[HIGH COURT OF AUSTRALIA.]

McDONNELL & EAST LIMITED . . . APPELLANT;
DEFENDANT,

AND

McGREGOR . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 16.

Dixon and McTiernan JJ.

Appeal—High Court—Jurisdiction—Action in State Supreme Court—Defendant refused leave to plead set-off—Counterclaim—Findings of jury—Judgment accordingly—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 73.

Practice—Set-off—Claim for unliquidated damages—Right to set off liquidated sum—Judicature Act (*Q.*) (40 *Vict. No.* 6), *sec.* 4—*Rules of the Supreme Court* (*Q.*), *Order XXII., r.* 3.

Limitation of Actions—Set-off—Counterclaim.

In an action in the Supreme Court of Queensland for unliquidated damages in tort the trial judge refused leave to the defendant to plead by way of set-off a claim for a liquidated sum. The claim was then raised by counterclaim and the issues arising thereon were determined by the jury. In accordance with the findings of the jury the judge entered judgment for the plaintiff for damages and for the defendant for part of the amount of the counterclaim. The defendant sought, by way of appeal to the High Court, to have the judgment set aside on the ground that the judge was wrong in refusing to allow the set-off to be pleaded.

Held that the appeal did not lie. The trial judge had no authority other than to enter judgment in accordance with the jury's findings, and on appeal from his judgment the High Court had no greater power to go behind the findings or to add to them.

In an action for unliquidated damages a defendant is not entitled to plead a liquidated sum by way of set-off.

Pellas v. *Neptune Marine Insurance*, (1879) 5 C.P.D. 34, and *McCreagh* v. *Judd*, (1923) W.N. 174, applied.

Dicta in *Government of Newfoundland* v. *Newfoundland Railway Co.*, (1888) 13 App. Cas. 199, and *Bankes* v. *Jarvis*, (1903) 1 K.B. 549, discussed.

Where the indebtedness of a plaintiff to a defendant is pleaded by the latter as an answer in whole or in part to the former's claim, lapse of time will not bar the answer unless the indebtedness accrued more than the statutory period before the issue of the plaintiff's writ; but in the case of a counterclaim the period of limitation must be calculated back from the time when the counterclaim was made.

Lowe v. *Bentley*, (1928) 44 T.L.R. 388, applied.

Decision of the Supreme Court of Queensland (*Henchman* J.): *McGregor* v. *McDonnell & East Ltd.*, (1935) Q.S.R. 266, affirmed.

APPEAL from the Supreme Court of Queensland.

In an action in the Supreme Court of Queensland by Elsie Maud McGregor against McDonnell & East Ltd. the plaintiff claimed (*a*) a declaration that certain furniture and effects were her property, (*b*) damages for wrongful conversion of goods, and (*c*) an account of dealings between the plaintiff and the defendant. The writ of summons was issued on the 5th July 1932. By its defence the defendant denied that the plaintiff was the owner of the furniture and pleaded that the plaintiff was the manageress for the defendant of a boarding-house established in Brisbane. The defendant further claimed that it had the right to sell the furniture and effects as owner thereof. The furniture and effects were used by the plaintiff in the conduct of the boarding-house and were sold by the defendant to one Arnold as purchaser in October 1929. At the trial, which commenced on the 9th September 1935, counsel for the plaintiff intimated that the plaintiff was not pursuing her claim for an account and applied for an amendment of the statement of claim by alleging trespass on the part of the defendant. Leave to amend was given accordingly by the trial Judge, *Henchman* J., the defendant to have the right to amend as advised. Counsel for the defendant then applied for leave to plead a set-off in respect of an amount of £637 for goods sold and delivered and for moneys paid by the defendant on behalf of the plaintiff. His Honour refused to allow the defendant to plead the set-off, on the ground that the claim was not the subject

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matter of a set-off: *McGregor* v. *McDonnell & East Ltd.* (1). The defendant then applied for and was given leave to claim the same amount by way of counterclaim. The plaintiff thereupon raised the Statute of Limitations: His Honour held that time must be calculated back from the date of the counterclaim (2), and this had the effect of barring the greater part of the defendant's claim. The jury returned a verdict in favour of the plaintiff on the claim for £1,258 and for the defendant on the counterclaim for £245. His Honour entered judgment accordingly.

