And this has

[108]Smith v. French (1906) 141 N. C. 1, 53 S. E. 435, 437, 438, SUNDERLAND, CASES AND MATERIALS ON JUDICIAL ADMINISTRATION, p. 1224.

[109]For the application of the rule to contract counterclaims: Heinrich v. Kirby, *supra,* p. 52 (Held counterclaim not available, because, for one reason, the consent of the other partner could not be retroactive and vest title in defendant at the time the suit was commenced.); Dreidlein v. Manger (1923) 69 Mont. 155, 220 P. 1107 (Action to recover damages for breach of contract; counterclaim on judgment obtained in another suit after commencement of the action. Held, counterclaim not available, the court relying upon the

been done without regard to the fact that since 1895 the clause

language of the second subdivision of the statute); Lappin v. Martin, *supra*, note 49. (Action to recover for work and labor performed for defendant; counterclaim for pasturages and other items furnished to plaintiff. Held, proof that the defendants had furnished the pasturage to plaintiff was properly excluded after statement of counsel for defendant indicating "that defendant's motion of charging plaintiff" did not arise until after the commencement of the action. *Query:* Was not the real question one of whether there was any obligation on the plaintiff to pay at any time, or whether the items were gratuities?); Dick v. King, *supra*, note 51 (Action to recover on promissory notes; counterclaim for work and labor done and materials furnished under a contract. Held, no error was committed in excluding evidence offered in support of the counterclaim, the contract upon which it was predicated having been superseded and terminated prior to the commencement of the action. Query: Would not the rule that the counterclaim must be a cause of action have been more to the point?)

For the application of the rule to transaction counterclaims: Cook & Woldson v. Gallatin Rd. Co. (1903) 28 Mont. 509, 73 P. 131 (Action on *quantum meruit* for services rendered in delivering certain ties; counterclaim for damages from delay resultant from failure of plaintiff to deliver ties as required by the contract. Held, counterclaim not available, because damages did not occur until after suit commenced.); Boucher v. Powers (1904) 29 Mont. 342, 74 P. 942 (Suit by assignee of contractor to foreclose lien for contract price of removal of building; counterclaim on judgment for assignee of workmen to whom the contractor, before the action was commenced, gave orders on defendant for work done in removal of the building, which judgment was obtained and paid after action was commenced. Held, if regarded merely as "money paid, laid out and expended," not available as a counterclaim; but, as the claims for labor done were liens against the property of plaintiff, whether paid or not, they were proper to be pleaded as equitable defense.); Yellowstone Park Rd. Co. v. Bridger Coal Co., *supra*, note 91 (Condemnation proceedings; held, plaintiff cannot be heard to complain of defendant's failure to plead his damages, counterclaim for damages not being available, because, for one reason, defendant had no cause of action when proceedings commenced); Scott v. Waggoner, *supra*, note 34 (Action by landlord against lessee and sureties on lessee's bond for rent on lease of hotel and damages for waste committed on the premises; counterclaim for conversion of personal property placed on the premises by defendant and alleged to have been taken upon wrongful reentry on the premises by plaintiff. Held, counterclaim available only if reentry was wrongful so that no demand was necessary, or if demand had been made when action begun); Hammond v. Thompson (1918) 54 Mont. 609, 173 P. 229 (Claim and delivery action; held, claim for damages for wrongful detention of property seized not a counterclaim, since it arises after commencement of action, but such damages are incident to right of successful defendant to a return of the property and must be pleaded.); Cook-Reynolds Co. v. Wilson, *supra*, note 94 (Suit by lessor to enjoin defendant from interfering with operations to harvest volunteer crop, and injunction issued and plaintiff harvested and marketed crop while same effective; subsequent counterclaim by defendant for value of his share. Held, counterclaim not available, because, for one reason, cause of action not in existence when suit commenced.); Griffiths v. Thrasher, *supra*, note 98 (Action to foreclose chattel mortgage; counterclaim for damages by reason of the commencement of the action by taking over the property in the course of the suit. Held, counterclaim not available, because the basis therefor did not exist at the time of the commencement of the suit.)

of the statute which precedes the subdivisions does not even require that the counterclaim must be one "existing in favor of defendant," but rather provides that the cause of action must "tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff." And it has also been done without regard to the fact that since 1919 the code makes provision for cross-complaints, as to which no such limitation exists.[110] The cross-complaint statute provides that a defendant may file a cross-complaint when he "desires any relief against any party relating to or dependent upon the contract, transaction, or subject matter upon which the action is brought, or affecting the property to which it relates;" and the Supreme Court has stated that its purpose is "to broaden the rule which obtained under the ancient chancery practice by permitting the determination in the one action of the ultimate rights of the parties affecting the subject matter involved in the litigation."[111] It would seem, therefore, that a cause of action which is a transaction counterclaim may also be considered as a cross-complaint and the limitation thus avoided.

