

that the reason of recouper in such case is, because otherwise when the disseisee re-enters, the arrearages of the rent-service, charge, or seck, would be revive; and therefore to avoid circuitry of action, and *circuitus est evitandus et boni judicis est lites dirimere, ne lis ex lite oriatur*, the arrearages during the disseisin shall be recouped in damages; but if the disseisor ought to have common on the land, the value of the common shall not be recouped, for by the regress of the disseisee, he should not have any arrearages of recompense for them." *Green v. Biddle*, 8 *Wheat.* 51. The Court take no notice of the position advanced in the argument, that "the disseissor shall recoupe all in damages which he hath expended in amending of the houses," and assign a reason for allowing the recouper in the other instances put, that is utterly incompatible with allowing a disseissor or *mala fide* possessor, to recoupe what he had expended in mending the houses, and therefore the position cannot be admitted to be sound law, to the full extent for which it was advanced, if at all.

79 * The term *recoupe* in the common law, signifies the keeping back or stopping something which is due, and is used for "to defalk, or to discount;" of which *Coulter's Case* furnishes an illustration. It is from the common law doctrine of recouper that our legislative provisions for "pleading discount;" 1654, ch. 23; 1699, ch. 39; 1715, ch. 29; 1729, ch. 20, s. 5; 1785, ch. 46, s. 7; *Baltimore Insu. Comp. v. M'Fadon*, 4 *H. & J.* 42; *Brack. Law Misc.* 185; and the English statutes of set-off, about half a century later, have been derived. 2 *Geo. 2, c. 22, s. 13*; *Just. Inst. b. 4, tit. 6, s. 30*. They all rest upon precisely the same principles. The object is to prevent cross actions, or, as the books express it, circuitry of action; and to allow the opposing claims of the same parties to be settled in one action, which must otherwise necessarily give rise to two actions; but however reasonable and desirable it may be, thus to put an end to two subjects of litigation in one and the same suit, yet, as it appears from *Coulter's Case*, no man shall be allowed to obtain this advantage by his own wrong; and therefore it is, that an executor of his own wrong will not be allowed to recoupe and retain.

Every claim, however, must have a fair, legal, or equitable basis, whether presented to the Court as the cause of an original action, or by way of recouper, discount or set-off. The claim for rents and profits, and the opposing claim for improvements, each of them rests upon principles of law and equity that are wholly separate and distinct. Whether or not the proprietor shall recover rents and profits must, in each case, depend upon the justice and equity with which he sustains his claim. If he has, for an unreasonable time, slept upon his rights, and there should appear to be any suspicious circumstances about his case, or any discoverable infirmity in it, the Court will lessen, or altogether reject the claim.