BRITISH COLUMBIA ADMIRALTY DISTRICT.

BOW McLACHLAN & CO.....PLAINTIFFS; 1906 Jan. 9.

vs.

THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA.....} DEFENDANTS.

THE CAMOSUN.

Action in rem—Mortgage—Set off—Practice.

In an action in rem to enforce the payment of money due upon a mortgage given to the builders to secure the purchase price of a ship, defendants were allowed to plead a set-off for the amount of moneys expended by them to replace defective work and materials in order to bring the ship up to the requirements of Lloyds A1 Class and Board of Trade.

MOTION to amend Statement of Defence.

November 26th, 1906.

E. P. Davis, K.C., in support of the motion: The seventh paragraph of the defence is the one in question. It alleges alternatively, and by way of equitable defence to claim on mortgage of ship for balance of price, in case it shall be held that owners have made default under mortgage and agreement, that plaintiffs in breach of the contract negligently and defectively constructed ship so that the sum of £3,638 was incurred by defendants for repairs, and asks to set off and deduct that sum from the amount due on the mortgage.

Though it has been decided by this court and the Exchequer Court on appeal that this cannot be set up as a counterclaim, nevertheless we can plead it as a defence. See Rule 63; *Padwick v. Scott* (1); *Howell's Adm. Prac.* (2); *Wms. & Bruce Adm. Prac.* (3).

(1) 2 Ch. D. 736.
(2) P. 36.
(3) 2nd ed. p. 346.

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Argument of Counsel.

This mortgage now depends entirely upon amount due for building of ship, and if the amount depends on good workmanship the court will look behind the mortgage. *The Innisfallen* (1); *The Minerva* (2); *The Trident* (3); *The Harriett* (4); *The Juliana* (5). But apart from all this Rule 63 is enough—this is really a set-off arising out of same cause or matter; it reduces the claim to that amount, and does not ask for a cross judgment as counterclaim does.

L. Bond, contra: The mortgage dated 9th February was given to secure the balance due on the ship, but the subsequent agreement made before the mortgage was due explains the true status, i.e. so long as terms of agreement were performed the mortgage would not be called in.

We do not object to the new defence (subject to costs) except par. 7. Refers to judgment of Mr. Justice Morrison on ground of jurisdiction. If it cannot go in as a counterclaim it would be wrong to allow it as a set-off as it would be getting round the decision in a round about way. But this cannot be a set-off for it is not a liquidated claim. *Annual Practice* (6).

A set-off can never sound for damages; and also the ground the Exchequer Court took in dismissing the appeal was that these claims were not an Admiralty matter at all therefore cannot be tried as a counterclaim or set-off.

Cases cited do not assist though they show that the Court of Admiralty may entertain all equitable defences on a mortgage. But this is not an equitable defence; no total failure of consideration, or non-acceptance, i.e. refusal to take. But here, they have taken and paid for the ship partly in cash and partly by mortgage. *Chitty on Con-*

(1) L. R. 1 A. & E., 72.
(2) 1 Hagg. Adm. 347.
(3) 1 Wm. Rob.. 29.
(4) 1 Wm. Rob., 182.
(5) 2 Dodson at p. 521.
(6) 1907, pp. 273-4.

tracts (1). So all that is left at common law is to bring an action for damages for wrongful construction. But such a thing never framed an equitable defence to a mortgage. And as it is a matter of discretion in view of the judgment of the Exchequer Court it should not be raised here.

And further as to convenient trial, it is agreed that the ship was built in Scotland, and it would be practically impossible to bring this action here; the balance of convenience is clearly in our favour.

Mr. *Davis* in reply: Decision in counterclaim goes no further than that an action could not be entertained in Admiralty for defects in construction of ship.

This is a set-off. *Young v. Kitchin* (2); *Goverment of Newfoundland v. Newfoundland Ry. Co.* (3). We have both things here (a) the damages and (b) the original parties. As to question of convenience—that means not so much local convenience as the nature of the issues, and not so much objectional in set-off as in the counterclaim. The real position is set up in the 4th par. of defence. The original mortgage making the payment for three months was intended only as an interim arrangement.

After steamer got out here we presented a bill for repairs, and paid the balance of mortgage in cash; we say we are not in default under the mortgage and agreement.

MARTIN, L. J. now (January 9th, 1907) delivered judgment.

The nature of and the proceedings in this action are set out in the judgment of Mr. Justice Morrison (4), which was affirmed on appeal to the Exchequer Court with another decision on the same application (5). In this relation it may not be out of place to refer to a cognate decision on the

(1) 13th ed. p. 698.
(2) 3 Ex. D., 127.
(3) 13 A. C. 199.
(4) [1906] 12 B.C. 283.
(5) *Ante*, p. 333.

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jurisdiction of this Court, *Cope v. S.S. "Raven,"* (1) and see also *Vermont S.S. Co. v. Abby Palmer* (2).

