

5, 1930

.IN THE SUPREME COURT OF CANADA

**ON APPEAL FROM THE EXCHEQUER
COURT OF CANADA**
TORONTO ADMIRALTY DISTRICT

Between:

THE SHIP "ROBERT J. PAISLEY,"
(Defendant) Appellant,

--and--

JAMES RICHARDSON & SONS, LIMITED,
(Plaintiff) Respondent,

And Between:

THE SHIP "ROBERT J. PAISLEY,"
(Defendant) Appellant,

—and—

CANADA STEAMSHIP LINES LIMITED,
(Plaintiff) Respondent.

APPELLANT'S FACTUM

GALT, GOODERHAM & TOWERS,
McGIVERIN, HAYDON & EBBS,
CASEY WOOD & CO.

*Solicitors for the Appellant,
Ottawa Agents for Appellant,*

*Solicitors for the Respondent,
James Richardson & Sons, Limited,*

ROWELL, REID, WRIGHT & McMILLAN,

*Solicitors for the Respondent,
Canada Steamship Lines Limited,*

LARMONTH & OLMSTEAD,

Ottawa Agents for both Respondents.

TORONTO:
THE HUNTER-ROSE COMPANY, LIMITED
1928

APPELLANT'S FACTUM
D. J. PAISLEY

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BETWEEN:

THE SHIP "ROBERT J. PAISLEY,"
(*Defendant*) Appellant,

—AND—

JAMES RICHARDSON & SONS, LIMITED,
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10 AND BETWEEN:

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(*Plaintiff*) Respondent,

APPELLANT'S FACTUM

This is an appeal by the Ship "Robert J. Paisley" from a judgment of the Honourable Mr. Justice Hodgins, Local Judge in Admiralty, dated the 20th day of March, A.D., 1928, giving judgment in favour of the Respondents, and condemning the Appellant in both of the actions herein for damages and costs owing to the sinking of the S.S. "Saskatchewan" in the harbour at Owen Sound, Ontario, on the morning of the 19th day of January, A.D., 1927.

The S. S. "Saskatchewan" was owned by the Canada Steamship Lines Limited and the cargo of wheat on board her by James Richardson & Sons Limited, while the Ship "Robert J. Paisley" was chartered and operated by the Cleveland Cliffs Iron Company.

Both vessels were lying in winter quarters loaded with winter storage wheat in the harbour of Owen Sound, Ontario, and on the date aforesaid the Appellant Ship "Robert J. Paisley" without power or means of navigation of her own, was being moved by the tug "Harrison" to her berth at the Great Lakes elevator at Owen Sound to discharge her cargo, and being brought into collision by the tug with the S. S. "Saskatchewan" lying at her berth, the port anchor of the "Paisley" penetrated the hull of the "Saskatchewan" causing her to sink, and doing damage to both ship and cargo.

On the 16th and 28th days of December, 1927, the Plaintiffs James Richardson & Sons, Limited, owners of the cargo, and Canada Steamship Lines Limited, owners of the "Saskatchewan" respectively issued writs of summons in rem against the ship "Robert J. Paisley" to recover the damages for the loss sustained.

The two actions having been tried together at a Sittings of the Exchequer Court, Toronto Admiralty District, between the 8th day of February, 1928, and the 8th day of March, 1928, judgment was given by the Honourable Mr. Justice Hodgins, local judge in Admiralty at Toronto, in favour of the Plaintiffs.

The evidence taken at the trial is printed in full and a number of documentary exhibits have been printed for the information of the Court, while the photographs, plans and blue-prints filed as exhibits at the trial, have not been re-produced or printed with the case. Copies of all photographic exhibits have, however, been made for the convenience of the Court.

The learned trial Judge found the ship "Paisley" in fault, while the owners and managers of the Defendant Ship contend that the tug alone was to blame.

From the judgment of the learned trial Judge the Appellant now appeals.

PART I

THE FACTS

20 On the 18th day of January A.D., 1927 the S. S. "Saskatchewan" being then the property of Canada Steamship Lines Limited, the Plaintiff in one of the actions herein, was lying in the harbour of Owen Sound, together with a number of other vessels, being laden with a cargo of wheat for winter storage, and was berthed on the west side of the harbour heading in-shore about 350 feet south of the Great Lakes Elevator Company's elevator. The S.S. "Robert J. Paisley" being operated by and under control of Cleveland Cliffs Iron Company, had, from the 26th day of December, A.D., 1926 to the 18th day of January aforesaid, been lying on the east or opposite side of the harbour heading south or out-wards, and was also laden with a cargo of winter storage wheat. The cargo on board
30 the S.S. "Saskatchewan" was owned by James Richardson & Sons Limited, the Plaintiff in one of the actions herein.

