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GOVERNMENT LAW SCHOOL OF SIAM.

Siam has a government law school, under the control of the ministry of justice, such as formerly existed in Japan. Graduates are generally appointed at once either judges of minor courts or public prosecuting officers. In 1904-5 it had one hundred and ten students, but in 1905-6 only ninety-eight. Most Siamese law students are educated here, but it is evident either that the instruction is inadequate, or the standard for the final examinations exceedingly high, since of one hundred and ninety-five who were examined in January, 1906, only twelve passed. The previous year one hundred and seventy-seven were examined and ten passed.

PRACTICING MEDICINE. WHAT CONSTITUTES.

The Supreme Court of New York in the recent case of *State v. Allcutt* (not yet reported) holds that one who assumes the prefix "Dr.," displays in the window of his residence his name followed by the words "Mechano Neural Therapy," receives, examines and treats patients by touching them with the tips of his fingers, and gives direction as to diet, receiving compensation for his services, is engaged in practicing medicine within the purview of the Statute making it a penal offense so to do without a license. The defendant neither administered nor recommended drugs of any kind, but simply claimed that all ailments were attributable to defective circulation, which his treatment restored to a normal state.

Such restrictive statutes are constitutional, being a valid exercise of the police power of the state. *State v. Webster, 41 L. R. A., 212*, and cases cited at page 217. The purpose of the

legislation is to protect an unwary public from the evils of charlatanism and empiricism, ignorance and quackery; and in this day and age there can be no denying the fact that it is of the most salutary description. People are continually ready to be imposed upon, and there are countless persons ready to prey upon their credulity.

The statutes on this subject vary greatly, and therefore the same state of facts will, in different states, call for different results. It is quite generally the case that the legislative body has defined what constitutes practicing medicine within the provisions of the act, but in the absence of such, a much greater latitude is accorded to the courts, and the question is necessarily involved of whether the phrase is used with its common general meaning or a technical sense. On this the courts are variant. *Bragg v. State*, 134 Ala. 165. If the former, then its scope is much more restricted. But it is safe to assert that in no court does the rule still obtain that the administration of drugs is the *sine qua non* of practicing medicine. It is a progressive science, and as such, views as to treatment are now recognized that a century ago would not only have been discountenanced but ridiculed, and *vice versa*. So the courts neither attempt to nor can they lay down any hard and fast rule on the subject. *People v. Phippin*, 70 Mich. 6.

The main case by clear inference adopts the view that a diagnosis is an essential and integral part. This is to be regretted, as it opens the door to many an impostor and quack. Magnetic healers, (*Parks v. State*, 159 Ind. 211); cancer doctors, (*Musser v. Chase*, 29 Ohio St., 577); opthalmologists, (*State v. Yegge*, 103 N. W. 17 S. D.); one who engages to cure alcoholism, (*Springer v. Dist. of Col.*, 23 App. D. C., 59), or the opium habit, (*Benham v. State*, 116 Ind. 112); an obstetrician, (*State v. Welch*, 129 N. C. 529) have all been held to be within the statute. A druggist who applied lotions to a lacerated finger, the other party believing him to be a physician, was held to be practicing medicine under a statute defining it as "to treat, operate on, or prescribe for any physical ailment." *Matthei v. Wooley*, 69 Ill. App. 654.

It is to be lamented that the lines cannot be drawn more closely as to Christian Scientists, as imposition in its worst form is perpetrated under the shield and cloak of religion. They have offices, receive patients, style themselves in many cases "practitioners," and receive compensation for their services. They attempt to cure nearly every disease that flesh is heir to. This is a dual paradox, and it is by reason of it that they are immune from the operation of the ordinary statute. They attempt to cure, and yet they do not claim to do so *per se* but by invoking Divine interposition. They deny all disease, and yet they endeavor as above to alleviate or cure the physical or mental abnormalities that can only be predicated on it. It appears that no such play upon words should relieve the case from its true construction, therefore the Nebraska Court has held it to be the practice of medicine under a usual statutory

definition. *State v. Buswell*, 40 Neb. 158; *contra*, *State v. Mylod*, 20 R. I., 632. More stringent statutes should be passed or a more liberal interpretation given to existing ones. The language used in the New York case justifies the conclusion that no prosecution can be successfully maintained against a Christian Scientist in that state. It is far from the intention to state that every one who entertains the beliefs sanctioned by this sect and who follows its teachings should be considered as practicing medicine, but the assertion is made that its exponents, who hold themselves out professionally as engaged in whatever is in reality "the healing art," although that particular nomenclature is repugnant to their tenets, should be considered as within the reason and spirit of the statute.

