APPEAL FROM NOVA SCOTIA ADMIRALTY DISTRICT.

Between

THE ACTIESELSKABET BORGESTAD ..... } PLAINTIFF; 1905 Oct. 23.

AND

THE SHIP *THRIFT* ..... DEFENDANT;

AND ALSO

THE DOMINION COAL COMPANY ..... } PLAINTIFF;

AND

THE SHIP *THRIFT* ..... DEFENDANT.

Shipping—Collision actions—Interlocutory application for consolidation of two actions—Appeal from Local Judge.

An action for damages against the defendant ship for collision was taken in the Nova Scotia Admiralty District by the owner of the injured ship on the 15th of September, 1905. The following day a similar action was taken by the charterer and owner of the cargo of such injured ship. On the 28th of September an application was made by the defendant to the Local Judge for an order to consolidate the two actions, or in the alternative for an order that the defendant ship be released upon tendering bail to the amount of her appraised value, and that a commission of appraisement be issued, to ascertain her value in her then condition. On the 3rd of October the Local Judge made an order that a commission of appraisement issue, and that upon bail being given for the amount of such appraised value in each of the actions, the ship be discharged from arrest, and that the two actions be tried together. An appeal from such order was taken to the Exchequer Court. Upon the appeal no objection was taken to the order, so far as it directed an appraisement, or to the direction that the two actions be tried together, except so far as that direction might be held to effect the question of the amount of bail to be given—it only being necessary to give bail to the amount of her appraised value to secure the release of the ship if the actions were consolidated. It was however urged that the Local Judge should have ordered the

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

consolidation of the two actions, and that the ship should be released in respect of both upon giving bail to the amount of her appraised value.

Held, that it was a matter within the discretion of the Local Judge to grant or refuse an order for consolidation, and, therefore, the decision ought not to be interfered with on appeal.

2. That the order of the Local Judge should be varied to allow in the alternative the ship to be released in respect of both actions and claims made, upon payment into court of her appraised value and the amount of her freight, if any.

3. This relief not having been asked before the Local Judge, the court on appeal declined to allow the costs of appeal to either party.

Argument of Counsel.

APPEAL from the interlocutory order granted by the Local Judge of the Nova Scotia Admiralty District.

The grounds of the appeal are stated in the reasons for judgment.

October 21st, 1905.

The appeal was now argued at Ottawa.

E. L. Newcombe, K.C., for the motion, contended:

1st. That the appeal, although from an interlocutory order, was regularly before the court, under sec. 14 of *The Admiralty Act*, 1891.

2ndly. The actions are based on the same cause of injury, and could with all propriety and convenience be consolidated. (Rule 33 of the Admiralty Rules and Orders.) They ought to be consolidated, and the bail limited to the appraised value of the *res*. (*The William Hutt* (1); *Williams & Bruce's Admiralty Practice* (2).

R. L. Borden, K.C., contra: There is no rule limiting the bail to the value of the *res* in such an action as this. It is not a question of the liability of the ship, but of the owner. If there are two distinct causes of action, bail should be given in each. (*The Saracen* (3); *The Clara* (4)).

(1) 1 Lush. 25.
(2) 3rd ed. pp 391, 392 n.
(3) 4 No. of Cas. at pp. 507, 508.
(4) Swab. at p. 3.

1905

THE ACTIESELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Argument of Counsel.

The old Admiralty practice was not to consolidate where the parties were unwilling. As a rule it was only in salvage actions that consolidation was ordered. *The Jacob Landstrom* (1); *Williams & Bruce* (2); *Marsden on Collisions* (3).

The question of consolidation is within the discretion of the court below, and that discretion will not be reviewed on appeal. *Golding* v. *Wharton Saltworks Co.* (4).

Mr. Newcombe replied, citing *Abbott on Shipping* (5); *Roscoe's Admiralty Practice* (6).

THE JUDGE OF THE EXCHEQUER COURT now (October 23rd, 1905,) delivered judgment.

