

ON APPEAL FROM BRITISH COLUMBIA ADMIRALTY
DISTRICT.

BETWEEN

1907
April 22. } BOW McLACHLAN & COMPANY, } APPELLANTS;
 } LIMITED, (PLAINTIFFS)..... }

AND

THE SHIP *CAMOSUN* (DEFENDANT)..RESPONDENT.

Shipping—Mortgage action—Defence—Motion to strike out—Set-off and counterclaim.

Held, affirming the judgment appealed from, that in an action upon a mortgage given to builders for the purchase price of a ship, defendants may plead a set-off for moneys they have been obliged to expend to replace defective workmanship and complete the ship in accordance with the contract.

2. Distinction in procedure between set-off and counterclaim discussed.

APPEAL from a judgment of the Local Judge for the British Columbia Admiralty District, reported in 10 Ex. C. R. 403.

April 8th, 1907.

J. S. Ewart, K.C. and *G. Osler*, for appellants, cited *Best v. Hill* (1); *Ogders on Pleading* (2); *Government of Newfoundland v. Newfoundland Railway Co.* (3).

F. H. Chrysler, K.C., cited, for respondents, *Young v. Kitchin* (4); *Annual Practice, 1907* (5); *Benjamin on Sales* (6).

The JUDGE OF THE EXCHEQUER COURT now (April 22nd, 1907), delivered judgment.

(1) L. R. 8 C. P. 10.

(2) P. 233.

(3) 13 App. Cas. 199.

(4) L. R. 3 Ex. D. 127.

(5) P. 274.

(6) 5th ed. p. 1008.

The plaintiffs appeal from an order made on the 9th day of January, 1907 by the learned Judge in Admiralty of the British Columbia Admiralty District, in an action on a mortgage of the defendant ship, whereby he gave the defendant leave to file and serve an amended statement of defence in accordance with a draft then presented ; and they ask that the order be reversed in so far as it gives the defendants liberty to file a defence containing the matters set forth in the seventh paragraph of such draft defence, or any defence setting up the alleged wrong construction or equipment of the defendant ship.

By the fourth paragraph of the statement of defence the Union Steamship Company of British Columbia, Limited, the owners of the said ship, allege among other things, that they entered into a contract with the plaintiffs to build the said ship *Camosun* at their works at Paisley, Scotland, in accordance with certain letters, plans and specifications, at and for the contract price of £28,000 ; that the said ship when constructed was registered temporarily in the name of Gordon Tyson Legg as trustee for the said owners ; that for interim security the said Legg gave the plaintiffs the mortgage on the said ship referred to in the statement of claim herein ; that upon the said steamer arriving at Vancouver she was conveyed to and registered in the name of the said owners ; that the said owners thereupon in accordance with a previous understanding entered into an agreement with the plaintiffs varying the terms and times of payment of the said mortgage moneys which were in reality moneys due by the said owners to the plaintiffs for the construction of the said ship. The agreement is then set out and is followed by allegations to show that the defendants are not in default.

By the seventh paragraph of the statement of defence the owners of the defendant ship, alternatively by way of

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equitable defence to the plaintiffs action (in the event of it being held that they have made default under the said agreement and mortgages and that the plaintiffs are entitled to recover), allege that the plaintiffs did not build the said ship *Camosun* in accordance with the terms of the contract, plans and specifications set out in the fourth paragraph of the statement of defence ; but that on the contrary, the said ship *Camosun* was built by the plaintiffs negligently and with defective work and materials, and not in accordance with the requirements of Lloyds 100 A 1 Class and Board of Trade, nor in accordance with the plans and specifications of the same, with the result that the said owners were forced to expend in repairing and replacing defective materials and bad workmanship ; and in making the said ship comply with the requirements of Lloyds 100 A 1 Class and Board of Trade ; and in repairing and renewing fittings, decorations, furniture and stoves damaged through leaking decks and hull, and other defective material and workmanship, and other incidental expenses, the sum of £3638, particulars thereof have already been delivered to the plaintiffs ; and the defendants, the owners of the said ship, claim that they are in equity entitled to and in justice should be permitted to set off and deduct from any and all sums of money which may be payable by the said owners to the plaintiffs, the said sum of £3638 so expended by them as aforesaid, with interest and costs.

