

Book IV.
Title XXXI.

Concerning Set-Offs.
(De compensationibus.)

Bas. 24.10. 25; D. 16.2.

Headnote.¹

This title deals with set-offs. Counterclaims are not dealt with separately, and the Romans evidently knew only one word for set-off and counterclaim, namely *compensatio*. The term set-off is generally used herein, without reference as to whether it, strictly speaking, would be a counterclaim. The question that has given rise to quite a little litigation in Anglo-Saxon jurisprudence as to the right of set-off by a debtor after a cause of action had been assigned by the creditor seem not to have arisen in Roman law, and inasmuch as contracts generally gave rise to rights and duties only between the original parties, an assignment of a contract-obligation not consented to by the debtor, did not, probably, abridge the right of a debtor to set off any indebtedness owing to him by the original creditor.

A set-off is an original claim and frequently has no relation to the claim of a creditor. As shown in law 14 of this title, the set-off could not be determined where it gave rise to complicated litigation. It was required to be fully due. D. 16.2.7 pr. In some cases, however, it was allowed as a matter of course. A banker who had a claim against a man could sue only for the balance due him, and was required to deduct from his claim the amount which he himself owed. The debts were treated as one. Gaius 4.64.68. The same rule existed if a procurator of an absent person was sued. D. 16.2.16. So if a purchaser of the property of a bankrupt sued a debtor to the bankrupt, he was required to allow for any debt due from the bankrupt to the defendant.² It did not need to be of the same kind, and in this case did not even need to be due; a debt not due was allowed for at the present value. This was reasonable, as otherwise the debtor had no chance to get the benefit of his own debt.³ This is like the principle applied in many courts that where a bank fails and a depositor owes a note to the bank, such depositor gets credit on the note to the full extent of the deposit. So set-offs (counter-claims) were always allowed in good faith—equitable contracts (note C. 4.10.4).

The extent of set-offs is fully mentioned in Inst. 4.6.30, which states: "In equitable actions the judge has full power to assess on fair grounds the amount due to the plaintiff, and in so doing to take into account set-offs of the defendant condemning the latter only in the balance. Even in actions of strict law, set-offs have been permitted since a rescript of the emperor Marcus, the defendant meeting the plaintiff's claim by a plea of fraud. By our constitution (C. 4.31.14), however, a wider field has been given to the principle of set-off, when it is clearly established, the amount claimed in the plaintiff's action, whether real or personal, or whatever its nature, being reduced by operation of law to the extent of the defendant's set-off." The words "by operation of law" has given rise to considerable discussion and indicate that a set-off was not required to be pleaded,

¹ Blume penciled in here: See C. 7.44.14; Nov. 96; 6 Sav., Sy. 330 ff; 355.

² Blume penciled in here: 30 Z.S.S. 459.

³ Blume penciled in: disputed--49 S.Z. 510.

but was allowed as of course. See 2 Melanges, P.F. Girard 97-99. However, it had to be brought to the attention of the court in some manner, and it seems that the defendant did not, at his option, need to bring it forward, but could sue on the claim later. D. 16.2.7.1; Buckland 700. Originally, a debt could be set-off only if it arose out of the same subject matter (Gaius 4.61), but under Justinian any debt arising out of any matter might be set-off, as noted by Inst. 4.6.30. There were a few exceptions, as noted in note to C. 4.31.14.

4.31.1. Emperor Antoninus to Dianensis.

A senate decree was passed and rescripts have often been issued, that a set-off may be set up in a fiscal matter only whenever the same governmental office (station) which claims something from a person also owes him in turn. This rule must be strictly observed on account of the confusion (that would otherwise result) in the different offices. If it appears that the office of which you make mention is owing you, you will soon receive the amount due.

4.31.2. The same Emperor to Claudius and Ascepiades.

A payment made on a judgment cannot be reclaimed; hence such payment is not a subject for an off-set. But no one questions that a person who is sued on a judgment can claim a set-off⁴ for money owing him.

