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Landlord and Tenant--Summary Proceedings--Right of Tenant to Interpose Counterclaim that Accrued Prior to Assignment of Leasehold (Stafford Security Co. v. Kremer, 258 N.Y. 1 (1931))

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for punishment by fine and imprisonment, and also for a money penalty for each offense, in an action for the penalty, evidence of the defendant's prior acquittal in a criminal proceeding was held to be inadmissible for want of mutuality, since the record of conviction would not have been evidence against him.[3] It is obvious why a judgment of acquittal in a criminal case should not be used by or against a defendant in a civil action, inasmuch as it is merely a determination that guilt has not been established beyond a reasonable doubt. But where a party has been convicted in a criminal action for falsifying certain facts, there seems to be no reason why he should be allowed to attempt to prove in a civil action that the facts were not falsified.[4] In the principal case, the court appreciates the illogic of holding that conviction is only presumptive and not conclusive evidence of the material facts but prefers to abide by the sanctity of the doctrine of *stare decisis* and to leave to the legislature the task of changing the established New York rule. We feel that the pruning of the archaic precedents—unpleasant though the process may be—might have been done with just as much grace by the court.

A. S.

LANDLORD AND TENANT—SUMMARY PROCEEDINGS—RIGHT OF TENANT TO INTERPOSE COUNTERCLAIM THAT ACCRUED PRIOR TO ASSIGNMENT OF LEASEHOLD.—On February 10, 1930, the Correll Real Estate Corporation assigned a leasehold estate to the petitioner, the Stafford Security Company. The respondent, Kremer, was a subtenant. After $3,500 in rent had accrued and remained unpaid, proceedings to dispossess were instituted. The subtenant set up by way of defense a counterclaim for rent due from premises occupied by the assignor and owing before notice of assignment to the petitioner. The petitioner objected to the counterclaim on the ground that at the time the assignment was made the assignor had not yet supplied the consideration, namely, possession of the land, in return for which the defendant was under a duty to pay the installment of rent now sued for. *Held,* A tenant cannot set off against a claim for rent, claims which materialized before the assignment of the leasehold. *Stafford Security Co.* v. *Kremer,* 258 N. Y. 1, 179 N. E. 32 (1931).

The law relative to counterclaims where plaintiff sues on an assigned claim has been set forth in the adjudicated cases. A person

[3] People v. Rohrs, 49 Hun 150, 1 N. Y. Supp. 672 (1888).

[4] *Cf.* the extreme to which this doctrine has been applied in New Jersey, where, in a suit to forfeit a husband's interest in his wife's property on the ground that he murdered his wife, the record of his conviction of the murder was held to be inadmissible. Sorbello v. Mangino, 108 N. J. Eq. 292, 155 Atl. 6 (1931).

having a cause of action for injury to his property may assign the claim and the assignee may sue. The latter takes the claim subject to any counterclaims existing between the original parties.[1] The defendant must have acquired the counterclaim in good faith and before the cause of action was assigned.[2] The cause of action to be counterclaimed must have accrued at the time of the assignment.[3] The counterclaim must be in contract [4] and the defendant cannot recover more than the plaintiff's demand.[5] The principal case introduces no new principle of law but reflects the attitude of the courts in interpreting the law pertaining to counterclaims. The equities in favor of the petitioner are clear. He purchased the leasehold and the tenant enjoyed its occupancy until the value of its use was a sizeable item to be counterclaimed against. The case under discussion is no new departure in the application of equitable principle to counterclaims.[6] In another recent case [7] a counterclaim was allowed even though it was admitted by the court that at law a defendant could not set up a counterclaim, if the plaintiff owed it to a copartnership of which the defendant was a member. Undoubtedly courts of equity will extend the doctrine of set off in cases where special equities intervene.[8] In this case the plaintiff was unable to pay the partnership claim because of insolvency. This was such a special circumstance sufficient to extend the law of counterclaims, and the partnership claim with the consent of the firm members was allowed.[9] The decision in the instant case adjudicates the rights of the parties. The tenant still has his claim against the assignor and the new owner of the reversion is compensated for the use of his leasehold. In conclusion, in the case under discussion, the court said, if the decision were otherwise, "the assignee of the reversion would be unable to collect rent from a tenant during an unexpired term extending over many years, if before notice of the assignment, the tenant had become

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[1] American Guild v. Damon, 186 N. Y. 360, 78 N. E. 1081 (1906); Seibert v. Dunn, 216 N. Y. 237, 110 N. E. 447 (1915).

