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Theme
Set-off and damages for delay

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Introduction

There will be those who will regret the introduction of a new series of law reports. I am amongst them.

Within recent years, however, many cases of great importance to the building and civil engineering industries have gone unreported. There have also been cases in other jurisdictions on points of law on which there is as yet no authority in English law, and which may therefore have an influence on future decisions in English courts.

Quite apart from these special factors, the construction industry will find it convenient to have within one set, with a cumulative index, a full range of cases relevant to their problems.

In the first year special attention will be given to catching up with the backlog of unreported cases in key areas, although when major judgments are given on other topics, these will also be included.

Building law is a specialised field, and underlying it is the truth recognised by Lord Salmon in *Gilbert-Ash v Modern Engineering*: 'I cannot help thinking that building contractors and sub-contractors and architects advising building owners know far more about the building trade than I or, indeed, any judge can hope to do.'

An editorial commentary on each case has been added in order to place a particular case in the context of the general law and to make plain its implications for the industry. It is hoped that this may also be of some use to the legal profession.

John Parris
Oxford

The Standard Building Contract Forms

These forms are often referred to by lawyers as 'the RIBA contracts', although they have not been that technically for nearly forty years.

The building owner (or 'employer', as he is often termed) and main contractor forms are those prepared by the Joint Contracts Tribunal. This is a body consisting of representatives appointed by the Royal Institute of British Architects, the National Federation of Building Trades Employers, the Royal Institution of Chartered Surveyors, the Association of County Councils, the Association of Metropolitan Authorities, the Greater London Council, the Association of District Councils, the Scottish Building Contract Committee, the Committee of Associations of Specialist Engineering Contractors, the Federation of Associations of Specialists and Sub-Contractors, the Association of Consulting Engineers, together with a representative of the Confederation of British Industry present in the capacity of an observer.

The contract comes in a number of different editions, and it is to be regretted that judgments rarely, if ever, specify which form is before the court, still less which edition. The main ones current now are:

1. Private edition with quantities
2. Private edition without quantities
3. Private edition with approximate quantities
4. Local authorities edition with quantities
5. Local authorities edition without quantities
6. Local authorities edition with approximate quantities
7. Fixed fee form of prime cost contract
8. Minor building works
9. Agreement for improvement grant works

Amendments to these contracts are often made in January and July each year, and on occasions emergency amendments are issued. The parties are, of course, at liberty to make any alterations they wish to the forms. Supplemental agreements are also sometimes incorporated.

Before determining the contractual rights and obligations of the parties therefore it is essential to know:

(i) which contract and
(ii) which edition was used
(iii) which amendments were incorporated, and
(iv) whether or not there were any other amendments.

There are, of course, other standard contract forms, not drafted by the JCT, which are in use between building owners and main contractors, particularly for civil engineering work and Government work. The terms of these differ substantially from those of the JCT form. They rarely seem to come before the courts, which may be a tribute to their authors or those who use them or both.

The form in use between main building contractors and sub-contractors is of entirely different authorship, and the two have not much more in common than chalk and cheese.

The practice is for the building owner to dictate to the main contractor who should be the sub-contractor for specialist work. At one time a main contractor had no right to refuse to accept a sub-contractor nominated by the employer. However, by clause 27 of the current JCT form, the main contractor can refuse to accept a sub-contractor on either of two grounds:

1. that the proposed sub-contractor is one against whom he has 'reasonable objection', or
2. that the nominated sub-contractor is not willing to enter into a contract with the main contractor on terms which cover certain matters set out in clause 27(a) (i)-(x).

It is sometimes thought that these clauses involve contractual rights or obligations between the main contractor and the nominated sub-contractor. They do nothing of the sort. They merely give the contractor the right not to accept the nomination of a sub-contractor who will not contract with him on those terms. It is not a right which the main contractor is obliged to exercise. The clause only describes the sort of horse that the contractor can say shall run in the race. He is entitled to refuse any but fillies that conform, but if a stallion is nominated he can let him run if he likes. And many main contractors make use of their own forms for nominated sub-contractors.

