THE DOCTRINE OF EQUITABLE SET-OFF

By S. B. GRANAT*

The question, which I shall attempt to answer in this article, is whether a claim for an unliquidated amount can ever be relied upon by a defendant, as a defence in an action where a liquidated amount has been claimed. I would concede that, generally, a set-off requires that both claims be for liquidated amounts; but I would submit that this general rule does not operate, when, what I shall call the cross claim, upon which the defendant seeks to rely, arises out of the same transaction, or is closely connected with the subject matter of the plaintiff's claim. In England, an equitable defence known as equitable set-off, is well established; but the trend of recent Australian cases, is to deny the existence of the defence of equitable set-off. Such a defence is also available at law. Under the common law doctrine, a defendant is entitled to set up a breach of warranty in diminution or extinction of the price. This principle is enacted in the Goods Act,[1] but the fact that the common law defence is available in respect of contracts other than contracts for the sale of goods, seems to have been largely overlooked. As will be seen later, the common law defence is of more limited application than is the equitable defence.

Dealing firstly with the equitable defence, I would respectfully submit that the reasoning behind the expressions of judicial opinion in the Australian cases is unsound. In the first of these cases, *McDonnell and East Ltd v. McGregor*,[2] which was an action where the plaintiff was seeking damages for trespass and conversion, and the defendant was seeking to rely upon a set-off, being in respect of a liquidated claim for goods sold and delivered and money paid, Dixon J. said, 'My opinion is that a liquidated cross-demand cannot be pleaded as an answer in whole or in part to a cause of action sounding in unliquidated damages or *vice versa*'.[3] In so far as this statement was intended to apply to cases where there was a close relationship between the cross claims, it was, of course, only *dicta*, because in this case, the claims were completely independant of one another. There is, however, no doubt that Dixon J. intended that his remarks should be of general application, and that they should apply in cases where the claims were closely interwoven. It is this *dicta* of Dixon J. which has been adopted and applied in later Victorian cases, and has brought about the present divergence of our law from the law of England.

* B.Com., LL.B.; Barrister-at-Law.

[1] Goods Act 1958, s. 59 (1). [2] (1936) 56 C.L.R. 50. [3] *Ibid.* 62.

In *McDonnell and East Ltd v. McGregor,* Dixon J. approved of *Stooke v. Taylor,*[4] which is an old case, and if it ever was the law, it was not the law in 1936. In *Stooke v. Taylor* the plaintiff recovered £35, being £25 damages for breach of a covenant in a lease, and £10 as rent due under the lease. The defendant succeeded in recovering £20 on a counterclaim, as damages for breach of the plaintiff's covenant to repair in the same lease. Since, under the County Court Act, the plaintiff would not have been entitled to costs unless he had recovered an amount exceeding £20, the question arose as to whether the plaintiff could be said to have 'recovered' more than £20. The answer to this question was dependent upon whether the defendant was entitled to set his claim off against the plaintiff's claim. In holding that the defendant's claim could not be set off, the majority of the Court (Cockburn C.J.[5] and Manisty J.[6]) followed *Cole, Marchant & Co. v. Firth.*[7] In that case, on a reference to arbitration, the plaintiff had recovered an amount for work and labour done and materials supplied, and the defendants had recovered a slightly larger amount in respect of defects in the work. It was held that the plaintiff was entitled to costs on the claim, and the defendant, to costs on the counterclaim. If the defendant had been entitled to set-off his claim, it would have extinguished the plaintiff's claim, and the plaintiff would not have been entitled to any order for costs. The judgment was not a considered one, and no reasons were given; but the reason for the decision is quite apparent. The parties had themselves provided in their reference to arbitration that 'costs of the cause and counterclaim [were] to follow the event'. It was, therefore, unnecessary for the Court to decide whether the counterclaim could be set off against the claim, and in fact, this was not decided.