4.31.3. Emperor Alexander to Aetrius Capito.

The trial judge who has jurisdiction will order that the amount which the city owes you shall be set-off against the sums which you acknowledge you owe to the city, if you do not owe such amount by reason of money of the city which is to be loaned out, of for impost duties (vectigalia), oil or grain property tax, or for a trust due the city. Promulgated October 1 (223).

Note.

As shown in law 1 of this title, debts due from the fisc could be offset against money owing the fisc. That is also stated to be the law at D. 16.2.24. But it would seem that the rule applied in exceptional cases only, if the rule applicable to cities, as stated in the foregoing law, was fully applicable to the fisc, which is probable.

Cities frequently had money on hand which was loaned out. The book of accounts in which this money was shown was called *calendarium*. The man that supervised and attended to these loans was called *curator calendarii*, and the money that he took to loan was said to be *ex calendario*—that is to say, taken out of the amount shown in the book. A man who owed money to the city on account of the funds which he thus received could not offset against it a debt that the city owed him.

So, too, if a man owed the city money on account of dues (vectigalia), which seems to have included water rent, land rent, transit dues, and various other dues, or if he owed it for a property tax, he could not offset any debt against it. The same was true if he owed for oil or grain bought of the city, and in fact the rule was that if he bought any property of the fisc, no set-off was allowed. Law 7 of this title. D. 49.14.47.5. So if he owed food supply, or if he had money intended for regular expenses, no set-off was allowed. 9 Cujacius 304, 305; 8 Donellus 317, 320.

4.31.4. The same Emperor to Flavius and Lucianus.

⁴ [Blume] As to the action on a judgment, see C. 7.52.1 note.

If it appears that money is mutually owing from one to the other, the amounts should, of course, be set-off against each other by operation of law, as from that time that they were respectively owing, to the extent that they offset each other; and interest is due only for the excess, provided that a claim therefore still subsists.⁵
Given September 17 (229).

4.31.5. The same Emperor to Honorata.

Even in the case where it appears that a trust is due you from the person to whom you say you owe a smaller quantity, the equity of a set-off excludes the computation of interest (on the whole amount) but a claim (for interest) on the excess which you prove is due you alone is left.

Promulgated 229.

4.31.6. The same Emperor to Polydeuca.

The written instrument which acknowledged the receipt of something which you say was not delivered, could not obligate you contrary to the true facts, and you also justly demand the equity of a set-off. For it is not just that the amount which you appear to owe should be paid until answer shall be made to your counter-action, and so much the more so since you say that you are seeking to recover what you complain was taken away be the woman (your wife) on the ground of divorce.

Promulgated November 16 (229).

4.31.7. The same Emperor to Flavius Ausonius.

The principle of set-off applies when the purchase price is owing on a sale. For purchasers are forbidden to claim a set-off only when the fisc seeks to recover the purchase from buyers (of fiscal property).⁶

4.31.8. Emperor Gordian to Aurelius Emeritus, a soldier.

If you stepfather became your debtor on account of income which he received from your property, and he shall have commenced to seek to recover from you the amount of the legacy left him by your mother, you will properly plead as a set-off, before the judge who will sit on the case, the amount which he owes you.

Note.

In this case the stepson was the heir of the mother. The latter had left a legacy to the stepfather, and it was the duty of the heir to pay legacies.

4.31.9. The same Emperor to Lininia Euctemonides.

A sum not owing to a defendant, but to another, cannot be claimed as a set-off.

Note.

A set-off could be pleaded only if the plaintiff owed the defendant. This was the general rule. D. 16.2.16 and 18. But that was not literally true. A surety, if sued, could set-off both what was owing to himself, as well as what was owing to the principal debtor. D. 16.2.4 and 5. So if an unemancipated son was sued, he could set-off both what was owing to him and to his father. D. 16.2.9. A procurator might set-off a sum

⁵ [Blume] To a similar effect, see C. 8.42.7; See Sohm, Institutes §88.