The effect of clause 27(a) of the JCT form comes to an end the moment the main contractor has entered into a contractual relationship with a sub-contractor.

The contract that commonly regulates the contractual relationship between the main contractor and a sub-contractor is that known as the FASS form or, from the colour of the paper on which it is printed, the 'green form'. Ever since 1936 it has been drafted by agreement between the National Federation of Building Trades Employers (NFBTE) and the Federation of Associations of Specialists and Sub-Contractors (FASS) and approved also by the Committee of Associations of Specialist Engineering Contractors (CASEC).

To determine the rights and obligations of the main contractor and a sub-contractor it is unnecessary to look outside that document. The sub-contractor is not a party to the JCT contract, and, in accordance with the normal principles of privity of contract, can acquire no benefits under it and has no obligations placed upon him by it: *Scruttons v Midland Silicones Ltd.* In the cases that follow, it will be seen that this elementary principle is overlooked as often by the Bench as by the Bar.

Delay and the Standard Contracts

All the JCT contract forms for use between the building owner and the main contractor make provision in an appendix for a completion date, termed in clause 21 'the Date for Completion'. This is not defined but is the same thing as 'Practical Completion' which is referred to in clause 15(1), or so the House of Lords seems to have thought in *J. Jarvis and Sons Ltd v Westminster Corporation (post).*

Instead of a right to general damages for a breach of the contract by non-completion on the date for completion, the JCT form provides, in clause 22, for liquidated damages at the rate specified in the appendix. Provided this sum is not so extravagant as to be a penalty, these liquidated damages are recoverable by the employer against the main contractor, and they are the only damages recoverable for delay.

However, the employer's architect is under an obligation by virtue of clause 23 to make 'in writing a fair and reasonable extension of time for completion of the works', provided the delay is caused by any of eleven named events or circumstances and the main contractor applies for the time to be extended. One of the eleven grounds are:

> '(g) by delay on the part of nominated sub-contractor or nominated suppliers which the Contractor has taken all practicable steps to avoid or reduce.'

The main contractor can therefore never validly make claim against any sub-contractor for the whole or part of liquidated damages sum he may have had to pay the employer (apart from the exceptional circumstances of *Jarvis's* case).

If it is accepted that there has been 'delay on the part of the sub-contractor', three situations may arise:

1. The main contractor fails to apply to the architect for an extension of time under clause 23. In that event, he cannot possibly hold the sub-contractor liable for any liquidated damages he has had to pay because he is the author of his own misfortunes.
2. The main contractor applies to the architect for a certificate under clause 23(g) and is refused. This can only mean either:
   (a) that the delay is not in fact 'on the part of the nominated sub-contractor' - in which case the main contractor has no rights against the sub-contractor, or that
   (b) the delay is on the part of the nominated sub-contractor but the contractor has failed to take all practicable steps to avoid or reduce it - in which case, once again, the contractor is the author of his own misfortunes.
3. The architect issues a certificate that the delay is caused by delay on the part of the nominated sub-contractor. The date of completion is extended accordingly and the contractor pays no damages in respect of that period.

Turning now to the FASS contract, that does not provide for liquidated damages but requires the sub-contractor under clause 3:

> 'to indemnify and save harmless, the contractor against and from . . .
> (ii) any act or omission of the Sub-Contractor . . . which involves the Contractor in any liability to the Employer . . .
> (iii) any claim, damage, loss or expense due to or resulting from any negligence . . .'

Delay in completing the work does not come under this head because it involves the contractor in no liability to the employer (by virtue of JCT clause 23(g)) and there can be no claim other than liquidated damages by the employer.

