

It seems to me impossible to deny that where the plaintiff is claiming to recover the price of work and labor under the contract, and the defendants are counter-claiming damages for the plaintiff's delay in completing the work according to the contract, both claim and counter-claim arise out of the same transaction. The claim and counter-claim make up one action, in which there will be one result."

These views, however, are not uniformly held. In *Stooke v. Taylor*, 5 Q.B.D. 576, Cockburn, C.J., held that a counter-claim need not be analogous to the claim of the plaintiff, and that a claim founded on tort may be opposed to one founded on contract or vice versa. Mr. Justice Fry, in *Beddall v. Maitland*, 17 Ch. D. 181, says: "It is, to my mind, evident that there is no intention to confine the claim made by the counter-claimant to damages, or to an action of the same nature as the original action, and therefore when it is said that the defendant may set up against the claim of the plaintiff a claim of his own, it does not necessarily mean that the claims are to be ejusdem generis because it says expressly whether such counter-claim sound in damages or not. The plaintiff's right may be in damages, the defendant's right may be to an injunction or to any other equitable relief not sounding in damages; and therefore there is nothing to confine the defendant's claim to something in the nature of set-off or to setting up against the claim of the plaintiff merely something which counteracts that claim." In *Gray v. Webb*, 21 Ch. D. 804, Kay, J., contended for a wide interpretation of the rule, and laid down that its terms were large enough to include any case raised by the way of defence, whether it is or is not connected with or of the same character as the plaintiff's claim.

It is to be observed that the decisions favorable to an extended meaning of the counter-claim could not fail to be influenced by the consideration that under the rule and also other rules, power is reserved to the Court or a Judge to strike out a counter-claim not admitting of convenient trial with the action. This power is not contained in the New Brunswick statute, and its absence fairly suggests the argument that counter-claim should be given a narrow operation. Section 133 of the same statute providing that the Court or a Judge may order any pleading so framed as to prejudice, embarrass, or delay the fair trial of the action to be struck out, does not apply to counter-claim: *Whitford v. Zinc*, 28 N.S. Rep. 531, 534.

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