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APPELLANT'S
CASE.

In the Privy Council.

No. 84 of 1929.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

JAMES RICHARDSON & SONS LIMITED
(Plaintiff) - - - - - *Appellant*

AND

THE SHIP " ROBERT J. PAISLEY " (Defendant) *Respondent*

AND BETWEEN

10 CANADA STEAMSHIP LINES, LIMITED (Plaintiff) *Appellant*

AND

THE SHIP " ROBERT J. PAISLEY " (Defendant) *Respondent*
(Consolidated Appeals).

CASE FOR THE APPELLANTS.

1. This litigation arises out of a collision between the Respondent steamship " Robert J. Paisley " and the steamship " Saskatchewan " which occurred in the harbour of Owen Sound, Ontario, on the 18th day of January 1927, and resulted in the sinking of the " Saskatchewan " and the damaging of her cargo of wheat.

Record.

20 Separate actions in rem were brought against the " Robert J. Paisley " by Canada Steamship Lines, Limited, owners of the " Saskatchewan," and James Richardson & Sons, Limited, owners of her cargo. These actions were tried together and on the same evidence before Mr. Justice Hodgins, Local Judge in Admiralty for the Toronto Admiralty District of the Exchequer Court of Canada, who gave judgment for the plaintiffs, the present Appellants. Appeals were taken from the judgments of the trial Judge to the Supreme Court of Canada, which reversed his decision. From this judgment of the Supreme Court of Canada the present appeal is taken.

pp. 2-3.

2. This appeal raises questions both of fact and law. On some of the questions of fact the Supreme Court reversed the findings of the learned trial Judge in spite of his express statements as to his belief or disbelief of the evidence given by certain witnesses.

3. The questions of law will involve consideration of the duties devolving upon a tug and her tow respectively and as to how far a maritime lien may be enforced against a vessel being shifted in harbour which comes into collision with another vessel. Questions will also arise as to the duty of a shipowner in connection with the manning, equipment and preparation of his vessel when he has arranged for the shifting of his vessel to be carried out by an independent contractor. 10

4. The "Saskatchewan" is a steel steamship of 1,860 tons gross, and 1,089 tons net register, 266 feet in length, 38 feet beam, of Canadian registry, owned by the Appellant, Canada Steamship Lines, Limited. At the time of the collision she was laden with a cargo of wheat. She was lying moored on the south side of the elevator slip along the starboard side of the steamship "Thomas J. Drummond." Both vessels were heading about west by north into the slip as indicated on the plan, Exhibit S.1. 20

p. 11, ll. 32-37
p. 10, ll. 12-13
p. 28, ll. 9-42.
p. 30, ll. 1-5.
p. 8, l. 19.

It is admitted that there was no fault on board the "Saskatchewan" causing or contributing to the collision.

5. The "Robert J. Paisley" is a steel steamship of 3,762 tons gross and 3,130 tons net register, 360 feet in length, 50 feet beam, of United States register: she is owned by the Paisley Steamship Company and operated by the Cleveland Cliffs Iron Company as Managers. The "Robert J. Paisley" at the time of the collision was laden with a cargo of wheat. She had in December 1926 been moored on the east side of the harbour, about abreast of what is marked on the plan, Exhibit S.1 as "Rear Lt." heading into the harbour or about south. Astern of her on the same side of the harbour were three steamships, moored abreast. Arrangements had been made by her Managers by correspondence with John Harrison & Sons Company, Limited, tug owners of Owen Sound, for the services of their tug "Harrison" in shifting the "Robert J. Paisley" to the elevator for unloading when required, and it was during the course of this operation that she came into collision with the "Saskatchewan." 30

p. 11, ll. 38-40
p. 16, ll. 28-29
p. 102, ll. 21-30.
p. 13, ll. 22-24
p. 41, ll. 24-37
p. 46, ll. 39-40
pp. 303-310.

6. In order to reach the elevator it was intended that the "Robert J. Paisley" should be moved stern first to a point north of the elevator, and then ahead and to starboard to her berth at the elevator. She passed the elevator without getting a mooring line ashore to check her way and when the tug "Harrison," which had been towing her ahead, 40

attempted to stop her by backing on the tow line, the tow line parted, and the collision occurred. The impact was slight, and the only damage sustained by the "Saskatchewan" was caused by the "Robert J. Paisley's" port anchor, which was improperly hanging outboard on her port bow, partly submerged, so that a corner of the crown of the anchor pierced the hull of the "Saskatchewan" about amidships about 18 inches below her waterline.