Pursuant to a contract which had been entered into by correspondence, (filed as Exhibit No. 63 at pages 303-310 of the case) made between Cleveland Cliffs Iron Company and John Harrison & Sons of Owen Sound, the owners of the tug "Harrison," the latter firm were, by telegram of January 14th, 1927 ordered to place the steamer "Paisley" at the elevator, and to notify the ship-keeper, A. R. Penrice, on board the "Paisley." The telegram is filed as Exhibit No. 64 at page 311 of the case. In accordance with the instructions so given, the tug "Harrison", under the command of master George Waugh, came alongside the
40 steamer "Paisley," and as had previously been arranged with the engineer of the "Paisley" before he left the ship in the month of December A. D., 1926, connected a steam line from the tug to the steamer to furnish steam to operate the windlass in raising the ship's anchors. After the steam was connected the crew of the tug and the ship-keeper Penrice on board the

"Paisley" by means of the ship's windlass, with power furnished by the tug—the steamship having no steam or other power available—hailed in the port anchor chain of the "Paisley", and the anchor was lowered from the hawse-pipe on the chain to a point where it would not interfere with the tug, the tug master being satisfied that the guard rail of the tug would keep it clear of the anchor. At this point the crown of the anchor was about two feet below water.

On the 18th day of January, A.D., 1927 the tug "Harrison" came in the morning to move the ship "Paisley" and the crew of the tug made fast its
10 tow line to the Paisley's stern, the intention being to tow her northerly into the harbour, and then southerly to the elevator dock.

Penrice, the ship-keeper, was on board the "Paisley" with three men to handle the mooring lines, open the hatches and do other work usual in unloading a vessel. The vessel was towed by the tug "Harrison" some distance north in the harbour and when the tug had completed the northerly movement of the "Paisley," the tow line was cast off from the "Paisley's" stern on a signal from the tug, and the tug went to the vessel's bow and passed a tow line up on the starboard side. There was some delay in making fast the tow line, which was carried on the
20 tug master's orders from the starboard to the port side of the vessel, but this delay appears to have been unimportant and the vessel was then towed by a short tow line, and wholly under the motive power and direction of the tug, toward the elevator. The mooring lines, consisting of two cables and two manilla lines, were prepared by the ship-keeper on board the "Paisley" ready to pass ashore when the vessel was brought to the dock, in order to make her fast to her berth. The men at the elevator were warned to be ready to take the lines from the "Paisley" when she should be brought to the elevator dock and were in readiness to do so, as the tug attempted to bring the vessel's bow to the elevator dock.

The tug towed the "Paisley" past the elevator and at a considerable distance
30 from the dock, and then reversed her engines to take the way off the vessel by shifting the towline forward on the tug and backing up on the vessel's port side, and, failing to handle her tow line properly, broke the tow line and permitted the "Paisley" to continue on her forward way, and in spite of attempts made by the tug to get a second tow line aboard and of those on board the "Paisley" to pass a cable ashore, the bow of the "Paisley" came into contact with the "Saskatchewan" and the port anchor penetrated the side of the "Saskatchewan". The "Paisley" sheered off and it was not apparent at the time that any injury had been sustained by the steamer "Saskatchewan". No examination to ascertain the damage was made and the "Saskatchewan" filled with water and sank at about 4.30 o'clock
40 of the morning of the following day.

PART II

FINDINGS AT TRIAL AND EVIDENCE

The learned Trial Judge erred:

- (1) In finding that the responsibility for the position of the port anchor

rested equally upon Waugh and Penrice. (p. 325, l. 1.)

The account of what took place with regard to the disposition made of the port anchor on January 15th, 1927, is given by the tug master, George Waugh in his examination-in-chief at pp. 42 and 43 of the case and at p. 52.

The tug master Waugh says (p. 43, l. 40) that they—meaning the tug crew—with Penrice's assistance hove in the port chain, the tug furnishing steam and Penrice operating the windlass. The cables were still attached to the anchor and would not permit the anchor stock to enter the hawse-pipe more than about two feet (p. 44, l. 8). This left the port anchor sticking out
10 at an angle, (p. 44, l. 18, p. 45, l. 12) and Exhibit S-4 shows the shape of the anchor and cables attached to it, and at page 52 Waugh gives his account of what was done and said about the port anchor between himself and Penrice. The anchor was not lowered to its former position, but was left hanging from the hawse-pipe on the anchor chain, the cable being still attached to the anchor, and its crown lowered from the point where it had formerly been above the water to a point about 2 feet below the water.

It was then hanging so low that the rail of the tug would keep the tug away from it, and the tug would be in no danger from its position (p. 53, ll. 2-6).

The tug master (p. 155, l. 30-36) was familiar with the windlass, the
20 chief engineer Mr. Telliard having explained all that was necessary with regard to heaving in the anchors. (p. 115, p. 155, l. 30-46.)

The port anchor was placed in position by the "Paisley's" windlass with steam from the "Harrison" (p. 156, ll. 10-23), but at the tug master's request was lowered for fear of injury to the tug (p. 157, l. 1-10, p. 194).

After the anchor was lowered the tug master was satisfied with it (p. 157, l. 34) and proceeded three days afterward with the anchor in that position.

(2) The learned Trial Judge erred in finding that the ship-keeper was responsible when the tug cast off from the stern and went to the bow of the "Paisley" and the men on the "Paisley" did not go at once to receive the lines at the bow.
30 (p. 325, ll. 1-9 and 25-32.)

The evidence is that Sykes went forward to take the tow line and was on the vessel's bow when the tug reached it (p. 208, l. 16).

Sykes says (p. 209, ll. 29-45, and particularly at l. 36) that he does not know whether a strain was taken on the vessel from the starboard side or not. He describes (pp. 210 and 211) how he passed a heaving line to the tug and drew in the tow line making it fast on the starboard bitts, and how the master of the tug asked to have the line changed to the port side, that he got assistance and had it changed, and then when 60 feet of line was out (p. 211, l. 37) after the tug was fast to the port side, she began to pull her forward,
40 to propel her toward the elevator dock. The line was passed to the starboard side because the tug was there (p. 214, l. 45-46, p. 215, l. 11.) The passing of the line to the starboard side of the "Paisley" made no difference in her movement as no strain was taken on her from the starboard side, but the line was carried to the port side before her forward movement commenced, and the line could not be shifted if it were taut.

(3) The learned Trial Judge erred in accepting the stories of Waugh and Mathewson that they got the bow of the "Paisley" within 30 feet of the dock (p. 325,

l. 14.). The facts established by the preponderance of evidence as to the distance of the "Paisley" from the elevator dock up to the time her bow passed it and passed the clump of spiles where the heaving line was attempted to be thrown and as marked on Exhibit Number 51, are that the vessel was never within fifty or sixty feet of the elevator dock prior to the line parting. (p. 125, l. 4-43; p. 126, l. 1-6; p. 136, l. 13; p. 139, l. 43; p. 142, l. 12-41; p. 146, l. 16-35; p. 165, l. 10; p. 180, l. 35; p. 144, l. 36-46; [p. 145, l. 17-19; p. 193, l. 11; p. 164, l. 7. Exhibit No. 51.)

Had the cable been carried ashore it would have to be carried inland about 10 65 feet to a post marked "A" (p. 129, l. 9, p. 147, l. 23) on Exhibit S-7 and C-1. p. 161, l. 40; p. 162; p. 163; p. 164, Exhibit C-2.

(4) The learned Trial Judge erred in finding that the tug seems to have pursued proper methods in what she did (p. 325, l. 23). Her whole handling of the Paisley on the morning in question was a succession of errors in judgment and negligent navigation. In the first place, the tug master navigated the vessel with the port anchor below the water between two and three feet (p. 68-69;) He had full control over the position of the anchor (p. 72, l. 10-20), and full responsibility for its position (p. 324, l. 30-39), and having placed the anchor in that position, he had three days in which to consider 20 and alter its position if he chose to do so, but he did not make any change in the anchor's position. The tug master first pulled the "Paisley" astern so far north and east that her stern was in danger of coming into contact with riff-raff or piling (p. 47, l. 24; p. 186, ll. 30-35, shown on Exhibit, p-1, C-2 and S-5); then the tug proceeded up the vessel's starboard side, and took a line from the steamer on the starboard side, although the tug master thought this the wrong side (p. 47, l. 40, to p. 48, l. 18). The tug master then ordered the line to the port side where it was promptly carried (p. 48, l. 21), and then pulled the "Paisley" toward the elevator, but past the elevator at so great a speed and for such a distance that it was necessary for him to back on her to stop her way and en- 30 deavour to push her in toward the elevator (pp. 50-51). The use of mooring lines or cables when a vessel has no power on board, her winches, being dead (p. 165), is merely to tie her to the dock and not to stop and assist in working her into the dock as is sometimes done when a vessel has her own steam up and is navigating under her own power. When the master of the tug attempted to check the way of the "Paisley" and back upon her port side with his line carried from the stern bitts forward and attached to the bow of the tug, the operation was so clumsily performed (p. 63) that the line first slipped and then parted, and the vessel, under the way which the tug had given her, proceeded forward until she came into collision with the Saskatchewan.

