

An. Code, sec. 11. 1904, sec. 11. 1888, sec. 11. 1785, ch. 80, sec. 3.

14. No plea of "*non est factum*" shall be received in any action, unless the party for whom such plea be tendered verify the same by affidavit, or unless the defendant being heir, executor or administrator of the person alleged to have made the deed obtain leave from the court, upon showing just cause, to put in such plea.

This section requires a plea that alleged deeds are not defendant's deeds to be sworn to; as issue was joined on a plea unsworn to, it was treated as sufficient. *Conowingo Land Co. v. McGaw*, 124 Md. 652.

The execution of a bond can only be denied by plea of *non est factum*, which must be verified by oath except as provided in this section. *State v. Duvall*, 83 Md. 124.

It was unnecessary to determine whether plea of *non est factum* was verified by affidavit, since issue had been joined on it, and certain other pleas were demurred to. *Milburn v. State*, 1 Md. 12.

See sec. 4.

An. Code, sec. 11A. 1914, ch. 108.

15. In suits brought upon any instrument or writing under seal executed on and after June 1, 1914, any person entitled to sue or liable to be sued thereon but for such seal, shall be entitled to sue and liable to be sued notwithstanding such seal.

Cited but not construed in *Manning v. Embert*, 126 Md. 550.

An. Code, sec. 12. 1904, sec. 12. 1888, sec. 12. 1785, ch. 46, sec. 7. 1876, ch. 398. 1914, ch. 393.

16. In any suit *ex contractu* or upon any judgment, if the defendant shall have any demand or claim arising *ex contractu* or upon judgment against the plaintiff, the defendant may plead such claim specially, whether such claim of the defendant be for liquidated or unliquidated damages, and whether it be of such nature as may be availed of by way of recoupment without such special plea or not.

Judgment will be given for defendant where plaintiff owes him in excess of amount defendant owes plaintiff. Although no judgment can be rendered for defendant where the set-off arises on account of what is due by a third party, this does not deprive defendant of his right to file claim in bar of plaintiff's recovery. The plaintiff's joint and several liability may be set-off against defendant's separate liability. The fact that a defendant has instituted suit on his claim against plaintiff which is still pending does not defeat former's set-off. *Steele v. Sellman*, 79 Md. 6.

The question of nature of a special plea, characterized sometimes as a plea in confession and avoidance, sometimes as a plea of set-off, and sometimes as a plea of recoupment, held to be of no practical importance since act of 1914, ch. 393. *Fleischmann v. Clark*, 137 Md. 174.

In view of this and following section and of art. 26, sec. 17, a verdict in an action *ex contractu* being for plaintiff for ninety dollars, and a judgment of *non pros.* and for defendant for costs having been entered, such judgment is a finality since it conclusively establishes the debt, and defendant may appeal where there is a plea of set-off in case. *Baer v. Robbins*, 117 Md. 224.

A defendant held entitled to set up by plea damages arising out of a breach of warranty in sale of a machine, by virtue of this section, regardless of his right to recoup before passage of act of 1914, ch. 393. *International Harvester Co. v. Neuhouser*, 128 Md. 180.

A special plea of set-off held good. *Merryman v. Wheeler*, 130 Md. 569.

Cited but not construed in *Nihiser v. Nihiser*, 127 Md. 458.

See sec. 4 and notes to secs. 17 and 183.