1881 *Dec. 10, 12. 1882 *Mar. 13.

L McCALLUM (*Defendant*)..................APPELLANT;

AND

D. B. ODETTE (*Plaintiff*)....................RESPONDENT.

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

In re "*THE M. C. UPPER.*"

Appeal and cross appeal from the Maritime Court of Ontario—Collision with anchor of a vessel—Contributory negligence—Damages, apportionment of.

On the 27th April, 1880, at *Port K.* on Lake Erie, where vessels go to load timber, staves, &c., and where the *Erie Belle*, the respondent's vessel, was in the habit of landing and taking passengers, the *M. C. Upper*, the appellant's vessel, was moored at the west side of the dock, and had her anchor dropped some distance out in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, and without buoying the same or taking some measure to inform in-coming vessels where it was. The *Erie Belle* came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the *M. C. Upper*, making a large hole in her bottom.

On a petition filed by the owner of the *Erie Belle*, in the Maritime Court of *Ontario* to recover damages done to his vessel

*PRESENT—Sir William J. Ritchie, Knt., C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

by the schooner *M. C. Upper*, the judge who tried the case found, on the evidence, that both vessels were to blame, and held that each should pay one half of the damage sustained by the *Erie Belle*. On appeal by owner of *M. C. Upper* and cross appeal by owner of *Erie Belle* to the Supreme Court of *Canada*,

Held, Per *Ritchie*, C.J., and *Fournier* and *Taschereau*, JJ., that as the *Erie Belle*, being managed with care and skill, went to the wharf in the usual way, and came out in the usual way, and as the *M. C. Upper* had wrongfully and negligently placed her anchor (as much a part of the vessel as her masts) where it ought not to have been, and without indicating, by a buoy or otherwise, its position to the *Erie Belle*, the owner of the *Erie Belle* was entitled to full compensation, and the *M. C. Upper* should pay the whole of the damage.

Per *Strong*, *Henry* and *Gwynne*, JJ., that the *M. C. Upper* had a right to have her anchor where it was, and that it was not in the line by which the *Erie Belle* entered and by which she could have backed out; that the strain on the anchor chain when the crew of the *M. C. Upper* were hauling on it all the time the *Erie Belle* was at *K.* sufficiently indicated the position of the anchor, and therefore that the accident happened through no fault or negligence on the part of the *M. C. Upper*.

The court being equally divided, the appeal and cross appeal were dismissed without costs, and the judgment of the Maritime Court of *Ontario* affirmed.

APPEAL from a judgment of the Maritime Court of *Ontario*.

This was a petition filed by the respondent, the owner of the steamer *Erie Belle*, to recover damages for injury done to his vessel by the schooner *M. C. Upper*, of which the appellant is owner.

The case made by the petition, as amended, was that on the 27th April, 1880, the defendant's schooner, the *M. C. Upper*, was moored at the dock at *Kingsville*, and had her anchor dropped, at a distance of about 250 feet from the dock, in the channel by which vessels usually depart from said port; that there was no buoy or other signal to indicate the position of the anchor; that about one o'clock in the afternoon of that day, the

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plaintiff's steamer, the *Erie Belle*, in her usual course, called at *Kingsville*, and shortly after, in backing out, struck the anchor of the *M. C. Upper*, being unaware of its being there, making a hole in her own hull, and in order to avoid sinking, ran ashore on *Lake Erie*; and that the disaster was imputable solely to the fault of the *M. C. Upper* in not buoying her anchor.

The plaintiff further alleged that "it is the custom and usage at the said port, for all vessels having an anchor out to mark its position by a buoy or signal."

The defendant's contention was that the anchor lay where the direction of the chain indicated; that *Kingsville* was merely a wharf on the open coast, and that there was no channel leading to it, and plenty of sea-room for the plaintiff's vessel; that the persons in charge of the *Erie Belle* were well aware of the position of the anchor, and that the accident was due solely to the careless and unskilful manner in which the *Erie Belle* was managed, it being proved that the vessel was entrusted to another mariner, Captain *Laframboise*, who voluntarily offered to take the vessel in; that there was no obligation to buoy the auchor, and, in any case, that the absence of a buoy did not contribute to the disaster; that there was no impact between the vessels. The facts of the case appear in the following extract from the judgment of his honor *G. W. Leggatt*, Esq., surrogate judge of the Maritime Court of *Ontario* at *Sandwich*.