This is a motion in consequence of the former decision to deliver an amended statement of defence, and the objection arises from the following proposed paragraph thereof:

"7. Alternatively and by way of equitable defence to the plaintiff's action, in the event of it being held that the said owners have made default under the said agreement and mortgages, and that the plaintiffs are entitled to recover from the defendants in this action the said owners say that the plaintiffs did not build the said ship *Camosun* in accordance with the terms of the contract, letters, plans and specifications set out in paragraph 4 hereof, but 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 Lloyd's 100 A1 Class and Board of Trade, nor in accordance with the plans and specification of the same, with the result that the said owners were forced to spend in repairing and replacing defective materials and bad workmanship, and in making the said ship comply with the requirements of Lloyd's 100 A1 Class and Board of Trade, and in repairing and renewing fittings, decorations, furniture and stores damaged through leaking decks and hull, and other defective materials and workmanship and other incidental expenses, the sum of £3,638, particulars whereof have already been delivered to the plaintiffs, and the defendants, the owners of the said ship *Camosun* claim 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 £3,638 so expended by them as aforesaid, with interest and costs."

While Mr. Bond concedes that this Court will entertain equitable defences to a mortgage, he contends, first,

(1) [1905] 11 B.C. 486. (2) [1904] 10 B.C. 383; 8 Ex., 462.

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that to allow this defence to be set up would be really evading or getting round said decision that it cannot be set up as a counterclaim. As to that, all I need say is that if Rule 63 is broad enough to include it as a set-off, it is my duty to give effect thereto. It is not a sufficient ground to reject it that if alleged in one way it is objectionable, though if set up in a different way it may be permissible. In pleading, much depends on how defences are put forward, and their character may be changed or obscured by the manner of allegation.

Secondly, it is urged that this not a set-off in the true sense, but a counter-claim disguised, because it arises from an alleged breach of contract for negligent and defective construction and can only ask for unliquidated damages, and as there is not a total failure of consideration it is not an equitable defence to the mortgage; nor is there non-acceptance here, for the owners have taken the ship and paid for her, part in cash and part by the mortgage, and therefore all that is left them is to sue as at common law on the said breach.

In reply, it is urged that this defence differs essentially from a counterclaim for no cross judgment is asked for, but merely the right to deduct from the balance of the purchase price represented by the mortgage the loss the owners have had to bear occasioned directly by the defective construction, which is simply reducing their claim *pro tanto*, and as the matter is all one between the same parties directly arising out of the same transaction, it is manifestly a case for the consideration of an equitable set off, and *Young v. Kitchin* (1) and *Government of Newfoundland v. Newfoundland Ry. Co.* (2), are relied upon as shewing that an equitable set-off can be founded on damages for breach of contract. At p. 213 of the latter case their Lordships of the Privy Council say :—

(1) [1878] L.R. 3 Ex. D. 127. (2) [1888] 13 A.C. 199.

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"That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law 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 also give rise to the subject of the assignment.

"It appears to their Lordships that in the cited case of *Young v. Kitchin* the decision to allow the counter-claim was rested entirely on this principle."

On considering the whole matter I cannot see that I would be justified in excluding this proposed set-off in circumstances such as these at bar, for they seem to me equitably to clearly entitle the defendants to a reduction of the mortgage, if they can be substantiated, and therefore an opportunity should be given them to do so.

Thirdly, I am asked to say in the language of said rule that this set-off in my opinion "cannot be conveniently "disposed of in the action." No evidence is before me on this point other than is contained in the pleadings and the judgments which have been referred to. It is stated in that of my brother Morrison that the repairs in question were made at Montevideo and San Francisco while the *Camosun* was on her way out to this Province where she now is, and probably the greater part of them were made at San Francisco towards the close of the voyage. It certainly would be more convenient to dispose of the questions arising out of these repairs here, where the ship is and can be inspected, than in Scotland, and witnesses who would for example, testify regarding her condition on arriving at San Francisco could be examined with greater facility and less expense on this coast, either orally or by commission, than in Scotland. Of course as regards the original construction of the ship, there is much to be said in favour of Mr. Bond's contention that

seeing she was built in Scotland the evidence must be got there; but on the other hand, the ship is here and the actual inspection of her by skilled persons in the light of the evidence will be of much importance in determining any alleged defects. The truth is it will doubtless be a difficult matter to dispose of anywhere satisfactorily, but I am unable to say that it will be more inconvenient here than in the only other place suggested, and therefore I should not refuse to entertain it. This is apart from Mr. Davis' submission that "convenience" means not so much locality as the nature of the issues and the facility for their disposition, in regard to which all I need say is that I think the matter should be additionally considered in that light; but it is not suggested by Mr. Bond that in this sense there is any lack of convenience here.

The result is that the motion will be allowed, with costs thereof, and of those occasioned by the amendment, to the plaintiff in any event. The reply to be delivered in six weeks as requested by Mr. Bond.

Judgment accordingly.

L. Bond, solicitor for plaintiffs.

Davis, Marshall & Macneill, solicitors for defendants.