TORONTO ADMIRALTY DISTRICT

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CANADA STEAMSHIP LINES LTD.....PLAINTIFF; Feb. 8, 9, 10. Mar. 20.

VS.

SS. *PAISLEY* .....DEFENDANT.

AND

JAMES RICHARDSON & SONS LTD.....PLAINTIFF;

VS.

SS. *PAISLEY* .....DEFENDANT.

Shipping—Collision—Damage to moored vessel—Towage—Negligence—Onus of proof—Responsibility of tow—Maritime lien

The owners of the *P.* contracted with a towing company to have the *P.* towed from her berth to a grain elevator to unload her cargo. The *P.* had no motive power. Owing to the breaking of the tow line at one stage of the movement the *P.* continued her forward movement past the elevator and reached the south end of the harbour where the *S.* was laid up, puncturing the latter under the water line, by an anchor left hanging down on the port bow of the *P.* partly under water. This anchor was left so hanging down by those on the tow notwithstanding a warning by the tug master.

Held: That when commencing the towing of a ship her anchor is left, by the joint negligence of the tug master and those in charge of the ship, in such a position as to constitute a danger to other vessels,

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and does in fact cause such damage, the tow and tug are each responsible and liable for the damages so caused.

2. That when a vessel at anchor or moored at a dock is run into by another, the onus is upon the moving vessel to justify or excuse her action.

3. That towage is a joint undertaking, and although the motive power may be wholly that of the tug, yet both tug and tow are bound to take reasonable care and to use reasonable skill in performing the operation. This duty is not affected by the terms of the towage contract, which cannot regulate the relations between the tug and tow and third parties.

4. That persons on board the tow such as a ship-keeper and his helpers, though not a regular navigating crew, in regard to reasonable care and skill, may be treated as agents of the owners of the ship in performing or neglecting to perform such duties as the towage contract or the exigencies of the operation casts upon them.

5. Provision in a towage contract that the operation is at "owner's risk" will not absolve the tug in case of negligence in navigation so far as third parties are concerned.

NOTE.—The responsibility of the tug and tow, as between themselves discussed.

ACTIONS by the owners of the SS. *Saskatchewan* and of her cargo, against the *Paisley* for damages by collision in Owen Sound harbour.

These actions were tried before the Honourable Mr. Justice Hodgins L.J.A. at Toronto.

A. R. Holden, K.C., and *F. Wilkinson* for the Canada Steamship Lines.

S. C. Wood, K.C., and *G. M. Jarvis* for James Richardson & Sons Ltd.

R. I. Towers, K.C., and *O. S. Hollinrake*, for the ship *Paisley*.

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now (March 20, 1928), delivered judgment (1).

Action for damages by the owners of the SS. *Saskatchewan* and of her cargo against the SS. *Paisley* due to a collision which occurred in Owen Sound harbour on the 18th January, 1927.

(1) On appeal to the Supreme Court of Canada, this judgment was reversed [(1929) S.C.R. 359], but was restored by judgment of Judicial Committee of the Privy Council, on 21st January, 1930.

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The *Paisley* was being shifted from her berth on the east side of the harbour to the elevator dock on the west side where she was to discharge her cargo. She had been laid up in the harbour since the close of navigation. She had no motive power and was moved by the tug *Harrison*. Owing to the breaking of the tow line at one stage of the movement the *Paisley* continued her forward movement past the elevator and reached the south end of the harbour where the *Saskatchewan* was laid up, puncturing the latter steamer under the water line by an anchor left hanging down on the port bow of the *Paisley* and being partly under water.

The defence of the *Paisley* is practically that the responsibility for what happened does not lie upon her as she had nothing to do with the navigation, being in that respect wholly under the control of the tug.