After discussing *Stooke v. Taylor,* Dixon J. went on to consider the case of *The Government of Newfoundland v. The Newfoundland Railway Co.*[8] That was a case in which the assignor to the plaintiff had contracted with the defendant to construct and maintain a railway in consideration of the defendant agreeing to pay an annual subsidy to the plaintiff's assignor in respect of every five mile portion of the railway which had been completed. In an action by the plaintiff to recover the subsidy, it was held that the defendant was entitled to set off damages suffered by it as a result of breaches of the contract by the plaintiff's assignor. Dixon J. distinguishes this case on the ground that what was being dealt with there was 'a question whether an assignee of a contract could recover moneys arising under

[4] (1880) L.R. 5 Q.B.D. 569.
[5] *Ibid.* 579.
[6] *Ibid.* 587.
[7] (1878) L.R. 4 Ex. D. 301.
[8] (1888) L.R. 13 A.C. 199.

it without being met by a counterclaim for breaches by the assignor of the same contract'.[9] His Honour went on to say:

> He [Lord Hobhouse] did not, I think, intend to institute a comparison between set-off in the strict sense and counterclaim. It would have been irrelevant to institute such a comparison. In fact he was dealing with liability under a counterclaim, and the conclusion of the Board, which is stated at pp. 213, 4 again makes it clear that, not a set-off, but a counterclaim was allowed by the judgment.[10]

Although Dixon J. may have been correct in his observations, I would respectfully submit that Lord Hobhouse's remarks cannot be given any restricted meaning. Lord Hobhouse said, 'Unliquidated damages may now be set off *as between the original parties,* and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which give rise to the subject of the assignment'.[11] I would submit that Lord Hobhouse could not have expressed himself more clearly. In my view, Lord Hobhouse was not using the term counterclaim as a term of art at all. All he wished to do was to express his approval of the principle of allowing such a cross claim as a defence to the action. I am strengthened in this view by the next sentence of the advice, where his Lordship said, 'It appears to their Lordships that in the cited case of *Young v. Kitchin,*[12] the decision to allow the counterclaim was rested entirely on this principle'.

In *Young v. Kitchin,* the plaintiff claimed the balance due under a contract of which he was assignee, to erect certain buildings, and the defendant relied upon a set-off or counterclaim arising out of breaches of the same contract, by the assignor. In the course of argument, 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, s. 25, subs. 6(1) says that the assignment of a debt . . . shall be 'subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been 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.

In his judgment, Cleasby B. said:

> In this case the principal question was disposed of upon the argument by holding that the defendant 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.[13]

9 (1936) 56 C.L.R. 50, 60.
10 *Ibid.*
11 (1888) L.R. 13 A.C. 199, 213. Italics my own.
12 (1878) L.R. 3 Ex. D. 127.
13 *Ibid.* 130-131.

I would submit that it is abundantly clear that Cleasby B. allowed the defendant's claim as a defence to the action, and it was this principle which was approved by Lord Hobhouse.

I should perhaps refer at this stage to the case of *Sun Candies Pty Ltd v. Polites,*[14] wherein Mann C.J. applied the *Newfoundland* case to hold that in an action where the plaintiff claimed the balance of the purchase price of a business, the defendant was entitled to a set-off in respect of a breach of warranty by the plaintiff, arising out of the same contract, upon which the plaintiff's action had been brought.

Dixon J. next referred to the case of *Bankes v. Jarvis.*[15] In that case, the plaintiff sought to recover the balance of purchase money due on the sale of a business to the defendant. The plaintiff's action was brought on behalf of her son, who had originally purchased the business from the defendant and had subsequently sold it back to the defendant. The plaintiff's son had committed breaches of certain covenants in the contract under which he had purchased the business, and the defendant sought to set off damages sustained by her as a result of the son's breaches of the earlier contract. She was held to be entitled so to do.

