

An. Code, 1924, sec. 15. 1912, 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.

This section held applicable in support of right of receiver of bank to sue on subscription agreement for guaranty fund. *Sterling v. Cushwa & Sons*, 170 Md. 226.

This section as to right of suit upon sealed instrument held determinative in Federal court as to effect of seal upon right under Maryland contract of guaranty under seal. *Duvall Co. v. W. B. A. El. Ry. Co.*, 15 F. Supp. 536.

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

An. Code, 1924, sec. 16. 1912, 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.

Defaulting trustee nor his surety can, as against successor trustee who is seeking to recover trust fund, set off a claim by the defaulter on account of a private debt due the defaulter by one of the distributees of the trust fund. *Assurance Corp. v. State*, 163 Md. 135.

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. 18, 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. Neuhaus*, 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.

An. Code, 1924, sec. 17. 1912, sec. 13. 1904, sec. 13. 1888, sec. 13. 1785, ch. 46, sec. 7. 1876, ch. 398. 1914, ch. 393.

17. In every case where a special plea is filed as authorized by the preceding Section, judgment for the excess of the one claim over the other, as each is proved, with costs of suit, shall be given in favor of the plaintiff or the defendant, according as such excess is found in favor of the one or other of the parties, if such excess be sufficient to support a judgment in the court where the cause is tried according to its established jurisdiction, otherwise the finding of such excess to be due shall have the same effect as is given to verdicts for amounts below the court's jurisdiction by Article 26, Section 18 of this Code.

When set-off is applicable.

Joint debts cannot be set-off against separate debts, nor separate debts against joint debts. To support a plea of set-off, defendant's claim must be of such a nature