APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

THE ATLANTIC COAST STEAMSHIP COMPANY (PLAINTIFFS) ..... } APPELLANTS; 1909 Feby. 1

AND

THE MONTREAL TRANSPORTATION COMPANY, LIMITED, AND THE SHIP *MARY ELLEN* (DEFENDANTS)..... } RESPONDENTS;

AND

THE MONTREAL TRANSPORTATION COMPANY, LIMITED, (PLAINTIFFS)..... } RESPONDENTS;

AND

THE SHIP *BUCKEYE STATE* (DEFENDANT) ..... } APPELLANT.

Shipping—Admiralty Practice—Joinder of actions in rem and in personam—Irregularity—Pleading over without objection taken—Judgment—Appeal—Judgment varied.

In this case the plaintiffs had joined a personal action for the breach of a contract of towage against the towage contractor with one against the owner of a tug for damages arising from the negligent towing of a barge. No objection was taken by the defendants, who pleaded over, and the case proceeded to judgment; the trial judge finding that the owner of the tug performing the towage service was solely responsible for the damage, and dismissing the action as against the towage contractors who had hired the tug for the service. On appeal, the court, while expressing the opinion that the two actions were improperly joined under the practice in Admiralty cases, did not interfere with the proceedings below in that respect as no objection had been taken thereto; but intimated that the proper course would have been to complete the proceedings *in rem* and if it appeared that the amount of the damages fixed by the judgment was not recovered against the tug, then, if the towage contractors were legally liable, to bring an action against them *in personam* for the difference between the amount recovered and the damages fixed by the judgment.

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Reasons for Judgment.

2. The court directed that the judgment should be varied by reserving the question of costs of the trial, and the question of the liability of the towage contractors, as well as for the costs of the appeals, until it was ascertained if the amount of the damages fixed by the judgment below could be realized against the tug.

APPEAL from a judgment of the Local Judge for the Toronto Admiralty District.*

January 26, 1909.

C. H. Cline, for the appellants.

F. King for the respondents.

CASSELS, J., now (February 19th, 1909), delivered judgment.

These were appeals from a judgment of Mr. Justice Hodgins delivered on the 10th day of November, 1908.

I have carefully perused the mass of evidence adduced before the trial Judge, and also the exhibits, and the written arguments of counsel.

In certain portions of the evidence reference is made by witnesses to plans, and a location is pointed to, the places indicated not being marked on the plans. This makes it difficult to understand portions of the evidence.

The trial Judge has very carefully considered the evidence. He not only had the benefit at the trial of seeing and hearing the witnesses, but has also carefully analyzed the evidence as subsequently transcribed.

The questions involved in these appeals, with the exception of the liability of the Montreal Transportation Company, Ltd., for the negligence of the tug *Mary Ellen* are purely questions of fact; and I would hesitate before overruling the finding of the trial Judge, even if inclined to take a different view of the effect of the evidence.

The remarks of the trial Judge as to the character of the testimony before him is fully justified.

* Reported *ante* p. 419.

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Reasons for Judgment

It is about as contradictory and unsatisfactory as could well be.

I agree that the contract of towage was for a continuous trip or voyage from Lachine to Port Dalhousie by the Montreal Transportation Company, and that the towage by the tug *Mary Ellen* of the ship *Buckeye State* was performed by the latter as agent of the said Montreal Transportation Company. I also think that the conclusion of the learned trial Judge that the *Buckeye State* met with two accidents, one in the Cornwall canal, Lock 17, and the other at Morrisburg, is in accordance with the evidence. It is quite obvious to my mind that the hole in the bottom of the barge which caused her to sink could not have been caused in the Cornwall Canal.

