BETWEEN:

CANADIAN BRINE LIMITED, Plaintiff (APPELLANT);

AND

NATIONAL SAND & MATERIAL COMPANY LIMITED, WILSON MARINE TRANSIT COMPANY and THE HANNA MINING COMPANY

Defendants (RESPONDENTS).

1962

Sept. 25, 26, 27

Oct. 31

Shipping—Practice—Rule 20(d) General Rules and Orders, Exchequer Court in Admiralty—Service ex juris against foreign defendants—Claim for damages to pipe line—Alleged collision by defendant ships or a combination of them through faulty navigation—Pleadings—Discretion—Appeal from order of Surrogate Judge dismissed.

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Appellant, the owner of the Canadian portion and the lessee of the United States portion of a pipe line under the Detroit River claimed damages for injuries to the pipe line and its appurtenances alleged to have been caused by ships owned by the defendants, or by any combination of these ships colliding and interfering with the pipe line due to the negligent navigation and operation of the ships. Service of the writ of summons was effected on the first defendant in the Ontario Admiralty District and the appellant applied for and obtained leave to serve the other two defendants out of the jurisdiction. The application was supported by two affidavits in which certain allegations were made to the effect that the foreign defendants were proper parties to the action brought against the first defendant. Leave to serve *ex juris* was then granted. Both foreign defendants applied to set aside the leave and service made and to strike out their names as parties to the action. The Surrogate Judge of the Ontario Admiralty District granted the applications and set aside both the leave and service made thereunder. Plaintiff appealed.

Held: That the material before the Court is not sufficient to show that the foreign defendants are proper parties to the action and that the case is a proper one for service out of the jurisdiction.

2. That for service *ex juris* under Rule 20(*d*) of the Rules of the Exchequer Court in Admiralty mere allegations in an indorsement on a writ or in a statement of claim are not enough; the appellant has to show that the case is one which falls within the said rule which permits service and that the foreign defendants are necessary or proper parties to the action.

3. That even if the requirements of Rule 20(*d*) could be regarded as having been met, the material before the Court does not make out a case for the exercise of the Court's discretion in favour of the appellant.

4. That the appeal is dismissed.

APPEAL from an order of the Surrogate Judge of the Ontario Admiralty District setting aside an order for service *ex juris* and the service made thereunder.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

A. J. Stone for plaintiff (appellant).

J. A. Bradshaw for defendant (respondent) Wilson Marine Transit Co.

Jean Brisset, Q.C. for defendant (respondent) Hanna Mining Co.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (October 31, 1962) delivered the following judgment:

This is an appeal by the plaintiff from an order of the Surrogate Judge of the Ontario Admiralty District setting aside leave which he had previously granted to serve the

defendants, Wilson Marine Transit Company and The Hanna Mining Company out of the jurisdiction and the service effected pursuant to such leave.

The appellant is the owner of the Canadian portion and the lessee of the United States portion of a pipe line under the Detroit River between Windsor, Ontario and Detroit, Michigan used for the purpose of transporting brine and in the endorsement on the Writ of Summons claims damages for injuries to the pipe line and its appurtenances in excess of $200,000 alleged to have been caused on or about November 25 or 26, 1958 by the Ship *Charles Dick* owned by the defendant, National Sand and Material Company Limited, or by the ship *Thomas Wilson* owned by the defendant, Wilson Marine Transit Company, or by the ship *Edward J. Berwind* owned by the defendant, The Hanna Mining Corporation or by any combination of the said ships by colliding and interfering with the pipe line and its appurtenances due to negligent navigation and operation of the ships. In the statement of claim filed some two months after the issue of the writ and after the making of the order for service *ex juris* the claim was expanded to allege that the damage was caused by the trespass, nuisance or negligence of the *Charles Dick,* or alternatively of the *Thomas Wilson,* or alternatively of the *Edward J. Berwind,* or alternatively of all or a combination of the three ships and that such trespass, nuisance or negligence occurred on the Canadian side of the International boundary or alternatively on the United States side of the boundary. Service of the Writ of Summons having been effected on the first named defendant in the Ontario Admiralty District, the appellant applied for and obtained leave to serve the other two defendants out of the jurisdiction. The application was supported by two affidavits sworn by Robert Bernard Michael Keenan, a student-at-law in the office of the plaintiff's solicitors to the first of which was exhibited a transcript of evidence said to have been given by Captain Carl Henry Borgen, the master of the *Thomas Wilson,* at the trial of another action. This disclosed that the *Thomas Wilson* had been anchored in the Detroit River on the United States side of the International boundary, a short distance upstream from the pipe line from the evening of November 24 until the afternoon of November 26 and that in that period Captain Borgen had seen the *Charles Dick* at

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anchor on the Canadian side of the boundary slightly downstream from the *Thomas Wilson* and had also seen the *Edward J. Berwind* and other unnamed ships manoeuvering in the vicinity. The affidavit went on to say that from this evidence it appeared to the plaintiff and its solicitors that the ships *Charles Dick, Thomas Wilson* and *Edward J. Berwind* were manoeuvering or anchored in the vicinity of the pipe line on or about the 25th or 26th days of November, 1958 and may have caused the damage proceeded for. The affidavit further disclosed that records kept by the J. W. Westcott Company indicated that the *Charles Dick* had entered up-bound in the Amherstburg Channel in the Detroit River at 12:15 p.m. on November 25, 1958 and had cleared the Detroit River at 10:40 p.m. on the same day. In his second affidavit, sworn several days later, Mr. Keenan after giving addresses in the United States where the two foreign defendants were probably to be found and stating that they were not British subjects went on to say:

> I am informed and verily believe that the Plaintiff has a good cause of action and that this application is made on the grounds that the said two Defendants are necessary and proper parties to this action which was properly brought against the Defendant National Sand & Material Company Limited, 48 St. Clair Avenue West, Toronto, which last mentioned Defendant has been duly served in the Ontario Admiralty District of this Honourable Court.

Leave to serve *ex juris* was granted under Rule 20(*d*) of the *General Rules and Orders of the Exchequer Court of Canada in Admiralty* by which it is provided that:

> Service out of the jurisdiction of a writ of summons or notice of a writ of summons, may be allowed by the Judge whenever:
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> * * *
>
> (*d*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the district or division in which the action is instituted;

By Rule 21:

> Every application for leave to serve a writ of summons, or notice of a writ of summons, on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Judge that the case is a proper one for service out of the jurisdiction.

Both foreign defendants on being served with notice of the writ launched applications to set aside the leave and the service made pursuant thereto and to strike out their names as parties to the action. The application of each of these defendants was supported by an affidavit of one of its solicitors stating in each case that the defendant is not a British subject and does not have any office or carry on any business within the Province of Ontario or elsewhere in Canada except that on occasions vessels owned and/or managed by it and engaged in trade and commerce on the Great Lakes, their connecting and tributary waters, pass through the territorial waters of Canada and call at ports thereof. Both affidavits referred to records of the J. W. Westcott Company which indicated that in all some 40 vessels were in the Detroit River between its Amherstburg and Detroit observation stations (which are more than 14 miles apart) at one time or another on November 25 and November 26, 1958 some of which were probably anchored in the area and some not. The affidavit filed in support of the application of The Hanna Mining Company also showed that its ship the *Edward J. Berwind* was anchored in United States territorial waters up-stream from the pipe line from 6:15 p.m. on November 25, 1958 until about 9:30 p.m. on November 26, 1958. In the course of cross-examination on his affidavit, the solicitor indicated that the place where the *Edward J. Berwind* had anchored was about one-half mile from the pipe line.

Before the applications were heard, a further affidavit sworn by Warren Maitland Harris Grover, another student-at-law in the office of the plaintiff's solicitors was filed on behalf of the plaintiff. In it the deponent stated that he was informed by Patrick T. Nolan, Superintendent of the plaintiff and verily believed "that on November 25, 1958, he (Nolan) saw the *Thomas Wilson* at anchor in the Detroit River on the Canadian side of the river directly over the Canadian Brine pipe line", and "that he (Nolan) observed the *Thomas Wilson* to be at anchor in the morning and all day of November 25, and that he also saw the boat there on the morning of November 26, 1958". The affidavit goes on to state that Mr. Nolan further informed the deponent and the deponent verily believed that the Detroit meter chart which records the brine flow as metered on the Detroit side of the river had stopped recording on the morning of

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November 26, 1958, that the recording cable was laid in the same trough as the pipe line itself, that the inspection carried out by divers in the early part of 1959 indicated that the cable was damaged at the same time that the pipe line was damaged in that it was scored in the same places as the pipe line and that in his opinion the severing of the cable which caused the Detroit meter chart to stop recording was the best possible indication of the time that the pipe line was damaged. Grover too was cross-examined on his affidavit and stated further that he was informed by Nolan that the cable broke at 3:55 a.m. on November 26, 1958, and that the damage to the pipe line extended over a distance of some 200 feet of its length. He was not sure of what he had been told as to how far the damaged area was from the Canadian shore, and there is no satisfactory evidence on the question whether it was in Canadian or in United States territorial waters. It also appeared from the cross-examination that Mr. Nolan had not personally identified the *Thomas Wilson* as the ship which he saw directly over the pipe line on November 25 and 26.

In his decision on the two applications the learned Surrogate Judge considered objections taken by counsel for the applicants that Rule 20(*d*) was inapplicable because though the action was admittedly "properly brought" against the defendant, National Sand and Material Company Limited, the foreign defendants were not "necessary" or "proper" parties to it, their joinder as defendants not being authorized by Rule 29; and being in considerable doubt as to whether the applicants were proper parties within the meaning of Rule 20(*d*) and considering that such doubt should be resolved in favour of the foreign defendants he felt bound to grant the applications and thereupon set aside the leave and the service made pursuant thereto.

In my opinion, the learned Surrogate Judge made the right order on the material before him, but my reasons for reaching that conclusion differ somewhat from his. For my part while I too am not satisfied that the owners of the three ships were properly joined in the action, my doubt arises from the lack of material on which to determine the matter rather than on the interpretation of Rule 29. By Rule 29:

> Any number of persons having interests of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or as defendants.

Generally speaking the effect of this rule is to retain the ancient practice in admiralty of permitting numerous parties having interests of the same nature in the matter to join or be joined in the same proceeding. But as I read it, the Rule is not restrictive. It is an enabling rule. It expressly permits joinder of certain parties in certain cases and that is as far as it goes. It does not purport to be and is not exhaustive on the subject of joinder of parties, nor does it appear to deal with joinder of causes of action. The latter subject as well as the subject of when parties who have interests in the matter which are not of the same nature may be joined is dealt with elsewhere. In the *Marlborough Hill*[1] the Supreme Court of New South Wales held that a corresponding rule also numbered 29 applied to allow joinder of plaintiffs having separate though similar causes of action against a ship but it is noteworthy that on appeal[2] the Privy Council while upholding the order appealed from did not do so by interpreting and applying Rule 29 but stated that the matter was covered either by Rule 29 or by Rule 155. The latter rule provided that:

> In all cases not provided for by these rules the practice of the Court in its Common Law jurisdiction shall be followed, or in cases therein unprovided for the practice of the Admiralty Division of the High Court of Justice of England shall be followed.

Rule 29 as well as Rules 30, 31 and 32 have their origin at least as far back as 1883 when they appeared as Rules 23 to 26 of the Rules for the Vice Admiralty Courts in Her Majesty's Possessions Abroad established by Imperial Order in Council of August 23, 1883. By Rule 207 of the same Rules it was provided that:

> In all cases not provided for by these Rules the practice of the Admiralty Division of the High Court of Justice of England shall be followed.

Thereafter similar Rules numbered 26 to 29 respecting parties were included in the Rules of the Maritime Court of Ontario made in 1889. In these Rules there is none corresponding to Rule 255 of the Vice-Admiralty Rules but the matter was covered by s. 15 of the *Maritime Court Act* R.S.C. 1886, c. 137 which provided that in the absence of any other provision the practice and procedure of the High Court of Admiralty in England at the time of its abolition should be applicable. The Maritime Court of

[1] [1919] N.S.W.S.R. 306. [2] [1921] 1 A.C. 444, 456.

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Ontario was abolished on the coming into force of the *Admiralty Act*, 1891, S. of C. 1891, c. 29, which conferred admiralty jurisdiction throughout Canada on the Exchequer Court of Canada. In the General Rules and Orders regulating the practice and procedure in admiralty cases in the Exchequer Court of Canada dated December 5, 1892, Rules 29 to 32 were the same as the present Rules having the same numbers and Rule 228 brought into play the practice for the time being in force in respect to admiralty proceedings in the High Court of Justice in England in all cases not otherwise provided for by the Rules. In the present Rules of the Court in Admiralty dated June 2, 1939, and made pursuant to the *Admiralty Act*, S. of C. 1934, c. 31, Rules 29 to 32 were unchanged but by Rule 215 it was provided that:

> In all cases not provided for by these Rules the general practice for the time being in force in respect to proceedings in the Exchequer Court of Canada shall be followed.

By s. 35 of the *Exchequer Court Act*, R.S.C. 1952, c. 35:

> The practice and procedure in suits, actions and matters in the Exchequer Court, shall, so far as they are applicable, and unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and procedure in similar suits, actions and matters in Her Majesty's High Court of Justice in England on the 1st day of January, 1928.

Neither the *Exchequer Court Act* nor the Rules of the Exchequer Court purport to deal specifically with procedure in admiralty or generally with joinder of parties or of causes of action but Rule 2 provides:

> (1) In all suits, actions, matters or other judicial proceedings in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall:
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> (*a*) If the cause of the action arises in any part of Canada, other than the Province of Quebec, conform to and be regulated as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England; and
>
> (*b*) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Superior Court for the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England.

If the Rules of the Exchequer Court which are dated April 21, 1931, are treated as having made provision in the place of s. 35 of the *Exchequer Court Act,* which was first enacted in 1928, Rule 2 may have the effect (except in respect of matters otherwise provided for in clause (*b*)) of incorporating the practice and procedure of the High Court of Justice in England in effect subsequent to January 21, 1928, in cases in which the cause of action arises in Canada, rather than to limit the incorporation to the practice and procedure existing on that date but this, I think, makes no difference in the present case because so far as I am aware the English Rules with respect to joinder of parties and joinder of causes of action have not in the meantime changed in any respect material to this proceeding.

Under the English practice established since the alteration made in Order XVI, Rule I following the decision of *Smurthwaite v. Hannay*[1] Rule 4 of Order XVI dealing with joinder of defendants receives a liberal construction and it would in my opinion be open to the plaintiff in a case of the kind set forth in the endorsement of the writ and in the statement of claim to join all three defendants in this action. *Vide* the remarks of Swinfen Eady, L.J., on the development of the practice under this rule in *Re Beck, Attila v. Seed*[2]. The claim is asserted against all three defendants jointly and against them in the alternative and appears on the face of it at least to meet the requirements of the rule.

That, however, is a somewhat different matter from the question which arises on an application for service *ex juris* under Rule 20(*d*). In seeking such an order, it is for the plaintiff to make it sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction. For this purpose mere allegations in an indorsement on a writ or in a statement of claim are not enough. The plaintiff must show that the case is one which falls within the rule which permits such service and as applied to the present situation the plaintiff must make it sufficiently to appear that the foreign defendants are necessary or proper parties to the action, that the action is properly brought against the defendant resident within the jurisdiction and that the case is in other respects a proper one in which to make such an order.

[1] [1894] A.C. 494.

[2] (1918) 118 L.T. 629, 631.

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The authorities on this subject emphasize the necessity for the exercise of great care in authorizing service abroad and the need for this caution is probably of even greater importance when the foreign defendant is not a British subject. In *The Hagen*[1], Farwell, L.J. expressed three important principles as follows:

> During these present sittings Vaughan Williams L.J. and myself have on more than one occasion had to consider Order XI., and we have had many authorities discussed and fully considered by the Court, and the conclusion to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J., in *Société Générale de Paris v. Dreyfus Brothers* (1885) 29 Ch. D. 239, at p. 242, that "it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiciton." The second point which we considered established by the cases was this, that, if on the construction of any of the sub-heads of Order XI. there was any doubt, it ought to be resolved in favour of the foreigner; and the third is that, inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application.

In *Société Générale de Paris v. Dreyfus Brothers*[2], Lindley M.R., had set out some additional principles respecting service out of the jurisdiction at p. 224 as follows:

> We are referred to Order XI., and it is contended that inasmuch as an injunction is asked, and as an affidavit has been made in the terms required by that order, we have no right to refuse leave to serve this writ, and it has been contended, upon the authority of *Call v. Oppenheim* 1 Times L.R. 622, that if we do we shall be running counter to a decision of the other branch of this Court. I differ entirely from every one of those allegations. In the first place, Order XI. enumerates certain circumstances under which, and under which alone, the Court can give leave to serve writs out of the jurisdiction. It does not say that when those circumstances occur the Court is bound to give leave. On the contrary, the language is that service out of the jurisdiction "may be allowed by the Court or a Judge" in certain specified events. This shews that the Court has a discretion and is bound to exercise its discretion. This becomes still plainer by turning to rule 2, which states certain matters which the Court is bound to have regard to when it is asked for leave to serve a writ in *Ireland*, or *Scotland*. It is not that you are entitled to have leave simply because you bring your case within one or the other of the eleven rules of Order XI. You cannot get the leave unless you do, but it does not follow if you do you are to have the leave. The Court has a discretion, and that discretion must of course be exercised judicially, and upon proper grounds.

[1] [1908] P. 189.

[2] (1887) 37 Ch. D. 215.

Then it is said you cannot go into the merits. That is quite true. Of course you cannot properly upon an application to serve a writ try the action. The object in giving leave to serve the writ is to put the parties in a position to try the action by-and-bye, but at the same time a judge cannot perform the duty imposed upon him by this Order unless he so far look into the matter as to see whether the plaintiff has a probable cause of action or not. I do not think the Court ought to look into the defence as distinguished from the plaintiff's case. The Court must look at the plaintiff's case and see whether he has a probable cause of action. If he has no probable cause of action, and if the cause of action depends entirely upon foreign law, and the proper foreign tribunal has decided against him, that he has no cause of action, there is no ground for exercising the discretion of the Court and the Court ought to refuse the leave to serve the writ.

In the present case the material put before the Court in my opinion does not make it sufficiently to appear that the case is a proper one for service out of the jurisdiction under the rule for to my mind the material does not show enough to make it appear that the foreign defendants are proper parties to the action. They may well be proper parties if the plaintiff has reason to believe that one or more of the three ships caused the damage complained of and if the plaintiff is genuinely in doubt as to which of them it was. But the affidavits do not disclose such a situation. At most they say that the evidence of Captain Borgen given in an earlier action made it appear to the plaintiff and its solicitors that any of the three ships may have been responsible. On reading the evidence of Captain Borgen this seems to me to mean no more than that any one of a number of ships including the three in question may possibly have been responsible because they were manoeuvering or anchored in the river in the vicinity of the pipe line on the days when the damage is alleged to have been done. For aught that appears, it seems just as likely that the damage was done by some unknown ship for there is nothing to indicate that the three were the only ships manoeuvering or anchored in the vicinity which could in the circumstances have caused the damage. It is thus not a case in which the affidavits make it to appear that the plaintiff has a probable cause of action either against the defendants jointly or against them severally or against one or another or any combination of them. Nor do the affidavits say that the deponent believes that the plaintiff has a good cause of action against these defendants or any of them for the deponent simply says that he believes the plaintiff has a good cause of action without saying against whom and in the circumstances disclosed this

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appears to me to mean no more than that he believes the plaintiff has a good cause of action against someone. Nor is the case shown to be one in which any of the defendants on being charged with responsibility for the damage has sought to place the blame on another of them. Moreover, the material before the Court does not indicate that the plaintiff is in doubt as to which, if any, of the three ships caused the damage. Consistently with the material, the plaintiff may for example, know that it has no cause of action against the owner of the *Edward J. Berwind* or the owner of the *Charles Dick* for nothing in the material indicates that the *Edward J. Berwind* was at any material time anchored closer than one-half mile from the pipe line and on the other hand, the material does indicate that the *Charles Dick* had left the Detroit River some hours before the damage was done. Nor does the bald assertion by Mr. Keenan that he is informed and verily believes that the application is made on the grounds that the two foreign defendants "are necessary and proper parties to this action which was properly brought against" the owner of the *Charles Dick,* in my opinion do anything to fill the need to make it sufficiently to appear to the Court that on the facts known to the plaintiff, the foreign defendants are necessary or proper parties to the action. In my opinion, it must be shown that in the circumstances the foreign defendants are proper parties to be joined in the action against the resident defendant and the material before the Court does not make it appear that that is the case.

The foregoing in my opinion is by itself sufficient ground for discharging the order for service out of the jurisdiction but I would add that even if I thought that the facts disclosed were sufficient to make it appear that the foreign defendants were proper parties to the action so that the requirements of the wording of Rule 20(*d*) could be regarded as met, I would not regard the material as making out a case in which the discretion of the Court should be exercised in favour of the appellant. First, the material does not in my opinion make it appear that the appellant has a plausible or probable cause of action or a good arguable case against any of the defendants. The most that can be said of it is that it shows that it is possible that the appellant may have a cause of action against one or more of them. Secondly, the Court is left in uncertainty as to whether the

alleged tort occurred in Canadian or United States territorial waters, a matter which affects the question of which Court would be the *forum conveniens*. Finally, having regard to the very different complexion which the matters disclosed by Mr. Grover puts on the case as it had been made to appear by the affidavits of Mr. Keenan, and particularly with respect to the claim against the owner of the *Charles Dick* which is the foundation for the application of Rule 20(*d*), it is not clear to me that leave would have been granted to the plaintiff when applying *ex parte* for the order for service *ex juris* if the information later given by Mr. Grover had been before the Court and I am not satisfied that the plaintiff when applying for that order made a full and fair disclosure of the facts within its knowledge at that time.

I am accordingly of the opinion that the leave to serve *ex juris* and the service made pursuant thereto were properly set aside. The appeal therefore fails and it will be dismissed with costs.

Judgment accordingly.