The point on which there is the widest diversity of opinion is in regard to osteopaths. On either side, a cluster of decisions may be found, but the decided weight of authoritv is to the effect that they are engaged in the practice of medicine. *Jones v. People*, 84 Ill. 453. A knowledge of anatomy, physiology, hygiene, histology and pathology is essential to them, as it is to them as it is to a regular physician, and the only point of distinction is as to therapeutice, and the day has passed when all reliance is placed in drugs. Their value in many cases is indisputable, yet there are diseases in which other forms of treatment are far more efficacious. Consumption is instanced. And yet it would be an anomaly to say that persons engaged in these other modes of treatment were not practicing medicine. The Alabama Court in the case of *Bragg v. State* (*supra*), in an exceedingly interesting decision, traces the development of the science and demonstrates that in its primary sense it applies to the art of treating or of attempting to cure or alleviate any mental or physical ailment by any means whatever, and in its popular acceptation the term has become materially perverted.

The cases will be found collated and the subject discussed in 3 L. R. A. (N. S.) 763, note to *O'Neill v. Tennessee;* and *Am. & Eng. Enc. of Law*, 2nd Ed., Vol. 22, p. 785.

PROFESSIONAL CONDUCT—SOLICITING BUSINESS.

In the case of *Ingersoll et. al. v. Coal Creek Coal Company*, 98 N. W. 178, the Supreme Court of Tennessee availed itself of an opportunity to denounce as unprofessional a lawyer's active solicitation of business. A mine explosion had occurred, causing great loss of life and many injuries. A young lawyer, Chandler, was one of many attorneys who rushed to the scene of disaster. The Court of Chancery stated that Chandler "entered actively into competition for business, that he boldly and openly saw widows and others whose husbands and next of kin had been killed in the explosion, and sought as other lawyers were doing, to have them entrust the prosecution of suits to his firm, but that it does not appear that he practiced any fraud or deception, or made any false representations to get the cases for his firm." Chandler secured some forty cases which were to be prosecuted on a contingent fee and of this he was to receive a portion from

Ingersoll and Peyton, the law firm for whom the cases were solicited. This firm prepared and filed declarations in all the cases and prepared to try them. The Coal Company, through their general counsel, employed other counsel or agents and negotiated settlements, ignoring Ingersoll & Peyton, the complainants in this case, the attorneys of record in the damage suits. It was conceded that the plaintiffs had the right to recover for their services unless they were precluded from recovery by unprofessional conduct. The court said:

"We are of opinion that, under the facts disclosed by the finding of the Court of Chancery Appeals, complainants are not entitled to recover, because these facts show acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties. We cannot agree to several propositions advanced by complainants. We cannot agree that in these latter years a spirit of commercialism has lowered the standard of the legal profession. We cannot agree that the practice of law has become a "business" instead of a "profession," and that it is now allowable to resort to the practices and devices of business men to bring in business by personal solicitation, under the facts shown in this case. As to how far an attorney may go in soliciting business, or whether he may solicit at all, we are not called upon to decide; but when such a case is presented, as is disclosed in this record, of attorneys rushing to the scene of disaster in hot haste, and competing with each other in soliciting the bereaved ones to allow them to sue for their losses, we feel that we are called upon to say in no uncertain terms that such conduct is an act of impropriety and inconsistent with the character of the profession. We cannot, we dare not, lower the standard of the legal profession to that of a mere business, in which fleetness of foot, or the celerity of the automobile, determines who shall be employed. The miserable victims of the disaster are dazed by the terrible bereavement. They are in no condition to consider their rights to damages. In their extremity, they fly to any one promising relief, when, if left to time and more mature consideration, they would be enabled to make, perhaps, a better choice. In addition, it is unbecoming a member of the profession, and a public scandal, and when he bases his right to recover fees upon such improper conduct, and lowering the character of the profession and the court, it is no excuse that other attorneys do the same; but this is rather a reason why this court should act promptly and decidedly, in order that an end may be put to the practice. It is no excuse that corporations which have caused such disasters have been alert to send their agents and representatives to the scene with a view of forestalling suits and making favorable compromises. This court has never failed to condemn this practice in the strongest terms; and, whenever a case has come before it which in any way smacked of fraud or undue advantage arising out of such conduct, this court has not been slow to disregard or set aside improper or hard settlements. But such agents of corporations are not, as a rule,