Therefore, both as a matter of grammatical construction of the counterclaim statute itself and from the standpoint of its purpose, to prevent the defendant, upon notice of suit, from buying up contract claims against the plaintiff and thus putting him in the wrong and making him bear the costs of the suit, application of the limitation to counterclaims within the first subdivision is unsound; and, since the adoption of the cross-complaint statute, there seems to be no purpose which can be accomplished by such an application of the limitation.

Assuming that the counterclaim is one to which the limitation is applicable, questions arise as to the meaning of the language "existing at the commencement of the action." The action is "commenced" at the time of the filing of the original complaint, and not at the time of the filing of an amendment, unless the amendment states a new cause of action.[112] Also, as has been pointed out, the Supreme Court of Montana has said that the requirement is that the counterclaim be "matured for action" at the time of the commencement of the suit. As has been stated by Professor Charles E. Clark, now judge of the United States Circuit Court of Appeals of the second circuit, such a limitation tends to defeat the ultimate purpose of the

[110]See *supra*, note 75.
[111]Callender v. Crossfield Oil Syndicate, *supra*, note 59, 84 Mont. at p. 273.
[112]Boucher v. Powers, *supra*, note 109: Dreidlein v. Manger, *supra*, note 109.

counterclaim; and he suggests that, if the cause of action be viewed as the operative facts giving ground for judicial relief, the existence of most of such facts in favor of defendant at the time the suit is commenced could plausibly be held to satisfy this limitation.[113] Under such an approach the limitation would be satisfied if the defendant owned the claim when the suit was commenced although it did not mature until after commencement of suit. *Fleming v. Consolidated Motor Sales Co.*[114] seems to have used such an approach, but it does not appear from the case that the question was raised or that it was material to the result; and, in view of other holdings,[115] the limitation in Montana must, it seems, be regarded as requiring that defendant's cause of action be matured at the commencement of the suit.

5. *What Constitutes a Transaction Counterclaim.*

The first subdivision of the counterclaim statute, as we have seen,[116] specifies three different and distinct causes of action which not only may be availed of as counterclaims but of which a defendant is obliged to so avail himself or be barred from another suit thereon,[117] namely: 1. those which arise out of the contract sued upon; 2. those which arise out of the transaction sued upon; 3. those which are connected with the subject matter of the action. The cases in the several states applying similar provisions have been numerous and conflicting, and various theories and schools of interpretation are to be found. Little attempt has been made in the cases to separately define each phrase of the statute, but the courts have confined themselves to a determination of whether the counterclaim is one of the three types, frequently without distinguishing between them.[118]

[113]CLARK, CODE PLEADING (1928), pp. 461, 462.

[114]*Supra*, note 101. Defendant, by what the court called a "cross-complaint or counterclaim," sought judgment on promissory notes. The court held that defendant was not entitled to judgment on one of the notes, because it was not due at the time of the filing of the "cross-complaint or counterclaim," but was entitled to judgment on the others. The case contains no reference to the time when the action was commenced and no suggestion as to whether any of the notes upon which recovery was allowed was then due.

[115]Dreidlein v. Manger, *supra*, note 109; Scott v. Waggoner, *supra*, note 34.

[116]*Supra*, p. 38.

[117]It must affirmatively appear from the pleadings that the counterclaim is within subdivision 1, if a party is to be held to be barred from maintaining an action therefor because of failure to assert the claim in prior suit. Kaufman v. Cooper (1909) 39 Mont. 146, 101 P. 969.

[118]POMEROY, CODE REMEDIES (5th ed. 1929), §644.