The *Paisley* having been laid up in the harbour was put in charge of one Penrice who is called the "shipkeeper." He signed an agreement with the Cleveland-Cliffs Iron Company, Marine Department, who were operating the *Paisley* for the owners, the Paisley Steamship Company. That agreement was put in evidence, and is dated 22nd December, 1926 (signed 24th or 25th December, 1926). The terms of that agreement are given later. Penrice employed three men to sweep out the vessels, tidy up and handle the lines when the ship was being moved. He spoke to Richards, the elevator superintendent on the 15th of January, 1927, with regard to removal and was told that the *Paisley* was next in order. The Captain of the *Harrison,* Waugh, came aboard the same day and talked to Penrice about the contemplated movement. The tug which he commanded was owned by the John Harrison & Sons Co. Ltd., which firm was engaged by the Cleveland-Cliffs Iron Company to move the ship. The importance of the interview lies in regard to what was then done as to the port anchor. It seems that the chain cable of this anchor had been, as appears to be usual, unshackled and used as a mooring line to the dock. This cable was taken in as a mooring line by Penrice, with the assistance of the tug men and drawn in through the hawse hole on the port side and left hanging down beside the anchor, which had been hanging down the port side by wire cables. The chain was then

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shackled on to the anchor which was drawn in to the hawse hole as far as the cable would allow the anchor stock to go. About a foot and a half or two feet got into the anchor pipe, the crown of the anchor sticking out about five feet according to Waugh, and about two or three feet according to Penrice, at an angle of around eighty degrees. This left the flukes drooping down. The parties differ somewhat as to what was said at the time concerning the anchor. Waugh says that he did not like the position of the anchor when hauled up, as it was dangerous, and that Penrice dropped it down till the crown was about two feet or two and a half feet under water as well as part of the stock. The crown of this particular anchor is shown as having a rather sharp point outwards as indicated in Exhibit S-4. Waugh says that at the time he offered to take the cable off and bring the anchor in. He had his men there and Penrice had none. Penrice, however, replied, with a certain amount of blasphemy, that he would leave it as it was till spring and let " them " take it in. Penrice does not to my mind satisfactorily contradict Waugh's statements; indeed he refused to controvert many of them and where they conflict I accept Waugh's testimony as to what was done and said at this time. Penrice, after lowering the anchor asked Waugh if it would be in his way, and Waugh answered " No," meaning it was not in the way of manoeuvring the tug. As a consequence the anchor was left hanging down as I have described and was in that position on the 18th January, 1927, (See Exhibits S.3 and S.4 and S.5), and in my view the responsibility for its position rests equally upon Waugh and Penrice.

No arrangements were made or discussed then or later between Penrice and Waugh as to how or where the ship would be moored when the *Paisley* reached the elevator dock.

The *Paisley* was lying across the harbour from this dock and to the south of and forward of two other vessels in the harbour, with her stern to them, and so was hauled out and towed stern first down the harbour to the northward. When far enough down and with her stern beyond the house marked on the chart " J.H.S." the tug swung the ship's bow towards the west and her stern to the east and then cast off from the stern and went to the bow. Penrice

and his three men, Sykes, Holmes and Bechard, were at the stern when the tug cast off from it. Penrice says he sent the men forward when the tug left, but only one of them seems to have obeyed at once, the others following later. Penrice maintained his position at the stern, fearing, as he said, that his vessel might, while being backed up, run into what he called "riff raff," a term which I understand him to use in reference to the condition of the margin of the harbour at that place, where piles and rocks made it dangerous to vessels. The tug having gone forward, took up its position on the starboard bow of the *Paisley*. A heaving line from the *Paisley* was thrown to the stern of the tug by Sykes. This was taken by Mathewson, mate of the tug, and was attached to the tug's line which was hauled aboard by Sykes and by him put through the starboard chock and on the bitts on that side of the vessel. There was no one there to assist him, otherwise he says would have carried the line over to the port side, which according to him, was the proper place for it to go, and he adds that the tug should have been on the port instead of the starboard bow. Having got assistance, the line was shifted to and through the port chock and to the bitts on the port bow, and after letting out fifteen feet of the line the tug commenced its movement ahead straight for the elevator dock at a point marked "X" on the chart. Waugh says he got the *Paisley's* bow to about thirty feet from the dock, her speed then being, according to him, about one-half a mile an hour. Mathewson corroborates both these statements. Waugh expected the men on the *Paisley* to heave a line ashore then and says it could easily have been done but he could not see as the bow of the ship was between him and those on the deck of the *Paisley*. He kept on ahead hauling the bow past the elevator and then put the tug's wheel hard a port, swung her stern out to clear the steamer and backed up to the port side of the *Paisley* to put the tug's nose against the *Paisley* and push her in. The men in the tug when it backed up carried the line forward on the tug. Waugh, seeing that the *Paisley* had not got any line to the dock, hailed Sykes not to cast the line off and told his mate to take a turn on the timber head forward on the tug so as to back up and stop the *Paisley*. The tug did back up but the line on being moved from the

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stern of the tug to its bow ran out all but four feet and began to slip on the timber head. The tug went ahead to give a chance to make fast, while the mate put the eye of the line over the timber head. When taut the tug went full speed astern, and the line parted. The mate picked up another line and sang out for the *Paisley* to take it, but no one on board her was ready. When a man came and took it, the tug backed slowly so as not to part it but the *Paisley* forged ahead and got into the ice and ran into the *Saskatchewan*. As the *Paisley* continued her way a heaving line was thrown from her to the shore by Penrice but it only reached some piles beyond the south face of the elevator where it was caught by Yeo who had reached that point and caught it there, but it was not long enough to reach a snubbing post, the nearest being some 65 feet away. Penrice called for another line to attach and lengthen it, but due to the delay in getting it and the movement of the vessel he abandoned it. The *Paisley* went on and struck the *Saskatchewan* in the way I have described.

I find as a fact that the damage to the *Saskatchewan* was done by the *Paisley's* anchor and not by the boom which had drifted or been put alongside the *Saskatchewan*.

Under the circumstances which I have outlined the questions arise whether the action of the *Paisley* was due to the negligence of those on board her, or whether the negligence causing the accident was that of the tow and tug jointly or if by the tug alone whether the *Paisley* is liable for the damages so caused.

The contract under which the tug undertook to move the *Paisley* is contained in the correspondence put in as Exhibits P. 6, the final letter of which is dated December 27, 1926, from John Harrison & Sons Company, Limited, the owner, to Mr. Schneider, Manager of the Marine Department of the Cleveland-Cliffs Iron Company of Cleveland. It is as follows:

Dear Sir:

Your letter of the 23rd received.

Please give us the Wheat Capacity of your Steamers now in Harbour here. Our understanding is that the rate for one move to and from the Elevator will be one-quarter cent (¼c.) per bushel, on the Wheat Capacity of each steamer. Other Owners have arranged in this way and wish you would be good enough to give us the figures so that there will be no misunderstanding.

Thanking you in advance for this and wishing you the Compliments of the Season, we remain,

Yours very truly,
JOHN HARRISON & SONS CO. LTD.

It is, I think, unnecessary to refer to the previous correspondence which began on the 6th November and is contained in Exhibit P. 6, except to say that in the letter from the tug company of December 11/26 Exhibit (S.9) in which it is stated that their offer is to move steamers with storage cargoes to and from the elevator, there is a paragraph reading:

It is understood this work will be done at Owner's risk and that your ship-keeper will direct the mooring of Steamers after being unloaded, the Harbour Master to settle any dispute as to location.

In the telegram of December 13, the tug company say "Will require favourable weather and no mishaps to break even at our offer." The offer was accepted on the same day. The tug *Harrison* was in the correspondence designated by the Harrison Company to do the work in question.

It was urged by the plaintiff's counsel that the words "Owner's Risk" prevented the defendants from asserting that the tug company was an independent contractor so as to absolve the *Paisley* from liability. Whatever its meaning and effect may be as regards the tug and tow *inter se* I am unable to see how it affects or increases the right of the plaintiffs under the circumstances of this case.

I think that this must be considered to be a towage contract or in the nature of a towage contract because the service required would be to transfer the *Paisley* from one dock to another, a movement which necessitated that the operation should be conducted under the sole power of the tug and by means of lines between the tug and the *Paisley* and from the *Paisley* to the elevator dock. The incidents of a towage contract, of course, vary, but substantially the contract here seems one that should be judged by the ordinary relationship of tug and tow, especially as the events which happened occurred while the *Paisley* was in fact under the control of the tug as to motive power, and being towed from one dock to another.

The exact position of Penrice the shipkeeper of the *Paisley* and his helpers is not easy to determine. They were not a navigating crew and their actions must be considered

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in the light of what they necessarily had to do and did or did not do, having regard to the fact that the whole operation while under the control and direction of the tug master was a joint one.

Penrice in his evidence says that the purpose of having the three men he employed was

> to assist me in handling the lines, taking off hatches and principally to sweep out the boat when she arrived into the elevator and was being unloaded.

The contract between the operating agents of the *Paisley* and Penrice (Ex. P. 8), is as follows:

CLEVELAND, OHIO,
December 22, 1916.

Mr. A. R. PENRICE,
Owen Sound, Ontario.

DEAR SIR:—

You are hereby appointed shipkeeper on the Steamer *R. J. Paisley*. Your salary is to be *$65.00* per month.

Your regular duties will be to look after the boat you live on, as well as other vessels of this Company that may be near you. The shipkeeper should sound all tanks, peaks, and engine room well; record all movements of vessel and work done in connection with loading or unloading storage cargoes; get vessel ready for inspection or fumigation: look after repairs, and perform such work as chipping, scraping rust, painting, removing snow from hatches, as well as any other work called on to do, without extra compensation.

The shipkeeper is to report in writing to the "Cleveland-Cliffs Iron Company's office, 1460 Union Trust Bldg., Cleveland, Ohio," every Monday morning.

This contract is to terminate at any time the owners or their representatives are not satisfied with the services or conduct of the shipkeeper.

C. O. RYDHOLM,
THE CLEVELAND-CLIFFS IRON CO.

COR C

I hereby agree to the above contract:
A. R. Penrice,
Shipkeeper.
Dec. 16th, 1926.
Date commenced keeping ship.

1000 2nd Ave E.,
Mailing address,
Owen Sound, Ont.

It is a matter of some difficulty in such a case as this where the tow is a large steamer entirely deprived of her motive power and laden with a heavy cargo, without a navigating crew, but with men on board who must play some part in the operation, to say whether, the tow having run into and damaged a moored ship, under the circum-

stances I have outlined, a maritime lien can be established against her by reason of what happened. Was the Harrison Company, the owner of the tug an independent contractor so as to absolve the owners of the *Paisley* and consequently the *res* from liability for the negligent navigation of the tug, or can the owners and the *res* be held liable by reason of the fact that their employees in the *Paisley* took part in the enterprise, and by negligently doing, or omitting to do something which contributed to the accident?

In the *Canadian Dredging Company* v. *Northern Navigation Company* (1), I had to consider the position of a large vessel and a tug which was moving her and the responsibility of both. I there held that as the *Huronic* was not under her own power, but was moved by that of the tug *Sarnia,* the operation of taking the *Huronic* from the dry dock to the passenger dock at Port Arthur in the harbour of that name was a joint or combined operation and not one in which either vessel could be said to have had exclusive charge or control. I found both vessels negligent because in performing their part of the joint operation the crew of each omitted certain precautions which if taken would in my judgment have prevented the collision. I think this case is somewhat similar because although the men on the *Paisley* were not a navigating crew they were undoubtedly during the movement required and bound to do certain things, such as co-operating with the tug in relation to handling lines both from and to the tug and the dock which they were making.

See also the *Socrates & Champion* (2). Referring to *Cory & Son Ltd.* v. *France, Fenwick & Co. Ltd.* (3), Bucknill (In Tug and Tow, 2nd Ed., p. 5), says:—

> The towage is a joint undertaking, and both tug and tow are bound to take reasonable care, and use reasonable skill, a duty which cannot be removed by the terms of the towage contract. Such a duty is independent of contractual duties, and is in accordance with the general duty which rests upon everybody, whether using a river or a road, to take care not to omit anything which is reasonably necessary for the protection of others, and to do nothing which will be reason of want of care inflict injury upon others. Per Kennedy L.J., in that case, at p. 130.

(1) (1923) Ex. C.R. 189. (2) (1923) P. 76.
(3) (1911) 1 K.B. 114 at P. 130.

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There is also the statement of Bruce J. in *Penny's case* (1) quoted by A. L. Smith L.J. in *The Snark* (2), as follows:

> When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. *Pickard* v. *Smith* (3), is an authority for the proposition that no sound distinction in this report can be drawn between the case of a public highway and a road which may be and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do.

As to this statement, Smith L.J. says:

"I subscribe to every word of this passage as being the law."

The relationship between tug and tow which causes them to be regarded as one vessel is confined to their navigation and with regard generally to third parties. But when the tug alone or the tow alone injures a third vessel then questions arise as to the responsibility of the one which did not itself collide with or injure the third vessel. In this case, the tow only is before me and claims to be an innocent ship and the tug to be the sole cause of the collision. I do not think it is necessary for me to pursue the question of independent contractor further. The tug is not a party defendant, and if those on the *Paisley* in the course of the joint operations were negligent to such an extent as to make them the sole, or part of, the cause of the accident, then, as I understand the law, the ship would be liable for the whole of the damages, nor if negligence is to be imputed to them it would also be useless to discuss the very intricate and at present unsettled question discussed in the cases of the *Ripon City* (4) by Gorrell Barnes J., and the *Sylvan Arrow* (5) by Hill J.

I may note in passing that the following extract from the judgment of Gorell Barnes J. in the *Ripon City, supra,* is quoted with approval in *Strandhill* v. *Hodder Co.* (6).

> This right (a maritime lien) must therefore in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. . . . It does not follow that

(1) (1898) 2 Q.B. 212.
(2) (1900) P. 105.
(3) (1861) 10 C.B. (N.S.) 470.
(4) (1897) P. 226.
(5) (1923) P. 14 & 220.
(6) (1926) S.C.R. 680, at p. 685.

a right to a personal claim against the owner of the *res* always co-exists with a right against the *res*.

This must, I think, now be read as subject to the questions raised in that case and in the *Sylvan Arrow*.

The harbour of Owen Sound in winter is a long and narrow one in which many vessels are moored, and their movement to the elevator from the docks at times directed by the superintendent of the elevator by a tug or tugs may not in itself suggest conditions in which peril was likely to be encountered. But I must determine whether in what was done antecedent to and in the course of that navigation those on the *Paisley* did or omitted anything which might constitute negligence, for in that case the *res* and the owners of the *Paisley* would be subjected thereby to a maritime lien in favour of the plaintiff.

Those on the *Paisley* were clearly servants of the owners of that vessel, and I am satisfied that the contract with Penrice makes no difference in determining his or their obligations and duties during the movement of the vessel. *The Niobe* (1). The work outlined in it was that proper to a shipkeeper merely, but I think it is a reasonable inference to draw that his owners expected him to use his knowledge as a mate and his previous experience in moving vessels, and he admits he had some, and that those whom he employed should take their part in the navigation of the ship so far as called upon by the tug master or such part as could only be rendered by them in the operation undertaken. Indeed, the transfer of the ship to the elevator dock necessitated their assistance on board her, and I think demanded that they should render such service as was within their power. They were under the orders of the tug master when he needed them to give assistance on the *Paisley,* but none the less were they taking their part as employees of the owners during that time and could not be discharged by the tug owner. See *Fenton* v. *City of Dublin, S. Packet Co.* (2). The tug might have put a crew or men on board, but finding men there they dispensed with that necessity and the owners of the *Paisley* must accept whatever responsibility their presence and actions entailed.

(1) (1888) 13 P. 55.

(2) (1838) 8 Ad. & E. 835.

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The general scope of the duty of those on the *Paisley* may be described in the words of Lord Loreburn L.C., in *Owners of Lightship Comet* v. *Owners of W. H. No. 1* (1), in speaking of a hopper barge:

> It is the duty of the barge to do her part under all circumstances to avoid collision.

There are several circumstances which the plaintiffs urge would render the *Paisley* liable by reason of the acts or omissions of Penrice and his men, notwithstanding the fact that the motive power and the direction of the movement of that vessel was the tug, and I will consider them as put forward by Mr. Holden.

It is plain upon the evidence that Penrice, if judged by what was his reasonable co-operation under the proved circumstances pursued a course which it is hard to reconcile with the idea of a joint operation.

I have already outlined what occurred between him and Waugh regarding the port anchor and expressed my view that both are responsible for its position. As it was intended to move the vessel with the anchor so placed, it added an element of danger to the movement contemplated, in that it became a menace to other ships laid up in a narrow harbour, and possibly hampered the movement or position of the tug when at the bow of the *Paisley*. Its placing was not merely a wrongful act such as occurred in *Currie* v. *McKnight* (2), nor one negligent but not in navigation, see the *Alde* (3), but was one which though antecedent to the movement of the vessel yet in the events which happened not only aggravated the damage but in fact caused it to happen as the result of the negligent navigation. I think in this regard it altered the situation radically and made the navigation of the *Paisley* when undertaken, one in which the duty spoken of in *Cory* v. *France* and *Penny's* case (ante) arises when danger may or ought reasonably to be anticipated. Waugh, Captain of the tug, was to tow the *Paisley*, which when afloat would be under his charge, and he was to cause her to move across the harbour and place her close enough to the dock to enable her to be moored in safety. In that manoeuvre she would have to be moved both backward and forward under the steam

(1) (1911) A.C. 30. (2) (1897) A.C. 97, at p. 106.
(3) (1926) P. 211.

power of the tug, and I think the duty of seeing that everything was ship shape on the vessel that he was to tow rested primarily upon the tug master. Had he chosen to exercise his authority or insist on doing what he said he offered to do, namely, to take the cable off and raise the anchor properly into the hawse hole, he could have accomplished it without difficulty for he had his men there and Penrice had none, and Penrice would not and could not have withstood him if he had insisted upon so doing. Neglect to do this might be such a default on his part that in the subsequent movement of the ship under his command, his negligence would consist in towing a vessel in a confessedly dangerous condition and so a case of negligent navigation. The *Six Sisters* (1). This, however, cannot be finally determined as the tug is not before me. But so far as Penrice's responsibility is concerned what he did in his position as shipkeeper was to urge and persuade Waugh to allow the anchor to occupy a dangerous position and to take part in leaving it so. The safe stowing of this anchor was, if not specifically covered by the contract, within its scope and purpose. As I understood him at the trial, the stowing of this anchor was part of his duties in assisting in safely moving the *Paisley* across the harbour, and in the events that happened his neglect and that of Waugh jointly became the cause of the damage.

The next allegation is that when the tug cast off from the stern and went to the bow, the men on the *Paisley* were not promptly despatched, or did not go at once, to receive the lines at the bow. Penrice says he ordered the men forward, but either through their neglect, or possibly because Penrice did not order them as he said he did, only one of them was at the bow when the line was heaved from the tug to the *Paisley,* resulting in a delay which Sykes said might be from 1 to 3 minutes. When Sykes got to the bow he says the *Paisley's* bow was 125 feet out from the dock and the stern about 100 feet. This indicates a more or less parallel course. The towing continued according to him until the bow of the *Paisley* had got as far as the south side of the elevator.

I accept the stories of Waugh and Mathewson that they got the bow of the *Paisley* within 30 feet of the dock, and

(1) (1900) P. 302.

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that the course taken would throw the stern in, and I have no doubt that had those on her been ready and proper arrangements made to have men at the dock to receive them, they could have got their lines out in time to have helped to check the steamer and with the shoving of the tug to safely dock her. This had been done shortly before on the *Pres'quile* which the tug *Harrison* had shifted in precisely the same way, Penrice, being aboard her as I understood from his evidence. The vessel was somewhat larger than the *Paisley* and had 30,000 bushels more of grain on board. The tug seems to have pursued proper methods in what she did and it does not occur to me that her navigation in this regard was at fault.

At the same time lack of arrangement beforehand lies at the door of the tug master, as well as at that of Penrice. They should together have concerted measures both as to having men ready and properly stationed and on the look out on the elevator dock at the proper time and as to the position and duties of those on the *Paisley* to co-operate both with the crew of the tug and the shore men at the elevator, and to be early on the look out and prompt to heave out the lines.