The defendant purported to appeal to the High Court from that judgment. He sought to have it set aside on the ground that the judge had wrongfully refused to allow the set-off to be pleaded, and also asked for a new trial.

A. D. Graham and *Devlin*, for the appellant.

P. L. Hart (with him *Jeffriess* and *G. L. Hart*), for the respondent, raised a preliminary objection. This appeal does not come within sec. 73 of the Constitution. It is an appeal from the findings of a jury. It is not possible to grant a new trial without upsetting the findings of the jury (*Musgrove* v. *McDonald* (3); *R.* v. *Snow* (4); *The Commonwealth* v. *Brisbane Milling Co. Ltd.* (5)).

A. D. Graham. This is not an appeal from the verdict of the jury. It is an appeal from the order of the trial judge refusing the appellant leave to plead a set-off. The appellant is not asking for a new trial of all the issues raised in the case but only for a trial of those issues which he should have been allowed to raise by way of set-off. In order to support the decision of the trial judge, Order XXII., rule 3, of the *Rules of the Supreme Court* (Q.) must be read as applying to claims for unliquidated amounts. It is a rule of general application. If it is a rule which applies only to a liquidated claim a defendant could not raise a liquidated claim by way of counterclaim. If there is any limitation, that limitation must be expressed in the rule itself. There is no limitation appearing in the rule which applies

(1) (1935) Q.S.R. 266, at pp. 267, 268.
(2) (1935) Q.S.R., at p. 268.
(3) (1905) 3 C.L.R. 132, at pp. 144, 147.
(4) (1915) 20 C.L.R. 315, at pp. 361, 362.
(5) (1916) 21 C.L.R. 559.

to claims for damages whether liquidated or unliquidated. It is a rule of procedure only to carry into effect the rights of the parties. [He referred to *McCreagh* v. *Judd* (1) and *Bankes* v. *Jarvis* (2).] Whatever rights a defendant may have had before the *Judicature Act*, he may since that Act plead a claim against the plaintiff either by way of set-off or counterclaim (*Government of Newfoundland* v. *Newfoundland Railway Co.* (3); *Stumore* v. *Campbell & Co.* (4); *Smail* v. *Zimmerman* (5); *Woodroffe & Co.* v. *J. W. Moss & Co.* (6); *Lord Kinnaird* v. *Field* (7); *Stooke* v. *Taylor* (8); *Pellas* v. *Neptune Marine Insurance Co.* (9)). In the last case it would appear that under a similar rule the trial judge had a discretion. That discretion does not mitigate a universal rule. All these cases fail to advert to the definite words of the *Judicature Act*, namely, that the rule is available in every civil action. As to the right to appeal, there is no attack on the verdict of the jury. The trial judge had two functions to perform. One was to deal with the answers returned by the jury, and the other was to consider the appellant's right of set-off. The appeal is against the order of the trial judge and not against the verdict of the jury. [Counsel also referred to *Buchanan* v. *Byrnes* (10).]

Counsel for the respondent were not called upon.

The following judgments were delivered :—

DIXON J. In this appeal a preliminary objection was made upon the ground that the judgment under appeal was pronounced after questions had been put to the jury and findings obtained to which the judgment gave effect. It is objected that it was not permissible for the judge at the trial to go behind the findings of the jury, and that upon appeal this court can do no more than he could have done at the stage when he gave judgment. Decisions of this court, which are based upon sec. 73 of the Constitution, have established that, although an appeal does lie from every judgment, decree,

(1) (1923) W.N. 174.
(2) (1903) 1 K.B. 549, at pp. 551, 552, 553.
(3) (1888) 13 App. Cas. 199.
(4) (1892) 1 Q.B. 314, at pp. 316, 318.
(5) (1907) V.L.R. 702.
(6) (1915) V.L.R. 237.
(7) (1905) 2 Ch. 361.
(8) (1880) 5 Q.B.D. 569, at pp. 573, 576.
(9) (1879) 5 C.P.D. 34.
(10) (1906) 3 C.L.R. 704.

