

"113. Such set off shall have the same effect as if relief were sought in a cross action, and so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claims."

The meaning of "set off" as thus used is certainly obscure. If the words are used in their technical or customary sense, the statute must be given a narrow construction. If they are not so used one may place upon them a meaning agreeable to the language in which they are found. The question thus is whether the construction of the sections is to be governed by the term set-off, or is to be determined by the meaning of that term in relation to its surroundings. How real the difficulties are in putting a construction upon the sections is apparent when they are placed in contrast with Order xix., rule 3 of the Judicature Act rules, which reads as follows :

"A defendant in an action may set-off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

Set-off, while sometimes spoken of as a cross-action, properly signifies a defence as distinguished from an independent action or counter-claim. It does not dispute the existence and validity of the plaintiff's claim, for it cannot be enforced and given effect to except upon an admission of the plaintiff's claim. A counter-claim, on the other hand, is consistent with a denial of the plaintiff's demand, and may be allowed, although the plaintiff's action is defeated. This distinction is taken, though in different terms, by Pitt-Lewis in his work on County Court Practice, p. 321, in a passage quoted with approval by Cockburn, C.J., in *Stooke v. Taylor*, 5 Q.B.D., 569, 577. "A set-off," he says, "would seem to be of a different nature from a defence (*sic*), inasmuch as a set-off appears to show a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-