40 (5) The learned Trial Judge erred in finding that there was no arrangement with the Superintendent of the elevator or the men there, to be on hand at some definite time to handle the lines, and that this was a most serious omission.

The evidence of Dault (p. 124, ll. 25-46, pp. 125 and 126), of Colquette (pp. 136 and 137), of Ney, the elevator foreman (p. 139, ll. 20-44 and p. 145, ll. 1-19), and of Yeo (p. 145, ll. 20-46, p. 146, ll. 14-47, p. 147, ll. 1-25), was that they were warned to take the lines of the "Paisley" in ample time

and proceeded to the dock for the purpose of doing so. They were out in front of the elevator ready for the Paisley's lines when she was in the middle of the slip and stationary (p. 59, ll. 1-3, p. 141, l. 58, p. 142, ll. 30-40). They waited for the tug to bring the vessel in to the dock (p. 143). All of them were men accustomed to handling lines from vessels, and there is no evidence to show that they lost sight of the "Paisley", but they knew from her distance out that they could not expect any heaving lines to be thrown to them, and did not expect any until Penrice threw the heaving line to Yeo on the spiles. The evidence shows that it was never the intention that any mooring lines should be passed
 10 ashore until the tug had brought the vessel to the dock (p. 139, ll. 40-46; p. 140). Had the line not parted the tug would have checked the way of the vessel (p. 64, ll. 10-20), and nosed, or shoved her by the tug's nose, into the elevator dock (p. 50, l. 23-28, p. 63, l. 19).

Upon this evidence the facts appear to be that men were warned to take the "Paisley's" lines, were prepared to do it, Penrice had the lines ready to give to them as soon as the vessel was in a position to pass them ashore, and Waugh, the tug master, who had given no instructions to Penrice as to passing any lines ashore (p. 41, l. 10, and p. 45, ll. 25-35) carried the "Paisley" too far past the elevator, and failing to stop her way, broke his tow line and brought about the
 20 collision.

(6) The learned Trial Judge erred in finding that the real fault was 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 (p. 326, ll. 43-45). At this time Penrice and his helpers were forward on the fore-castle deck a few feet from the stern of the tug (p. 189). No orders were given by the tug as to lines. There was no thought or intention of stopping the vessel by mooring lines (p. 165, ll. 10-40). The men and lines were ready when the proper time came to use them (p. 167, ll. 10-38); the tug master and the tug are charged with the duty of bringing the vessel to the dock (p. 252,
 30 ll. 4-12; pp. 253-254).

(7) The learned Trial Judge refers to the fact (p. 319, ll. 9-10) that the men in the tug when it backed up carried the line forward on the tug. This was the manoeuvre that Penrice and those on board observed from the fore-castle deck and caused Penrice to go down to attempt to get a line ashore because of the trouble the men on board the tug were having with the tow line (p. 163, ll. 20-44, pp. 164 and 165). The tug master gives no reason for thinking that a line was ashore, had given no orders, and made no arrangements to put a line ashore. The handling of the line on the tug, the difficulty with the stays, of which Penrice speaks, which prompted him to go to the deck below and to
 40 heave a line to Yeo in the hope of getting a cable out, all point to negligence on board the tug, culminating in the parting of the tug's line.

(8) The learned Trial Judge refers to the fact that when it was attempted to pass a second line to the vessel no one on board her (the "Paisley") was ready. The evidence is that the delay was not a factor in the collision and those on board the vessel were not bound to anticipate the negligence of those on board the tug (p. 54, ll. 20-40).

(9) The learned Trial Judge finds that the movement 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 (p. 320, ll. 29-32), and that the contract 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 control of the tug as to motive power (p. 320, ll. 32-36).

The evidence shows that not only the motive power, but the governing power of the movement was in the tug and in the tug alone. The casting off
10 of mooring lines and the making fast of mooring lines were matters preliminary and subsequent to the movement of the vessel and under the circumstances were not, and were not intended to be, factors in her movement, either to start or to stop her. She was in fact, a dumb barge having no control of any kind. (pp. 164-165; p. 232, ll. 34-40.)