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order, or sentence of a Supreme Court, yet in deciding an appeal from a judgment founded on a jury's verdict or findings this Court stands in the position in which the court below stood at the time when it was pronounced. If the court below takes a general verdict or findings from a jury and if, after having done so, it has no authority under the law governing its procedure to interfere with the verdict or findings of the jury or to disregard them but is required to give effect to them, then this court stands in a like position and cannot go behind the verdict or findings. That is the result of a line of cases which began with *Musgrove* v. *McDonald* (1), and includes *Brisbane Shipwrights' Provident Union* v. *Heggie* (2) and the criminal case of *R.* v. *Snow* (3) and ends, at present, in the case of *Fieman* v. *Balas* (4), in which the Full Court unanimously gave effect to the principle.

On the first and second days of the trial of the present case *Henchman* J. was faced with applications to amend the pleadings. At the plaintiff's instance the statement of claim underwent some reform, and, in consequence, the defendant had general leave to amend. The defendant brought in an amendment in the form of a set-off. The plaintiff's case at that stage had become one in tort for trespass and conversion. The learned judge refused to permit an amendment to the defence seeking to plead a set-off in answer to such a cause of action. But he allowed the same matters to be pleaded by way of counterclaim. At the conclusion of the trial his Honour left to the jury a number of questions, which they answered, and their findings are recorded in the formal judgment of the court. It appeared that much of the matter relied upon by the defendant as a set-off and as a counterclaim consisted of debts which as at the date of trial were statute-barred. At the commencement of the action, which had begun a good while before, a much larger sum was not barred by lapse of time. If, when the action was instituted, the defendant had immediately issued a writ or filed a counterclaim, he would have been able to recover a much larger sum. His Honour put to the jury questions which were limited to debts or claims against the plaintiff arising less than six years before

(1) (1905) 3 C.L.R. 132.
(2) (1906) 3 C.L.R. 686.
(3) (1915) 20 C.L.R. 315.
(4) (1930) 47 C.L.R. 107.

the actual date of the counterclaim, that is, 10th September 1935. The jury found in the defendant's favour, so far as the facts were concerned, on four items of its counterclaim. On the claim, they found in the plaintiff's favour and assessed damages in three sums amounting to a much larger sum than the total of the four items found for the defendant on the counterclaim. Moreover, in respect of one of those items their verdict was insufficient to carry judgment. It was for money paid by the defendant to the plaintiff's use, and, under the direction of the judge, the jury found that the money was not paid at the plaintiff's request. His Honour then entered judgment on the claim for the plaintiff for damages amounting to £1,258, and for the defendant on the counterclaim for the three first sums found by the jury to be owing to the defendant by the plaintiff which amounted to £240 0s. 5d. The judgments were each set off one against the other and an order was made that the defendant pay the balance to the plaintiff.

It is contended that this court, in the exercise of its appellate jurisdiction, may now examine the question whether his Honour was right in excluding a set-off and allowing only a counterclaim in respect of the plaintiff's indebtedness to the defendant. It is said that his Honour was wrong in refusing to permit the defendant to rely on a set-off, although the plaintiff's claim was for unliquidated damages. The importance to the defendant of the distinction between set-off and counterclaim lies in the fact that debts which have accrued within six years of the issue of the writ may be relied upon as a set-off by way of defence, while a cause of action relied upon as a counterclaim must have accrued within the period of limitation calculated from the delivery of the counterclaim. In my opinion, the learned trial judge was not at liberty, after the jury had answered the questions in the manner which I have described, to enter any other judgment than that which he did. After the jury's answers he had no authority to do more than give legal effect to the findings they express or imply. He could not, even if he desired, then retrace his steps, reverse the decision at which he had arrived on the application for amendment, and give directions for another or further trial. When a jury answers specific questions, the strict course is to obtain under direction a general verdict in accordance