However, delay is dealt with under clause 8, whereby the sub-contractor undertakes to *complete* the works within the period specified in Part II of the appendix to his contract. Under that clause, 'he shall pay or allow to the Contractor a sum equivalent to any loss or damage suffered or incurred by the Contractor . . . caused by the failure of the Sub-contractor.' The main contractor therefore has to prove the extent of his loss or damage before he can recover.

This, however, is subject to a condition precedent set out in the words:

> 'Provided that the Contractor shall not be entitled to any loss or damage under this clause unless the Architect shall have issued a Certificate . . . stating in his opinion the sub-contract works ought reasonably to have been completed . . .'

The result is that, before the contractor can recover, he must first get this certificate and then prove that he has suffered loss or damage over and above any liquidated damages he may have had to pay the employer.

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Hanak v Green

Coram: *The Court of Appeal*
Hodson LJ, Morris LJ, Sellers LJ

Date of judgment: *1 April 1958*

Counsel: *Mr Alan Campbell for the defendant appellant*
Mr Conrad Dehn for the plaintiff respondent

The plaintiff, Bozena Hanak, a widow, bought a house from the defendant, a builder, on 31 July 1954. He agreed to carry out certain work. The plaintiff was dissatisfied with what he did and sued him in the County Court for damages for breach of contract, put in the pleadings at £266. The defendant counter-claimed for (i) a *quantum meruit* for extra work, (ii) damages caused by the plaintiff's failure to admit one of his workmen to her house and (iii) trespass to his tools. Judgment was given for the plaintiff in the sum of £74 17s 6d and for the defendant under (i) for £69 17s, (ii) £12 7s 6d and (iii) £3 0s 9d, totalling £84 19s 3d. This judgment was not appealed against.

The judge awarded costs to the plaintiff on the scale appropriate to a judgment for £74 17s 6d and to the defendant on the scale appropriate to £84 19s 3d (both scale 3). He also ordered that the costs of a reference to a referee should be shared equally.

Against this, the defendant appealed on the ground that he was to receive £10 1s 9d, and the plaintiff nothing; and that his counterclaim against her should be treated as a right of set-off, and that he should therefore receive costs and not be ordered to pay any.

The court held:

1. That the appeal would be allowed with costs.

2. That the defendant was entitled to his costs on the plaintiff's claim in the County Court at the rate appropriate to the amount of the claim (ie, £266), that is scale 4 (the highest).

3. That on the counterclaim, he should receive costs on scale 2, that appropriate for the sum of £10 1s 9d.

4. The expenses of the reference should be shared equally.

5. Per Morris LJ 'that a set-off when permissible is a defence, but not every defence is a set-off'. Since the Judicature Acts there may be (i) a set-off of mutual debts (ii) in certain cases, a setting up of matters of complaint which, if established, reduce or extinguish the claim, (iii) an equitable set-off only in circumstances in which the Court of Equity would recognise one. As to (i), set-off of mutual debts was available only under the Statutes of Set-off where the claims on both sides were 'in respect of liquidated debts or money demands which can readily and without difficulty be ascertained'; as to (ii), the principle of *Mondel v Steel* was now incorporated in section 53, Sale of Goods Act 1893; as to (iii), this applied where formerly the Court of Equity would have granted an injunction to restrain the common law action.

6. In the circumstances of this case, the Courts of Equity before the Judicature Act would say that 'neither of these claims ought to be insisted upon without taking the other into account', (per Sellars LJ) because it arose 'directly under and affected the contract on which the plaintiff herself' relied.

Commentary

This case is noteworthy for the valuable historical analysis contained in

the judgment of Morris LJ of the origins and development of set-off and of counterclaim.

In the present law so far as the construction industry is concerned, no less than seven strands have been woven into an inextricable tangled web which, as the result of the use of imprecise language, are often confused with one another. They are:

1. *Alterations made in the procedure of the common law courts by the Statutes of Set-off 1728 and 1734*

A right of set-off was unknown to the common law courts for the procedural reasons set out in the judgment of Parke B in *Mondel v Steel* 1 BLR 5. If the builder erected a house which shortly afterwards fell down, the owner was liable to pay the agreed sum and then had to bring a separate action for damages for breach of warranty. The second action could not be a defence to an action for the agreed sum nor could the two cases be tried together. It is a solecism, therefore, to speak of a common law right of set-off. There was no such thing.

The statutes allowed, as a matter of procedure, the trial together of the two actions where the claims on both sides were liquidated debts or money demands which could be ascertained with certainty at the time of pleading and which both arose out of the same transaction. The statutes were not repealed until the Civil Procedure Acts Repeal Act 1879.

2. *A right to abate the price of goods sold with an express or implied warranty*

This first appears in the last quarter of the eighteenth century after Lord Mansfield had begun incorporating parts of the law merchant into the common law. It was limited to claims in respect of breaches of conditions or warranties relating to quality. Its spiritual ancestor is an edict of the Curule Aedile about 150BC (see *Digest* 21st book, 1st title) although it existed earlier where there was an express *stipulatio*. From Roman law it passed into the law merchant. The common law was never so tender to purchasers, as is well known.

As Morris LJ points out (1 BLR5) this abatement of price was 'not by way of set-off'.

The principle is now statutory by section 53 (1) of the Sale of Goods Act 1893 whereby: 'where there is a breach of warranty by the seller . . . (the buyer) may set up against the seller the breach of warranty in diminution or extinction of the price'.

Since *Mondel v Steel* is so often quoted as authority for the proposition that there is a general right to set-off any counterclaim against a plaintiff, it is perhaps advisable to point out what Parke B in fact said (1 BLR 5): 'It is competant for the defendant . . . *not to set-off* by a proceeding in the nature of a cross-action the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject matter was worth by reason of the breach of contract'.

3. *Injunctions by the Court of Chancery restraining an action at common law for a debt*

Equity would restrain a plaintiff from proceeding in the common law courts for a debt in certain limited circumstances where the defendant could show certain equitable grounds for being protected against the plaintiff's claim at law. The remedy was, of course, discretionary and a counterclaim by itself was insufficient. It was a safeguard against debts incurred by misrepresentation or unconscionable bargains etc. There had to be an equitable right which undermined 'the title to the legal demand': *Rawson v Samuel* (1841). The circumstances of this case would not have afforded an equitable set-off.

4. *Counterclaims*
A counterclaim is a different thing entirely from a set-off. It is any claim which the defendant is entitled to bring as a separate action against the plaintiff. It might be something entirely different in nature from the claim.

Until the Supreme Court of Judicature Act 1873, counterclaims in fact always had to be a separate action, ie, the defendant in the first case between the parties became the plaintiff in a second case. The descendant of that enactment is now The Rules of the Supreme Court (Revision) 1965 SI 1965: No 1776, as amended:

> 'RSC Order 18 r17: 'Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied upon as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.
>
> RSC Order 18 r18: Without prejudice to the general application of this Order to a counterclaim and a defence to a counterclaim, or to any provision thereof which applied to either of those pleadings specifically:
> (a) rule 15(1) shall apply to a counterclaim as if the counterclaim were a statement of claim and the defendant making it a plaintiff
> (b) rules 8(2), 16 and 17 shall, with necessary modifications, apply to a defence to a counterclaim as they apply to a defence'.

Rule 8 deals with matters that must be specifically pleaded and rule 15 deals with the contents of statements of claim. There has been a considerable change in these rules in 1965. The previous Order XIX rule 3 was limited to liquidated sums.

It will be seen, therefore, that all these are procedural matters which do not affect the rights of the parties but only how a case shall be conducted. 'The Judicature Acts, as has been often said, did not alter the rights of the parties' — Lord Esher MR. They 'conferred no new rights of set-off' — Morris LJ (1 BLR 8). There are similar provisions in the county court regulations.