Penrice, the ship-keeper of the "Paisley", and his helpers were not, as the Local Judge in Admiralty finds, a navigating crew, and the operation was not, it is submitted, a joint one. Having regard to the fact that the whole operation was under the control and direction of the tug master, it is submitted that it could not be a joint one. Only in handling the lines had Penrice any
20 function or duty to perform. He or his men took the tow lines from the tug on the tug master's orders and made them fast or let them go under his direction. The mooring lines were cast off to permit the vessel to be moved from her berth, and when placed as she should have been, and after the accident was, placed by the tug (p. 65, ll. 4 and 5) to make her fast to her berth.

PART III.

ARGUMENT

The Appellant submits that on the evidence the sole responsibility for the accident and consequent damage herein rests on those in charge of the tug "Harrison" and not on those on board the S.S. "Paisley", or upon her charterers
30 or owners, and the Appellant refers to the rule laid down in the River Wear Commissioners vs. Adamson (1872) 2 A.C., p. 743, particularly to the judgment of Lord Blackburn at page 767.

Before 1860 a tow in charge of a tug was frequently held liable on the ground that those on board the tow were in charge of the tug—in other words, that the tug was the servant of the tow, or that the tug and tow were, in the eye of the law, one vessel. The rule, now adopted as settled law, is laid down in an American case, Sturgis vs. Boyer, 23 Howard Supreme Court Reports, U.S., p. 110 (1860).

In the "Clarita" and the "Clara," 23 Wall 1, p. 11, the principle was again enunciated :

40 "Consequences of the kind, however, do not follow when the person
"committing the fault does not in fact or by implication of law, stand in the
"relation of agent to the owners."

In the *J. P. Donaldson*, 167 U. S. Reports, 599, at pp. 602 and 603, the

rule was again laid down :

“The master of the tug is appointed by and is the agent of the owners of the tug; and he is not appointed by the owners of the vessel towed, and if by the mismanagement of the tug, without any negligence on the part of the tow, the tow is brought into collision with another vessel, the tug and not the tow is responsible.”

The first English case of authority to approve the doctrine as laid down in *Sturgis vs. Boyer*, was “*The Stormcock*,” (1870), 5 *Aspinall, Maritime Law Cases*, p. 570, where it was held that it is not the duty of those in charge of a tow, which is being towed with a long scope of hawser by night at sea, to direct the movements of the tug.

Following this case the point came up for decision in the *Union Steamship Co. vs. the Owners of the “Aracan,”* the case being better known as “*The American and the Syria*” (1874), *Law Reports*, 6 P.C., p. 127, on appeal from the High Court of Admiralty in England. It was held, reversing the decision of the High Court of Admiralty, that

“having regard to the exceptional circumstances under which the towing was undertaken, the governing, as well as the motive power, being wholly with the ‘*American*,’ the ‘*Syria*’ was not liable to be condemned in damages occasioned by the collision,”

and it was further held that the “*Syria*” could not be deemed in intendment of law to be one vessel with the “*American*” or liable for her negligence.

The judgment distinguishes “*The Cleadon*,” 14 *Moore’s P.C. Cases* 97, on the ground that the governing power, as well as the motive power, rested in the towing vessel.

In “*The Niobe*,” 13 *Probate Division*, p.55 (1890), Sir James Hannen, President of the Court, said :

“If it had been shown that the “*Flying Serpent*” (the tug) had by some sudden manoeuvre which those on board the “*Niobe*” could not control, brought about the collision, I should have held the ‘*Niobe*’ blameless. Thus, in ‘*The Stormcock*’ (*supra*) I held the tug to be responsible because the tug, which was originally steering a safe course, so suddenly departed from it that the tow could not check her or follow without striking another vessel.”

“*The Quickstep*,” 15 *Probate Division*, p. 196, held that no general rule could be laid down as to the liability of a vessel in tow for a collision between it and a third vessel occasioned by the negligence of those on board the tug. Whether the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, so as to make the former liable, depends upon the circumstances of each case. In the judgment in this case, Butt J. reviews the authorities, and in part says :

“It is clear that although there were men on board the barge the navigation was in the hands of the master of the tug, and the barge men could do nothing to avoid a collision. The real question is whether or not the relation of master and servant exists between the Defendants, the owners of the vessel towed, and the persons in charge of the navigation of the steam tug. Unless that relation exists, consideration of expediency cannot avail

“to impose liability on the owners of the vessel in tow.”