[2] N. Y. C. P. A. §267, Lindemann v. Globe Indemnity Co., 123 Misc. 530, 205 N. Y. Supp. 547 (1924).

[3] Michigan Savings Bank v. Millar, 110 App. Div. 670, 96 N. Y. Supp. 568 (1st Dept. 1906).

[4] *Supra* note 2.

[5] Faulkner v. Swart, 55 Hun 261, 8 N. Y. Supp. 239 (1889).

[6] Burns v. Lopez, 256 N. Y. 123, 175 N. E. 537 (1931).

[7] *Ibid.*

[8] The Court in Burns v. Lopez, *supra* note 6, evidently follows this doctrine, for at 128, 175 N. E. at 538 the Court, quoting 3 STORY, EQUITY JURISPRUDENCE (3rd Eng. ed.) §1437a, said: "There is no doubt that courts of equity did eventually extend the doctrine of set-off, and claims in the nature of set-off, beyond the law, but they only did so where peculiar equities intervened between the parties. The cases in which a set-off was allowed on special grounds are so very various as to admit of no comprehensive enumeration."

[9] See, in this connection, Rothschild v. Mack, 115 N. Y. 1, 21 N. E. 726 (1889).

the owner of a cause of action on contract against the assignor. Such a result is too harsh; it would impress too great a clog upon the free alienation of land. * * *" [10]

C. V.

PLEADING AND PRACTICE APPEAL AND ERROR—CIVIL PRACTICE ACT SECTION 211-A GIVES NO RIGHT OF APPEAL AS AGGRIEVED PARTY TO DEFENDANT UPON REVERSAL OF JUDGMENT AGAINST CO-DEFENDANT.—An iron cover hurled into the air by an explosion in a manhole struck plaintiff. A gas corporation and street railway company were sued jointly to recover for the injuries sustained. Plaintiff recovered against both defendants on the trial. The Appellate Division [1] reversed the judgment as to the street railway company. Gas corporation appealed from this reversal on the ground that it deprived appellant of its right to contribution from its co-defendant. *Held,* appeal dismissed and judgment affirmed.[2] *Ward* v. *Iriquois Gas Corp.,* 258 N. Y. 124, 179 N. E. 317 (1932).

The Court of Appeals has indicated again [3] that the significance attached to the comparatively new [4] addition to the Civil Practice Act, Section 211-a,[5] was greatly over-estimated and the confusion

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[10] Instant case at 5, 179 N. E. at 33.

[1] 233 App. Div. 127, 251 N. Y. Supp. 300 (4th Dept. 1931). Crouch, *J.,* dissented from the holding of the Appellate Division on the ground that the evidence did not warrant a dismissal of the judgment agains tthe street railway company. The question of the construction of §211-a and the right of the gas corporation to have its co-defendant remain in the action was not before that court.

[2] Gas corporation, as a second point, appealed from the decision of the Appellate Division affirming the judgment as to it. Lehman, *J.,* dissented from so much of the ruling of the Court of Appeals as affirmed the judgment against the gas corporation.

[3] Price v. Ryan, 255 N. Y. 16, 173 N. E. 907 (1930) held that a defendant cannot complain because a jury failed to find co-defendant negligent; Fox v. Western New York Motor Lines, Inc., 257 N. Y. 305, 178 N. E. 289 (1931) decided that a co-tort-feasor cannot be brought in under §193, subd. 2, in order to give effect to §211-a of the CIVIL PRACTICE ACT.

[4] N. Y. L. 1928 c. 714.

[5] "Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own *pro rata* share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the *pro rata* share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his *pro rata* share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice."