Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bow, McLachlan and Company, Limited, v. *The Ship "Camosun" and The Union Steamship Company of British Columbia, Limited, the Owners of the said Ship, from the Supreme Court of Canada; delivered the 23rd July,* 1909.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ASHBOURNE.
LORD JAMES OF HEREFORD.
LORD GORELL.
LORD SHAW.

[*Delivered by Lord Gorell.*]

This Appeal raises a question of considerable interest and importance as to the jurisdiction in Admiralty of the Exchequer Court of Canada.

The facts giving rise to the case are these:—

The Appellants are a shipbuilding company, having their office at Paisley, and in 1904 agreed with the Respondent Company (herein-after called the Respondents), whose office is at Vancouver, British Columbia, to build a steamship, afterwards called the "Camosun," for £28,000, of which £5,000 was to be paid in cash on delivery, and the balance was to be treated as lent by the Appellants and secured by mortgage.

The "Camosun" was accordingly built by the Appellants at Paisley and delivered to Mr. Gordon Legg, the Managing Director of the Respondents,

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on the 9th February 1905. On the same day he was temporarily registered as owner, paid the Appellants £5,000 and mortgaged the vessel in the statutory form to them to secure the sum of £23,248 and interest. The £248 was for interest to the date of settlement. The consideration was stated in the mortgage to be £23,248 " this day lent to me by Bow, McLachlan & Co., " Ltd.," and the mortgage contained a covenant by Mr. Legg to pay to them the said sum with interest at 6 per cent. per annum on the 9th May then next, and that, if the said sum was not paid on that day, he would, during such time as the same or any part thereof remained unpaid, pay to them interest on the amount unpaid at 6 per cent. per annum by equal half-yearly payments on the 9th February and the 9th August in every year, and was expressed to be to secure the repayment in manner aforesaid of the said principal sum and interest. The mortgage was duly registered.

An agreement was subsequently entered into between the Appellants and the Respondents, signed by the former at Paisley on the 25th February, 1905, and by the latter at Vancouver on the 13th May 1905. This agreement recited that the " Camosun " had been built to the order of the Respondents for the sum of £28,000 and was completed and made ready for sea, and that £5,000 had been paid, and provided for the payment of the balance with interest on the cost during construction, viz. £23,248, by yearly instalments commencing with a payment of £5,248 on or before the 9th February, 1906, and £5,000 on or before each subsequent 9th February until the whole was paid off, with interest at 6 per cent. per annum from the 9th February, 1905, on the balance of price remaining unpaid from time to time. The first payment of interest was to be made on the 9th February.

1906, for the year previous to that date, and afterwards the interest was to be paid half-yearly on the 9th February and 9th August in each year. In addition to the security of the said mortgage, the Respondents agreed to give the Appellants certain further security, and to keep the vessel insured, and they also agreed that, if they failed to pay any of the instalments or half-yearly balance of interest when due, or failed to carry out any of the obligations undertaken by them under the agreement, the Appellants should be entitled forthwith to enforce the mortgages or any of them, accounting to the Respondents for the net proceeds of the vessel if sold.

The vessel proceeded to Vancouver and was transferred by Legg to the Respondents, who were then registered as her owners.

On the 9th February, 1906, there were due to the Appellants £5,248 and £1,380 for one year's interest. The Respondents tendered to the Appellants £2,990, being £1,610 on account of the £5,248, and £1,380 in respect of the interest, but claimed to deduct from the £5,248 the sum of £3,638 in respect of expenses, loss and demurrage which they alleged they had incurred because, as they alleged, the vessel was not properly built in accordance with the contract, and was built negligently and defectively. The amount tendered was received under protest, and an action *in rem* was at once commenced by the Appellants in the Exchequer Court of Canada, British Columbia Admiralty District, to enforce the said mortgage for the sum of £21,638, which was, according to the Statement of Claim, the sum then alleged to be due in the circumstances on the mortgage, after giving credit for the payments received, unless the Respondents were entitled to deduct the amount of their cross-claim. The vessel was arrested, but afterwards released on bail.

The Appellants' statement of claim was in the usual form to enforce payment of the said sum of £21,638 and interest.

The Respondents delivered a defence and counter-claim, in which they did not dispute the validity of the mortgage and admitted the payments aforesaid, but they alleged there was no default. This allegation appears to have been based on their claim to reduce the amount payable by their cross-claim, and accordingly they put forward their claim by way of counter-claim in the action.