5. *The rules regarding the circumstances in which summary judgment can be obtained*
RSC Order 14 provides a procedure for obtaining a judgment for sums due without a trial. If the defendant wishes to resist this, he has to file an affidavit disclosing that he has a valid defence. There is a substantial body of judge-made law as to the circumstances in which leave to defend should be granted, dealt with in the notes to the subsequent cases.

6. *The actual terms of specific contracts*
The parties are at liberty to make any agreement they like regarding a right to set off one claim against another.

7. *The effect of section 4 of the Arbitration Act 1950*
Where there is an arbitration clause the court is under an obligation to stay an action 'if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement'.

It will be seen that of all these strands, only (2) above can validly be described in jurisprudence terms as 'a right'; all the others are purely procedural matters.

Hanak v Green

Court of Appeal
Hodson LJ, Morris LJ, Sellers LJ

HODSON LJ: I have had an opportunity of seeing the judgment which Lord Justice Morris is about to read, with which I fully concur. In those circumstances, I do not propose to deliver a judgment of my own.

MORRIS LJ: The disputes between the plaintiff and the defendant were decided by the judge after considering the report made by a referee before whom the parties appeared for three days. So far as conclusions of fact and conclusions as to amounts are concerned there is no appeal. The appeal originates in the discontent of the defendant as to the orders as to costs. But in order to meet the difficulties that face those who complain of orders concerning costs when there is a discretion in a judge as to the award of them, the defendant challenges the form in which the judgment was entered. If he does this successfully then he submits that on a different form of judgment he can ask for a different order as to costs. It is only because of a very natural concern as to the costs of the struggle that submissions have been made to us as to the form in which the decisions in the struggle, not themselves now in issue, should be expressed. So it has come about that we have heard a learned debate, rich in academic interest, but, save so far as costs are affected, barren of practical consequence, on the subject as to whether certain claims could be proudly marshalled as set-off or could only be modestly deployed as counterclaim.

Before recording a view on the points of law it is necessary to have in mind the nature of the various claims. [Lord Justice Morris then summarised the facts.] The judge did not, in his judgment, deal with the question as to whether there was a set-off: this was probably because the submission as to set-off was only being made in furtherance of the endeavour to have an order as to costs which was favourable to the defendant.

Mr Campbell submits that the items which total £84 19s 3d should have been treated as being in part set off, with the result that the plaintiff should have been adjudged to recover nothing and the defendant to recover £10 1s 9d on his counterclaim.

In *In re A Bankruptcy Notice* Lord Hanworth MR said:

> 'With regard to the word "set-off", that is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set off.'

But in an action at law a defendant could only set off after the passing of the Statutes of Set-off. The statute of 2 Geo. 2, c. 22, provided that if there were mutual debts between a plaintiff and a defendant then one debt might be set against the other. But under the statute and under the statute of 8 Geo. 2, c. 24, the claims on both sides had to be liquidated debts or money demands which could be ascertained with certainty at the time of pleading.

Counterclaim is the creature of statute. The Supreme Court of Judicature Act 1873, section 24(3), enabled the courts to hear a counterclaim: until then a crossclaim had to be advanced by a separate action. But before the Judicature Act 1873 there were circumstances in which a defendant who was sued could without bringing a separate action, set up certain contentions against the plaintiff. Thus, in answer for a claim for the price of goods sold, it became possible for a defendant to assert that the goods were of poor quality. He was allowed to do so by way of defending the claim made against him. That was not, however, by way of set-off.

Though a set-off when permissible is a defence, it is, of course, not correct to say that every defence is a set-off. The way in which the matter developed was explained by Parke B in his judgment in *Mondel v Steel*. He said:

> 'Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well as the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten v Butter*, a different practice, which had been partially adopted before in the case of *King v Boston*, began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattels by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value: *Kist v Atkinson*, *Thornton v Place*. The same practice has not, however, extended to all cases of work and labour, as for instance, that of an attorney, *Templer v M'Lachlan*, unless no benefit whatever has been derived from it; nor in an action for freight; *Sheels v Davies*.'