Probably the greatest confusion has resulted from the terms "transaction" and "subject of the action." Two fundamentally different views of the term "transaction" are to be found in the cases.[119] According to one view, a "transaction" is a series of acts constituting a single event, looking at an event through the lawyer's eyes. So viewed a transaction is limited to a group of acts which have but one set of applicable legal principles. According to the other view, it is a series of acts constituting a single event as the layman looks at it. So viewed it is not important that the plaintiff's cause of action and the defendant's cause of action are governed by different legal principles, or are proved by different evidence, or met by different defenses; but rather a transaction encompasses any group of circumstances which have a bearing one upon the other and covers acts which occurred because something else occurred.[120]

Some of the early Montana cases reflect the first of these views, the court stating that a counterclaim based upon tort cannot be availed of in an action based upon contract, and, conversely, that a counterclaim based upon contract cannot be availed of in an action based upon tort.[121] However, these cases are no longer controlling, and it seems that the Montana court has definitely committed itself to the layman's view of what is a "transaction." In *Scott v. Waggoner*,[122] the court, starting with the proposition that the statutory provisions were designed to enable parties litigant to adjust their difficulties in one action, so far as that can logically be done, and thereby prevent multiplicity of suits, and that statutes so highly remedial should be given a broad and liberal construction, said:

> ". . . The reason assigned for the doctrine that a counterclaim sounding in tort cannot be pleaded as against a demand upon contract is the supposed impossibility of legal connection between the two events; but every money demand is either upon contract or upon tort, and the same

[119]McCaskill, *Actions and Causes of Action*, 34 YALE L. J. 614, 643-647 (1925).

[120]Wheaton, *A Study of the Statutes Which Contain the Term "Subject of the Action" and Which Relate to Joinder of Actions and Plaintiffs and to Counterclaims*, 18 CORNELL L. Q. 232 (1933).

[121]Wells v. Clarkson, *supra*, note 8; Collier v. Ervin, *supra*, note 80; Potter v. Lohse (1904) 31 Mont. 91, 77 P. 419; Osmers v. Furey, *supra*, note 89; Davis v. Frederick (1887) 6 Mont. 300, 12 P. 664. Scott v. Waggoner expressly denied the authority of Wells v. Clarkson, Collier v. Ervin, and Potter v. Lohse for the proposition that in no instance can a counterclaim technically in tort arise out of the same transaction as plaintiff's demand, when the latter is *ex contractu* in form, and disapproved the proposition itself.

[122]*Supra*, note 109.

reason may be and is assigned with stronger emphasis for denying the right to plead a counterclaim in tort as against a demand in tort. If a counterclaim in tort cannot be pleaded as against a demand either upon tort or in contract, then, in the case of money demands we have a counterclaim which is not a counterclaim—a conclusion which cannot be accepted. As pointed out by Mr. Pomeroy (Code Remedies, Div. 6, subd. 1), the solvent of the difficulty lies in the breadth and scope of the terms 'transaction' and 'subject of the action.' The term 'transaction' is not legal and technical—it is common and colloquial; it is therefore to be construed according to the context and to approved usage (Rev. Codes, sec. 8070).[123] As so construed it is broader than 'contract' and broader than 'tort,' although it may include either or both; it is 'that combination of acts and events, circumstances and defaults, which viewed in one aspect, results in the plaintiff's right of action, and viewed in another aspect, results in defendant's right of action (Pomeroy's Code Remedies, sec. 774), and it applies to any dealings of the parties resulting in wrong, without regard to whether the wrong be done by violence, neglect, or breach of contract.' . . . When in this sense of the word a cause of action in favor of the defendant arises from the 'transaction' set forth in the foundation of plaintiff's claim, it is pleadable as a counterclaim, no matter what its technical soundings or those of plaintiff's demand may be . . . '"[124]

Again, in *Mulcahy v. Duggan,* in an action for damages for an assault and battery by defendant on May 17, a counterclaim for libel published by plaintiff of and concerning the defendant on May 8 was held to be proper. The court quoted *Scott v. Waggoner* with approval and said:

"In order to determine whether a counterclaim arises out of the transaction set forth in the complaint as the foundation of plaintiff's claim, we are not limited to the facts alleged in the complaint. We look to 'all the facts and circumstances out of which arose the injury complained of by him alone.' . . . We approve the language used by the author in 34 Cyc. 687 note 63, where, in stating the holding of *Story, etc., Commercial Co.* v. *Story,* 100 Cal. 30, 34 Pac. 671, he says: *'The transaction is not limited to the facts set forth in the complaint,* but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of the agreement, and, if plaintiff omits or fails to set forth in his complaint the entire transaction out of which his claim arose, the defendant may supplement this omission by

[123]Provision now contained in R. C. M. 1935, §15.
[124]48 Mont. 536, 544, 545.

setting forth in his answer the omitted facts, so that the entire transaction may be before the court, for plaintiff is not at liberty to select an isolated act or fact which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on the fact alone, if the fact is so connected with others that it form only a portion of the transaction.'

"It will be noted that the case which is there cited involved contractual transactions,[125] but there is no distinction between the rule in such cases and in actions *ex delicto*. . . .

"We cannot approve a rule which arbitrarily uses the element of time in determining whether or not various causes of action arise out of the same 'transaction.' If, as a matter of fact, there is such a connection that the acts complained of were the results of plaintiff's own acts, we think all causes of action arising therefrom must be litigated in one action."[126]

[125]That the word "contract" is used to refer to the negotiations culminating in the agreement sued upon, see CLARK, CODE PLEADING (1928), p. 452.

[126](1923) 67 Mont. 9, 15, 16, 17, 214 P. 1106. For other Montana cases dealing with the term "transaction" see Griffiths v. Thrasher, *supra*, note 98 (Action to foreclose a chattel mortgage on hotel furniture, given to secure promissory notes for the balance of the purchase price. "Cross-complaint" alleging that the sale leading to the execution of the mortgage was induced by fraudulent representations of the seller relating to patronage, class of patrons, etc., by reason of which defendant was induced to pay $2500 for the business over and above the reasonable value, and take a three year lease upon the hotel property from the owner at a higher rate than the defendant would otherwise have paid, whereby defendant suffered damages in the sum of $5680, held to state a claim arising out of the transaction sued upon); Kinsman v. Stanhope (1914) 50 Mont. 41, 144 P. 1083, L. R. A. 1916 C. 443 (Action for conversion of an automobile, plaintiff alleged to have been entitled to possession by virtue of his purchase of it from defendant. Counterclaim for balance due on purchase price, held to arise out of the same transaction, or, at least, to be connected with the subject of the action); James v. Speer (1923) 69 Mont. 100, 220 P. 535 (Action by mortgagor of personal property against the mortgagee for its conversion. Counterclaim for balance due on the note secured by the mortgage after sale at foreclosure, held proper subject of counterclaim); Guthrie v. Holloran, *supra*, note 59 (Action for damages for conversion of an automobile. Counterclaim, treated as "cross-complaint," for amount due on promissory note executed and delivered on an exchange of another used automobile for the automobile involved). *Cf.* also Boucher v. Powers, *supra*, note 109; Osmers v. Furey, *supra*, note 89, decided before Scott v. Waggoner (Action by lessee of building against lessor and a sheriff in claim and delivery to recover possession of lodging house furniture and damages for wrongful taking. Defense: justification of seizure under lien for rent, and counterclaim for expenditures for repair of building which plaintiff allowed to fall into disrepair during tenancy. Held, motion to strike should have been granted because, for one reason, the cause of action alleged in the counterclaim did not arise out of the transaction set forth in the complaint and was not connected with the subject of the action. The

While such a view of the term "transaction" is much more liberal than the view of some other courts, yet it would seem that it is in accord with the purpose of the statute. If multiplicity of suits is to be avoided, then a group of circumstances which have a bearing upon one another should be considered as one transaction.

