1919
March 5.

WILLIAM MARTIN, OLIVER MARTIN AND ARTHUR CAROW, TRADING AS CAROW TOWING COMPANY,

PLAINTIFFS;

v.

THE "ED. McWILLIAMS," HER CARGO AND FREIGHT,

DEFENDANT.

Towage—Lien for—Mortgage—Priorities—Lex loci—Place of contract—Acceptance by telephone.

Under British and Canadian law a claim for ordinary towage does not give a maritime lien upon the ship towed nor one superior or prior to a mortgage existing upon it at the time the claim arose.

2. Where a contract is proposed and accepted over the telephone, the place where the acceptance takes place constitutes the place where the contract is made. Acceptance over the telephone is of the same effect as if the person accepting had done so by posting a letter, or by sending off a telegram from that place. The contract having been accepted in Canada was governed by Canadian law.

ACTION for towage by the plaintiffs against the ship "Ed. McWilliams", a British ship registered at Amherstburg, Ontario.

The plaintiffs are a partnership, with their head office at Cheboygan, Michigan, in the United States of America.

The contract of towage on which the claim herein was based, was arrived at as follows: Telegram from Sault Ste. Marie, Ontario, by the Lake Superior Paper Company, to plaintiffs at Cheboygan, Michigan, and reply from plaintiffs to the Paper Company. No contract was made by these telegrams. Subsequently a long distance telephone call was sent by the plaintiff, William Martin, at Cheboygan, to Capt. Thos. R. Climie's house at Sault Ste. Marie, Ontario,

where it was answered by Capt. Climie, who by telephone discussed and agreed to the terms of the towage contract.

The subsequent towage service was in accordance with the contract, and consisted in towing the "Ed McWilliams", a dump barge, from Sault Ste. Marie, Ontario, to Calcite, Michigan, light, and back to Sault Ste. Marie, Ontario, loaded with limestone. The claim $434.38 was admitted to be correct.

At the time of the towage contract and of said towage service, the "Ed. McWilliams" was subject to two registered mortgages, both of which are still subsisting. The amount of these mortgages greatly exceeds the value of the ship.

No appearance having been entered, the plaintiffs, after some time had elapsed, applied for leave to proceed *ex parte,* and to set down the action for trial, in the usual way, and to prove their case by affidavit evidence, the Court ordering that notice of trial should be served upon the owner and the mortgagees of said ship.

An appearance was subsequently entered by the owners, and by one of the mortgagees of said ship as intervenor. A statement of facts was agreed to and signed on behalf of the plaintiffs and the intervenor.

The hearing took place at Osgoode Hall, before the Honourable Mr. Justice Hodgins, Local Judge of the Toronto Admiralty District, on the 30th December, 1918, and was adjourned for argument, and afterwards written arguments were put in.

W. S. Maguire, for plaintiffs.

J. G. Irving, for owner and mortgagee intervening.

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HODGINS, L. J. A. (March 5, 1919), delivered judgment.

Action for towage by the American tug "Charlie O. Smith" of the barge "Ed. McWilliams", from Sault Ste. Marie, Ont., light, to Calcite, Mich., U.S.A., and back from there, laden, to the point of departure. The amount is not in dispute.

A mortgagee, Simpson, intervenes and claims that the lien of the plaintiffs, if any exists, is subordinate to his mortgage claim. He shows that there is also a second mortgage for a large amount and it is not disputed that unless the plaintiffs are entitled to a maritime lien ranking ahead of these mortgages, a sale would result in no benefit to them.

The dispute therefore resolves itself into the question:—

Does towage give rise to a maritime lien ousting the mortgages, or merely to a statutory claim with the right to seize and sell the vessel subject to the charges then existing against it. In arguing this, the plaintiffs assert that American and not Canadian law applies.

The contract was led up to by telegrams, one despatched from Sault Ste. Marie, Ont., to Cheboygan, Mich., and the other a reply thereto. In consequence of these telegrams, the plaintiffs telephoned from Cheboygan to Captain Climie at the Canadian Soo and he there accepted their offer or made his terms with them. I think the contract was one made in Ontario, for, when Captain Climie went to his telephone, he then and there received an offer or discussed terms which, when accepted, formed the contract. In other words, the plaintiffs at Cheboygan, Mich., by using the long distance telephone, were

able to reach Captain Climie in Ontario just as if they had telegraphed to him and he had received the telegram at the Soo. His reply at the telephone is of the same effect as if he had posted a letter or sent off a telegram from an office in Ontario. See *Weyburn Townsite Co. v. Honsburger*.[1]

The contract provided for the despatch of the tug from Michigan to Ontario and involved taking the barge in tow to Calcite in Michigan. It also necessitated towing the barge back, laden with a cargo, and delivering her safely at Sault Ste. Marie, Ont. Both the beginning and the end of the enterprise were in this province, and the successful completion of it is an essential feature which must be proved before the money is due: *The "Edward Hawkins"*[2]; *The "Minnehaha"*[3]; *The "Queen of Australia"*.[4]

The fact, if it be a fact that the plaintiffs were to be paid for all the time which would elapse till the tug returned to Cheboygan, makes no difference as to where the performance of the contract ended.

Under these circumstances, what law should be applied? The place of the making of the contract, of its initial and final steps in performance was Canada, and entry into the United States was only for the purpose of securing a cargo. It is true that the moving of that cargo was commercially the *raison d'etre* of the contract, but in law what should be looked at for this purpose are the various incidents that go to make up not only the formation and performance of the contract, but the situation of the parties, its working out, where and how that is to be done, and

[1] (1919), 15 O.W.N. 428.
[2] (1862), Lush 515.
[3] (1861), 15 Moo. P.C. 133, 15 E.R. 444.
[4] 4 Asp. M.C. 274, N.

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the possible remedies in case of default.

I think these parties must have intended Ontario law to apply if the whole situation is looked at. The hiring was done here, the tug was to tow in waters half of which were Canadian, to return into Canada and deliver its tow and be paid there. Indeed, the successful completion of the towage contract could only be done by the delivery of the barge into the Canadian port, where, if the hire was not paid, suit would naturally be brought and proceedings *in rem* begun. So that the chief elements generally regarded in this connection point to the application of our own law. See *Hamlyn v. Talisker*[1]; *Spurrier v. La Cloche.*[2]

Applying Canadian maritime law, it is clear that where the owners do not appear or contest the claim, the remedy is limited to the *res*. The same result follows when the intervenors are the mortgagees, for they cannot be made liable for any part of the demand. Sir F. H. Jeune, Knt., says, in *The "Dictator"*[3]: "A mortgagee has no interest in or connection with the action beyond his interest in the *res*, . . could he by any process be fixed with any further liability."

No evidence was given suggesting that the plaintiffs were looking to the owners merely, and the presumption is therefore that the ship is liable. The exact terms of the contract are not disclosed. The cases cited to show that there is a conclusive presumption against the ship's liability when the contract is made in its home port (to which may be added *Kane v. The "John Irwin"*[4]), relate to neces-

[1] [1894] A.C. 202.
[2] [1902] A.C. 446.
[3] [1892] P. 304 at 321.
[4] (1912), 1 D.L.R. 447; 13 Can. Ex. 502.

saries and repairs and are not fundamentally applicable to a contract for towage.

The question is thus squarely up for decision, namely, does a towage claim give a maritime lien upon the *res* superior or prior to the mortgages existing upon it at the time the claim arose?

In several old cases towage is classed with other claims which carry with them maritime liens. These are *The "Isabella"*[1]; *The "Constancia"*[2]; *The "St. Lawrence"*[3]. And to them may be added *The "Athabaska"*[4]; Cassels Digest, S.C.C. 1875-1893, p. 522.

But in none of these cases is the point distinctly raised, but rather is tacitly assumed in favour of the lien. This is probably because the towage in these cases was really a continuation of or so connected with the other claims as to form a part of the operation in which a maritime lien properly attached. The only decision upon the exact point is to be found in *Westrup v. Great Yarmouth Steam Carrying Co.*,[5] a judgment of Mr. Justice Kay, in which he discusses the cases I have mentioned, saying that in them, there is no distinct argument nor any distinct decision that a maritime lien was created by towage simply.

That learned trial judge followed the expressions of opinion by Lord Bramwell in the House of Lords, and of Lord Esher and Lords Justices Bowen and Fry in the Court of Appeal in the *Heinrich-Bjorn*[6] case, and held that the weight of authority was

[1] (1838), 3 Hag. Adm. 427.
[2] (1846), 10 Jur. 845.
[3] (1880), 5 P.D. 250.
[4] (1884), 5 C.L.T. 600.
[5] (1889), 43 Ch. D. 241.
[6] (1885), 10 P.D. 44; (1886), 11 App. Cas. 270.

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against there being a maritime lien for ordinary towage.

This decision has not been accepted by Williams and Bruce, who, after the decision in 10 P.D. had been given, but before the appeal was disposed of, say that "no authority is stated for this proposition, and it is apprehended that the Court of Appeal did not intend to overrule the decision in *The "Constancia", supra,* which has been unquestioned for nearly forty years." I find, however, that most learned authors regard it as disposing of the question. It has not been doubted for thirty years, so that its authority stands high. Abbott and Roscoe both quote it as established, and in Halsbury's Laws of England it is so dealt with. Howell in his Canadian work on *Admiralty* does the same; Mayers leaves the matter in doubt. I find that Stewart, L. J. A., in Prince Edward Island in *The "Santa Marie"*,[1] has recently held against the proposition that a maritime lien for towage exists. American authorities differ on this point from the English and Canadian. Their State laws generally give a maritime lien, and it is then recognized by the U.S. Admiralty Courts.

I prefer to follow the English and Canadian decisions and authorities and must therefore decide against the plaintiffs' claim and in favour of the contention that the mortgagees rank first in priority. *The Pacific*[2]*; The Aneroid.*[3] In *The "Colonsay"*[4], Brett, J., held that when the mortgage claims exceed-

[1] (1917), 16 Can. Ex. 481; 36 D.L.R. 619.
[2] (1864), Br. & L. 243.
[3] (1877), 2 P.D. 189.
[4] (1885), 5 Asp. M.C. 545.

ed the value of the ship, the lien claimed for necessaries was completely ousted. That state of affairs exists here, but as one of the mortgages is to a bank and the circumstances may change, the dismissal of the plaintiffs' claim against the ship will be without prejudice to any future action if the mortgages are paid off or sufficiently reduced. The plaintiffs may, of course, if the mortgagees agree, have an order for sale subject to the mortgages. The view I have taken renders it unnecessary to deal with the other matters argued.

The dismissal as against the ship will be without costs down to the appearance fyled by the mortgagee, but the mortgagee will be entitled to his costs since then. *The "Eastern Belle"*.[1]

No order allowing intervention was applied for or made, but it seems that where mortgagees or others who are clearly entitled to intervene desire to do so, the proper practice is to allow them to fyle an appearance without more. As the owners have entered an appearance, there may be a judgment against them for $434.38, with interest and costs of action, including those payable to the mortgagees.

Judgment accordingly.

[1] (1875), 33 L.T. 214.