But this case has nothing whatsoever to do with equitable set-off, and it would seem that the facts of the case would not give rise to an equitable set-off. The claim and cross claim arose out of entirely separate transactions or contracts. The only link between them was that the subject matter of each of the contracts was the same business. The case was decided upon the erroneous view that the Judicature Act put liquidated and unliquidated claims on the same footing. This is apparent from the judgment of Channell J., where he said:

> I think that this counterclaim ought to have been allowed as a set-off —that is to say, it is a good defence to the extent of the plaintiff's claim; it could not, of course, stand as a counterclaim for the full amount. The case of *Agra & Masterman's Bank v. Leighton*[16] is clear authority that before the Judicature Act a liquidated amount owing to the defendant by the plaintiff's son could have been set off by the defendant against the claim of the plaintiff suing as trustee for her son. Then the Judicature Act, and more especially the rules, distinctly put an unliquidated claim on the same footing as a liquidated claim for the purpose of set-off; and consequently the defendant's claim against the plaintiff's son, which, if liquidated, could have been pleaded before the Judicature Act as a set-off to the plaintiff's claim, can now, although unliquidated, be relied on as a defence to the extent of the claim.[17]

If the reasoning of this case is correct, then, at least in contract cases, it would never be necessary to counterclaim except where the amount of the cross claim exceeded the amount of the claim. Further-

[14] [1939] V.L.R. 132.
[15] [1903] 1 K.B. 549.
[16] (1866) L.R. 2 Exch. 56.
[17] [1903] 1 K.B. 549, 553.

more, the defence given effect to in this case would have been a creature of the Judicature Act, whereas the doctrine of equitable set-off existed long before the Judicature Act. All that the Judicature Act did was to require courts of law to give effect to the doctrine. In cases where a court of equity would have protected the defendant by an injunction, the Judicature Act provided that after the passing of the Act, the defendant would be entitled to rely upon such matters as a defence to the action.[18]

In *McDonnell and East Ltd v. McGregor*,[19] Dixon J. distinguishes *Bankes v. Jarvis* on the grounds that the statement of Channell J. was not necessary for the decision in that case. He says, 'The matter in question was the right of the defendant to avail himself of a cross-demand against the person equitably entitled to the debt for which he was sued by the trustee'.[20] But the decision of the Court was to reverse the judgment appealed from, which had been given in favour of the plaintiff. The effect of the appeal was to entitle the defendant to judgment on the claim. If the defendant's claim were to have been allowed only as a counterclaim, the judgment in favour of the plaintiff would not have been disturbed. I would therefore respectfully submit that the statement of Channell J. was necessary to the decision. I would concede, however, that the case was wrongly decided, but I would prefer to say that this was not a case on equitable set-off.

The final case referred to by Dixon J. was *Smail v. Zimmerman*,[21] which was a decision of Hood J. in the Victorian Supreme Court. It is not really necessary to say much about that case because, as no facts are given, it is impossible to say whether the case was one to which the doctrine of equitable set-off would have applied. Hood J. merely states and applies the general principle that the plea of set-off is available only where the claims on both sides are in respect of 'liquidated debts'.[22] As I have said, I do not dispute that this is the general principle. But this is not a case that can be cited as an authority against the doctrine of equitable set-off. There is no consideration of the doctrine in the case. The decision is based on the cases of *Stooke v. Taylor*,[23] and *Bankes v. Jarvis*. But, as I have demonstrated, the reasoning in both of these cases is unsound, and *Bankes v. Jarvis* is certainly not support for the proposition for which it is cited.

The second Australian case which requires consideration is *Re K.L. Tractors Ltd*,[24] a decision of O'Bryan J. in the Victorian Supreme Court. In that case, the Commonwealth was petitioning for the winding up of a company, and it alleged that a certain sum was

18 Victorian Supreme Court Act 1958, s. 61 (5).
19 *Supra* n.2. 20 *Ibid.* 61. 21 [1907] V.L.R. 702.
22 *Ibid.* 703. 23 *Supra* n.4. 24 [1954] V.L.R. 505.

owing to it for goods sold and delivered and work and labour done. The company said that it was entitled to an equitable set-off as damages for breaches of the same contract by the Commonwealth, and that the amount of these damages would extinguish the Commonwealth's claim. This argument was rejected by O'Bryan J. who in his judgment said:

> I am of opinion, however, that the company's claim, even if established, could not be relied upon as a set-off. The petitioner's debt is a common law debt for goods supplied and work and labour done pursuant to an express contract. The company's claim is for common law damages (unliquidated) for breach of terms, express or implied, in the same contract. Prior to the Judicature Act, the Courts of common law gave adequate remedies to both parties for the enforcement of their respective claims. The debts, although arising out of the same contract or transaction, are independent and not mutual in the sense of a debt due to one party and a credit by the other, founded on a common knowledge and trust between them that one was to be the means of destroying the other. Nor is there here to be found any presumed intention or express agreement which a Court of equity would enforce by an order for specific performance that the claims, though independent, were to be set-off against each other *pro tanto*. Equity would have left the parties in such a case as this to their common law rights and procedure. Where both claim and counterclaim were enforceable at common law only, equity did not interfere to give a better right of set-off than that given by the common law courts unless special natural equities between the parties were disclosed.—Story, *Equity Jurisprudence* (13th ed.) Ch. XXXVIII, Vol. 2, pp. 765 *et seq.*[25]

Perhaps the foregoing remarks of O'Bryan J. are explicable on the basis that he regarded the claims as being independent; but I am rather doubtful of this. What he meant by the limitation or requirement that both claim and counterclaim should be enforceable at common law only, I have difficulty in understanding. It is my understanding that generally, one went to equity or law according to the nature of the remedy required, rather than according to the nature of the right sought to be enforced. In ordinary circumstances, if there were no special equities existing, a court of equity would apply the same rule as that applied by a court of law. But even if the statement of O'Bryan J. be correct, the question still remains as to what is 'a special natural equity between the parties' which would be sufficient to induce a court of equity to give greater relief than that available at law. I would respectfully submit that the facts in *Re K.L. Tractors Ltd*, where the cross claim arose out of the very contract which the petitioner relied upon, were sufficient to give rise to the 'special natural equity' and the respondent ought to have been allowed to

[25] *Ibid.* 507.

rely on its claim as a defence to an action on the debt. It seems to me, that this was a case where the claim and cross claim were so closely connected, that a court of equity would not allow one party to enforce its claim without taking into account the claim of the other party.

O'Bryan J. referred to the case of *Morgan & Son Ltd v. Martin Johnson & Co. Ltd.*[26] In that case it was held, that in a claim for storage of vehicles, the defendant was entitled to set-off damages sustained by reason of the plaintiff's breach of duty as a bailee, or breach of contract, which resulted in the theft of one of the vehicles which the plaintiff had stored. Tucker L.J. said that the defendant was entitled to an equitable set-off, because the defendant's claim arose 'out of the subject-matter of the plaintiffs' claim for storage, and [was] closely interwoven with it'.[27]

O'Bryan J. sought to distinguish *Morgan's* case on the ground that counsel for the plaintiff conceded that the court of equity, in circumstances similar to those present in that case, would have allowed the defendant's claim as an equitable set-off. But, as was pointed out by Morris L.J. in *Hanak v. Green*,[28] in reply to a similar argument which was advanced by counsel for the defendant in that case, the judgment of Tucker L.J. in *Morgan's* case, clearly shows that the concession was thought to have been properly made.

Of the cases referred to in *Morgan's* case, O'Bryan J. said:

> The cases referred to by Tucker L.J. and Cohen L.J. were all cases in which claims were being pursued in a Court of equity and equitable principles were applied—see *e.g. Piggott v. Williams.*[29] The case of *Young v. Kitchin*[30] was concerned with an action by the assignee of a debt to enforce an assignment under the statute which allowed the assignment only 'subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed', *i.e.* subject to all equities which would be enforced in a Court of equity. Equity had developed its own principles in allowing the assignee of a common law debt to sue in Chancery. The debt could be enforced in Chancery in favour of the assignee only subject to equities which included *e.g.*, the setting-off of a claim for unliquidated damages which the debtor might have against the common law creditor (the assignor).[31]

I would, with respect, submit that the remarks of O'Bryan J. do not afford a valid means of distinguishing the cases cited. A court of equity allowed the set-off against the assignee because it would have allowed it against the assignor if the contract had not been assigned, and the assignee should not be in a better position than the assignor had been. *Piggott v. Williams* was not a case on assignment. In that case, an action was brought by a solicitor to recover his costs. Sir John

[26] [1949] 1 K.B. 107. [27] *Ibid.* 108. [28] [1958] 2 Q.B. 9, 21.
[29] (1821) 6 Madd. 95; 56 E.R. 1027.
[30] *Supra* n.12 [31] [1954] V.L.R. 505, 508.