The meaning of the phrase "subject of the action" has been the subject of much refinement, and it has been debated whether it means cause of action, object of action, defendant's "wrong," plaintiff's "primary right," or the thing involved.[127] Much is to be said for the position that the phrase refers to the thing involved—for the position that when a tangible thing is involved in the case, the tangible thing is the subject of the action; that when the action is on contract and a tangible thing is not involved, the contract, written or unwritten, is the subject of the action; and that when the action is in tort and a tangible thing, including the human body, is not involved, the intangible thing injured is the subject of the action.[128] Certain Montana cases seem to have so treated it.[129] However, in other cases the court has expressly stated that the subject of the action does not relate to the thing itself, but refers to the origin and ground of

court said: "The transaction set forth is the wrongful taking of the property. While rent due for the use of the premises would have been a complete justification, the fact that it was due did not arise out of the wrongful seizure, nor was it in any way connected with it. It was the result of the breach of the lease, as were all the other items alleged as elements for defendant's claim." It is submitted that such a position would not be taken by the court under the rule of Scott v. Waggoner and Mulcahy v. Duggan, and that the lease and its breach was a circumstance connected with the alleged wrongful taking).

[127]Wheaton, *A Study of the Statutes*, etc., *op. cit.*, note 120.

[128]Wheaton, *A Study of the Statutes*, etc., *op. cit.*, note 120.

[129]Davis v. Frederick, *supra*, note 121 (In action for wrongful issuance of an execution upon a judgment and levy upon money, the court said, "The subject of the action was the money seized under the execution, and paid to appellant." As, apparently, there was no connection between the counterclaim, which alleged an indebtedness from plaintiff to defendant upon an account, and the issuance of the execution and the levy, what was said would seem to have been *obiter dictum);* Davis v. Davis, *supra*, p. 44 (In holding that the matter alleged by defendant was connected with the subject of the action and sufficient as a counterclaim, the court said, "The title to the premises is the subject of the action"). And *cf.* Callender v. Crossfield Oil Syndicate, *supra*, note 59 (In suit against the owner of an oil and gas lease to foreclose a mechanic's lien, the subject matter was the leasehold, under R. C. M. 1935, §9151, dealing with cross-complaints. It is to be noted that the cross-complaint statute permits relief relating to the "subject matter upon which the action is brought, or affecting the property to which the action relates"),

plaintiff's right to recover and obtain the relief asked for.[130] And in *Potter v. Lohse,* the court quoted with approval a statement of a New York court that: "The words 'subject of the action' mean the facts constituting plaintiff's cause of action."[131]

However, in view of the broad and liberal construction of "transaction" adopted by the court in *Scott v. Waggoner* and *Mulcahy v. Duggan,* it would seem that abstract definitions of "subject of the action" are of little importance in results to be reached; and that in truth there is no definite line of demarcation between "transaction" and "subject of the action,"[132] but rather that "subject of the action" was intended merely to broaden the term "transaction" and permit the trial in one action of controversies with respect to all circumstances which are so connected or have such a bearing one upon the other[133] that it is just and expedient that they be tried together.[134]

[130]Collier v. Ervin, *supra,* note 80; Pittsmont Copper Co. v. O'Rourke, *supra,* note 64 (Suit to enjoin sale of property in execution of judgment. Counterclaim alleging judgment obtained by defendant against another company and a transfer of the property of that company to plaintiff to avoid liability to defendant, held proper, the subject of plaintiff's action being its right as owner to enjoy the property in question free from the levy complained of, free from the threatened sale, and free from any claim on the part of defendant by virtue of his judgment, and the ground for defendant's claim to affirmative relief being his right to make the same levy and sale on execution of the same judgment. *Query:* Would not the same result have followed by treating the subject of the action as the tangible thing, namely, the property?)

[131]31 Mont. at p. 97.

[132]See, for instance, Kinsman v. Stanhope, *supra,* note 126, 50 Mont. at p. 46: "defendant's counterclaim arose out of the same transaction, or, at least, was connected with the subject of the action."

[133]In Kaufman v. Cooper, *supra,* note 117, decided prior to Scott v. Waggoner, the court said that the requirement that the counterclaim be "connected with the subject of the action" necessitated a "legal relationship between the ground of recovery mentioned in the counterclaim, and the subject of plaintiff's action as disclosed in his complaint." However, the court said that from the record it could not say what the relationship was, and just what the court meant by "legal relationship" is not clear. To require a connection in the sense of immediate and direct, or, in contract cases, such as Kaufman v. Cooper, to require that it be something the parties contemplated in their dealings with each other, would seem to be to apply a lawyer's view, an approach which, as we have seen, the Montana court abandoned in Scott v. Waggoner when dealing with the term "transaction."