This counter-claim was on the 7th July, 1906, struck out on motion by Mr. Justice Morrison, the Deputy Local Judge in Admiralty, on the ground that the Exchequer Court of Canada in Admiralty had no jurisdiction to entertain it. An appeal to the Judge of the Exchequer Court at Ottawa was dismissed with costs on the 13th September, 1906. The learned Judge, Mr. Justice Burbidge, after referring to the Statutes on which the point turned, said—

> It is not contended that the Admiralty jurisdiction of the High Court in England includes jurisdiction to hear a claim for the breach of a contract to build a ship in accordance with certain specifications, but it is argued that, because a Judge of the High Court in England has otherwise authority to hear and decide such a claim, and might, if he saw fit, dispose of it as a counter-claim in an action in Admiralty (*The Cheapside*, 1904, P. 339), this Court has a like jurisdiction and authority. That, it seems to me, is not the effect of the Statutes referred to. The jurisdiction which this Court may exercise under the Statutes mentioned is the Admiralty jurisdiction, and not the general or common law jurisdiction of the High Court in England.

From this decision no appeal was brought, but an application was made by the Respondents to Mr. Justice Martin, the Local Judge of the Exchequer

Court, for leave to deliver an amended statement of defence. The proposed amendment was contained in the 7th paragraph of the amended defence, and will be found at page 13 of the Record. From this it appears that the Respondents pleaded by way of equitable defence the same allegations as they had previously pleaded by way of counter-claim, and claimed that they were entitled to set off and deduct from the sums payable by them to the Appellants the aforesaid sum of £3,638 alleged to have been expended by them.

Leave to file and serve the amended defence was given by the learned Judge. He seems from his Judgment to have considered that he would not be justified in excluding the proposed plea, and to have allowed it under Rule 63 of the practice rules of the Exchequer Court. That Rule provides that the defendant may in his statement of defence plead set-off and counter-claim, but that if, in the opinion of the Judge, such set-off or counter-claim cannot be conveniently disposed of in the action, the Judge may order it to be struck out. With regard to the discretion conferred by the Rule, he considered it would not be more inconvenient to try the question in British Columbia than in Scotland, though it would doubtless be a difficult matter to dispose of anywhere satisfactorily.

This decision was affirmed on appeal by Mr. Justice Burbidge on the 22nd April, 1907, on the ground that, to the extent that the facts stated in the amendment entitled the Respondents to an abatement in the price of the ship, such facts might be pleaded in defence to the Appellants' action. He pointed out that the Respondents had no right to set-off special or consequential damages, and that some of the damages sought to

be set-off might only be the subject of a cross-action, but that would not be ground for striking out the whole paragraph pleading the amended defence.

It may be here noticed that in any view of this case the amended plea read with the particulars delivered under it, so far as it is possible to ascertain by a perusal of the particulars, would show no answer to the whole claim, but only to part thereof, as the particulars appear to include matters which would not go only to an abatement of the price, but to special or consequential damages.

After the amended defence had been put in, there were further pleadings and objections in law. These raised formally the right of the Respondents to plead the 7th paragraph of the amended defence, which set forth the claim on which the Respondents relied. The points of law were argued before Mr. Justice Martin, who, while considering that the Appellants could raise their objection in law to the plea, notwithstanding that leave had been given to plead it, held that the previous Judgment had substantially decided the point, and his Order, which was made on the 25th September, 1907, was that the said 7th paragraph constituted a good defence in law *pro tanto* to the Appellants' action, and that the Respondents were at liberty to plead the same, and that the Court had jurisdiction to entertain the questions thereby raised.

An Appeal from this Order came before Mr. Justice Burbidge at Ottawa on the 7th January, 1908, and was dismissed by him for the reasons which he had given on the previous application. The Appellants appealed to the Supreme Court of Canada, and on the 16th June, 1908, that Court, consisting of The Chief Justice and Davies, Idington and Duff, JJ., dismissed the Appeal. The Chief Justice dissented, but, owing to his

absence on the day when the Judgment was delivered, his Judgment was announced by Mr. Justice Davies without stating the reasons for dissent. Mr. Justice Davies agreed, though entertaining many doubts, that the Appeal should be dismissed.

Leave to appeal having been granted by the Supreme Court, this Appeal was brought. It was not contended before this Board that the Respondents had any right to deduct from the amount claimed by the Appellants to be due on the 9th February 1906 any sum for special or consequential damages arising from the alleged breach by the Appellants of the building contract, but only that the Respondents were entitled, if they proved the alleged breach, to deduct such a sum as represents the difference at the time of delivery owing to the alleged breach between the vessel as she was and as she ought to have been according to the contract.