Parke B further said:

> 'It must however be considered, that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a

> cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more.'

Before the passing of the Judicature Acts there were circumstances in which a court of equity would restrain one who was a plaintiff in an action at law from proceeding until the further order of the court with the trial of his action at law, or might restrain him until the further order of the court from levying execution upon a judgment obtained in his favour. The Court of Equity would not act merely because there were cross-demands. The assistance of the Court of Equity would only be given to someone who could show some equitable ground for being protected against his adversary's demand. Lord Cottenham LC made that clear in 1841 in his judgment in *Rawson v Samuel*. Lord Cottenham examined the reported cases dealing with what he said was 'familiarly' spoken of as 'equitable set-off', and came to the conclusion that what had to be established was that there was an equity which went to impeach 'the title to the legal demand'.

After the Judicature Acts were passed it was no longer necessary for a defendant to bring a separate action if he had a cross-claim. He could present his cross-claim in the existing action brought against himself. So counterclaim, the creature of the Judicature Acts, became possible. Furthermore, it was provided that equitable defences could be relied upon in actions at law: see section 38 of the Supreme Court of Judicature Act 1925. Section 41 provides:

> 'No cause or proceeding at any time pending in the High Court or the Court of Appeal shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might formerly have been obtained, whether unconditionally or on any terms or conditions, may be relied on by way of defence thereto.'

If a plaintiff had a demand which was a matter of equitable jurisdiction and brought proceedings in a court of equity, then not only could there be a set-off in regard to any liquidated demand but the courts of equity allowed a defendant to defend by showing that he had what was called an equitable set-off—that is, as Lord Cottenham pointed out, some equitable ground for being protected against the claim.

In *Young v Kitchin* a firm of builders, Downs & Co, erected certain buildings for the defendant, who then entered into possession of them. At that time a sum of money was due from the defendant to Downs & Co in respect of the contract. Downs & Co then assigned such sum to the plaintiff, who sued the defendant for it. But the defendant pleaded that Downs & Co had been late in erecting the buildings, whereby he had suffered loss, and he also said that Downs & Co had done defective work, and that the contract had provided that defects were either to be remedied or allowed for. The plaintiff demurred to the plea that Downs & Co had not completed the buildings

by the contract dates: he so demurred on the ground that the plaintiff as assignee of Downs & Co could not be held liable for breaches of contract by Downs & Co, and that such breaches constituted no answer to the plaintiff's claim. Cleasby B said:

> 'In substance I think the defendant is entitled to the benefit of this defence in reduction of the plaintiff's claim. The Judicature Act 1873, section 25(6)(i) says that the assignment of a debt or other legal chose in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this act had not passed", that is, subject to all equities which would be enforced in a court of equity. I think this is a case where in equity, the whole matter might be dealt with and the plaintiff's claim settled, after deducting all that ought to be deducted in respect of the failure to complete and deliver the buildings.'

Cleasby B pointed out that the defendant could not recover anything from the plaintiff but was entitled 'by way of set-off or deduction from the plaintiff's claim, to the damages which he had sustained by the non-performance of the contract on the part of the plaintiff's assignor.' Cleasby B further put the position as follows: 'He only meets the plaintiff's claim by a counterclaim of damages arising out of the same contract.'

