

James Richardson and Sons, Limited	-	-	-	-	-	<i>Appellants</i>
						<i>v.</i>
The Ship "Robert J. Paisley"	-	-	-	-	-	<i>Respondent</i>
The Canada Steamship Lines, Limited	-	-	-	-	-	<i>Appellants</i>
						<i>v.</i>
Same	-	-	-	-	-	<i>Respondent</i>

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1930.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD MERRIVALE.

LORD ATKIN.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD MERRIVALE.]

The collision in question took place on January 18th, 1927, while the s.s. "Saskatchewan," the appellants' vessel, was lying moored, outside ship in a tier, at a slip in a recessed area at the west side of Owen Sound. The "Paisley" is a steel s.s. of 3,762 tons gross register, 3,130 net, 360 feet length, 50 feet beam, and 28 feet depth, registered in the United States; the "Saskatchewan" is a steel s.s. of 1,860 tons gross register, 1,089 net, 266 feet long and of 38 feet beam. The Sound is a deep and narrow inlet of Lake Huron. It has natural advantages of situation and form for the heavy cargo traffic of the Great Lakes, and at the time in question was undergoing development as a harbour.

Both the "Paisley" and the "Saskatchewan" had been laid up in the Sound at winter moorings, each with a cargo of grain, as had numerous other vessels of considerable tonnage with like cargo. Before January 18th the movement of ships had been going on in the Sound for several days, under the direction of persons who afterwards had charge of the movements of the "Paisley" which come under consideration here. The "Paisley" had been moored alongside a wharf on the east side of the Sound, the opposite side from the "Saskatchewan's" position, and at the material time was being moved by a tug across the Sound to a wharf outside the Grain Elevator on the west side, where her cargo was to be discharged.

The "Paisley" had been for some time before January 18 under the charge of a shipkeeper, Alvin Roy Penrice, a licensed pilot entitled under his licence to act as mate. She had no crew, in the normal meaning of the term, nor power of her own engines available for the operation of removal. For the removal her owners had contracted with the owners of a steam tug, the "Harrison," and the "Harrison" had the "Paisley" in tow at the time of the casualty. Penrice had on board with him at this time men hired by the "Paisley's" owners, who were to act under his direction in some of the work connected with the placing of the "Paisley" at the Elevator.

The removal of the "Paisley" from her old moorings to the Elevator wharf involved towing her out into the harbour and across the Sound stern foremost, till she should be something to northward of the Elevator, and then taking her ahead and to starboard to bring her alongside. In course of the towage the "Paisley's" way should have been checked as she moved ahead, in time to bring her up and moor her as required. It was not so checked; in an attempt by the tug to back the ship by a tow-line attached to her forward the tow-line parted and the "Paisley" with the way she still had continued ahead half a length or thereabouts further than she should have been allowed to do, and her bow came in contact with the starboard side of the "Saskatchewan." Ordinarily the contact would have been practically harmless. The port anchor of the "Paisley"—a patent anchor—had, however, been so fixed up preparatory to her removal that it hung with the crown and part of the stock submerged, and when the "Paisley" struck the "Saskatchewan" a fluke or point of the anchor's crown penetrated the vessel's side below the waterline, with the result of an inrush of water which saturated the cargo and set down the ship upon the muddy bottom.

The owners of the "Saskatchewan" and the owners of her cargo brought separate actions *in rem* against the "Paisley," which were in due course tried together under the Admiralty jurisdiction of the Exchequer Court of Canada at Toronto by Hodgins J. The learned Judge found in favour of the plaintiffs, but the judgments so given were reversed on appeal in the

Supreme Court of Canada. The decision of the Supreme Court is the judgment now under appeal.

At the hearing before Hodgins J. it was established to the satisfaction of the learned Judge that, preparatory to the removal of the "Paisley," her anchor was improperly and negligently placed in a dangerous position by the joint action of the shipkeeper Penrice and the master of the tug, and that the damage complained of by the plaintiffs was thereby occasioned.

The actions of the respective plaintiffs were not founded solely on the cause of action which has just been stated. There were numerous grounds of claim. One, fully dealt with at first instance and on appeal, was that the defendants' shipkeeper Penrice, and the hands under his direction, caused or contributed to the collision by negligent mishandling of, or failure to handle, a heaving line or lines as the Paisley approached the Elevator wharf. In the Court of first instance this charge was held to be established. On appeal this finding was over-ruled, upon grounds which deal fully with the scope of Penrice's employment and the detailed evidence given at the hearing with regard to his acts and omissions. The several charges of negligence necessarily involved close consideration of these matters, and as the actions were brought *in rem* necessitated a strict examination of some principles discussed in various well-known authorities in law, and particularly at this Board in *The Bold Buccleugh* 7 Moo. P.C. 267, and by Lord Gorell in *The Ripon City* [1897] P. 226, authorities which determine—or leave open for determination—the extent to which, if at all, shipowners may be made answerable *in rem* for negligence in the use of a ship by persons having her under their independent control.

At the hearing of the appeal before their Lordships' Board Counsel for the appellants singled out from the various causes of action alleged by his clients that dependent upon the charge of negligence of the shipkeeper of the "Paisley" in respect of the ship's port anchor. As to this he claimed that, if the findings of fact of the learned trial Judge are found to be warranted by the evidence, the plaintiffs' case is in point of law unanswerable.

Their Lordships, after hearing the case so presented, invited Counsel for the respondents to deal in the first instance with the single question thus raised. Upon consideration of the facts proved and of the arguments of Counsel their Lordships find that—whatever be the true view as to the other matters raised below between the parties—the decision of the controversy with regard to the anchor of the "Paisley" disposes of the appeals.

The material questions, as to the liability of the defendants for the damage done to the "Saskatchewan" and the loss thereby caused to the owners of the ship and her cargo, can be concisely stated. Was the anchor dangerously exposed? Was such

exposure negligent? Was the alleged negligence the cause of the damage and loss complained of? Was the negligence, if any, negligence of a servant of the owners of the "Paisley" in the course of his employment? All these questions were answered by the learned Judge, Hodgins J., in the affirmative.

As to three of the four questions there is little conflict between the parties. The anchor, when not in use on the ground for holding the vessel, would normally be and ought to have been on this occasion raised to the hawse-hole and so disposed there as not to be a cause of danger. The anchor was in fact so hung that any accidental contact with another vessel of the "Paisley" when in motion would almost inevitably cause penetration of the side of the other vessel by the crown or flukes of the anchor. The damage suffered by the "Saskatchewan" and her cargo was directly and solely due to penetration of her side by a fluke or point of the crown of the "Paisley's" anchor.

As to the remaining question the material facts are not substantially in dispute, and at any rate, the findings of the learned Judge at the hearing must be accepted so far as they are reasonably supported by the evidence.

Three days before the shifting of the "Paisley" to the Elevator wharf the master of the tug "Harrison," George Waugh, went on board the "Paisley" to make arrangements. The shipkeeper Penrice was in charge then—in charge, that is, of the ship and her tackle. The chain of the port anchor had been unshackled from the anchor for use as a mooring chain ashore. With help from the tug Penrice got in the chain so that the free end hung through the hawse-hole over the side. The anchor had been temporarily fixed up with part of a wire rope. It was re-shackled and drawn up, but the temporary attachment of wire blocked the hawse-hole, and some labour was necessary for the clearance required to admit of the proper stowage of the anchor. It at first projected at the hawse-hole. Evidence was given and accepted by the learned Judge, Hodgins J., that the master of the tug objected to the shipkeeper that the position of the anchor outside the hawse-hole was "dangerous," that the shipkeeper thereupon lowered it—with the help of the tug's gear—so that the anchor hung in the water with the stock partly submerged and the crown two or two and a-half feet under water. Penrice asked if the anchor would be "in the tug's way," and was told it would not, but the tug master offered to take off the obstructing wire and "get the anchor in." Penrice replied, "It's too much trouble . . . we will leave it till spring, and let them take it in in the spring."

The learned trial Judge, after summarising the evidence as to the anchor, says that, in his view, the responsibility for its position at the time of the collision rests equally upon those in charge of the tug and the shipkeeper:—

"Both," he says, "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 vessels laid up in a narrow harbour. . . . Its placing, in the events which happened, not only aggravated the damage, but in fact caused it to happen. . . . I think the duty of seeing that everything was shipshape on the vessel . . . rested primarily on the tugmaster. . . . So far as Penrice's responsibility was 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," *i.e.*, the contract between Penrice and the owners of the "Paisley"—"within its scope and purpose. As I understood him at the trial the stowing of the 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 judgment in which the learned Judges in the Supreme Court agreed deals with the matter now in question in the following passage :—

"There is no doubt that Penrice . . . when the tugmaster objected to the position to which he had raised the anchor in its hawse-pipe, encouraged Captain Waugh to leave it in the position in which it was at the time of the accident, and, perhaps, the 'Saskatchewan' would not have sustained the damage which occurred, if the anchor had not been there. But the position of the anchor, if it were a fault, was not the fault of the owners of the 'Paisley'; they had put the tug in charge, and their shipkeeper had no authority to direct the stowage of the anchors, for the purposes of the tug, and moreover, the anchor did not cause or contribute to the collision."

At the hearing before their Lordships' Board it was not disputed—as, indeed, it could not be—that Penrice was in charge of the "Paisley" and her tackle and equipment, including the anchor. The anchor having been at the commencement of the material time temporarily unshipped, one of Penrice's duties, in making ready for the move to the Elevator, was to get the anchor restored to its place at the hawse-hole. With help from the tug he set about this task. Before it was completed he agreed with the tugmaster, "We will leave it." But for this the anchor would have been safely stowed. As things went, by reason of Penrice's decision, the anchor crown was damaged and the "Saskatchewan's" side was penetrated by the fluke. Had the tugmaster Waugh kept or left the anchor dangerously exposed against Penrice's will, that piece of perversity on Waugh's part would have wholly altered the relevant facts. Both the incidents of damage could have been attributed solely to him. On the contrary, though, the shipkeeper instigated and actively shared in the misplacement of the anchor so that it became a cause of damage.

Their Lordships are of opinion that the finding of negligence on the part of the shipkeeper Penrice, made in the Court of first instance, rests upon evidence abundantly sufficient to sustain it and, indeed, to make it conclusive in point of fact; that such negligence occurred in a matter within the scope of Penrice's duties to the owners of the "Paisley": and that it was an immediate and direct cause of the damage in question in the two actions.

As to the several other questions which arose in the course of the case, it would not be proper that any opinion should be here expressed.

Their Lordships will humbly advise His Majesty that the appeal of the plaintiffs should be allowed and the judgments at first instance restored.

The respondents must bear the costs here and below.

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In the Privy Council.

JAMES RICHARDSON AND SONS, LIMITED,

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THE SHIP "ROBERT J. PAISLEY."

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DELIVERED BY LORD MERRIVALE.

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