In an action commenced in the Nova Scotia Admiralty District the plaintiff, the Actieselskabet Borgestad, as owner of the ship *Chr. Knudsen* claimed the sum of fifty thousand dollars against the steamship *Thrift* for damages occasioned by a collision which took place at or near Bird Rocks in the Gulf of St. Lawrence on the 12th day of September, 1905; and in another action in the same court the plaintiff the Dominion Coal Company as charterer of the said ship *Chr. Knudsen*, and as owner of her cargo claims the sum of thirty thousand dollars against the said steamship the *Thrift*, for damages occasioned by the same collision. The writ in the action by the Actieselskabet Borgestad was issued on the 15th day of September, 1905; and that in the action by the Dominion Coal Company on the 16th day of the same month; and the first writ issued was also the first to be served.

On the 28th of September an application was made to the learned Judge of the Nova Scotia Admiralty District for an order to consolidate the two actions;

(1) 4 P. D. 191.
(2) 3rd ed. pp. 391, 392 n.
(3) 3rd ed. p. 293.
(4) 1 Q. B. D. 374.
(5) 14th ed. p. 1227 n.
(6) 3rd ed. p. 371.

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

or in the alternative for an order that the *Thrift* be released upon tendering bail to the amount of the appraisement and that a commission of appraisement be issued to the marshal to appraise the *Thrift* in her then condition On that application an order was made on the 3rd of October that a commission of appraisement issue for the appraisement of the *Thrift*, and that upon bail being given for the amount of such appraised value in each of the actions the ship be discharged from arrest; and that the two actions be tried together. From that order an appeal has been taken with a view to having the order reversed and set aside, and an order made that the said actions be consolidated and that the steamship *Thrift* be released upon tendering bail in the consolidated action to the amount of her appraised value.

To that part of the order that directed the appraisement to be made no objection is taken; and it was stated during the argument that such appraisement had been made, and the value of the steamship *Thrift* ascertained to be twenty-four thousand eight hundred dollars Further, no objection is taken to the direction that the two actions be tried together, except so far as that direction may be held to affect the question of the amount of bail to be given. If the actions are consolidated it will only be necessary to give bail to the amount of her appraised value to secure the release of the ship, and this consideration is urged as one of the reasons why the order for consolidation should be made. For the defendants, the owners of the steamship *Thrift*, it is contended that the ship ought to be released in respect of both actions upon giving bail to the amount of such appraised value; and that bail to that amount in each action should not be required.

With reference to the consolidation of the two actions the rules provide that two or more actions in

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

which the questions at issue are substantially the same; or for matters which might properly be combined in an action may be consolidated by order of the judge upon such terms as to him shall seem fit. (Rule 35). And then it is provided that the judge, if he thinks fit, may order several actions to be tried at the same time and on the same evidence, or the evidence in one action to be used as evidence in another; or may order one of several actions to be tried as a test action; and the other actions to be stayed to abide the result (Rule 34). In the third edition of *Roscoe's Admiralty Practice* at page 307 it is stated that "when there is a separate action brought by "cargo owners or shipowners against a vessel it is "usual for the defendants to apply that the cargo "a tion shall be stayed to abide the result of the ship "action and that bail be given in one bond to answer "both claims. If the defendants are successful, the "plaintiffs in the two actions will each pay half of "the costs of giving one bond." And again at page 371 "where more than one action is brought in respect "of a collision, as by owners of ship and owners of "cargo, the so-called order for consolidation is now in "fact an order to stay, under the Judicature Act, 1873, "s. 24 (5). For the practice is to order the stay of one "action to abide the result of the other and if the "defendants ask for this to order that bail be given in "one bond to answer both claims." Such an order as that might have been made, I think, under the rules in force in this court; but the order made that the two actions should be tried together is also within the terms of such rules, and within the discretion of the learned judge who made it. Actions are consolidated for reasons of convenience and economy; but there is some question whether, in such a case as this where the plaintiffs object, such an order as that

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

asked for should be made. But even if it were within the learned judge's power to make such an order, a question that need not be now decided, it was a matter within his discretion to decide whether he would make it or the order that was made, and under the circumstances the latter order ought not, it seems to me, to be interfered with on appeal.

