

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

BRUCE LINDSAY BROTHERS }
LIMITED

PLAINTIFF;

1936
Nov. 16 & 19.
Dec. 2.

AND

THE BARGE BRUCE HUDSON, }
HER CARGO AND FREIGHT.....

DEFENDANT;

AND

CHARLES LEVENS, ET AL.....

PLAINTIFFS;

AND

THE BARGE BRUCE HUDSON }
AND LLOYD REFINERIES LIM- }
ITED

DEFENDANTS.

Admiralty—Practice—Salvage—Joinder of action in rem and action in personam.

Held: That actions for the recovery of salvage may be either *in rem* or *in personam*.

2. That an action for recovery of salvage must be continued in the form in which it is begun.

MOTION to have defendant Lloyd Refineries Limited struck out as being improperly joined.

The motion was heard before His Honour Frank M. Field, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

H. E. Langford and *Frank Wilkinson* for plaintiff, Bruce Lindsay Brothers Limited.

H. H. Harris and *K. B. MacLaren* for plaintiffs, Charles Levens et al.

Francis King, K.C., for all defendants.

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

FIELD D.J.A. now (December 2, 1936) delivered the following judgment:

Motion returnable November 16, 1936, and resumed November 19, 1936 (when judgment was reserved), for an order amending all proceedings in the action, begun in the Quebec Admiralty District, subsequently consolidated

1936
 BRUCE
 LINDSAY
 BROS. LTD.
 ET AL.
 v.
 CHARLES
 LEVENS
 ET AL.
 Field D.J.A.

with the action begun in the Ontario Admiralty District, striking out Lloyd Refineries Limited as one of the defendants, on the ground that, as against Lloyd Refineries Limited (owners of the barge *Bruce Hudson*), the action being *in personam*, it is improperly joined with the action *in rem* against the barge *Bruce Hudson*.

Mr. King relies solely on *Atlantic Coast Steamship Company v. Montreal Transportation Company Limited et al* (1). I do not regard it as conclusive. It will be found on reading that reported case, the observation of the late Mr. Justice Cassels as to joining of claims *in rem* and *in personam* in one action are not essential to his decision, but are *obiter dicta*. That was a towage claim; these are salvage claims. The first action for an unstated sum, was begun as an action *in rem* in the Ontario Admiralty District, on November 18, 1935, for salvage services in Lake Ontario, on the 16th and 17th November, 1935, rendered by SS. *Brulin*, her master and crew.

Seized at Port Weller, Ontario, November 18, 1935, by the sheriff of Lincoln on the Admiralty Registrar's telegram, the *Bruce Hudson* was released on bail of \$15,000. \$6,500 was on July 20, 1936, paid into Court. Opportunity arising through defendant Barge *Bruce Hudson* mooring at Amherst Wharf at Pointe aux Trembles on April 27, 1936, in Montreal Harbour, the plaintiffs in the second action claiming \$2,950 against the *Bruce Hudson in rem* and against her owners Lloyd Refineries Limited *in personam*, Lloyd Refineries Limited filed a bond for \$3,400 and thereupon the defendant barge was released.

Upon the application of all the defendants both actions were consolidated and ordered to be brought to trial as one action, by my order of 21st May, 1936. To the statement of claim delivered by the solicitors for Bruce Lindsay Brothers Limited on the 10th January, 1936, a statement of defence was delivered in the first action on 31st January, 1936. No pleadings have been delivered in the second action. The Honourable Mr. Justice Demers, District Judge in Admiralty, Quebec Admiralty District, on 5th May, 1936, on application of defendants' solicitors, ordered that the action be tried at Toronto and the record be transmitted to the Toronto Registry of this Court on its Admiralty side.

There have been several applications regarding trial of the consolidated actions, mainly at the instance of solicitors for plaintiffs Charles Levens *et al*, and one of these by defendants' solicitors resulting in the order herein of July 14, 1936, fixing date of trial as November 30, 1936. On the 16th November, 1936, the trial was postponed to December 15, 1936.

1936
 BRUCE
 LINDSAY
 BROS. LTD.
 ET AL.
 v.
 CHARLES
 LEVENS
 ET AL.
 Field D.J.A.

Since the case of *Atlantic Coast Steamship Company v. Montreal Transportation Company Limited et al (supra)* was decided on appeal from the Honourable Mr. Justice Hodgins (then L.J.A., Toronto Admiralty District) twenty-eight years ago, the general trend of practice and judicial sanction in all Courts of Justice has been towards one trial of claims arising out of the same circumstances. I do not think it would be just at this stage to grant the application.

Rule 228 governing Admiralty Practice (as found in Audette's Practice, Exchequer Court of Canada, 1st Ed., 1895), provides:

In all cases not provided for by these rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

Rule 29 is in these terms:

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.

Rules 33 and 34 relating to "Consolidation of Actions" are also in point.

An action *in personam* for alleged salvage services rendered to ship, freight and cargo is not *prima facie* irregular. *The Elton* (1).

Actions for salvage may be either *in rem* or *in personam*. *The Hope* (2); *The Meg Merrilies* (3); *The Rapid* (4).

The action when it is once commenced either *in rem* or *in personam*, must be continued in the form in which it is begun and cannot be changed. *The Hope* (5); *Humphreys v. Edwards* (6).

I am indebted to the diligence of Mr. Harris for his very complete memorandum of the proceedings in the Quebec Admiralty District, filed with his memorandum of authorities on this application. He contends in the former that

(1) (1891) P. 265.

(2) (1801) 3 C. Rob. 215.

(3) (1837) 3 Hagg. 346.

(4) (1838) 3 Hagg. 419.

(5) (1838-42) 1 W. Rob. 154.

(6) (1875) 45 L.J. Ch. 112.

1936

BRUCE
LINDSAY
BROS. LTD.
ET AL.v.
CHARLES
LEVENS
ET AL.

Field D.J.A.

the owners of the *Bruhin* had no mandate to act on behalf of the crew, and that the action he has taken on behalf of his clients in the Quebec Admiralty District has been fully justified in the form in which it was taken and continued. He cites *A. L. Smith and Chinook v. Ontario Gravel Freighting Company* (1); *Gilmore v. The Marjorie* (2); *The Cella* (3); *The Dictator* (4); *The Gemma* (5), and Roscoe's Admiralty Practice p. 33, and generally contends that the progress of this litigation to date of this motion (November 16, 1936) without objection heretofore to the form in which the action of Levens *et al* was instituted, now precludes granting of the application to dismiss Lloyd Refineries from the litigation. In this view I agree, and therefore dismiss the motion, costs in the cause.

Judgment accordingly.