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with the findings and to enter judgment upon the verdict. But the formality of requiring the jury to return a verdict may be dispensed with if there be no objection. When a jury answers specific questions and is discharged without giving a general verdict, the jury and the parties are, in the absence of express objection, taken to have authorized the court to enter such verdict and consequent judgment as flows in law from the answers which are given. Under Order XLII., rule 6, of the *Rules of the Supreme Court* (Q.) on a motion for judgment the court may draw any inference of fact not inconsistent with the jury's findings. But there is nothing in the Queensland statutes or in the rules of court which would enable the judge, after accepting a jury's answers to questions and discharging the jury, to take steps which would result in the allowance of a further or wider defence, whether by way of set-off or otherwise. *Skeate* v. *Slaters Ltd.* (1) contains dicta to the effect that, under the Judicature system, if, after verdict, the trial judge arrives at the conclusion that no evidence supports the verdict, he may enter judgment contrary to the verdict. Such a course could not be followed at common law. The constitutional theory was that judgment could be founded only on a verdict. The trial judge could not refuse to accept and enter upon the postea a verdict which a jury persisted in returning, and, however many times the court in banc might send the cause down for a new trial, in the end there must be a verdict. It may be doubted whether Order XXXVI., rule 39, of the English *Rules of the Supreme Court*, or any other provision which applies to the trial judge impairs this theory. The question can seldom if ever be of any importance in England, because the authority of the Court of Appeal is not limited to that of the trial judge and extends to entering judgment contrary to the verdict. No such question arises in the present case. The jury's answers implied that they had found under the direction of the learned Judge and in the due performance of their functions what was the full amount of money owing by the defendant to the plaintiff, and the full amount to which the plaintiff was entitled. The judgment of *Evatt* J. and myself in the recent case of *Edmond Weil Incorporated* v. *Russell* (2) contains a discussion of the position occupied by the trial judge who

(1) (1914) 2 K.B. 429.

(2) *Ante*, p. 34.

accepts answers to questions and then without directing a general verdict discharges the jury. No doubt, until a general verdict is returned, a judge has full control. But that is because the trial has not concluded and the jury is there under his direction to perform whatever duties are imposed by law upon it. But, after its discharge, the position is necessarily different. *Henchman* J. had no authority to do other than he did, and upon appeal from his judgment this court has no greater power to go behind the findings or add to them. It follows, in my opinion, that this appeal must be dismissed independently of the correctness, or the incorrectness, of the course *Henchman* J. took in limiting the defendant's amendment to a counterclaim.

But the argument on behalf of the defendant appellant has entered upon the general question whether what *Henchman* J. did was right or wrong, and I think I should add that, in my opinion, it was perfectly correct. Order XXII., rule 3, of the Queensland rules of court which deals with set-off and counterclaim, is not identical with Order XIX., rule 3, of the English *Rules of the Supreme Court*. But the difference is in the introductory words only, and, in substance, the provisions are the same. Under the rule the distinction between set-off and counterclaim has, I think, been maintained. Its practical importance is illustrated by the decision of *MacKinnon* J. in the case of *Lowe* v. *Bentley* (1), which applies to the present case. When the indebtedness of a plaintiff to a defendant is pleaded by the latter as an answer in whole or in part to the former's claim, lapse of time will not bar the answer unless the indebtedness accrued more than the statutory period before the issue of the plaintiff's writ. But *MacKinnon* J. decided that in the case of a counterclaim the period of limitation must be calculated back from the time when the counterclaim was made. That decision, which I accept, involves the maintenance of a clear distinction between set-off affording an answer to a cause of action, and a counterclaim amounting to a cross-action. The argument, however, is that under Order XXII., rule 3, a set-off may be maintained on a liquidated demand as an answer in whole or in

(1) (1928) 44 T.L.R. 388.