The case of *Morgan & Son Ltd v Martin Johnson & Co Ltd*, proceeded on the basis that a Court of Chancery would have recognized an equitable set-off. The plaintiffs claimed a sum of money for storing the defendants' vehicles. The defendants acknowledged that pursuant to contract the sum claimed would, but for what they asserted, have been due. They said, however, that as to one of the vehicles which the plaintiffs were storing, itself worth more than what the plaintiffs claimed, the plaintiffs had either handed it over to someone else or had negligently allowed it to be stolen. So they said that their case was of such a nature that, quite apart from forming the basis for counterclaiming, it amounted to an equitable defence and that, accordingly, following section 38 of the Judicature Act, the court should give the same effect to it by way of defence as the Court of Chancery ought formerly to have given. If what a Court of Chancery would formerly have done would have been, on equitable grounds, to have granted an injunction against the prosecution of the plaintiffs' action, then, pursuant to section 41 of the Judicature Act, the equitable grounds could be relied upon by way of defence. The defendants were, in effect, saying: 'We ought not to have to pay you for storing our vehicles since as to one of them you have allowed us to be deprived of it.' The defendants said, therefore, that the plaintiffs ought not to have judgment for the amount claimed even though such judgment was stayed pending the hearing of the defendants' counterclaim, but that there should be leave to defend the plaintiffs' claim. Leave to defend was given.

The question which arose was whether, in the circumstances of the case, a court of equity would have recognised that the defendants had an equitable set-off. The judgment of Tucker LJ shows that counsel for the plaintiffs conceded that a court of equity would have recognised that the defendants had an equitable set-off. Mr Dehn has submitted that this concession need not have been made. But Tucker LJ thought that it was properly made, as is seen from his judgment. He cited the judgment of Lord Cottenham LC in *Rawson v Samuel,* and proceeded:

'Those cases to which the Lord Chancellor referred do, however, indicate the kind of circumstances in which the Court of Chancery gave this equitable relief. As already indicated, the case most in point was *Piggot v Williams,* where there was a charge against a solicitor for negligence which went directly to impeach the demand for payment which he was making. In view of those authorities, I think that the present case is one where, on the facts set out in the affidavit, the Court of Chancery would clearly have allowed the defendent's claim as an equitable set-off against the plaintiff's claim.'

Cohen LJ was of the same opinion. He said:

'Once Mr Hale conceded, as, in my view, he was constrained by the authorities to which we were referred, in particular by the decision in *Piggot v Williams,* to concede, that the facts alleged in the affidavit sworn for the defendants, if proved at the trial, would establish a good equitable set-off, then it followed that the appeal must succeed. Before the Judicature Act, such claims were very often enforced by injunction, but it is plain from section 41 that an injunction would not be the appropriate way of giving effect to a set-off now and that effect should be given to it, under section 38, as an equitable defence if so pleaded. That being so, it seems to me to follow that the matter must be treated as Cleasby B indicated in *Young v Kitchin* that equity would treat it, namely, by deducting from the claim of the plaintiff all that ought to be deducted in respect of the failure, if failure be proved, to deliver the lorry that the plaintiff received from the defendant.'

Though the Statutes of Set-off were repealed by the Civil Procedure Acts Repeal Act 1879 and the Statute Law Revision and Civil Procedure Act 1883, there was in the former act a saving for any jurisdiction or principle or rule of law or equity established, or confirmed (see section 4(1) of the Act of 1879), and the preamble of the latter act referred to certain enactments:

'...the subject-matter whereof is provided for by or under the Supreme Court of Judicature Act 1873, and the acts amending it or rules made persuant thereto...'

Section 39(1) of the Judicature Act 1925, which is in terms comparable with section 24, rule 3, of the Judicature Act 1873, and Order 19, rule 3, of the Rules of the Supreme Court, are now operative. It has, however, been held in this court that the Judicature Acts conferred no new rights of set-off.

In *Stumore v Campbell & Co* Lord Esher MR said:

'The Judicature Acts, as has been often said, did not alter the rights of parties, they only affected procedure, so that no set-off could now be maintained in such a case as this. Before these acts a person having a cross-claim must have raised it by a cross-action; but these acts have given a right to counterclaim. In some of the cases language has been used which would seem to imply that a counterclaim is sometimes in the nature of set-off and sometimes not. No doubt matter is occasionally