In order to determine the question, it is in the first place necessary to consider the nature and extent of the jurisdiction of the Exchequer Court of Canada.

That Court was constituted by the Exchequer Court Act, 50 and 51 Vic., c. 16 (Dominion), for the purpose of dealing with matters in which the Crown was concerned (sections 15 and 16), and has no general common law jurisdiction. Its Admiralty jurisdiction is derived under the Colonial Courts of Admiralty Act, 1890, 53 and 54 Vic., c. 27 (Imperial), and the Admiralty Act, 1891, 54 and 55 Vic., c. 29 (Dominion). The Act of 1890, so far as material, is as follows :—

> Sec. 2. (1) Every Court of law in a British Possession which is for the time being declared in pursuance of this Act to be a Court of Admiralty . . . . . shall be a Court of Admiralty, with the jurisdiction in this

Act mentioned, and may, for the purposes of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, . . .

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner, and to as full an extent as the High Court in England, . . .

Sec. 3. The legislature of a British Possession may by any Colonial law (*a*) declare any Court of unlimited civil jurisdiction [by Sec. 15 unlimited civil jurisdiction means civil jurisdiction unlimited as to the value of the subject-matter at issue or as to the amount that may be claimed or recovered], whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under this Act and limit territorially or otherwise the extent of such jurisdiction and (*b*) confer upon any inferior or subordinate Court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal, if any, as may seem fit Provided that any such Colonial law shall not confer any jurisdiction which is not, by this Act, conferred upon a Colonial Court of Admiralty.

The Canada Admiralty Act, 1891 (Dominion) enacts :—

Sec. 3. In pursuance of the powers given by " The "Colonial Courts of Admiralty Act, 1890," aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act.

(4) Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially

made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty, under "The Colonial Courts of Admiralty Act, 1890."

(9) Every local Judge in Admiralty shall, within the Admiralty district for which he is appointed, have and exercise the jurisdiction and the powers and authority relating thereto of the Judge of the Exchequer Court in respect of the Admiralty jurisdiction of such Court.

(25) Any rules or orders of Court made by the Exchequer Court for regulating the procedure and practice therein, including fees and costs, in the exercise of the jurisdiction conferred by "The Colonial Courts of Admiralty Act, 1890," and this Act, which require the approval of Her Majesty in Council, shall be submitted to the Governor in Council for his approval, and, if approved by him, shall be transmitted to Her Majesty in Council for Her approval.

It is clear from these Statutes that the jurisdiction of the Exchequer Court as a Court of Admiralty is no greater than the Admiralty jurisdiction of the High Court of England, and that the power to make rules for procedure and practice is confined to the making of rules for the exercise of the jurisdiction thus conferred, so that the 63rd Rule of procedure above mentioned does not affect the case unless the defence or set-off is within the Admiralty jurisdiction.

The question thus arises—What is the Admiralty jurisdiction of the High Court in England with regard to such a matter as that in controversy?

It was suggested by Mr. Justice Idington that the Admiralty jurisdiction of the High Court in England had been altered by the Judicature Acts

of 1873 and 1875, and he referred to Section 24 of the first of those Acts. Those Acts amalgamated the English Courts and transferred to the High Court all the jurisdiction which had been previously exercised by the different Courts, so that every Judge of the High Court can exercise every kind of jurisdiction possessed by the High Court, but these changes conferred no new Admiralty jurisdiction upon the High Court, and the expression "Admiralty jurisdiction of the High Court" does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new Admiralty jurisdiction. It is true that a Judge of the High Court sitting in the Admiralty Division thereof may, as Judge of the High Court, exercise any jurisdiction which is now possessed by a Judge thereof, but he does so by virtue of the general jurisdiction conferred upon him, and not by virtue of any alteration in his Admiralty jurisdiction. In their Lordships' opinion this case is unaffected by the Judicature Acts, and upon this point they agree with the opinions expressed by Mr. Justice Morrison and Mr. Justice Burbidge, who struck out the counter-claim, although the Respondents might have made it, if the Judicature Acts applied so as to alter the Admiralty jurisdiction into a general jurisdiction.