officers of the court, nor do they occupy that high status which the law places the attorney upon; and we think that we can safely say that if any attorney should make such settlement, under such circumstances, this court would not hesitate to disbar him. It is said that there is no precedent for refusing fees because of such conduct. If this be so, we are admonished by the record in this case that it is high time that such a precedent be set, and in such terms as may not be mistaken or misunderstood."

This particular phase of professional conduct does not seem to have been before presented for judicial consideration. To that extent the present case is peculiar. Text writers and cases in dealing with professional conduct are concerned chiefly with grounds for disbarment. They thus treat particularly aggravated cases of fraud and instances of gross misconduct. Soliciting business by a professional man is nearest akin to advertising. Both the legal profession and the medical profession in their respective associations have discussed and condemned such practices as opposed to public welfare and not in line with the highest professional ideals. An eminent jurist has said, "The world relies on the lawyer to tell what the conduct of one man should be to others." On account of such an influential position in a community it is important that the honor and dignity of the profession should be maintained and that a professional pride should prompt all lawyers to hold aloof from common commercialism that cannot but lower the dignity of the bar. As a lawyer is an officer of the court, so the judge of the court has discretionary powers in the punishment of unprofessional conduct. Chief Justice Taney, in Ex Parte Secombe (19 How. 9) speaking of the court's power to disbar, said, "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice or personal hostility, but it is the duty of the Court to exercise and regulate it by sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Courts as the rights and dignity of the Court itself." The Supreme Court of Tennessee in the present case has most strongly asserted this power of the judiciary to discipline lawyers not only in disbarable misconduct, but requires of them as officers of the court a liability for unprofessional acts not reached by statute or the letter of the law.

Many states guard against solicitation of legal business in some of its forms by statute. In Langdon v. Conlin, 67 Neb. 243; Alpers v. Hunt, 86 Cal. 78, a contract by an attorney to pay a layman one-third of his fee if layman procures the employment of the attorney by a litigant, is contrary to public policy. The court says, "Such practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person."

It is important that the legal profession be respected by people of all classes. The decision in *Ingersoll v. Coal Creek Coal*

Company will have a tendency to bring about this result by its condemnation of a practice which has become prevalent in certain localities.

FUGITIVE FROM JUSTICE.

The decision of the Supreme Court of the United States in the recent case of *Appleyard v. Massachusetts*, handed down December 3, 1906, is of interest not because the result reached was novel or unexpected but for reason of the fact that it is a final and complete adjudication of a matter on which the position assumed, while supported by the decided weight of authority, was yet the subject of some contrariety of opinion. It embodies a construction of the term "fugitive from justice," as found in the act of Congress respecting interstate extradition, and sanctions the proposition that the *actual intent* of the alleged offender, in leaving the jurisdiction where the crime was committed, is not material to a determination of his *status*.

The case of *Pettibone v. Nichols*, was passed upon immediately preceding by the same court. (See Comment XVI, YALE LAW JOURNAL 347). While cognate to the present case in many particulars, the principle announced is distinctively different; it there being held that a circuit court of the United States, when asked upon *habeas corpus*, to discharge a person held in actual custody by a state for trial in one of its courts under an indictment charging an offense against its its laws, cannot properly take into consideration the methods whereby that custody was obtained.

The decision in *Appleyard v. Massachusetts* is a confirmation of the *dictum* in *Roberts v. Reilly*, where it was said, "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having committed within a state that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." 116 U. S. 80. This *obiter dictum* had been followed by several decisions in state courts. *State v. Richter*, 37 Minn. 438; *Hibler v. State*, 43 Tex. 197, 201; and others cited in principal cases. In the Minnesota case the statement is made, "the important thing is not their purpose in leaving, but the fact that they had left, and hence were beyond the reach of the process of the state where the crime was committed," and again, "the simple fact that they are not within the state to answer its criminal process, when required, renders them, in legal intendment, fugitives from justice, regardless of their purpose in leaving." These cases represent the weight of authority, both logically and numerically.