⁶ [Blume] See note to law 3 of this title.

owing him and his principal. D. 16.2.18 and 21; 8 Donellus 341. A debt due to a joint and several promisor and who was at the same time a partner of the defendant, might be set-off. D. 45.2.10; Buckland 699,

If a guardian was suing in his representative capacity, a debt owing to the defendant by the guardian personally could not be set-off. D. 16.2.23.

4.31.10. Emperors Diocletian and Maximian and the Caesars to Julius Nicandrus.

Since you say that a farm was sold to you free of encumbrance, but that you afterwards paid a lien existing against it preceding the purchase, and you are sued before the president of the province for the amount of the purchase price you owe, you may plead a set-off for the amount so paid, but not owing by you.

4.31.11. The same Emperors and the Caesars to Claudius, Julius and Paulus.

If you, by reason of your duty as a magistrate, nominated guardians for minors, and you paid for them money for a debt (which their father owed) as primipilar, you are needlessly afraid that you cannot charge the amount up against them, if you are sued, or that anything more can be demanded from you if it is shown that you, in the name of the guardian, paid as much as the guardians owed them or a greater amount.

Note.

Municipal magistrates were responsible if they did not take sufficient sureties from guardians. C. 5.75 and notes. In this case, the guardian was evidently not able to pay, and the magistrate who nominated him or took a bond from him was threatened to be sued. But he had a set-off. The father of the minors had been primipilar or primipilar, having charge of the food supply to soldiers. Note C. 4.9.1. As such he owed the fisc. The magistrates above mentioned had paid this amount for him, and [they], accordingly, had a claim against him and his heirs—the minors. This claim was a set-off to the claim of the minors against him.

4.31.12. The same Emperors and the Caesars to Lucius Cornelianus.

After offsetting the amounts mutually owing, and paying any excess which you owe, of if after offering, sealing and depositing it, if your creditor refuses to accept I, you can bring an action concerning the recovery of pledges given by you.⁷
Promulgated at Nicomedia December 16 (294).

4.31.13. The same Emperors and the Caesars to Aurelius Bassus.

If you wrote Mucianus that he would, as an offset, pay the amount which you owed for customary public rents, you would not claim anything more from him, but after payment by you of what was to serve as a set-off, you claim against him is not for having paid a debt not owing by you, but for the recovery of the original debt.

4.31.14. Emperor Justinian to Johannes, Praetorian Prefect.

We ordain that debts may be offset in all actions by operation of law,⁸ and no difference in this respect exists between actions in rem and in personam.

⁷ [Blume] As to tender by deposit, see C. 4.32.19.

⁸ [Blume] If set up; a party was not compelled to set up a counter-claim. See Buckland 700.

1. We order that set-offs shall be claimed only in the event that the transaction by reason of which a set-off is claimed is for a liquidated sum, and not involved, but permits the judge to allow the set-off without trouble. For it would be deplorable that after perhaps many and various issues have been tried, and when a cause has already been proved, the opponent, almost defeated, should then claim a set-off against a debt already made certain and undoubted, and thus prevent condemnation by side-issues which delay the case. The judges must consider this and must not too readily permit set-offs or admit them with tender mind, but must apply the strict law. If they shall find that set-offs demand greater and more extended investigation, they must reserve them for another trial, and render final decision in the suit which is almost finished, excepting an action on a deposit in which, we have ordered⁹ that no set-offs can be claimed.

2. To those who hold the property of others wrongly, a set-off is not given.¹⁰
Given at Constantinople November 1 (531).

⁹ [Blume] C. 4.34.11.

¹⁰ [Blume] See C. 9.32.1 to the effect that one heir may not set up a set-off in an action to produce the property of an inheritance held by him. A debt could not be used as a set-off to prevent the return of property loaned for use. C. 4.23.4. The same was true in case of a deposit. C. 4.34.11.