Proceeding then with the consideration of what is the Admiralty jurisdiction of the High Court in such a case, it must be pointed out that, under that jurisdiction, no claim could be made formerly by a mortgagee of a ship to enforce his mortgage nor by either party for breach of a contract for the building of a ship. The history of the long contest between the civilians of the Admiralty Court and the Courts of Common Law is well known and need not be gone into now. It

resulted in the Admiralty jurisdiction being confined within certain well-defined limits, which were, however, extended by the Legislature in more modern times, but not sufficiently to include a suit to enforce such a claim as that made by the Respondents.

With regard to mortgages, the Act 3 and 4 Vict., c. 65, provided (Sec. 3) that whenever any ship or vessel should be under arrest by process issuing from the High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested should have been brought into Court and be in the Registry of the said Court, in either such case the Court should have full jurisdiction to take cognizance of all claims or causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively. The object of this was to enable the Court in the cases mentioned to take cognizance of claims by mortgagees of ships to enforce their mortgages in suits and to intervene to protect their property. This remedy being found to be inadequate, it was enacted by the 11th section of the Admiralty Court Act, 1861, that the Admiralty Court should have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854 (now the Act of 1894), whether the ship or proceeds thereof were under arrest of the said Court or not. These sections seemed to be confined to claims by mortgagees. It is under the jurisdiction conferred by the later Act that the Appellants proceeded in this case.

With regard to the building of a ship, the 4th section of the last-mentioned Act gave the Admiralty Court jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time

of the institution of the cause the ship or the proceeds thereof are under arrest of the Court.

The Appellants could not have proceeded under this section for the price of the vessel unless she, or the proceeds of her, were under arrest, and the Respondents could not proceed under it for damages for breach of the building contract, whether there was an arrest or not.

Therefore, as the Exchequer Court had no general common law jurisdiction, and the Respondents had no right under the Admiralty jurisdiction to proceed either against the ship or the Appellants, they could not enforce their counter-claim in that Court.

The ground upon which they have been permitted to put forward their claim as a defence *pro tanto*, so far as it is for a difference in value resulting from an alleged breach of the building contract by the Appellants, is either that it may be treated as a set-off or as justifying a reduction in the price on the principles indicated in the case of *Mondel* v. *Steel* (8 M. and W., p. 858), and that therefore the amount due on the mortgage may be lessened to the extent of the aforesaid difference—that is to say, that though they cannot put forward a counter-claim, they can put forward a defence *pro tanto*. Let it be assumed that any matter which affords a defence, in the ordinary sense of the term, to a mortgage claim can be set up under the Admiralty jurisdiction, it remains to be seen whether the Respondents' contention in this case is sound.

Now, in the first place it is to be observed that the claim is to enforce under the mortgage deed a debt which it was agreed should be treated as due from the Respondents to the Appellants as money lent, and that it is no answer by way of set-off to such a claim to seek to reduce it by unliquidated damages claimed under another

contract. Cases such as *Mondel* v. *Steel* do not proceed upon any principles of set-off (which depend upon the Statutes of set-off), but upon another and different principle, not of law, but of practice.

This principle is very clearly stated in the case just mentioned. In former days it was held that, where an article had been supplied under a contract at an agreed price, and the buyer had taken delivery and retained the article and was sued for the price, his remedy for breach of contract resulting in a diminution of value of the article was by a cross-action for damages, and that he could not set-off or deduct the sum he claimed. An early case of this character is that of *Broom* v. *Davis* (7 East, p. 479, in Notes to *Basten* v. *Butter*) before Mr. Justice Buller. Afterwards Lord Kenyon in another case (*ibid.*, p. 481) seemed to be of opinion that the buyer ought to be allowed to deduct the difference in value. The following passage from the judgment of Baron Parke in *Mondel* v. *Steel* (p. 870) shows how the practice became changed :—

> Formerly it was the practice, where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action as well the difference between the price contracted for and the real value of the articles or of work done, as any consequential damage, might have been recovered: and this course was simple and consistent . . . . But after the case of *Basten* v. *Butter* a different practice . . . began to prevail, and, being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value.

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Similar views were expressed in the case of *Davis* v. *Hedges* (L.R. 6 Q.B. 687) by Hannen, Lush, and Blackburn, then JJ. of the Court of Queen's Bench, where the change of practice is referred to as being introduced to prevent circuity of action.

It seems clear that the change was made, not upon any principle of law, but upon grounds of convenience, in order to prevent circuity of action. Before the Statutes of set-off, it was necessary to bring cross-actions in respect of debts on the one side and on the other, and, except in the cases referred to by Baron Parke, no change was, as a matter of strict law, made with regard to unliquidated damages until the Judicature Acts.