The learned Judge refers to *Laugher vs. Pointer*, 5 B. & C., 547, adopted and approved by the Court of Exchequer in *Quarman vs. Burnett*, 6 M. & W. 499, and refers, with approval, to the judgment of Mr. Justice Clifford in delivering the judgment of the Supreme Court of the United States of America, in the case of *Sturgis vs. Boyer*, 24 Howards' Reports 110 at p. 122 (*supra*), and he proceeds :

“Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking so that no degree of negligence can attach
10 “to the owners of the tow on the ground that the motive power employed by
“them was in an unseaworthy condition, the tow, under the circumstances, is
“no more responsible for the consequences of the collision than so much freight,
“and it is not perceived that it can make any difference in that behalf that a
“part, or even the whole of the officers and crew of the tow are on board
“provided it clearly appears that the tug was a seaworthy vessel, properly
“manned and equipped for the enterprise, and from the nature of the under-
“taking and the usual course of conducting it, the master and crew of the
“tow were not expected to participate in the navigation of the vessel.”

It is submitted, with deference, that no difference now exists between the
20 principles of English and American law, the rule being that under an ordinary
contract of towage the tow has control over the tug, and the latter is bound to
accept the directions and orders of the former, but there are exceptions to this
rule, notably in the case of dumb barges and canal boats having little or no
control over their own movements, and where, by custom, contract or necessity
the control of the tow is in the tug.

In “*The Wandrian*,” Chief Justice Davies refers to Marsden on Collisions
at Sea, 5th Edition, pp. 169 and 173, to “*The Union Steamship Co. and The*
“*Aracan*,” “*The American and the Syria*” (*supra*), “*The Cleadon*,” 14 Moore's
P. C. 97, distinguished in “*The American and the Syria*” (*supra*), and to
30 the “*Devonian*” (1901), Probate Division 221, and to the judgment in that
case of Lord Chief Justice Alverstone in the Court of Appeal :

“With regard to her responsibility (that is, the tow's), apart from the
“Statute, I do not think there is any doubt about the law, although there was
“difficulty about its application until the case of ‘*The Cleadon*,’ 14 Moore's
“P. C. 92, 97 in 1860, when it was recognized that where one ship is in
“tow of another the towed ships are, by intendment of law, for some pur-
“poses to be regarded as one, the commanding or governing power being
“with the tow and the motive power with the tug;”

all of which considerations are said to remove the case from the exceptions
40 which appear to exist in the towage of dumb barges or canal boats, or such cases
as “*The American and the Syria*” (*supra*) where it was held that the motive
power and also the control or governing power were in the tug.

In the House of Lords, owners of the Lightship “*Comet*” (Appellants) and
the owners of the W. H. No. 1 (Respondents), *The W. H. No. 1 and the “Knight*
Errant” (1911), A. C., p. 30, the rule was very definitely applied affirming
the decision of the Court of Appeal (1910), Probate, p. 199, and reversing the
judgment of the Admiralty Court, where it was held that as a bare question of

fact in the circumstances the barge was entitled to expect that the tug would be reasonably well navigated, and to act upon that belief, and that the barge was not to blame.

In "The Devonshire" (1912) A. C. 634, it was held that where a collision occurs through the faulty navigation of the tug and the tow is, as regards navigation, completely under the control of the tug, and does not stand to the latter in the relation of master and servant, the tow is to be regarded as an innocent ship, in no sense identified with the delinquent tug, and that therefore where a dumb barge in tow of a tug, which had the sole control and management of the navigation, was damaged by collision with a third vessel owing to the faulty navigation of the tug and the third vessel, and the owners of the tow brought an action *in rem* against the owners of the third vessel only, it was held, affirming the decision of the Court of Appeal (1912), Probate Division 21, that the Defendants were liable for the whole damage, and the judgment refers to the case of "The Quickstep" (*supra*) and the judgment of Butt, J., in that case, and proceeds to say that the doctrine of identification as enunciated in Thorogood vs. Bryan, 8 C. B. 115, at p. 129, has now been swept away, and the principle laid down is a simple application of the rule established in the well-known case, Quarman vs. Burnett (1840) 6 M. & W. 499.

20 These cases were followed in 1914 by "The Adriatic and the Wellington," T. L. R., Vol. 30, p. 699, where it was held, in an action by the Plaintiffs against the tug owners and the barge owners that notwithstanding the terms of a contract between the tug owners and the barge owners, making the master and crew of the tug servants of the barge owners during the towage, they were in fact the servants of the tug owners, and that therefore in law the tug owners, and not the barge owners, were responsible for the negligence of the master and crew of the tug.

In the present case the contract for the shifting of the Paisley was made by correspondence filed as Exhibit 63 and printed at pp. 303-310 of the case, and the telegram instructing the placing of the Paisley at the elevator is Exhibit 30 64, S-8, printed at p. 311 of the case. The effect of this contract is that an offer was made on December 11th by John Harrison & Sons of Owen Sound to undertake the moving of the steamer Paisley with storage cargo, to and from the elevator, at a flat average rate of $\frac{1}{4}$ c. per bushel, subject to immediate acceptance, and after some intermediate telegrams, on December 13th, 1926, the offer was accepted by telegram, at the rate of $\frac{1}{4}$ c. per bushel. In the first offer (Exhibit Number 69, S-9) printed at p. 309 of the case the duties which the ship-keeper was expected to perform were indicated by the tug owners (p. 309, ll. 33-36). "It is understood that this work will be done at owner's 40 risk and that your ship-keeper will direct the mooring of steamer after being unloaded, the harbour master to settle any dispute as to location."

The contract between Penrice and Cleveland Cliffs Iron Company (Exhibit Number 67, P.-8), printed at p. 310 of the case, defines the ship-keeper's salary and duties. With regard to movement of the vessel his duty (l. 22) was to "record all movements of vessel and work done in connection with loading or unloading storage cargoes."

On these facts it is submitted with deference that the sole responsibility

for the way in which the port anchor of the "Paisley" was carried on January 18th, 1928, rested with the master of the tug, and not jointly upon Waugh and Penrice, as the learned Trial Judge has found. The contract for the moving of the "Paisley" was in writing, clearly placing the vessel in the sole charge of the tug and her crew and owners. The instructions for the moving were given by Exhibit Number 64, S-8, to the tug owners. They were told to place the vessel and notify the ship-keeper accordingly. The latter had secured the services of three men to be on the vessel and help him with hatches and lines and other work on board but their services were not required on the 15th January, 10 when the anchor was put in position, and none but the ship-keeper was present on that occasion, which was three days before the actual movement of the vessel. The negligence was not in leaving the anchor hanging, but in navigating with it hanging, and this was negligence of the tug and her master, not in any sense of the ship-keeper, who had nothing to do with navigation.

The master had been made familiar with the means by which the anchors were to be raised and the provision made for them. He was in sole charge of the operation and had the sole responsibility for the navigation of the vessel to and from the elevator, except that the ship-keeper after she was unloaded, was to direct her mooring place, subject to the final directions of the harbour 20 master. The learned Trial Judge in his reasons for judgment at p. 324, ll. 25-40, found that Waugh, Captain of the tug, was to tow the "Paisley", which, when afloat, would be under his charge. "In that manoeuvre she would have "to be moved both backward and forward under the steam 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 insisted on doing what he said he offered to do, "namely, to take the cable off and raise the anchor properly in 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 with- 30 "stood him, had he insisted upon so doing." By his acquiescence in the position of the anchor the tug master assumed full responsibility. The Olive Baker, 18 Fed. Cases, p. 649 *Infra*.

His Lordship refers (p. 321, l. 44) to *Canadian Dredging Company vs. Northern Navigation Company* (1923), *Exchequer Court of Canada*, page 189, where a tug was assisting a vessel to leave a dry dock at Port Arthur. It is submitted that that case is distinguishable on the ground that the tug was the servant of the vessel which was in full commission with its crew aboard, and while held to be a joint operation, the *Huronic*, of the Defendant Company, was held liable for and paid the full damages. The motive power for part of the move- 40 ment was in the tug, but the governing power was not, and the failure to properly exercise the governing power was held to render the vessel liable.

The learned Trial Judge refers to co-operation in handling lines from and to the tug and the dock to which they were making (p. 320, l. 30). It is submitted that those on board the "Paisley" did co-operate with those on the tug in handling lines to and from the tug, that if they did not their failure to do so did not cause or contribute to the accident, and that they had no orders and no opportunity to use the mooring lines to check the vessel's way, and were entitled

to expect that the tug and tow would be properly navigated by those on board the tug. The "Comet," W. H. No. 1, 1911, A.C., 30.

It is with deference submitted that on the evidence those on board the Paisley brought themselves within the requirements of the cases referred to by the learned Trial Judge at p. 322, p l. 10, of the Case. *Socrates vs. Champion* (1923) p. 76; *Cory vs. France Fenwick* (1911) 1. K.B., 114.