As opposed to the prevailing view may be cited *Degant v. Michael*, 2 Ind. 396 and *United States v. O'Brian*, 3 Dillon 381. In the latter there was under consideration a state statute to

the effect that no indictment should be found unless within two years from the commission of the alleged offense, followed by a proviso that the bar or limitation should not extend to one fleeing from justice. The Court says, "it is necessary..... to determine the motives of the defendant in leaving the state" and further on, (referring to fleeing from justice), "it means to leave one's home, or residence, or known place of abode, with intent to avoid detection or punishment for some public offense against the United States." In Massachusetts also there seemed at one time a tendency to so construe the phrase as to require a consciousness of guilt in certain classes of cases. *OP. Atty. Gen. in Vinal case.* (1890.) In *ex parte Tod*, 12 S. D. 386, an unusual state of facts existed and a peculiar modification was imposed on the general rule. There the petitioner in *habeas corpus* had defrauded his employers. Subsequently he departed from the state at the request and direction of his employers and on their business. When sought to be extradited, it was held that he was not a fugitive from justice, and the following is quoted from the decision: "While it may not be necessary, to make a person a fugitive from justice, that he should leave the state where the offense is alleged to have been committed, with the intention, or for the purpose of, avoiding a prosecution, still we think it must appear that he left the state without the knowledge or consent, actual or implied, of the parties alleged to have been defrauded."

It is almost universally conceded that the party sought to be extradited must have been actually, physically present in the demanding state at the time of the occurrence of the alleged offense. A constructive presence will not be sufficient. It would indeed be a distortion of language not to be countenanced, to say that a person who had never set foot in a state, had fled from it. Accordingly, it was held that where a dealer in horses, residing in Chicago, had through the mails, effected a sale to a resident of Tennessee by means of false pretences, he could not be extradited from Illinois, never having been corporeally present in Tennessee. *Tennessee v. Jackson*, 36 Fed. 258. So also where the alleged criminal is only constructively present in a state at the time of the commission of a crime, he cannot be considered a fugitive from justice, although it be, that subsequent to said time, he has actually been in the state in which the crime was committed and which is now seeking his extradition. *People v. Hyatt*, 172 N. Y. 176.

The doctrine enunciated by the Supreme Court must appeal to every one as a most sound one. If the *animus* of the individual was the controlling factor, if his secret thoughts and motives had to be inquired into to ascertain whether or no he was a fugitive, it would to all intents and purposes emasculate the act of Congress on the subject. The subjective test must be repudiated as too vague, shadowy and uncertain for practical purposes. While the opinion does not expressly mention these objections, yet it is to be plainly inferred from the whole current of authority on the subject, that the matter was considered by the court in arriving at its conclusion.

DYING DECLARATIONS.

The limitations on the admissibility of dying declarations are shown in the case of *State v. Thompson*, decided by the Supreme Court of Oregon and reported 88 Pac. 583. The accused was convicted of murder in the second degree and appealed from an alleged erroneous ruling of the court in admitting the dying declaration of his victim. The decedent was told by his physician that he had only a few moments to live. Preparatory to making the statements introduced in evidence, the decedent was asked what expectation of recovery he had, and he replied that he didn't know. The court held these statements were admissible as dying declarations.

The admissibility of dying declarations has been long recognized, but the law regarding them has not always been the same. Some of the very earliest cases show that such evidence might be admitted in civil suits, as when in an action on a deed, the dying declaration of a witness to its execution was admitted. *Wright v. Litlet*, 3 Burr. 1255. But in an action of ejectment reported in 17 St. Tr: 116, (1743) a distinction between the admissibility of such evidence in criminal and civil actions was pointed out and the necessity for admitting dying declarations in the latter was shown not to exist.

The modern doctrine regarding the admission of dying declarations insists upon the presence of well-defined circumstances at the time of the making of the declarations. They are only admissible in trials for homicide, *State v. Barker*, 28, Oh. St. 583; the death for which the accused is on trial must be that of the declarant. *Railing v. Com.*, 110 Pa. 103; the subject of the declarations must be the circumstances connected with the death for which the prosecution was instituted. *People v. Wong Chuey*, 117 Cal 624. It is only where these facts exist that statements of a dying declarant are admissible, and further, there must appear, preliminary to entertaining this evidence the fact that the declarant was in fear of impending death. *Mattax v. U. S.*, 146 U. S.; 140. Whether or not all these conditions are present must be decided by the court and then the evidence must be admitted or excluded accordingly.

That such declarations are only admissible in prosecutions for homicide is now well settled. This exception to the hearsay rule was originally made on the ground of necessity and it is only in criminal cases similar to the above that such necessity is now conceded to exist. It was said by Judge Ogden in *Donnelly v.State*, 26 N. J. L.; 617; "Such declarations are received as evidence from necessity, for furnishing the testimony which in certain cases is essential to prevent the manslayer from escaping punishment."

Another limitation recognized by the present doctrine is that the prosecution in which such evidence is to be admitted must have been instituted for the death of the person making the statements. Such dying declarations being admitted because of necessity in the case of secret murders, it is plain that the above

rule results naturally. *State v. Bohan*, 15 Kan. 418. Again the declaration sought to be introduced must concern the facts leading up to or causing or attending the injurious act in question. This rule excludes any narration that the declarant may attempt to state as to previous relations with the accused. His declarations are only admissible in so far as they explain the occurrence or fix the liability on some person. In *People v. Smith*, 172 N. Y., 242, the court in discussing the dying declarations introduced in that case, speaks of such declarations as admissible as part of the *res gestae*. It does not seem essential to the dying declarations now under discussion that they should be part of the *res gestae*. Statements of this nature to be admissible should undoubtedly explain the nature of the assault, but that they should accompany the act so closely as to be part of it would not seem to be an essential characteristic of this kind of evidence. Words which accompany and explain an act are admissible where the principal fact is admissible and no limitations are placed on them as is done in the case of dying declarations.

Another very important qualification to be noticed in this connection is that the declarant must have made the statements sought to be introduced with a realization and belief that death was inevitable. This qualification must be present, but it is not necessary that the person should really die soon after the making of the statements. *Com. v. Cooper*, 5 Allen 495. A declarant under these circumstances is as likely to tell the truth as if he were under the sanction of an oath. In fact, the fear of death supplies the office of the oath. *Tracy v. People*, 97 Ill. 106. The declarant must believe that dissolution will soon result, in order that full faith should be given his words. *State v. Welsor*, 117 Mo. 570. The trial court determines whether or not such fear exists in the mind of the declarant from all the circumstances of the case. *State v Cronin*, 64 Conn. 293.

A few courts manifest a tendency to apply these rules very narrowly. Especially in determining whether or not the declarant fear a speedy dissolution, have they been very particular and fine distinctions drawn which do not meet the approval of many of the students of evidence. Undoubtedly in many jurisdictions, the fact that the declarant, as in the principal case, said that he didn't know what his chances for recovery were, would be enough to exclude the evidence as not being made in fear of impending death, and it would seem that a strict application of these rules was wise, as the accused if deprived of many well recognized privileges by the admission of these statements under any conditions.

FEDERAL PRACTICE—WAIVER OF JURISDICTION—RECOUPMENT.

The United States Supreme Court, in the recent decision in *Merchant's Heat & Light Company v. J. B. Clow & Sons*, 204 U. S. 286, adds an important contribution to the law of pleading and practice in the Federal Courts.

The suit was brought in the United States Circuit Court for the Northern District of Illinois and was based on a breach of contract

entered into between plaintiff, an Illinois corporation, and defendant, a foreign corporation, of the State of Indiana. Service was had on an independent contractor in the employ of defendant, as superintendent of construction of defendant's plant in Indiana, but, at the time of service, in Illinois for the purpose of purchasing material for the said plant.

After the suit was begun, a motion to quash the return of service, on the ground that service was not such as to give the court jurisdiction, was made, and overruled, and thereupon the defendants, after excepting, appeared, as ordered, and pleaded the general issue and also asked a recoupment of damages under the same contract, and overcharges, in excess of the amount ultimately found due to the plaintiff.