That leaves the question only of the bail to be given on the release of the ship to be dealt with. And as to that it is obvious that the owners of the steamship *Thrift* are in no worse position than they would have been if the owners of the *Chr. Knudsen* had first arrested the *Thrift* and bail had been given, and then the cargo owners had subsequently arrested her. They are probably in no worse position than they would be if one or the other of the two plaintiffs should now discontinue its action, leaving the owners of the defendant ship to put in bail, if they desired the possession of the ship, and then after that was done institute a new action. In either of such cases the court would have to decide whether in case judgment went for the plaintiffs it would allow the bail in the two actions to be held for more than the appraised value of the vessel. And that, under the order that was made, is what the learned judge in giving judgment and disposing of the two actions, will now have to determine. But the defendants wish, and very naturally wish, to avoid having that question raised; and the order ought, it seems to me, to be made in view of the existing conditions and not with reference to other conditions that might have arisen, and did not, or with reference to other conditions that might arise. The rules on the Admiralty side of the court provide for the release of property under arrest on (1st) payment into court of the amount claimed, or of the appraised value of the property arrested or where

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

cargo is arrested for freight only, of the amount of the freight verified by affidavit (1); and (2ndly.) on one or more bail bonds being filed for the amount claimed or for the appraised value of the property and on the allowance of the same if objected to (2). The money paid into court is substituted for the *res*; and bail is the substitution of personal security for the *res*. The amount of money to be paid into court or of the bail to be given in such a case as this is limited by the amount of the claim and by the appraised value of the *res*. In some cases the amount of the statutory liability of the owners may have to be taken into account. But not in a case such as this where the value of the *res* is less than the amount of the statutory liability. The value as appraised in this case is also less than the amount of either of the claims made. Now it seems to me that where, as here, there is at the time when an application is made for the release of property under arrest in the court more than one claim against such property, the amount claimed within the rule is the sum or aggregate of the amounts of such claims; and where such sum exceeds the appraised value of the property the amount of money to be paid into court, or of the bail to be given should be determined by reference to such appraised value. Where that sum or aggregate does not exceed such appraised value of the property no difficulty will arise. Equally it seems to me there is no difficulty where the appraised value is paid into court. In such a case the money paid into court is substituted for and represents the *res* or property, and the court is free to deal with it in any way in which it could deal with such property or the proceeds of it when sold. But when one or more bail bonds are given a difficulty may arise. The interests of the several claimants may be adverse, and the judge may

(1) Rule 54 (*a*). (2) Rule 54 (*b*).

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

not at the time when bail is tendered be in a position to determine the questions that may be in controversy between them. He might possibly order one bail bond in the appraised value of the property to be given for the benefit of all the claimants, and possibly the form of bail bond in use could be adapted to meet such a case. But that might possibly raise questions that would render the security to each claimant of less value than separate bail bonds. And it does not appear to me to be unreasonable for a judge under such circumstances to say to the defendants: If you wish to secure the release of your property by giving bail bonds, you must give the bail to each plaintiff that you would have to give if his action and claim were the only action and claim before the court; and when the actions come to be tried and to be disposed of, and they will be tried together, I shall decide as to the respective rights of the parties, and if the plaintiffs succeed I shall determine the amount for which the bail in each action will be liable in respect of the property under arrest. But I am not able to determine these questions until the hearing, and in the meantime you must give bail in each action to the amount of such appraised value. That, it seems to me, would not be an unreasonable exercise by the Judge of his discretion in the matter. There is not, however, in my opinion, the same difficulty where the amount at which the property is appraised is paid into court.

I am therefore of opinion not to vary the order that the learned Judge made further than to allow in the alternative the steamship *Thrift* to be released in respect of both the actions and claims made upon payment into court of her appraised value and the amount of her freight (if any). And, as the learned Judge was not asked to make any such order as that, there will be no costs of appeal to either party.

Judgment accordingly.