[134]See Wheaton, *A Study of the Statutes,* etc., *op. cit.,* note 120; Toelle, *Joinder of Actions,* 18 CALIF. L. REV., 459, 474, 477, (1929-30); CLARK, CODE PLEADING (1928), pp. 453-457. Clark urges that it is not desirable to attempt to delimit separately the sphere of each term by abstract definitions, for to do so is to obscure the true function of the counterclaim which is to enable litigants to settle in one suit as many controversies as are feasible.

6. *What Constitutes a Contract Counterclaim.*

Under the second subdivision of the counterclaim statute, if the action be on contract a defendant is permitted, but not required, to set up a counterclaim on contract, although it does not arise out of the contract sued upon and is not connected with the subject of the action.[135] It is clear that this subdivision comprehends claims which are unliquidated as well as those which are liquidated.[136]. A problem arises, however, as to what causes of action are to be treated as on contract.

Although in *Davis v. Frederick,* decided in 1887, the Supreme Court of Montana said that the provision of the code intends a cause of action arising *ex contractu,* and not *ex delicto,*[137] yet it is established as a general doctrine by the overwhelming weight of authority that any cause of action which might have afforded a basis for a claim in express or implied contract prior to the codes of civil precedure will be treated as a cause of action in contract.[138] And such was the position taken in *First National Bank of Butte v. Silver.*[139] In that case, in an action upon a promissory note, the defendant interposed a counterclaim alleging that plaintiff wrongfully obtained a check of defendant's, caused it to be indorsed, presented it to the bank upon which it was drawn, collected the money, "converted" it to his own use, and failed to account to the plaintiff for the same. The court held that by waiving the tort and proceeding as upon the implied contract, defendant could set up the cause of action as a counterclaim, for subdivision 2 of the statute includes implied as well as express contracts. It seems, therefore, that Montana is in accord with the weight of authority, in spite of *Davis v. Frederick.*

A question of more doubt is whether the election to sue in contract must be indicated in the pleading itself.[140] It is to be observed that in *First National Bank of Butte v. Silver* the court was not deterred from treating the counterclaim as on contract by reason of the fact that the defendant alleged that the plaintiff "converted" the property. However, in *Davis v. Frederick,*

[135]Of course, the first subdivision of the statute applies if plaintiff's cause of action and defendant's counterclaim arise out of the same contract, and in such a case defendant must urge his claim as a counterclaim or be barred from enforcing it in a subsequent separate suit. *Supra,* pp, 39, 61.

[136]POMEROY, CODE REMEDIES (5th ed. 1929), §674; CLARK, CODE PLEADING (1928), p. 458.

[137]*Supra,* note 121.

[138]POMEROY, CODE REMEDIES (5th ed. 1929), §677; CLARK, CODE PLEADING (1928), p. 460.

[139]*Supra,* note 81.

[140]POMEROY, CODE REMEDIES (5th ed. 1929), §677.

the action was to recover on account of the wrongful issuance of an execution upon a judgment previously recovered against the plaintiff; and the plaintiff alleged that the judgment had been satisfied before the execution was issued, that the execution was levied upon the property of plaintiff, the same being money in the hands of the sheriff, and paid to the defendant upon the execution, and he claimed judgment for the amount seized and paid over, with interest. In holding that the complaint set forth an action in tort and not on contract, so that a contract counterclaim not connected with the subject matter was not available, the court said:

> ". . . It is true, the respondent might have waived the wrongful issuance of the execution, and brought his action upon the implied contract to repay the money wrongfully seized and paid over under the execution, or, as the expression would have been before the adoption of the code, waived the tort, and sued in *assumpsit;* but this is not a question of what might have been done, but of what, in fact, was done. We must look to the pleadings as we find them. . . . "[141]

It is not apparent why any different rule should be applied in testing the character of plaintiff's cause of action than in testing the character of defendant's counterclaim, unless it be that a defendant by the very fact of urging his claim as a counterclaim rather than in a separate suit evidences his election to waive the tort and sue in contract, whereas the only way in which a plaintiff can indicate his election is in the manner in which he phrases his pleading. However, to construe the statute so as to permit a plaintiff to control the use of a counterclaim by the manner in which he casts his pleading does not promote the purpose to prevent multiplicity of suits. And it would seem to be more consistent with a system of code pleading, under which the legal principle upon which a party bases his cause of action is not expressed and the statement of the facts constituting a cause of action is the heart of the pleading, to permit the counterclaim in any case where the allegations of facts in the plaintiff's complaint and the defendant's answer are such that they could have been cast as an action on contract and a counterclaim on contract, irrespective of the way in which the allegations are in fact phrased.