There is no doubt that the absence of any arrangement with the Superintendent of the Elevator or the men there to be on hand at some definite time to handle the lines was a most serious omission. The result is seen in the tale told by these men themselves. They were warned only when the vessel was moving toward the dock. Two emerged from the door of the elevator facing the harbour and seeing the *Paisley* to the north of the elevator, and the day being cold went round the southeast corner of the building to get out of the wind, thus losing sight of the *Paisley*, until they saw her bow passing the south side of the elevator behind which they were sheltering. These two, Ney and Dault, say the vessel when they first saw her was some distance off the elevator, Ney says 250 feet away and in the centre of the slip and standing still.

The other two men came out of the door in the south wall of the elevator which was back two-thirds of the way from the front of the elevator, and were only in time to see the *Paisley's* bow pass the line of that wall by about 75 feet, as Colquette says. Yeo ran to some piles 50 feet south

of the elevator and caught a line but could do nothing at that time as the nearest snubbing post was 65 feet away. Penrice found that the line he had passed to Yeo was too short and not being able to get another line in time, to fasten to it, desisted from his efforts to heave it ashore.

As to what was done on the *Paisley* when she was afloat, the story is equally unsatisfactory. The evidence discloses the following: Penrice went to the stern of the *Paisley* and remained there while she was being towed northerly stern foremost up the harbour. This was proper enough, but when the northward movement was over and that southward was begun, he still remained there while the tug and her tow were nearing the elevator dock and until the bow of the *Paisley* was abreast of the elevator. There was at this time no real necessity for staying on in disregard of a much more pressing need. He admits that he expected that the tug would put the *Paisley* at the dock without any lines being thrown, and in this belief he allowed himself and his men to do little or nothing. He looked up to see where they were going he says, not when the forward movement began, but only when there was trouble with the tug line. He had then got as far as amidships and started forward when the line parted, and when he got there he found the bow of the *Paisley* was 60 or 70 feet from the *Saskatchewan*. This was about twice the distance which the bow should have been south of the elevator if the *Paisley* had been safely docked. He later says that when the trouble with the line occurred the *Paisley* was a full length past the elevator and 150 to 200 feet from the *Saskatchewan*. His reason for staying aft was to watch the stern in relation to the eastern bank, but he admits he did not give a thought to his duty to go forward before the *Paisley* got to the dock.

In other respects he falls short of any standard of reasonable care and forethought.

He had, as I have stated, made no arrangements at the elevator with the superintendent for men to take the lines or with the men themselves, nor as to when the *Paisley* would arrive. He never consulted with the tug master as to how the movement was to be made, how the vessel was to be docked and what his men were to do. He thought he had mooring lines ready, but he gave no definite orders

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or instructions to his crew of three men to be ready or alert, did not assign them any station nor did he know where they were when wanted. He has a ticket, as he expresses it, as pilot, which includes a mate's standing, from the American authorities and had some previous winter experience in moving vessels. All this exhibits complete indifference or incompetence and an apparent disposition to let the tug do everything and himself and his men nothing but what might be forced on them.

The real fault to my mind was that when the *Paisley* was cast off by the tug as she shifted to the port side to nose her in, there was no one to heave lines ashore from any part of the ship and no one to receive them. I do not believe the young men who came out of the elevator, when they assume to give the *Paisley's* distance north of the dock. I think Waugh and Mathewson are more correct and that the vessel had got within 30 feet of the dock at the bow when it was passing the centre of the elevator and while she was going about half a mile an hour, its stern being probably somewhat further out—Mathewson says she passed the piles to which the line was thrown within 40 feet and that she was then heading a little out. There is nothing to show where Dault and Bedard were and it is clear that Penrice did not get forward to amidships until the bow was past the south side of the elevator. Even if the line had not parted this absence of all effort to get a line out to the dock and of all preparation to receive it is not, to my mind, excusable in any way. Penrice's only explanation is that he expected the tug to put the *Paisley* into her position at the dock without being assisted thereby by those on board or on the dock.