It is submitted that nothing done antecedent to the navigation, unless done by those responsible for the navigation, can give rise to a maritime lien as suggested by the learned Trial Judge. Eleven vessels only were in the harbour. 10 The "Paisley" lay with her port anchor inshore, and as it was intended and actually carried out, her port anchor would not be in any likelihood of colliding with any vessel, pier or structure, being towed by the stern north and brought to the elevator by the head south with the port anchor outside and away from the dock. The ship-keeper had no control over the anchor (p. 232, ll. 29-32), and had the right to expect proper navigation on the part of the tug. The "Cornet," W. H. No. 1. (1911) A.C. p. 30, *The Olive Baker*, 18 Fed. Cas. 649, Case No. 10,489, and the damage was not the reasonable or probable cause of the accident to be foreseen by the ship-keeper.

The finding of the learned Trial Judge (p. 326, l. 43), that those on board 20 the vessel were not ready, and no proper arrangements were made to have men at the dock to receive lines out in time to check the steamer, and, with the shoving of the tug, to safely dock her, is, it is submitted, contrary to the evidence, as is also the finding that the *Presq'ile* had been docked in a similar manner. The lines on board were ready (p. 162, ll. 7 and 8, ll. 20-27; p. 167, ll. 25-40; p. 175, ll. 1-3 p. 191, l. 20; p. 192, l. 31; p. 200, ll. 10-46). The tow line was taken on the starboard side because the tug was there. (p. 214, ll. 45 and 46, p. 215, l. 11). The tug had the vessel too far out and was pulling her too fast, but the men were ready to take the lines. (p. 180, l. 35; p. 193, l. 11; p. 125, ll. 33-42; p. 136, l. 13; p. 139, ll. 26 and 27; p. 146, l. 14-28; p. 165, l. 10). When the 30 heaving line was thrown the vessel was 75 feet out from the bank (p. 164, l. 7). The *Presq'ile* was not handled the same way (p. 165, l. 40).

The learned Trial Judge's findings as to what Penrice did on board the "Paisley" during the movement and up to the time of the accident are not, it is respectfully submitted, in accordance with the evidence in a number of important points.

The learned Judge finds (p. 326, ll. 3-5): "Penrice found 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." The evidence as to this is found at pp. 190, 191, 192 and 193, and in answer to the Court at 40 pp. 200 to 207.

It is respectfully submitted that the evidence shows that Penrice properly stayed at the stern of the vessel to see that it did not foul piling on the east bank, and that there was no duty or necessity upon him to put mooring lines ashore until the tug should have brought the vessel to her mooring berth, but that he did go forward and was on the fore-castle deck when he observed that the tug was having trouble with her tow line and immediately returned to the forward winch on the main deck and made an attempt to get a cable ashore, which was

not successful by reason of the distance from the dock and the speed of the vessel, and the learned Trial Judge agrees that it would have been of no avail to drop the starboard anchor, while there was, it is submitted, nothing else that Penrice could have done or should have done in the circumstances to attempt to prevent or avoid the collision.

The view entertained by the learned Trial Judge and expressed by him, that the mooring lines were intended to be used in the navigation of the vessel in stopping her or bringing her to the dock, is not, it is submitted, in accord with the weight of the evidence or with the practice of good seamanship under the winter conditions prevailing, with no steam power on the vessel available to handle the winches. (pp. 164-165; p. 232, 34-40.)

The following cases, not before referred to, are relied on by the Appellant : McCartan vs. Belfast Harbour Commissioners (1911), 2 Irish Reports, 143; Donovan vs. Laing (1893), 1 Q.B. 629; Rourke vs. White Moss Colliery Co., 2 C. P. D. 205; Reddie vs. L. & N. W. Railway Co., 4 Ex. 244; Waldock vs. Winfield (1901) 2 K.B., 596; Moore vs. Balsam, 2 T. L. R., 781.

The Appellant further refers to Bucknill, Tug & Tow, 2nd Edition, pp. 49 to 61, and cases cited, particularly to p. 55, l. 10 *et seq.*; and p. 56, l. 6 *et seq.*; and to 54 North American Law Reports (Annotated), p. 101, at p. 104, I—vs. The J. M. Lewis (1874), Fed. Case No. 6991, referred to at pp. 158 and 159; The Lyon (1861) referred to at p. 159, and particularly to The Olive Baker, 18 Fed. Cases, p. 649, Case No. 104,89, where it was held that the master of the tug in charge of the navigation, having acquiesced in the improper lengthening of a hawser by the man on board the barge, accepted full responsibility for it, and the barge owners were held entitled to recover against the tug and owners in respect of the resulting damage to the barge.

All of which is respectfully submitted.

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30 TORONTO, October 7th, 1928.