7. The Appellants in their Statements of Claim alleged that the collision and damage were caused (inter alia) by the negligence of the owner or agent of the "Robert J. Paisley" and of one Penrice, a servant of the owners who was in charge on board the "Robert J. Paisley" in moving her with only one tug, and without efficient and enough men on board to handle mooring lines properly; in failing to arrange with the tug Master as to the conduct of the shifting operation; in failing to have lines ready for mooring and to get them ashore at the proper time; in failing to arrange to have men at the elevator to receive mooring lines from the "Robert J. Paisley"; in failing to direct the movements of the tug, and to warn the tug if lines could not be, or were not, got ashore; in failing to drop the starboard anchor as soon as it became apparent that there was danger of collision; and in carrying and permitting the port anchor to remain in a dangerous submerged position and so slung that it could not be lowered when collision was imminent.

8. The Respondents in their defence alleged (inter alia) that by the contract with the tug-owners, the entire control of the "Robert J. Paisley," both as to what was to be done on board her, and as to the course to be followed in the shifting operation, had been handed over to the tug-owners, that Penrice had no duties to perform except as ordered by the tug Master, and no authority in connection with the navigation of the "Robert J. Paisley" and that the port anchor was left suspended in the position in which it caused the damage, by order of the tug Master.

9. The first part of the shifting operation consisted of stowing the "Robert J. Paisley's" anchors, of which the starboard was on the bottom and the port had been "hung off" on several parts of wire cable in order to permit the port anchor chain to be carried ashore as a mooring line. She was in charge of Penrice, who was holder of a pilot's licence which entitled him to act as mate of such a steamship. Penrice, with some assistance from those on board the tug because he had at the time no other men with him on board the "Robert J. Paisley," re-shackled the chain to the port anchor with a shackle which had been left accessible for the purpose, and, himself operating the windlass, endeavoured to heave it home into its hawse pipe. The wire on which the anchor had been "hung off" was not removed, and would only allow the stock of the anchor to go a short

distance into its hawse pipe, leaving the anchor projecting several feet out from the ship's port bow. Waugh, the Master of the tug, objected to the anchor remaining in that projecting position, as he said it would endanger the tug. Penrice thereupon dropped the anchor to approximately its former position, with the crown and part of the stock submerged. Waugh offered to assist Penrice in removing the wire so that the anchor might be hove home, but after Penrice had asked if the anchor so hanging would be in the way of the tug and been informed by Waugh that it would not, Penrice improperly and negligently declined to avail himself of the proffered assistance. He left the anchor hanging, partly submerged against the port bow with both the chain and the wire attached, in which position it was a danger to other vessels during the shifting operation, and became the instrument by which the hull of the "Saskatchewan" was punctured. Had it not been for the port anchor being left in this position the collision between the two ships would have caused no damage to the "Saskatchewan" and even if the shifting had been commenced with the port anchor in this position, it could up to the last moment have been lowered out of harm's way but for the fact that the wire on which it had been "hung off" had not been removed. 10

10. The actual shifting to the elevator was done on the 18th January. Penrice had hired three men, Holmes, Sykes and Bechard, to assist him. Steam was not raised either for the main engines, the steering engine or the winches. The tug "Harrison" passed a tow line to the stern of the "Robert J. Paisley" and towed her stern first outside of the tier of three moored vessels above referred to, then north to a point near the centre of the channel, and somewhat north of the elevator, cast off the tow line from the "Robert J. Paisley's" stern and passed the tow line to the bow. The tug then towed the "Robert J. Paisley" ahead and to starboard towards and along the elevator dock (i.e. the jetty in front of the elevator and extending to the north thereof). 20 30