If this were an action by the plaintiffs against the defendants for the stipulated price of the ship which the former had agreed to build for the latter in accordance with the alleged contract it would be competent to the defendants to set up by way of defence to the action that the plaintiffs had not built the ship according to contract and to show how much less the ship was worth by reason of such breach of contract. *Mondel v. Steel* (1); *Church*

(1) 8 M. & W. 871, 872.

v. *Abell* (1); *Benjamin on Sales* (2); *Mayne on Damages* (3) and in that way they might obtain an abatement of the price; and such abatement would not be a bar to a cross action for special or consequent damages for the breach of contract.

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In *Benjamin on Sales* (4), where these questions are discussed, it is stated as follows:—

“The Judicature Acts have not affected these rights of the buyer, for in giving a defendant a right to set off, or set up by way of counter-claim, any right or claim, they did not abolish the distinction between a defence and a cross-action, but had it in view only to prevent circuitry of action. The Acts deal with procedure only. Accordingly what before those Acts would have been a ground of defence may still be set up as a defence, and what would have been the subject of a cross-action will now be raised by a counter-claim in the strict meaning of the term.”

The distinction between a set off and a counter-claim is alluded to in *Ojger's on Pleading* (5), in the following terms:

“The Judicature Act which gave every defendant a very wide power of counter-claiming did not alter the rules as to set-off. Whatever was a good set-off either at law or in equity in 1875 is a good set-off still; and nothing else is admissible as a set-off, though it may be an excellent counter-claim. The distinction is important because it carries with it this result—that a set-off is still a defence proper to the plaintiff's action, while a counter-claim is practically a cross-action.”

Now if in an action for the price agreed upon the defendants might have defended themselves by showing as alleged in the seventh paragraph of the statement of defence that the plaintiffs did not build the said ship in

(1) 1 S. C. R. 442.

(3) 6th ed. 110.

(2) 5th Ed. 1003.

(4) 5th ed. page 1008.

(5) 6 ed. page 234.

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accordance with the terms of the contract, but on the contrary built it negligently and with defective work and materials with the result that the defendants had to expend a large sum of money in remedying such defects; that is, in substance, that the ship when delivered was worth that much less than the contract price, what good reason exists or can be suggested for refusing them permission to set up these facts as a defence to an action on a mortgage given to secure the stipulated price?

The jurisdiction of the court over a claim for building, equipping and repairing a ship depends upon the 4th section of *The Admiralty Courts Act, 1861*, which gives jurisdiction if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court. That of course is not the present case. But assume that the defendant ship, or the proceeds thereof, had been under arrest in the court, and the plaintiffs had instituted an action for the price which they now claim, would any one doubt the right of the defendants to defend themselves in the same way and form, and to the same extent that they might have done if the action had been brought in the usual way in any court of competent jurisdiction. And I do not see that a different practice should be adopted for the reason only that the action is upon a mortgage given to secure the price agreed upon. To the extent that the facts stated in the seventh paragraph of the statement of defence entitles the defendants to an abatement in the price of the ship, such facts may, it seems to me, be pleaded in defence of plaintiffs' action. But I do not think that the defendants have in this action any right to set off special or consequential damages arising from the alleged breach of the contract. Such damages would be the subject of a cross action or counterclaim for such breach, and for reasons which I have given elsewhere I do not think the court has any jurisdiction over such a claim. It is possible that some

such damages are sought to be set off by the seventh paragraph of the statement of defence; but that would, if anything, be a ground for amending or striking out a part of the paragraph as embarrassing, not for striking out the whole paragraph as I am asked to do on the ground that it discloses no defence open to the defendants in this action.

It was suggested at the argument that where, as here, a specific sum has been agreed upon to be paid for a ship to be built according to contract, the defendant in an action against them for such sum might without pleading or giving notice of the defence be admitted to show that by reason of some breach of the contract the ship was not worth as much as was contracted to be paid; but *Basten v. Butter* (1), shows, I think, that in such a case the plaintiff ought to have notice that the payment is disputed on the ground of the inadequacy of the work done, otherwise he may have some ground to complain of surprise. There can, of course, be no objection to such a defence, if a good one, being set up in the pleadings, and in a case such as this, where the action is not for the stipulated price but on a mortgage given to secure that price, such a defence ought, I think, to be set up if the defendants intend to rely upon it.

It was also argued that such a defence was not a set-off. Assuming the argument to be well founded, that would be a matter of form only and not of substance, and would not afford good ground for allowing the appeal and striking out the paragraph of the statement in defence in question here.

The appeal will be dismissed with costs to the respondents.

Judgment accordingly.

Solicitors for the appellants: *Ewart, Oster, Burbidge & Maclaren.*

Solicitors for the respondents: *Chrysler, Bethune and Larmonth.*

(1) 7 East, 482.

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