Leach V.C. held that the defendant was entitled to an equitable set-off in respect of damages sustained as a result of the work being negligently performed. O'Bryan J. said of that case, that it was a case being pursued in a court of equity, in which equitable principles were applied. But, since the Judicature Act, all courts are required to apply equitable principles.

Rawson v. Samuel[32] also indicates that the special or natural equity referred to by O'Bryan J. need not arise out of an assignment. Although an equitable set-off was not allowed in that case, Lord Cottenham did review a number of cases[33] indicating the kinds of circumstances which would give rise to an equitable set-off.

Another of the Australian cases in which equitable set-off was considered was the case of *Bayview Quarries Pty Ltd v. Castley Development Pty Ltd.*[34] This was a decision of Sholl J. in the Victorian Supreme Court. It was not a case of equitable set-off, because the defendant's claim did not arise out of the contract sued upon, and Sholl J. distinguished the English authorities on this ground. His Honour's remarks might, however, be said to indicate that he had some doubts as to the correctness of the Australian cases. Referring to the conflict between the authorities, his Honour said:

> But in Victoria we do not necessarily follow the English courts on matters of mere practice, and, in my opinion, I ought to follow the decision in *Smail v. Zimmerman,*[35] and the clear opinion of Dixon J. (as he then was) in *McDonnell and East Ltd v. McGregor*[36] concurred in by Mc Tiernan J.[37] that a cross-demand sounding in damages cannot be pleaded as a defence to a liquidated demand. In our courts that has always been the law—of course excepting special statutory rules as, for example, in bankruptcy—and the clear distinction between set-off proper and counterclaim has been clearly maintained. If we are now to take a different course in the light of recent English decisions, I think it must be as the result of the decision of an appellate court.[38]

His Honour then proceeded with a review of the English cases, and the requirements of an equitable set-off, according to those cases. In *Morgan's* case it was 'a *bona fide* claim arising out of the subject-matter of the plaintiff's claim for storage and closely interwoven with it'. In *Young v. Kitchin* his Honour said, 'the damages claim related to the same contract as that from which the debt arose'. In *Hanak v. Green,* 'the cross claims arose out of the very contract sued upon'. In *Rawson v. Samuel* Lord Cottenham had said that an equitable set-off would be allowed when the defendant had 'some equitable ground for being protected against the [plaintiff's] claim'. In *Piggott v.*

32 (1841) Cr. & Ph. 161; 41 E.R. 451.
33 *Ibid.* 179-180.
34 [1963] V.R. 445.
35 *Supra* n.21.
36 (1936) 56 C.L.R. 50, 62.
37 *Ibid.* 63.
38 [1963] V.R. 445, 449.

Williams the set-off 'went directly to impeach the solicitor's demand'.[39]

Finally, there is the Victorian case of *Newman v. Cook*.[40] In that case, one judge of the Full Court (Hudson J.) followed the English authorities, and allowed an equitable set-off as a defence to a claim by the vendor of a boat for the enforcement of an equitable mortgage over the boat which he had acquired under the sale agreement. Hudson J. allowed the equitable set-off in respect of damages sustained by the purchasers of the boat as a result of breaches by the vendor of warranties contained in the sale agreement. After referring to the English authorities, he said:

> In the light of these decisions it appears to me that when the appellant in the present case brought his action to enforce against the respondents the contract into which they had entered to execute a mortgage and to enforce his rights as mortgagee his claim was effectively met by a defence of equitable set-off founded on the right to damages (in this case damages that had been actually awarded and assessed) flowing from breaches of the same contract as that upon which the appellant's claim was founded. The immediate relief which the appellant sought and which the respondents were concerned to resist was of course an order for possession of the boat and the right to sell it as mortgagee. These rights depended upon the appellant establishing that there had been default on the part of the respondents in payment of instalments alleged to have become due under the mortgage which they were to be treated as having executed. Obviously, if the respondents were entitled, as in my view they were, to claim that the instalments had been satisfied by set-off, there was no default and the rights of seizure and sale did not arise.[41]

It should be noted however that Hudson J. does not mention the earlier Australian cases in his judgment, and it would seem that the cases could not have been referred to in argument. It should also be noted that the reasons for judgment given by him were not the same as the reasons given by the other members of the Court.

