ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT

1938
June 7 & 8.
1939
March 21.

BETWEEN:

THE MOTOR YACHT *DR. BRINKLEY II* (DEFENDANT) .... APPELLANT;

AND

THE OWNER, MASTER AND MEMBERS OF THE MOTOR VESSEL *SHANALIAN* (PLAINTIFFS) .... RESPONDENTS.

Shipping—Appeal from District Judge in Admiralty—Limitation of right of master to bind owner of vessel—Services rendered pursuant to contract—Services not in nature of salvage—Time for appealing from judgment rendered in Admiralty Court—Admiralty Rule 172—Appeal allowed.

Appellant yacht, United States Registry, while on a cruise from Galveston, Texas, to Nova Scotia, stranded on the coast of Nova Scotia. The owner of appellant yacht refused an offer made by the master of the respondent vessel to haul the yacht off the shore. He also instructed the master of the *Dr. Brinkley II* that he was not to employ any tow boat that day. Later, on the same day, the managing owner of respondent vessel offered to tow the yacht off, and look to the hull underwriters for his compensation, and not to the yacht itself, or her owner. The master of the *Dr. Brinkley II* accepted this offer. Unknown to either the owner or the master of the *Dr. Brinkley II* the policy of insurance did not cover her while in Canadian Atlantic waters.

The yacht was floated easily at high tide and was towed to Yarmouth, N.S., by respondent vessel. No demand for payment was made on the owner or the master of the *Dr. Brinkley II* while at Yarmouth, nor prior to her departure from Yarmouth two days later.

The trial judge found that the *Dr. Brinkley II* was in distress and danger, that the services rendered by the respondent vessel were voluntary and in the nature of salvage, and he awarded compensation to respondents.

On appeal the Court found that appellant yacht was not, at the time the services were rendered, in any imminent danger or distress.

Held: That the owner of appellant yacht was justified in preferring his own means of releasing the yacht and any services rendered by respondent vessel were not in the nature of salvage.

2. That the master of a ship cannot bind her owner in any transaction concerning the ship, when the owner is on the ship or easily accessible.

3. That the agreement entered into between the master of appellant and the master of respondent vessel was for the assistance of respondent vessel in releasing the appellant on certain definite terms, and cannot be interpreted as conceding the right of salvage against appellant or her owner, with the insurance company acting as arbitrator in fixing the amount of salvage.

4. That the time for appealing in any matter being an action, from a judgment or order in Admiralty, runs from the date the judgment or order is perfected and not from the time when it is decided or pronounced.

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APPEAL from the decision of the District Judge in Admiralty for the Nova Scotia Admiralty District, allowing respondents' action for compensation for salvage services.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Halifax, N.S.

W. H. Jost for appellant.

D. J. Fraser for respondents.

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

THE PRESIDENT, now (March 21, 1939) delivered the following judgment:

This is an appeal from the judgment of Mr. Justice Carroll, District Judge in Admiralty for the Nova Scotia Admiralty District, in an action for salvage, brought by the owner and master and crew of the motor vessel *Shanalian* against the American registered motor yacht *Dr. Brinkley II,* a vessel of 211 tons, and about 120 feet in length, and hereafter to be referred to as the *Brinkley.* The *Brinkley* was owned entirely by one Dr. John R. Brinkley, an American citizen, who was on board his yacht, on a cruise starting from Galveston, Texas, to Nova Scotia. Her last American port of departure was Portsmouth, New Hampshire, bound for Halifax, N.S. On Sunday, the last day of June, 1935, at 9.15 in the morning, on approaching the coast of Nova Scotia during a dense fog the *Brinkley* ran ashore, at Chebougue Point, some five or six miles from the Town of Yarmouth, N.S.; she was released therefrom about twelve hours thereafter in the circumstances soon to be related.

The evidence on behalf of the appellant was heard by the late Mr. Justice Mellish, then the District Judge in Admiralty for the District of Nova Scotia. The evidence on behalf of the respondents was heard some three or four months later by Carroll D.J.A., and this appeal is from his judgment rendered in the action.

The *Brinkley* went ashore in a hospitable spot, on an otherwise rocky shore line, a spot that was the scene of the stranding of a steamer, some twenty years earlier, whose release required the blasting and removal of rocks which thus made the locus favourable for the stranding

of the *Brinkley.* The *Brinkley* went ashore very lightly on a receding tide, and just at the moment of stranding she was going full speed astern on both her engines. After grounding, the *Brinkley* put out two bow anchors, one on each side, and had them carried pretty well to the stern, and fastened behind the largest rocks that could be found there, the anchor chains being attached to a windlass on board; this would tend to lighten the yacht forward, prevent her going further up on the shore at high tide, and it was expected that the disposition of the anchors would assist in floating her under an astern propellor movement, when the time came to do so. On the full recession of the tide—the fall and rise of tide being usually great in those parts—the *Brinkley* was soon high and dry, with a pronounced starboard list. It was not till about 9.15 p.m. on the evening of the same day that the *Brinkley* was floated, on a rising tide, with the assistance of the motor vessel *Shanalian,* such assistance occupying but a few minutes, probably less than five minutes. The *Shanalian* was not in any danger in rendering the assistance, and it is agreed that the release of the *Brinkley* was readily and easily accomplished. It was even suggested by the appellant that the *Shanalian* did not exert any pull at all in floating the *Brinkley* off the strand, and that she came off under her own power. While there may be some doubt as to the degree of assistance rendered by the *Shanalian* yet she had a tow line on the *Brinkley* and, I think, it will have to be assumed that she did render some assistance.

A Mr. Purney, a Lloyd's Agent, resident at Yarmouth, appeared on the scene around noon, a few hours after the stranding; and also Brannan, the master of the *Shanalian,* the latter having been sent there by his managing owner, for the purpose of putting his boat at the disposal of the stranded yacht, if required. Purney soon engaged in conversation with Dr. Brinkley, and this resulted in Purney asking Brannan what he would charge to "jerk" the yacht off at high tide, and Brannan replied that he would charge $1,000. This was communicated to Dr. Brinkley and he there and then declined to pay such an amount, for such a service. Some unidentified person at this time informed Dr. Brinkley that the high tide in the evening would be greater by three feet than it was when

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the *Brinkley* grounded, and this may have influenced Dr. Brinkley in concluding that his yacht would readily float off at the evening high tide, under her own power. In the afternoon Dr. Brinkley, who in the meanwhile had motored to Yarmouth and back, informed the master of his yacht that he was not to employ any tow boat that day, and, if the yacht failed to float off with the next high tide, he hoped to get the services of some Canadian Government boat, through a Mr. Kinney at Yarmouth, whom he had in the meanwhile met; in fact some such boat did tow his yacht out of her dock at Yarmouth on her departure for Halifax, on the following Tuesday. Later in the afternoon Dr. Brinkley motored to Yarmouth where he remained, as I understand the evidence, until the next morning. He apparently was strongly of the opinion that there would be no difficulty in floating his yacht, by her own exertions, at the high tide on Sunday evening, and if this did not prove successful he would then have to consider the matter of procuring or hiring the services of some tug, for the next high tide. He seems to have definitely concluded that he would not consider a payment of $1,000, and there is no doubt, I think, but that his instructions to his master were clear and explicit upon this point, and the master himself appears to have been indignant that in the circumstances of the case any such sum as $1,000 should be demanded for what he deemed to be a very slight service.

Nothing of importance thereafter transpired until shortly after or around 8 p.m. on Sunday evening, just before dark, when the *Shanalian* appeared on the scene, just as the tide was beginning to rise, but not at the request of the master or owner of the *Brinkley*. The master of the *Brinkley* observing this vessel, and thinking she might be a United States coastguard boat whose aid the yacht had requested by wireless just at the time of the stranding, or a Canadian Government owned boat, sent a launch with two of his crew to this then unknown vessel, which turned out to be the *Shanalian*. The managing owner of the *Shanalian*, a Mr. Sweeney, came ashore in the launch to the side of the stranded yacht, but the master, Brannan, I think, remained on his boat. Then some conversation ensued between the master of the *Brinkley* and Sweeney regarding the towing off of the *Brinkley*. Sweeney stated

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that he would tow the *Brinkley* off for $1,000, which proposal the master of the *Brinkley* refused to entertain. Then Sweeney stated that he would tow the yacht off and would look to the hull underwriters for his compensation, and not to the yacht itself, or her owner. To make sure about his understanding of this proposal the master of the *Brinkley* then called around him most everybody on board the yacht, and requested Sweeney to repeat his proposal, that is, to tow the yacht off the shore, and to look only to the insurers for payment of his services, and this was done. There is no conflict of evidence upon this point, and it is beyond controversy, in my opinion, that the managing owner of the *Shanalian* agreed to perform the services without any liability for compensation on the part of the yacht, or her owner. Both Sweeney and Brannan stated in their evidence that this was the arrangement, and with this the learned trial judge agreed, as I do. The proffered service being put on this basis the master of the *Brinkley* decided to accept the same, though contrary to the instructions of Dr. Brinkley. The master of the *Brinkley* does not appear to have given any reasons for this decision, and we need not speculate as to it. The master of the *Brinkley,* when all was in readiness for the start of the tow, told his crew to start heaving on the anchors, and he started his port engine at full speed astern, and in three or four minutes, in less than half her length, the *Brinkley* was afloat. It was the opinion of the pilot, McKinnon, who was retained on Sunday to accompany the *Brinkley* on the balance of her Nova Scotia cruise, that she would float off about a half hour before high tide. The evidence of McKinnon impresses me, and he was a person with a knowledge of the local situation and one who had an extensive experience in salvage matters. I think it is probable that the *Brinkley* would have floated when McKinnon said she would, and this may well have been entertained as a probability by the managing owner of the *Shanalian,* and it may have been the reason which induced him in the end to venture into the gamble of looking to the insurers, if the services of his boat were accepted. There seems to have been no difficulty in floating the yacht; and the *Shanalian* towed her to Yarmouth, reaching there at 11.30 p.m. Why she was towed to Yarmouth was not clearly explained. No bill was ever rendered the owner or the master of the

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Brinkley while at Yarmouth, nor was any demand of any kind made by the managing owner of the *Shanalian* prior to the departure of the *Brinkley* from Yarmouth on Tuesday, at about 11.50 a.m. Dr. Brinkley was in Yarmouth when his yacht floated, on all of Monday, and on Tuesday until the hour of his departure therefrom.

I should explain that while the *Brinkley* was insured in quite a large amount yet it transpired that the policy did not cover her while in Canadian Atlantic waters, but neither the owner nor master of the *Brinkley* was aware of this, and the master I have no doubt was in good faith if he led the managing owner of the *Shanalian* into believing that the policy of insurance covered his ship while in Canadian waters. That likely would be assumed and probably no words passed between them upon the point.

The case is an unusual one and not free from difficulties, and in some respects it is one of no little interest. Carroll D.J.A., found the *Brinkley* was in distress and danger, that the services rendered were voluntary and in the nature of salvage, and he awarded compensation in the sum of $600. If the *Shanalian* is entitled to salvage I should not feel justified in disturbing the award of the learned trial judge, and the amount of the award was not, so far as I recall, stressed as a ground of appeal. The appellant contended before me that the *Brinkley* was not a ship in danger or distress, in the practical sense at the material time, and that any services rendered were not in the nature of salvage. The important ground of appeal raised before me was that the master of the *Brinkley* could not bind the *Brinkley* or her owner for salvage services, or anything else, on the ground that a master cannot bind his ship or her owner when the latter is on board, or readily available to anyone desirous of any dealings relating to the ship. A principle of importance is therefore raised. It was also urged, in the alternative, that if any contract were made between the master of the *Brinkley* and the managing owner of the *Shanalian,* and such contract were binding upon the *Brinkley* or her owner, it was an express term of the contract that the *Shanalian* would not hold the *Brinkley* or her owner liable for any services rendered, but would take the risk of recovering compensation from the insurers of the *Brinkley,* and this being the essence of the contract it was

immaterial whether in fact the *Brinkley* were covered, while in Canadian waters, by her insurance policy.

The question as to whether or not the *Brinkley* was in danger or distress, at the time the services were rendered by the *Shanalian,* is one to which I have given anxious consideration. The conclusion, which I have reached, is that the *Brinkley,* at the time the services in question were rendered, was not in any imminent danger or distress, and, I think, all the circumstances of the case support this conclusion. I have in mind, of course, a time limitation, and the locality, the season of the year, and the actual and probable weather conditions. I do not think the *Brinkley,* in the practical sense, was in danger, or that her situation was so critical as to make it unreasonable for her owner, or master, to decide upon an attempt to float the ship by her own means at high tide, before seeking or accepting the assistance of a tug. It does not necessarily follow that because a ship is stranded that she is in danger, particularly a ship without a cargo. Doubtless, a stranded ship would be safer afloat, but that does not determine that the towing of her off the strand would be in the nature of a salvage operation. It was quite within the right of the owner, I think, at the time in question here, to prefer his own means of releasing the *Brinkley,* and in rejecting the services of the *Shanalian,* if her aid in his judgment were not urgent, and if in all the circumstances he did not regard his ship in immediate danger. I cannot reach the conclusion that in all the facts of the case the *Brinkley* was in danger when the services in question were rendered, or even the next day, and beyond that there is no evidence. There was no sea or wind at the time material that was alarming, and there is no evidence that any storm of any kind was imminent or predicted. In fact, whatever evidence there is goes to show that on Monday the weather conditions were not unfavourable. To say that a disturbance in sea or wind might occur at any time is not relevant. I think the owner of the *Brinkley* was justified in taking the risk he did, if risk it were, and that any services rendered by the *Shanalian* were not in the nature of salvage. The facts in the case of *The Pretoria* (1), offer a somewhat comparable situation.

(1) (1920) 5 Lloyds List L.R. 112.

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I was referred to the case of *The Auguste Legembre* (1). The question for decision there was under what circumstances a tug employed by a salving tug, against the will of the master of the salved vessel, can claim a salvage reward. That was the principal point in issue, but, I think, it has no application here. In that case there were grounds for holding that the third tug was necessary because she was called into service by a second tug already engaged in a salving operation, and the case was decided upon practical considerations. I do not think that the case of *The Auguste Legembre* establishes any such principle that because a ship is stranded the master must accept any salvage services offered her, and that he has no right to refuse the same. Gorrell Barnes J., in that case, said that the case he was dealing with involved the nautical question, whether having regard to the circumstances of the case, and what might have been anticipated at that time of year, and in that locality, it was reasonably prudent and necessary to have a third tug, and the Elder Brethern thought it was, and Gorrell Barnes J. thought it was a reasonable thing to do, and accordingly a salvage award was allowed the third tug.

I come now to the question of law raised by the appellant. Clear of authority altogether, the principle that a master of a ship cannot bind her owner in any transaction concerning the ship, when the owner is on the ship or readily accessible, would seem to be a sound and safe one, and one founded on reason. The contrary principle would appear to be an unreasonable and dangerous one, and in practice, it is the managing owner who makes all decisions affecting a ship when in her home port, and not the master, though I can conceive of possible exceptions, in very urgent circumstances, when agency might even then be implied. Generally, there is no room for the application of the doctrine of agency when a ship is in her home port, or when the owner accompanies his ship, and is readily available. Dr. Brinkley may be treated as always being on board his yacht. He was at least, at the time material here, available to anybody. Here we have the sole owner of a stranded yacht making the decision that an attempt should be made to float her by her own

(1) (1902) P. 123.

means, at the evening high tide of Sunday, June 30th, and that the hiring of any tug should in the meanwhile be postponed, and he so instructed his master. The decision of the owner to attempt to float his ship by her own exertions was within his right. The managing owner of the *Shanalian* was no doubt aware that Dr. Brinkley had refused on Sunday forenoon to accept the services of his tug, upon the terms already stated, and the same offer was refused on Sunday evening by the master of the *Brinkley*. The managing owner and master of the *Shanalian* were aware that Dr. Brinkley was accessible to them at the scene of the stranding, or at his hotel in the Town of Yarmouth. In fact, both had called to see him at his hotel in Yarmouth sometime before proceeding to the stranding on Sunday evening. He happened not to be in at the time, and they made no further effort to locate him. I cannot conceive of it being a difficult thing to locate him if they had seriously attempted to do so. Dr. Brinkley was dealing with his own property and in all the circumstances of the case, I do not think the plaintiffs can be heard to say what was his duty in respect of his own property.

Turning now to the authorities. The general rule is that the master of a ship by law has the power to bind the owner in conducting the navigation of the ship to a favourable termination, and he has, as incident to that employment, a right to bind his owner for all that is necessary, but, as was said by Parke B. in *Beldon* v. *Campbell* (1), " these instances do not apply where the owner of the vessel is living so near the spot as to be conveniently communicated with. In that case before the master has any right to make the owner a debtor to a third person, he must consult him, and see whether he is willing to be made a debtor or whether he will refuse to pay the money." The case of *Gunn* v. *Roberts* (2) affirmed the same principle. This rule seems to have been favoured by Dr. Lushington in the case of *The Elise* (3), wherein he said that a master might make a binding agreement on land as at sea as agent for the crew to bind them by agreement in respect of salvage compensation, but not, he

(1) (1851) 6 Ex. R. 886 at 890. (2) (1874) 9 L.R.C.P. 331.
(3) (1859) 166 Eng. R. at 1206.

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thought, where the owner was at hand and had given him no authority. The point is discussed in Halsbury (1), in the following language: "The owner of the salved ship is generally bound by a salvage agreement entered into by the master, the latter having an implied authority to bind his owner for all that is reasonably necessary for the successful navigation of the ship. But the shipowner is not bound by it where he was easily accessible and gave no authority to the master to enter into it, or where in the circumstances the agreement was not reasonably necessary, or where the terms of the agreement show that it is not for the benefit of the shipowner . . . ."

I come now to the alternative ground upon which the appeal was put to me. If an agreement were made between the master of the *Brinkley* and the managing owner of the *Shanalian* it was an express term of that agreement that neither the *Brinkley* nor her owner was to be liable for any services proposed to be rendered, the managing owner of the *Shanalian* having elected to take the risk of recovering any compensation from the insurers of the *Brinkley*. It was upon that express term that the *Shanalian* was permitted to put a line on board the *Brinkley*. That fact is, I think clearly established. It was not, I think, the agreement that a right to salvage compensation was conceded as against the *Brinkley* or her owner, and that the insurance company was to act as an arbitrator in fixing the amount of salvage, as was suggested. The master of the *Brinkley* carefully and deliberately made sure that the suggestion of the managing owner of the *Shanalian* was that neither the *Brinkley* nor her owner was to be liable for compensation, and his reason for this exactness probably was that he had been instructed by the owner not to engage the services of a tug at all, at least on the day in question. I do not think there is any room for doubt but that was the agreement or arrangement reached, and it was the suggestion of the managing owner of the *Shanalian*. I do not think it avails the respondents in a salvage action that it transpired that the insurance on the hull of the *Brinkley* did not cover her while in Canadian waters. If I should be in error in the opinions already expressed in the case, I think this point is of itself fatal to the case of the respondents.

(1) 1st Ed. Vol. 26, p. 572.

The towage from the scene of the stranding to Yarmouth, after the release of the *Brinkley,* seems to have been treated at the trial as part of the salvage services, and the action was disposed of on that footing. I think it is now too late to dispose of that portion of the services as one of towage—concerning which there is no evidence,—and the balance as salvage services, which I understood to be suggested to me on the appeal by counsel for the respondents; however I may be in error as to this. The towage to Yarmouth apparently was included within the service to be rendered by the *Shanalian,* on the terms which I have already stated. In any event the action was one for salvage and I do not see how I can now convert any portion of the services rendered into one for towage, even if the agreement did not stand in the way.

There remains for discussion one further point. There was raised on behalf of the respondents the preliminary objection that notice of this appeal was not served in time. The decision of the learned trial judge in this action was filed with the District Registrar, on February 18th, 1938, but no entry of the same was made at the time in any book of record. On March 22nd, following, a decree was taken out before the learned trial judge and this was thereupon filed in the Office of the District Registrar, and entered in the appropriate record book. The respondents contend that the time for filing notice of appeal runs from the date of the decision, while the appellant contends that the time for filing notice runs from the date of the decree. The notice of appeal filed herein was within the required time, if calculated from the date of the decree, but not within the period of calculation from the date of the filing of the decision.

Admiralty Rule 172 is the one applicable here. It is as follows:

No appeal to the Exchequer Court from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Exchequer Court, be brought after the expiration of thirty days, and no other appeal shall, except by such leave, be brought after the expiration of sixty days. The said respective periods shall be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application from the date of such refusal.

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The Rule might be more clearly expressed, but I think its meaning is fairly clear. The case under discussion, "being an action," would seem to fall within that portion of the Rule which prescribes a period of sixty days within which an appeal may be brought, and the Rule provides that such time shall be calculated "from the time at which the judgment or order is signed, entered or otherwise perfected." I am, therefore, of the opinion that the time for appealing runs from the date when the judgment or order is perfected and not from the time when it is decided or pronounced, but that would not apply in the case of an Order in Chambers, "in any matter not being an action."

For the foregoing reasons, my conclusion therefore is, with great respect, that the appeal must be allowed, and with costs.

Appeal allowed.