As the contract counterclaim may be an unliquidated claim, there may be a tendency to limit the statutory provision because of possible burdens at trial incidental to liquidation—a burden

[141] 6 Mont. 300, 302.

not compensated for by the advantage gained through trying in one suit claims arising out of one transaction.[142] However, if in any case the application of the statute does prove to be unduly burdensome, the Montana statutes contain provisions for direction by the court, in its discretion, of a separate trial of issues.[143] It is submitted that inconvenience of trial should be taken care of by ordering separate trial, rather than by a judicial construction of the statute which limits the filing of counterclaims.

III. ADVANCED PROCEDURE AND CONCLUSION

Since 1873 the English counterclaim procedure has been far in advance of the practice under American codes such as that existing in Montana. The English rules of court provide that the defendant may counterclaim any right or claim, but the court may, on the application of the plaintiff before trial, if in the opinion of the court such counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.[144] Under these rules any or all defendants may counterclaim against any or all plaintiffs;[145] it is not necessary that the counterclaim tend to diminish or defeat plaintiff's recovery, or arise out of the same transaction as plaintiff's claim, or be in any way connected with it, or that it exist at the time of the commencement of the action.[146]

In the United States, statutes in several of the states have for a number of years contained advanced procedure for the interposition of cross-demands. The Arkansas and New Jersey statutes permit as a counterclaim any cause of action in favor of any defendant, and provide for the bringing in of new parties and the ordering of separate trials or actions in the discretion of the court;[147] and the Iowa code permits the defendant to counterclaim any cause of action which he has against the plaintiff and which is matured when pleaded.[148] More recently Illinois and

[142]CLARK, CODE PLEADING (1928), p. 458.
[143]R. C. M. 1935, §§9328, 9329.
[144]ENG. JUD. ACT., Order 19, rule 3.
[145]Hodson v. Mochi (1878) 8 Ch. D. 569; Manchester & Sheffield Rail. Co. v. Brooks (1877) 2 Ex. Div. 243.
[146]Bartholomew v. Rawlings (1876) W. N. 56; Beddal v. Maitland (1881) 17 Ch. Div. 174, 181, 182; Stooke v. Taylor (1880) 5 Q. B. Div. 569, 576.
[147]ARK. ACTS 1917, p. 1441, DIG. STATS. OF ARK. (1937) Ch. 22, §§1417, 1418, 1419; N. J. P. L. 1912, p. 379, §12, N. J. S. A. 2:27-137, 139, 141.
[148]IA. CODE (1927) §11151, subd. 1. See also the change in California in 1927, abolishing the limitations that the counterclaim must arise out of the transaction set forth in the complaint or be connected with the subject matter of the action, and that a contract counterclaim must exist at the commencement of the action. CALIF. STATS. & AMDTS. (1927), p. 1620.

New York have extended their practice acts to liberalize the use of cross-demands. The new Practice Act of Illinois provides that any demand by any defendant against any plaintiff or any co-defendant may be pleaded in a cross-demand in any action;[149] and the New York Laws of 1936 provide that "a counterclaim may be any cause of action in favor of the defendants or some of them against the plaintiffs or some of them, a person whom a plaintiff represents or a plaintiff and another person or persons alleged to be liable."[150]

When it came to the formulation of the new federal rules of civil procedure the existing advanced procedure in England and the United States furnished a model for permissive counterclaim, and, in furtherance of the purpose to prevent multiplicity of suits, provision was also made for compulsory counterclaim. The rules provide that any claim which any defendant has at the time of filing his pleading against any plaintiff, arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim, must be set up as a counterclaim or it is waived; and that any defendant may state as a counterclaim any claim against any plaintiff not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. It is not necessary that the counterclaim diminish or defeat the recovery sought by the plaintiff, but a defendant may claim relief of a different kind from that sought by the plaintiff. The counterclaim need not have been acquired or matured for action before the commencement of the suit, and, with the permission of the court, a claim which either matures or is acquired by the defendant after serving his pleading may be presented. Additional parties may be brought in, and there may be separate trials and judgments.[151]

Thus the advanced procedure abolishes the limitations that the counterclaim be one in favor of a defendant between whom and the plaintiff a separate judgment may be had, that it tend to diminish or defeat the plaintiff's recovery, that it exist at the commencement of the action, and that it either be a contract counterclaim or arise out of the transaction set forth in the complaint or be connected with the subject matter of the action.