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part to a claim for unliquidated damages in tort. It is said that it is not the law that the defendant in an action for damages must counterclaim in order to obtain the benefit of a cross-demand, and thus expose the cross-demand to an answer of the Statute of Limitations which might not be available to the plaintiff if time were calculated back from the writ. The terms of the rule have occasioned difficulty almost from the time it was adopted in England. The explanation of its terms appears to lie in the fact that, as a matter of terminology, its framers did not seek to make a hard and fast distinction between the use of the expression "set-off" and the use of the word "counterclaim." The purpose of the rule was to make it clear that, whether under the law existing at the time a cross-demand would amount to a defence, or whether it would under that law be no defence but only the subject of an independent proceeding, it may now be used as a cross-demand in the same proceedings. Whether it be called a "set-off" or be called a "counterclaim" the cross-demand became available to the defendant in the same suit. But I do not think the rule requires an independent cause of action to be treated as if it were a matter of defence only. One reason why a set-off in the strict sense might be pleaded if it accrued within six years of the commencement of the action was that it answered the cause of action, and if, at the date of the writ, a good answer existed, the plaintiff's claim could not be maintained. The distinction between a cross-demand affording an answer to the cause of action wholly or in part and a cross-demand which could only be enforced by an independent claim, although in the same proceedings, is thus a real one. It is recognized in *Sovereign Life Assurance Co.* v. *Dodd* (1) by Lord *Esher* M.R., who says:—"What is the result of a plea of set-off? It is not a counterclaim or a cross-action, but a plea in bar; and therefore, in cases where the plea is made out, although it may be true that when the action was brought the defendant was a debtor of the plaintiff, yet, the plaintiff being the defendant's debtor to the same amount, the plaintiff's claim is barred." The importance of the distinction is made plain by the result produced.

(1) (1892) 2 Q.B. 573, at p. 578.

One of the earliest cases in which the effect of Order XIX., rule 3, upon the distinction was raised was that of *Pellas* v. *Neptune Marine Insurance Co.* (1). In that case *Bramwell* L.J., delivering the judgment of himself, *Brett* and *Cotton* L.JJ., said:— "The argument for the defendants was that whatever was a 'defence' to a liquidated claim, has been made by Order XIX., rule 3, a defence to an unliquidated claim. I cannot assent to that argument; according to it, if A sues B for damages for breaking his leg, B may set up as a 'defence' a claim against A as the acceptor of a bill of exchange; is it possible to say that that can be deemed a 'defence'? The rule does not authorize such an answer as this, and I am confirmed in this opinion by its concluding words, which allow a court or judge to refuse the defendant permission to avail himself of it. It is hardly to be supposed that this provision can refer to a defendant's right to defend himself" (2). In the following year the matter was again dealt with in *Stooke* v. *Taylor* (3). In that case the matter arose indirectly. But the distinction between a set-off affording an answer and a counterclaim as a cross-action was nevertheless definitely involved. As a result of provisions of the County Court Act relating to the recovery of costs, it was necessary for the Court to decide whether in an action referred to arbitration the plaintiff had recovered £15 or £35. The arbitrator had found that £35 was payable to him, part of which was damages, but had deducted £20 because he was liable in damages to that amount to the plaintiff. In the course of dealing with the question how much the plaintiff had "recovered," *Cockburn* C.J. discussed at length the difference between a cross-demand amounting to an answer, and one affording a cross-action. The discussion shows clearly that he regarded the distinction between a set-off, which affords a defence to the plaintiff's claim, and a cross-demand affording no defence but only giving rise to a counterclaim, as existing under the rule of court. I refer particularly to pages 572, 574, 575 and 576. Apparently the first judicial dictum to deviate from the position so stated is contained in the judgment of Lord *Hobhouse* in *Government of Newfoundland* v. *Newfoundland Railway Co.* (4).

(1) (1879) 5 C.P.D. 34.
(2) (1879) 5 C.P.D., at pp. 40, 41.
(3) (1880) 5 Q.B.D. 569.
(4) (1888) 13 App. Cas., at p. 213.