"I think it may be premised, for upon these points the evidence preponderates, if all the witnesses do not agree, that the port of *Kingsville* consists of a wharf projecting out in a southerly direction into the lake a distance of about 860 feet, where vessels go to load timber, staves, &c., and where the *Erie Belle* was in the habit of landing, when the weather permitted, on her route between *Windsor* and *Leamington*, with and

for passengers and freight. That around the wharf, extending some distance east and west, there is a uniform sandy or hardpan bottom, interspersed with stones or boulders of greater or less size, the water gradually increasing in depth as the distance from the shore becomes greater, being nine or ten feet at the southerly end of the wharf and increasing to the depth of eleven feet, two hundred feet farther away into the lake in a westerly direction where the accident occurred. That it is customary for vessels in going to a wharf of this kind, exposed as it is on the open coast, for a cargo, to drop their anchor some distance away from the wharf, either to the east or west side thereof, as circumstances suggest or require; and that this mode of dropping the anchor a distance away, when making for the wharf, is taken as a proper precautionary measure to enable them to haul away from the wharf, in case the wind sets in from off the lake and they are required or forced to leave. That it is not usual to buoy the anchor in such a place as this: that the custom of buoying the anchor has gone out of vogue (though it did prevail at one time), in consequence of the liability of propellers to pick the buoys up with their wheels; that there is, as a rule, nothing to indicate to in-coming vessels or propellers where the anchor of a vessel is, except the known or recognized custom which prevails among vessels of casting their anchor as nearly in line with that of the side of the wharf at which they intend to land as they can get, so that the chain or cable would be, when heaved taut, in a direct line from the hawser hole to the place where the anchor would be, and parallel with or in continuation of the direct line of the east or west side of the wharf, just as the vessel may lie on the east or west side thereof. That knowing this practice, a steamer in making the wharf, seeing a schooner lying on the west

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side of the wharf, would get the range of the east side, some distance away, in order to avoid the possibility of coming in contact with the anchor, and thence proceed to the east or opposide side of the wharf to that upon which the schooner lies."

And the learned judge at the trial came to the following conclusions:

"After making due allowance for the probable bias of the officers and crew of both the *M. C. Upper* and the *Belle* in giving their testimony in this cause, and giving the whole of the evidence the greatest possible consideration, I have come to the following conclusions: 1st. That the anchor of the *Upper* was dropped about 200 feet south of the wharf, and about in line with the centre of the wharf, extended in about 11 or 12 feet of water. 2nd. That the obstruction that the *Belle* came in contact with in backing out of the wharf, causing her to keel over the way she did, and making a large hole in her bottom, was the anchor of the *Upper*. 3rd. That the *Belle* in backing out did not retain the range of the east side of the wharf. *Laframboise* says "that she was heading about north when she struck." And *Odette*, the captain, says: "We backed out in range of the east side of the dock—observed great care in backing out, and followed the usual course; we might have diverged 4 or 5 feet." If the boat was heading about north when she struck, she must have been farther west than they imagined. The wharf direction from the shore is somewhat east of south. 4th. It was misconduct, want of proper care and prudence on the part of the *Upper* in dropping her anchor where she did, in water not more than 12 feet deep, without buoying the same, or taking some measure to inform in-coming vessels or steamers where it was.

"On the other hand, I find that the *Belle* is chargeable with contributory negligence. 1st. In going into the

wharf on that day, contrary to the better judgment of the captain or person in command, and when he knew it was dangerous, the water being low ; 2nd. In the captain giving over the charge of his vessel for the time being, to an irresponsible person to take her into the wharf, when he would not do it himself: and 3rd. In not taking greater care to observe and maintain the same course in backing out from the wharf that they did in going in.