Surely the question of the extent to which procedural recognition should be given to cross-demands should no longer be approached in the failing light of common law recoupment and statutory set-off of English origin. If the purpose is to enable

[149]ILL. LAWS 1933, p. 784; SMITH-HURD, ILL. ANN. STAT. (permanent ed.) ch. 110, §162, subd. 1.
[150]N. Y. LAWS 1936, ch. 324; CAHILLS N. Y. CIV. PRAC. (7th ed.), §266.
[151]Rules 13 and 42(b).

parties litigant to adjust their differences in one action and to prevent the multiplicity of suits, the new federal rules of civil procedure are logical; and economy of the time of the courts, of public funds, and of both the time and the money of the parties litigant, should be practiced so far as trial convenience and justice permits, irrespective of whether in any given jurisdiction there is a greater or lesser degree of congestion of commercial and legal business. It is true that under the advanced procedures incongruous counterclaims may be interposed, and different questions of fact may be presented requiring different modes of trial; but there is nothing in such a situation to defeat either trial convenience or justice to the parties, so long as the court has the discretionary power to order separate trials, for surely a court which is entrusted to try both questions of fact and law may be entrusted to order separation, not only when its own convenience will be promoted but also when necessary in fairness and justice to the parties.[152]

It may be expected that there will be an increase in the number of states which, in adopting rules or statutes patterned after the federal rules of civil procedure, will include the provisions of the federal rules with respect to counterclaims, as Arizona[153] and Colorado[154] have already done.[155] And may it not be expect-

[152]The interposition of an "equitable" counterclaim in an action "at law," or *vice versa*, does not present a new problem, for R. C. M. 1935, §9146, already permits such incongrous defenses, and there need be no difficulty in working out the form of trial. Parties may waive jury trial; or the court may choose to have the equitable issues tried to the jury also and send the entire case to the jury; or the court may hear the equitable issues along with consideration of the legal issues by the jury, the resulting judgment proper on the various findings of fact to be entered by the court; or the trial of equitable issues may be had to the court entirely apart from the trial of jury issues. CLARK, CODE PLEADING (1928), p. 64.

[153]ARIZ. CODE ANN. 1939 (official ed.) ch. 21, §§437-445.

[154]Rules 13 and 42(b), R. C. P. COLO. (effective Ap. 1941).

[155]Of course, this study is of but a small segment of the rules of trial practice, a simplification of which, patterned after the federal rules of civil procedure should proceed apace. As said by Hon. John T. Parker, chairman, Special Committee on Improving the Administration of Justice, American Bar Association:

> ". . . . Arizona and South Dakota have adopted the new federal rules almost in toto. Texas has adopted a simplified code based in large measure on the rules and Colorado has done a monumental work in adopting the federal rules with the same numbering, supplemented by such additional rules as are required by local conditions. In many other states features of the federal practice, such as discovery, pre-trial, etc., are being adopted. . . . It is highly desirable that such procedure be modeled on the federal rules. There is absolutely no sense in having a different kind of procedure in the state and federal courts or in different sections of the country. Diversity makes for confusion and misunderstanding and accom-

ed that courts will in some degree reflect the tendency toward unrestricted cross-demands by a more liberal construction of the statutory limitations in states retaining the old procedure? May it not be expected that the Montana court, having shown commendable liberality in its determination of what constitutes a transaction counterclaim, will re-examine other limitations placed upon counterclaims under R. C. M. 1935, Section 9138?

plishes no good purpose. When a simple, expeditious system has been adopted by the federal courts for use throughout the country, I see no reason why the states should not adopt it and relieve the bar of the necessity of learning two systems of practice. The federal rules are the result of long study and the best efforts of the bench and bar of the entire country. . . . ." 27 A. B. A. J. 748 (Dec. 1941).