

technicalities they may be called, they are, in substance, in the nature of a defence to the action."

That the Act should be construed narrowly finds well-nigh convincing support from the significant absence of the term counter-claim in the sections except in their title. The sections were framed upon Order xix., rule 3, and the alteration of the language must have been made deliberately. It seems reasonable to conjecture that the draftsman noticing the provision in the English rule for the exclusion of a set-off counter-claim that could not be conveniently tried in the action, and deciding to omit the provision in the Act before him, sought to overcome its absence by excluding matters of counter-claim from its operation. But speculation as to the intention of the framers of an Act is only valuable as an aid to its interpretation if supported by the language they have used. It is submitted, but with diffidence, that the language in question must be construed to include counter-claim, and that the distinction between set-off and counter-claim is abolished for many purposes.

Under the Judicature Act as both the terms set-off and counter-claim are used, meaning must be given to each, and set-off is construed in the sense given to it in the statute of Geo. II., and to apply to set-off as allowed by that statute. Thus in *Neale v. Clarke*, 4 Ex. D. 295, Hawkins, J., says: "It is important to bear in mind the distinction between that which is matter of defence in the nature of set-off as allowed by the statute of Geo. II., and that which is matter of pure counter-claim as allowed by the Judicature Act, 1873, and the orders framed thereunder. Both set-off and counter-claim under the Judicature Act are in one sense cross-actions, but there is a wide difference between them. A set-off is a debt allowed by the statute of Geo. II. to be set-off against another debt, and for it the plaintiff may in his particulars give credit so as to prevent the defendant from again setting it up." (See also *Gathercole v. Smith*, 7 Q. B. D. 629.)

This view of the meaning of the term under the Judicature Act is nowhere better summed up than in *Monteith v. Walsh*, 10 P. R. 163. It is there said: "Of these two, set-off and counter-claim, counter-claim is by far the more extensive. As to set-off, it has acquired a well known signification, and subject to the extension of it that is made by the rule, exists as it always did, and is liable to the old limitations. It does not follow that because they are