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The case related to a counterclaim, as appears clearly at p. 202. In dealing with the counterclaim, Lord *Hobhouse* referred to an authority on equitable set-off and said :—" That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not be the subject of set-off. That law was not found conducive to justice and has been altered. 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." His Lordship was then dealing with a question whether an assignee of a contract could recover moneys arising under it without being met by a counterclaim for breaches by the assignor of the same contract. He 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, 214, again makes it clear that not a set-off but a counterclaim was allowed by the judgment. That dictum was not cited in the next case which dealt with the matter, namely, *Stumore* v. *Campbell & Co.* (1). There a judgment creditor sought to garnishee some moneys of the judgment debtor in the hands of the garnishee. The garnishee answered that he was entitled to a cross-demand for costs against the judgment debtor. The moneys in his hands had been paid to him by the judgment debtor for a special purpose that had failed. Although the amount was liquidated, it followed from the fact that he held it for a special purpose that the garnishee could not rely upon a set-off in the strict sense. He said that whilst that might have been the law, it was no longer the law owing to the change made by the *Judicature Act*, and in particular by Order XIX., rule 3. The court considered that no such change had been brought about. In the course of his judgment, Lord *Esher* said :—" 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 pleaded as counterclaim which is really set-off ; but counterclaim

(1) (1892) 1 Q.B. 314.

is really in the nature of a cross-action. This court has determined that, where there is a counterclaim, in settling the rights of parties, the claim and counterclaim are, for all purposes except execution, two independent actions " (1). *Lopes* L.J. said :—" The power to counterclaim was introduced to prevent circuity of action. It is a matter of procedure, and does not affect rights, and, consequently, the claim of the defendants for costs against the estate is no answer to the claim of the plaintiff to attach the money that they hold at the disposal of the executors " (2). *Kay* L.J. said :—" All that those Acts have done in respect of a counterclaim is to allow a cross-action to be brought and tried at the same time as the original action. This is for the general convenience and to prevent the necessity for trying the actions separately, with all the attendant cost of doing so. If, then, before the Judicature Acts the defendants would have been bound to restore this money notwithstanding they had a claim for a liquidated sum larger than the amount deposited, and if they can neither assert a lien or set-off by reason of the nature of the deposit, it seems to follow *a multo fortiori* that they cannot set up this claim to costs in answer to a demand for the return of the money " (3).

Notwithstanding those decisions, a dictum is to be found in *Bankes* v. *Jarvis* (4) by *Channell* J. which appears to deny the distinction. He says : " 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." The statement is not material to the decision. 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. I think that all his Lordship meant was that no longer was there an obstacle to setting up such a claim by a defendant, although unliquidated, if it was limited to the amount claimed by the plaintiff. It might be used to prevent recovery by the plaintiff, but not to recover from the plaintiff. The use of the expression " set-off " by *Channell* J. cannot, I think, be taken to mean more than that he considered that the result was more like

(1) (1892) 1 Q.B., at pp. 316, 317.
(2) (1892) 1 Q.B., at p. 318.
(3) (1892) 1 Q.B., at pp. 318, 319.
(4) (1903) 1 K.B., at p. 553.

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that of a set-off than of a counterclaim. From that time there does not seem to be any distinct authority on the subject until *McCreagh* v. *Judd* (1), except the Victorian case of *Smail* v. *Zimmerman* (2). In the Victorian case, *Hood* J., and in the English case, a Divisional Court consisting of *Lush* and *Salter* JJ., decided that unliquidated and liquidated demands could not be set-off. In the one case the attempt was to rely upon an unliquidated claim as a set-off to a liquidated demand, in the other, upon a liquidated as a set-off to an unliquidated claim. 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 damages or vice versa. Such cross-demands must be pleaded by way of counterclaim, not set-off. Although at first difficulties may have been felt, I think it is almost universal in modern practice for the distinction to be maintained. The manner in which a judgment is drawn up dealing with claim and counterclaim affords an example. The judgment is pronounced on the claim only if there is a set-off in the strict and proper sense. When a cross-demand is not set off in the strict and proper sense, judgment is pronounced on the claim and on the counterclaim and the sums in which the respective parties are found liable to one another are set off.