11. There is conflict between the Appellants' witnesses and the Respondent's witnesses as to how close to the dock the "Robert J. Paisley's" bow was taken. Waugh, the Master, and Mathewson, the mate of the tug, testify that the ship's bow was brought within 30 feet of the elevator dock at a point north of the elevator, and they say that a mooring line could and should have been got out to the dock from the ship at about that point, and that they expected that a line would be got out and used to check her way. Penrice says that the ship was at all times too far out for him to pass the line ashore and that he expected the tug to bring the ship to a standstill at the elevator before he would be required to pass any lines ashore. The trial Judge accepted the evidence of Waugh and Mathewson where it conflicted with that of the Respondent's witnesses. It was admitted that no arrangement was made between Penrice and 40

p. 110, ll. 7-11
p. 160, ll. 6-11

p. 49, ll. 29-38
p. 73, ll. 28-36

p. 46, l. 8.
p. 49, l. 39 to
p. 50, l. 9.
p. 163, ll. 6-9.

p. 325,
ll. 14-25.
p. 326, l. 47 to
p. 327, l. 8.

Waugh as to the manner in which the way of the ship was to be checked and her mooring at the elevator completed. Penrice made no arrangements to have men available at the elevator for the purpose of taking lines from the "Robert J. Paisley," and made no attempt to heave a line ashore, or by hailing or otherwise to get men to take a line on the dock, until the ship's bow had passed well beyond the south wall of the elevator. He says that he had heaving lines and mooring lines ready; but he did not have enough wire cable off the drums of the winches to enable them to be hauled ashore and used for checking her way, and he did not have enough men on board to get more cable off the drums fast enough to be of service.

p. 176,
ll. 15-30.

p. 174, l. 9.
p. 175, l. 45.

p. 192,
ll. 18-25.

12. After the tug had brought the ship about parallel with the elevator dock those on board the tug could not see whether or not a line had been got out from the ship to the dock. Waugh assumed that this had been done, and backed the tug around the "Robert J. Paisley's" bow and down her port side, in order to get into position to nose the "Robert J. Paisley" alongside. When the tug had backed far enough down Waugh discovered that there was no line out from the ship to the dock. He thereupon told Sykes on board the ship not to cast off the tow line from the forward bitts, ordered Mathewson to make it fast on the timber head forward on the tug, and put the tug's engines astern to check the ship. The line slipped on the timber head of the tug and the eye at the end of the line was thrown over it. Waugh then put his engines astern until the line was taut, then rang up full speed astern, and the line parted. Another line was passed from the tug to the ship, but not in time to check her way before she collided with the "Saskatchewan."

p. 50, ll. 4-30.
p. 55, ll. 4-7.
p. 65, l. 14.

p. 50, ll. 5-40.
p. 88, l. 42 to
p. 89, l. 10.
p. 50, l. 38.

p. 51, l. 10.

13. After the tug had backed around and got on the port side of the ship, Penrice threw a heaving line ashore to a clump of piles south of the elevator, where one of the elevator men got it. Penrice had no mooring line attached to it, and had only 35 or 40 feet off the drum, and called for another heaving line, but before it was brought decided to give up the attempt to get a mooring line ashore.

p. 192, l. 18.
p. 319,
ll. 21-28.

p. 198,
ll. 40-47.

p. 192, l. 8 to
p. 193, l. 15

14. The starboard anchor had been hove home on its chain, and could have been dropped in a matter of seconds. Penrice appears to have thought of it at the last moment, but did not drop it.

p. 176, l. 44 to
p. 177, l. 31.
p. 183, ll. 1-2.

15. The only damage suffered by the "Saskatchewan's" hull was a small hole punched through one plate by a corner of the "Robert J. Paisley's" port anchor, about 18 inches below her water line. A corner was broken off the crown of the anchor. The "Robert J. Paisley" sustained no damage.

Exhibits
S. 2, P.4,
p. 32, ll. 5-8.

p. 318, ll. 9-19

p. 325,
ll. 14-15.p. 324, l. 9 to
p. 325, l. 2.p. 327,
ll. 21-25.p. 328,
ll. 12-17.

16. The trial Judge accepted the evidence of Waugh and Mathewson as to what occurred on 15th January in connection with the handling of the port anchor and as to the distance at which the "Robert J. Paisley" passed the elevator dock. He held that Penrice urged and persuaded Waugh to allow the port anchor to occupy a dangerous position and to take part in leaving it so; that the stowing of this anchor was part of his duties in assisting in safely moving the ship across the harbour, and that Penrice's neglect in this respect and that of Waugh jointly was the cause of the damage. As to the failure to get lines ashore at the elevator, he held that both Penrice and Waugh were at fault for the absence of pre-arrangement regarding the presence of men on the dock at the critical time, and also as to the proper stationing of men on the "Robert J. Paisley" and their duties at the same time. He held also that the four men on board the "Robert J. Paisley" were not sufficient for what they had to do, and that her owners or their agents should have foreseen this.

17. The judgment of the Supreme Court of Canada delivered by Newcombe, J., and concurred in by the other members of the Court (Anglin, C.J.C., and Mignault, Lamont and Smith, JJ.) reversed the judgment of the trial Judge and dismissed the actions.

pp. 336-355.

18. Newcombe, J., accepted the contention of the Respondent that Penrice had no authority in respect either of the stowing of the port anchor or in respect of the navigation of the "Robert J. Paisley," and no duties other than to obey the orders of the tug Master, and was guilty of no negligence. He held that the port anchor did not cause or contribute to the collision. He declined to accept the finding of the trial Judge as to the distance between the "Robert J. Paisley" and the elevator pier, and held that it was never intended or expected by the tug Master that lines should be put out from the ship to the dock before the ship's way had been checked by the tug, and she had been put against the dock. He found further that the effect of contracts between the "Robert J. Paisley's" managers and Penrice, and between the managers and the tug owners was to make the tug owners solely responsible for the navigation of the "Robert J. Paisley," and that since the "Robert J. Paisley's" owners had incurred no personal liability, no maritime lien could exist against the "Robert J. Paisley."

19. The Appellants submit that the Judgment of the Supreme Court should be set aside and the Judgment of the trial Judge restored for the following among other

REASONS.

- (1) BECAUSE the "Robert J. Paisley" negligently failed to keep clear of the "Saskatchewan."

- (2) BECAUSE the owners of the " Robert J. Paisley " or their servants or agents negligently caused or permitted the port anchor to be carried in a dangerous position.
- (3) BECAUSE the shifting of the " Robert J. Paisley " was a joint operation and those on board the " Robert J. Paisley " failed to exercise reasonable care and skill.
- 10 (4) BECAUSE those on board the " Robert J. Paisley " negligently failed to arrange with the tug master how the operation of shifting and securing the " Robert J. Paisley " to the elevator should be carried out.
- (5) BECAUSE the owners of the " Robert J. Paisley " or their servants or agents negligently failed to make proper arrangements for checking the " Robert J. Paisley " at the elevator.
- (6) BECAUSE those on board the " Robert J. Paisley " failed to get a line or lines ashore at the proper time.
- (7) BECAUSE those on board the " Robert J. Paisley " negligently failed to warn the tug of the situation of danger caused by the failure to get lines ashore.
- 20 (8) BECAUSE the owners of the " Robert J. Paisley " negligently failed to have a competent officer and a sufficient and competent crew on board.
- (9) BECAUSE those on board the " Robert J. Paisley " negligently failed to drop the starboard anchor when danger should have become apparent to them.
- (10) BECAUSE the contracts of the Managers of the " Robert J. Paisley " with Penrice and with the tug owners do not affect their duties toward the Appellants.
- 30 (11) BECAUSE the " Robert J. Paisley " was subjected to a maritime lien in respect of the damage sustained by the " Saskatchewan " and her cargo and the ship liable in an action in rem.
- (12) BECAUSE the Judgment of Mr. Justice Hodgins is right.

BUTLER ASPINALL.

K. S. CARPMAEL.

In the Privy Council.

No. 84 of 1929.

*On Appeal from the Supreme Court of
Canada.*

BETWEEN

JAMES RICHARDSON & SONS
LIMITED (*Plaintiff*) - *Appellant*

AND

THE SHIP "ROBERT J. PAISLEY"
(*Defendant*) - - - *Respondent*

AND BETWEEN

CANADA STEAMSHIP LINES,
LIMITED (*Plaintiff*) - *Appellant*

AND

THE SHIP "ROBERT J. PAISLEY"
(*Defendant*) - - - *Respondent*
(Consolidated Appeals).

CASE FOR THE APPELLANTS.

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