The tug master frankly admits that the earlier delay in shifting the line from the starboard side of the *Paisley's* bow to the port side, while causing delay, had no appreciable effect in causing or contributing to the accident and that the parting of his line was the effective cause. But the failure of those on the *Paisley* to do what in them lay to get lines out to the dock in time threw everything upon the ability of the tug to retard the vessel's progress and the strength of its line and when that failed the collision was inevitable.

I blame both the tug master and Penrice for the absence of any pre-arrangement regarding the presence of men on the dock at the critical time, and also as to the proper stationing of the men on the *Paisley* and their duties at the same moment. This was negligence in navigation as I held in *Canadian Dredging Co.* v. *Northern Navigation Co.* (*supra*).

A further complaint is made that the starboard anchor, which could have been dropped easily and in three seconds according to Penrice, was not dropped to retard the vessel's course. In the statement made by Sykes he says that Penrice admitted that he could have done this, but was not sure of the bottom. From what was stated by the fleet Captain of the Cleveland-Cliffs Iron Co.'s fleet (Rydholm) and not I think, successfully met, I should think that the anchor would not have had time to sink in the bottom of the harbour, so as to fetch up on its chain, and would have dragged through the surface of the bottom, instead of holding the vessel. It becomes a question whether the effort should have been made. It might have been successful in retarding the way of the *Paisley*. But I cannot persuade myself that the omission was negligence in view of the fact that no one could foresee just what the result of dropping the anchor would be, and it might, as has been pointed out, have been a matter of considerable risk to the ship itself. There was no request or order from the tug, and I am not convinced that, failing that, Penrice could be blamed for his inaction.

It is also argued that the hand-steering gear should have been ready for use and used during the movement of the *Paisley*. I have already expressed in *Poplar Bay SS. Co.* v. *The Charles Dick* (1), my views as to the necessity of a crew standing by an alternative steering gear under certain circumstances and need not repeat them. The question of responsibility in that respect however depends upon whether it was the duty of the tug master to have insisted upon steering gear being available, or whether the crew under Penrice, or Penrice himself, was bound to have made that provision. I cannot say that the same vigilance and responsibility in this respect can be required from those on

(1) (1926) Ex. C.R. 46.

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the *Paisley* as would be expected from a regular crew of seamen. The men on the *Paisley* were there to assist in any movement which the tug had caused her to make, and if the captain of that tug, knowing the conditions, did not insist before he started the operation, on the hand steering gear, which was stowed away and really almost inaccessible, being got ready and available, I cannot see that it became, under the circumstances, the duty of those on the *Paisley* to uncover it and have it ready for use.

It is further contended that the four men on the *Paisley* were insufficient for what they had to do and that one tug was not enough to safely handle so large and heavy a vessel. I think the first proposition, is, upon the evidence, borne out and that the owners of the *Paisley* should have foreseen this. But I am not satisfied that the tug employed was not powerful enough to undertake and safely carry out the shift to the elevator. It had accomplished that task alone with the *Pres'quile,* and besides it was the tug accepted for that purpose by the operators of the Paisley SS. Co.

There is no doubt that where a vessel at anchor or moored at a dock is run into by another vessel, the onus is upon the moving vessel to justify or excuse her actions; *Yosemite* (1); *Hatfield* v. *Wandrian* (2); *H. M. Wrangells* v. *SS. Steel Scientist* (3). In this case that onus is cast upon the *Paisley* as she was the vessel which did the damage. I have come to the conclusion, though I must admit with some doubt, that in the respects I have mentioned that onus has not been discharged.

The case of the cargo owners is identical with that of the plaintiff, and of the vessel in which it was carried and the recovery of both plaintiffs can be against the *Paisley* although the tug is not jointly sued. See *The Devonshire* (4); *Can. Dredging Co. v. Northern Navigation Co. (ante).*

Judgment will therefore be entered for both plaintiffs, condemning the *Paisley.* Reference to the Registrar of this Court at Toronto to assess the damages, with costs of action and reference.

Judgment accordingly.

(1) (1894) 4 Ex. C.R. 241.
(2) (1907) 38 S.C.R. 431.
(3) (1926) Ex. C.R. 202.
(4) (1912) P. 68, (1912) A.C. 634.