No instances were cited to their Lordships of any cases in which this procedure had been adopted, except such as are referred to by Baron Parke; and, indeed, in the cases where a seller or supplier had taken a bill of exchange for the price, the buyer has been left to his cross-action, unless there has been a total failure of consideration (*Warwick* v. *Nairn*, 10 Ex. 762).

The mortgage in question, though a security for the balance of price and interest, is expressed as usual, to be in consideration of money lent, and to secure the repayment of that money and interest, and the covenant is for the payment thereof (*see* Form B, Merchant Shipping Act, 1894). It is not expressed to be for securing the repayment of the amount due on the building contract, and it does not refer to that contract. The builders would, no doubt, be desirous of having a security which they could assign, if necessary, so as to keep them in funds, for the contract contained no provisions for giving bills for the instalments, which bills could be discounted, as is frequently done, and they would

also wish that they or their assignees should be in a position to enforce their mortgage against the vessel, wherever she might be, and whoever might then be her owners, so that their claim would be simply for the amount made payable by the mortgage, and, if those who became defendants in proceedings to enforce it had any claim against the holders of the mortgage which the Court had jurisdiction to enforce, the latter would have to meet it as a cross-claim. The Respondents' Counsel argued that the position was in effect the same as if the Appellants were suing on the building contract, and that, therefore, the amount which they could sue for was only the amount due under that contract after an abatement had been made. But that would be to extend the practice above referred to beyond the only cases in which it has been permitted, and to place the Appellants at a disadvantage in proceeding upon their mortgage. Upon such a document they are in effect much in the same position as the sellers who were holders of the bills of exchange in the cases above alluded to, where the claim is on one contract and the cross-claim on another, whereas the cases relied on by the Respondents are all cases in which the action was brought on the original contract, and the abatement was claimed for breach of it. Considerations which may apply to a claim and cross-claim on the same contract do not necessarily apply to a case where the claim is on one document, admitting on its face the amount of the debt due under it, and the cross-claim is in respect of damages claimed under another contract. It seems necessary to consider the matter strictly, for if the practice referred to were extended to a statutory mortgage of a ship, such as that in question, inconveniences might readily arise. The defendant may well be left to his cross-action or, in England since the

Judicature Acts, and, in any Courts of general jurisdiction which allow counter-claims, to his counter-claim.

Mr. Justice Burbidge, in his Judgment, puts the question: What good reason exists or can be suggested for refusing permission to set out the facts as a defence to an action on a mortgage given to secure the stipulated price? The most important reason in the present case does not appear to have been fully presented to the learned Judges in Canada. The change of practice, as stated in *Mondel* v. *Steel*, was based upon convenience in order to avoid circuity of action, and the Courts were dealing with actions in which they had jurisdiction in the action for the price, and also jurisdiction in an action which might be brought to enforce the cross-claim in which both the damages which might be treated as an abatement and special or consequential damages could be recovered, and it was not unreasonable to permit the former to be proved to reduce the price without putting the defendant to the expense of a cross-action.

But a totally different position arises when the Court, in which the action to recover the debt is brought, has no jurisdiction to entertain a cross-action by the defendant to recover from the plaintiff damages for breach of the contract. In such a case the matter cannot be treated as one of mere convenience.

This is the position in the present case. The real contest between the parties is with regard to a matter which is not a defence proper, and over which, if put forward as a claim, the Exchequer Court had no jurisdiction, whether the claim were against the ship or the Plaintiffs. This contest should be left to be settled by a cross-action in a Court having jurisdiction to entertain it.

The importance to the parties of deciding this case according to their strict rights is that upon the decision as to the plea under consideration depends the place of trial of the real dispute in the case. It is obvious that this is, in the circumstances, the reason for excepting to the jurisdiction of the Court to hear and determine the issue raised by the plea.

For these reasons their Lordships will humbly advise His Majesty to allow the Appeal, to set aside the Judgment of the Supreme Court of Canada dated the 16th June, 1908, and the Judgments of the Exchequer Court of Canada dated respectively the 7th January, 1908, and the 25th September, 1907, and to sustain the Appellants' objections in law that the Exchequer Court of Canada had no jurisdiction to entertain the questions raised by the 7th paragraph of the Respondents' amended statement of defence, and to order the Respondents to pay the costs of and incidental to the argument upon the said objections in the Courts in Canada.

The Respondents must pay the costs of this Appeal.

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