It has been held that in the case of claim and counterclaim there are two events for the purpose of costs. In the present case the distinction has proved of vital importance to the defendant because of the Statute of Limitations.

A question of costs has been raised by the appellant. It appears that the respondent insisted on the inclusion in the record of matter which the appellant desired to omit and the appellant seeks to have the costs said to have proved unnecessary. We think that, when an appeal is instituted, prima facie, the respondent is entitled to have included in the transcript all matters which, in his view, are likely to be necessary, or which he desires to bring to the notice of the court. We are not in a position to say that the respondent was unreasonable in her request and we shall make no special order. But what we say is not to be taken in any way as affecting the

(1) (1923) W.N. 174.

(2) (1907) V.L.R. 702.

taxing master's authority to disallow any costs which he may think unnecessary.

The appeal will be dismissed with costs.

McTiernan J. I agree.

Appeal dismissed with costs.

Solicitors for the appellant, *Bergin Papi & Finn.*

Solicitors for the respondent, *C. R. Ellison & Co.*

B. J. J.

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Appl *Vale Press Pty Ltd v Federal Commissioner of Taxation* (1994) 124 ALR 210

Expl *FCT v Australia & New Zealand Savings Bank Ltd* (1994) 69 ALJR 12

Appl *Dalco v FCT* 2 FLR 310 | Cons *Dalco v FCT* 82 ALR 669 | Appl *R v DCT (WA); Ex parte Briggs* 14 FCR 249 | Cons *Dalco v FCT* 19 ATR 1601 | Foll *John Tanner Holdings Pty Ltd v Federal Commissioner of Taxation* 19 ATR 1640 | Appl/Cons *R v DCT (WA); Ex parte Briggs* 72 ALR 365 | Appl *Dalco v FCT* 19 ATR 833 | Foll *EHL Burgess Pty Ltd v FCT* 19 ATR 1407 | Foll *McCauley v FCT* 19 ATR 1443

Appl *Deputy Commissioner of Taxation v Harris* 89 ALR 227 | Appl *Taxation Commissioner of v Swan Brewery Co Ltd* (1991) 30 FCR 553 | Appl *Eldridge v FCT* 21 ATR 897 | Dist *FCT v Kelly Ford Pty Ltd* 3 FCR 469 | Appl *Imperial Bottleshops Pty Ltd v FCT* (1991) 22 ATR 148 | Appl *FCT v Swan Brewery Co Ltd* (1991) 22 ATR 295 | Appl *A A T Case 8227* (1992) 24 ATR 1001 | Appl *A A T Case 8186* (1992) 24 ATR 1025 | Appl *A A T Case 20/93; No 8728* (1993) 26 ATR 1114

Foll *AAT Case 13,428; Re Palmer & FCT* (1998) 41 ATR 1016 | Foll *WR Healy Pty Ltd & FCT, Re* (2003) 52 ATR 1172

Case No (1997) R 1191

[IN THE HIGH COURT OF AUSTRALIA.]

Appl *Vale Press Pty Ltd v Federal Commissioner of Taxation* (1994) 29 ATR 207

TRAUTWEIN . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

THE KING

AGAINST

THE FEDERAL COMMISSIONER OF TAXATION;

EX PARTE TRAUTWEIN.

H. C. of A. 1936.

SYDNEY, *May* 13, 14, 15.

MELBOURNE, *Sept.* 9.

Latham C.J., Starke, Dixon and Evatt JJ.

Income Tax (Cth.)—Assessment—Amended assessment—Alterations or additions—"Imposing any fresh liability, or increasing any existing liability"—Right of taxpayer to object—Unaccounted-for accretion of assets over period of years—Allocation by commissioner—Equal proportion to each year within that period—Validity—Burden of proof—Objections by taxpayer—Duty of commissioner—Income Tax Assessment Act 1922-1934 (*No.* 37 *of* 1922—*No.* 18 *of* 1934), *secs.* 36, 37, 39, 50, 51A.

A taxpayer, who had not kept proper records or books of account, objected to assessments for Federal income tax made in respect of his income during each of seven consecutive years. His liability to tax was reviewed by the