Because not necessary to the decision of the case, the court did not consider whether or not defendant corporation was doing business in the State of Illinois, within the meaning of the Illinois statute, and consequently whether properly served, this question, so the court held, being concluded by the submission to jurisdiction which was disclosed by the pleadings. However, as the correctness of its holding may be questioned, in view of the fact that there is some doubt as to whether the defendant did actually submit to the jurisdiction absolutely, it is well to determine whether the service was good *ab initio*.

In order to authorize service upon an agent of a foreign corporation found within the state, such agent must be there doing business for his corporation. *Lumberman Insurance Company v. Meyor,* 197 U. S. 407. But every transaction in the state in the way of business will not authorize service; the business done must be something in the line of that for which the corporation was organized. *St. Clair v. Cox,* 106 U. S. 350.

Ordinarily, after a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on appeal is not lost by a subsequent appearance and defense to the suit upon the merits. *I. Foster's Federal Practice, 272; Harkness v. Hyde,* 98 U. S. 476.

But in this case the court took the view that the defendant, in pleading a recoupment, deprived itself of the right to appeal; that it went beyond a mere pleading to the merits and assumed the rôle of a plaintiff; that by seeking affirmative relief, it entered, not a defense, but a cross demand; that thereby it submitted to and invoked the jurisdiction of the court and waived absolutely the objections to jurisdiction first made. The decision, therefore, seems to depend entirely upon the nature of recoupment.

Recoupment is generally considered as being of common law origin, (*I. Chitty's Pleading,* 16 Am. Ed. 595) though it is more probable that it is a pure equity doctrine derived from the civil law, (12 Ark. 699). Recoupment is the right of the defendant to claim damages sustained by him, which grew out of matters set forth in plaintiff's complaint, or which arise from plaintiff's breach of contract on which the suit is founded, or from his violation of some duty imposed by the contract; and is different from set-off in that

its claim for damages is not enforced as an independent claim or debt due the defendant, but by way of reducing or destroying plaintiff's claim. *Grisham v. Bodman,* 111 Ala. 194. The doctrine is founded upon the fundamental idea that the action puts the whole contract in issue as it ought to do, and that no party to it should be allowed to recover upon a violation of a part, while his own breach of another part goes unredressed. (30 Ga. 415.) In other words, recoupment is merely a liberal and beneficial improvement upon the doctrine of failure of consideration, the gist of the defense being that the defendant does not owe the claim sued on because, in the transaction out of which the plaintiff's supposed cause of action arose, he has suffered such damages from plaintiff's violation of his obligations or omissions of duties in the premises, as reduce or destroy plaintiff's claim; and the effect and result of the plea of recoupment being sustained is an adjudication, that, to the extent of the sum recouped the plaintiff has no claim or debt against the defendant, and a judgment for defendant upon such plea is a judgment against the existence of the claim sued on. *Grisham v. Bodman,* 111 Ala. 194.

Where common law rules of pleading are in force, the defendant is allowed to recoup his damages by way of defense only, and is permitted to do no more than reduce, or at most wholly cancel, the plaintiff's claim, and his proper course is to bring a cross action rather than to recoup if he claims that his damages are greater than the plaintiff's whole demand. (52 N. H. 215.) At common law, should the defendant recoup more than the whole demand of plaintiff, a judgment in his favor was impossible, and he was held to be concluded from bringing a subsequent suit for the residue of his claim. In order to relieve himself of such a hardship, it was optional with the defendant whether he would plead a recoupment or bring a separate action. *O'Connor v. Varney,* 10 Gray 231.

Thus it is seen that at common law a recoupment was by way of defense only and not in the nature of a cross demand. Therefore, when by statute many of the states have provided that a defendant may get a verdict and a judgment in his favor by recoupment if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other, it does not seem, in fact, to be changing the nature of recoupment but merely doing away with the rigor and harshness of the common law rule.

Arising, as it does, out of the same transaction, and differing in this respect from the statutory plea of set-off, which arises out of matter separate from and independent of the transaction under controversy, it would seem that the plea of recoupment in the principal case is a mere defense and not such a new cross claim on the part of the defendant as to constitute an absolute submission to the jurisdiction of the court, and a waiver of all right of appeal on the matter of illegality of service, which right was reserved to the defendant in pleading to the merits.

The Supreme Court, however, held the plea of recoupment to be in the nature of a cross action, and therefore, the right of appeal lost to defendant, citing however, cases involving set-off proper and not recoupments.