The only other case to which I need refer, is the recent case of *Hanak v. Green*,[42] in which the doctrine of equitable set-off is reaffirmed by the Court of Appeal, and applied to permit a claim which was partly unliquidated to be set-off against a claim which was wholly unliquidated. The plaintiffs claimed for breach of contract, and the defendant was held to be entitled to an equitable set-off in respect of the value of the work done by him under the same contract, as well as damages for trespass which also arose out of the same contract. In his judgment, Morris L.J. considers most of the English authorities on this subject.

It is my view that the English cases on equitable set-off are correct,

39 *Ibid.*
40 [1963] V.R. 659.
41 *Ibid.* 674.
42 [1958] 2 Q.B. 9.

and that the Australian cases are incorrect. Perhaps one reason for the difficulties and confusion which have arisen in relation to this question, is to be found in the misleading and inaccurate description of the equitable defence as a set-off. There is really no similarity at all between an equitable set-off and a legal set-off. A legal set-off amounts to the setting off of mutual debts. There need be no relation or connection whatsoever between the subject matters of the respective debts, so long as both the claim and cross claim are for liquidated amounts. But apart from both the equitable and the legal set-off being a defence to an action, the two defences have nothing at all in common, and I can think of no reason why the equitable defence should be described as a set-off.

In this article, I have dealt primarily with the possibility of an equitable set-off where the claim is for a liquidated amount, and the cross claim is for an unliquidated amount. However, there does not seem to be any reason why a liquidated amount should not be set off against an unliquidated amount: for, why should there be a different result according to which of the parties instituted the proceedings. Also, as occurred in *Hanak v. Green*,[43] an unliquidated amount can be set off against an unliquidated amount. For the purposes of equitable set-off, the question of whether either or both of the claims are liquidated or unliquidated is entirely irrelevant. As I have said, it is my submission that preoccupation with these questions has resulted from a confusion of equitable set-off with legal set-off. An equitable set-off is not a set-off at all. The only reason one might have for considering whether both claims are liquidated would be that if they are, then it would be unnecessary to go further and consider whether the relationship between the claims is sufficiently close as to invoke the doctrine of equitable set-off. If both claims are liquidated there need be no relation between the claims, because a legal set-off can then be relied upon.

But there is another aspect of this question which appears to have been largely overlooked in recent Australian cases. This is, that even at law there is a defence which will sometimes permit a defendant to rely upon an unliquidated claim as a defence to a liquidated claim. Even at law, a defendant may set up a claim for damages arising out of a contract as a defence to a claim for the contract price. This doctrine results from a line of cases culminating in the case of *Mondel v. Steel*.[44] In that case Parke B. 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

[43] *Supra* n.28.

[44] (1841) 8 M. & W. 858; 151 E.R. 1288.

> 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 shewing how much less the subject-matter of the action was worth, by reason of the breach of contract.[45]

This principle has been enacted into the Goods Act, which provides that

> Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may set up against the seller the breach of warranty in diminution or extinction of the price.[46]

The foregoing principle was referred to in *Hanak v. Green*,[47] and has been applied by the Victorian Full Court in *Riverside Motors v. Abrahams*.[48] In the latter case, the plaintiff's claim was for a fair and reasonable amount for goods sold, work done, materials provided, and money paid, in respect of repairs effected to the defendant's tractor engine. The defence relied upon was that the work had been done so negligently as to be valueless. The defendant failed to establish that the work had been done improperly; but the Court made it clear that the defendant's allegations, if established, would have amounted to a defence. In their joint judgment, O'Bryan and Martin JJ. said, 'The defendant's reliance upon the alleged negligent work both as a defence to the claim for payment and as a counterclaim for the balance of the damage suffered by reason thereof is well supported by authority, and it is only necessary to refer to the classical passage in Parke B.'s judgment in *Mondel v. Steel*[49]'.[50]