I do not interfere with the amount allowed the Montreal Transportation Company for services performed in the nature of salvage, nor with the damages allowed to the *Buckeye State* against the *Mary Ellen*. The application to permit a re opening of the case for the purpose of giving further evidence on behalf of the *Buckeye State* was rightly rejected. No sufficient reason is shown why this evidence should not have been given at the trial. The issues are set out in the pleadings, and it was obvious that evidence of the character sought to be given was material. The difficult question is the one raised by Mr. Cline that the Montreal Transportation Company is liable equally with the tug *Mary Ellen* for the damage occasioned in the Cornwall Canal.

The action was brought by The Atlantic Coast Steamship Company, the owners of the *Buckeye State*, against the Montreal Transportation Company, Ltd., and John Jesmer and the ship *Mary Ellen*. The trial Judge finds that the Montreal Transportation Company is not liable for the damage sustained by the *Buckeye State*, and dismisses the action with a portion of the costs to be paid by the *Buckeye State*. The *Buckeye State* was not a party to this

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action, and I presume it was intended that these costs should be paid by the plaintiffs, the owners of the *Buckeye State*. There is no lien for these costs. The Montreal Transportation Company was sued for breach of contract. The proceeding against the tug *Mary Ellen* was a proceeding *in rem*. I find no authority where the two causes of action arising in this case have been joined against separate parties (See *Burstall* v. *Beyfus*, (1) *The Bowesfield*, (2) *The Hope*, (3) *Saccharin Corporation* v. *Wild* (4) and the following American cases: *The Prince Albert*, (5) *Atlantic Mutual Ins. Co.*, v. *Alexandre*, (6) *The Zodiac*, (7) *The Clatsop Chief*, (8) and more especially per Story, J. in *Citizens' Bank* v. *Nantucket Steamship Co.*, (9).

No objection, however, seems to have been taken, and no motion was made by the defendants, or either of them, to confine the action.

It does not appear upon the record that the remedy against the tug *Mary Ellen* has been exhausted by the plaintiffs the Atlantic Coast Steamship Co.; and it may be that the judgment against the tug *Mary Ellen* will be fully realized.

The proper course would have been to complete the proceedings *in rem*, and if it appeared that the amount of the damages fixed by the judgment was not recovered against the tug, then, if the Montreal Transportation Co. are legally liable, an action against them in *personam* for the difference between the amount recovered and the damages as fixed by the judgment. (*The Orient*, (10) *The Zephyr*, (11)

(1] 26 Ch, D. 39.
(2) 51 L. T. N. S. 128.
(3) 1 Wm. Rob. 154.
(4) (1903) 1 Ch. 422.
(5) 5 Ben. 386.
(6) 16 Fed. Rep 279.
(7) 5 Fed. Rep. 220.
(8) 8 Fed. Rep. 163.
(9) 2 Story 16.
(10) L. R. 3 P. C. 696.
(11) 11 L. T. 351.

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Reasons for Judgment.

There was no consolidation of the actions. The order of the 21st of March, 1908, made by the trial Judge is as follows:—

"Upon the application of the plaintiffs in both of the above named actions, and upon reading the writs of summons in the said actions, and upon hearing counsel for all parties, and counsel for all parties assenting thereto: It is ordered that in pursuance of rule 34 of the General Rules and Orders regulating the practice and procedure in this Court, the above actions shall be tried at the same time, at such place, and on such dates as may be fixed upon a further application; and that the same evidence shall, so far as applicable, be used in each action. And it is further ordered that the costs of this application be costs in the cause."

I do not at present deal with the question of the legal liability of the Montreal Transportation Co., nor with the costs payable by or to them.

I think these questions can be better dealt with, as well as the costs of the present appeals, after the remedy against the tug *Mary Ellen* has been exhausted.

No objection having been taken as to the misjoinder of the parties, I do not think it would be just to give effect to any objection at this stage.

The judgment should be varied by reserving the question of costs and that of the liability of the Montreal Transportation Co., as well as the costs of these appeals, until it is ascertained if the amount of the damages fixed by the judgment below is realized against the tug *Mary Ellen*.

Judgment accordingly.

Solicitors for appellants: *Maclennan, Cline & Maclennan.*

Solicitors for respondents: *King & Smythe.*