Of course, in *Riverside Motors v. Abrahams*, the claim was based upon *quantum meruit*, and in order to prove his case, the plaintiff had to show that the work done was worth the amount claimed. But it is clear that the principle is equally applicable to cases in which the plaintiff is suing for an agreed sum.[51] Thus, in *Allen v. Cameron*,[52] where the plaintiff had agreed to provide and plant a number of trees for the defendant and to maintain them for a two-year period, the defendant was permitted to defend an action for the contract price by showing that the trees had not been properly maintained during the period. In his judgment, Bayley B. said:

45 *Ibid.* 871-872.
46 Goods Act 1958, s. 59 (1).
47 *Supra* n.28.
48 [1945] V.L.R. 45.
49 *Supra* n.42.
50 [1945] V.L.R. 45, 48.
51 See *Allen v. Cameron* (1833) 1 C. & M. 832; 149 E.R. 635; *King v. Boston* (1789) 7 East 481; 103 E.R. 186; *Street v. Blay* (1831) 2 B. & Ad. 456; 109 E.R 1212; *Cousins v. Paddon* (1835) 2 Cr. M. & R. 547; 150 E.R. 234; *Poulton v. Lattimore* (1829) 9 B. & C. 259; 109 E.R. 96; *Dicken v. Neale* (1836) 1 M. & W. 556 150 E.R. 556; and *Thornton v. Place* (1832) 1 M. & Rob. 218; 174 E.R. 74.
52 (1833) 1 C. & M. 832; 149 E.R. 635.

> Secondly, is the plaintiff liable to an abatement from the amount agreed on in respect of misconduct on his part, or non-fulfilment of what he is bound to perform? The case of *Street v. Blay*[53] puts this in a plain and satisfactory point of view, not leaving the defendant to a cross action to recover for the diminution in value, by reason of the plaintiff's non-performance of the contract, but entitling him to deduct the amount of damage he has sustained thereby. That is a very plain and intelligible rule, and the present case shews the wisdom of it. The agreement is to pay £.220.10.0 for plants of a particular description, if kept in order; and if plants of less value are introduced, or the trees are not kept in order, the vendee is not driven to his cross action, but had a right to say, if the trees had not been what they ought to have been, they would have been worth that sum; but they were not. That sum, less by the difference in value of the trees as supplied, and by their not being kept in order, is the true amount of the plaintiff's claim, and that value only is to be recovered; so that if by the plaintiff's neglect they are worth nothing, he has no claim for any price; he is entitled to compensation only for what he has really supplied and done, and not for anything beyond.[54]

It is apparent that there is a considerable overlap between the equitable defence and the common law defence. The two defences are, however, not entirely parallel. A defendant who seeks to rely upon the common law defence must show that that which he contracted for is worth less by reason of the plaintiff's breaches, and of course, both claim and cross claim must arise out of the same contract. Although the equitable defence has been expressed in terms wide enough to include cases where either one or both of the claims are in tort, it would be going further than any case has yet gone to extend its application this far, and I would submit that there is no authority for extending the doctrine beyond those cases where both claim and cross claim arise out of the same contract. But the equitable defence is somewhat wider than the common law defence in that it would be available in respect of consequential damage. Thus, for example, where a plaintiff sued for the price of a motor car which he had sold to the defendant, the defendant could rely on the common law defence for breach of a warranty that the brakes were in first-class condition only to the extent that the breach of the warranty reduced the value of the car. But, relying upon the equitable defence, he could also deduct from the amount claimed damages suffered in a collision which had resulted from the defective condition of the brakes.

[53] (1831) 2 B. & Ad. 456; 109 E.R. 1212.
[54] (1833) 1 C. & M. 832, 840.