"The *Belle* having failed to return immediately to the wharf she had just left, to ascertain the extent of the leak, before making for the river, exhibited a manifest want of skill and ordinary judgment, and thereby augmented and increased the expense of raising and repairing her.

"I assess the damage sustained by the plaintiff at $1,000.00; and, both vessels being in fault, do order and decree that the defendant do pay one moiety thereof to the plaintiff or petitioner, and that both parties be left to pay their own costs."

A decree was drawn up accordingly, from which both parties immediately appealed. The plaintiff being the respondent on the main appeal, and the appellant on the cross appeal.

Mr. *Dalton McCarthy*, Q.C., for appellant and respondent on cross appeal, contended, upon the facts, that the *M. C. Upper* had not been guilty of contributory negligence, and that the rule respecting division of damage which obtains in the English High Court of Admiralty in cases of collision, was not applicable to this case, there being no impact between the parties—no collision.

Mr. C. *Robinson*, Q.C., for respondent and appellant on cross-appeal, contended that the *M. C. Upper* was responsible for the total amount of damage sustained.

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RITCHIE, C.J.:—

I think there is sufficient evidence in the case to sustain the finding of the judge that the accident was occasioned by the *Erie Belle* coming in contact with the anchor of the *M. C. Upper.* That the *Erie Belle* had the right to come into the wharf to take on board the passengers; that she did go in successfully and was in charge of a competent and skilled mariner, and that he did navigate the vessel with care and skill; that such being the case, whether he was in the employ and pay of the owner, or took charge of the vessel voluntarily at the request or by consent of the captain in charge, so far as the liability of defendant is concerned, is matter of no consequence whatever. That the *Erie Belle* backed in range with the east side of the dock and out in the usual and customary course and manner, and that had the anchor of the *M. C. Upper* been, as it should have been, in a direct line from the hawser hole in continuation of the direct line of the west side of the wharf, or if not in such direct line the anchor had been buoyed, the collision would not have taken place. That the anchor was dropped too far to the eastward.

That there is evidence that not only with a view to the convenience of the vessel herself, but having a due regard to the safety of other vessels coming in and leaving the pier, it is both prudent and right that anchors so dropped should be buoyed, and though the wholesome, sound and necessary rule of practice may have been abandoned, or not of late generally acted on, I am of opinion that those who choose for their own convenience not to adopt it, but to cast their anchors and leave them without a buoy or other indication of their actual position, do so at their own peril and risk, and if for want of such buoy or indication, vessels lawfully navigating the lake and in coming to or leaving the

pier, using due, ordinary and reasonable skill and care, collide with such anchors, and damage is the result, it is a damage for which the parties so placing and leaving their anchors must be responsible. I cannot agree with the learned judge that the *Erie Belle* is chargeable with contributory negligence either in going into the wharf as she did, or in the captain having given over the charge of the vessel to a thoroughly skilled mariner, nor was there, in my opinion, any evidence of want of skill or care in backing out from the wharf.

If I could come to the conclusion at which the learned judge has arrived as to contributory negligence of the *Belle* or those in charge of her, I should think the blame rested on her, because if she ought not to have come to the wharf on that day, and doing so was improper, and by reason thereof the accident happened, or if her captain improperly gave up the command to an irresponsible person, and by reason thereof the accident happened, or if they did not take proper care in pursuing and maintaining the same course in backing out from the wharf that they did in going in, it is clear that the plaintiff cannot contend that the accident would not have been avoided by the exercise of ordinary care on his part. If he ought never to have gone into the wharf, and he wrongfully and negligently did so, it is clear that the accident never could have happened but for his wrongful and negligent conduct, and so, if the giving up the charge of the vessel was wrongful and negligent conduct, and the accident resulted therefrom, then equally was it occasioned by his wrongful act. So, if proper care was not taken in coming out, and the accident resulted therefrom, can it be said that in either or all of these cases the accident would not have been avoided by the exercise of ordinary care, in which case the plaintiff would not be liable.

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I cannot agree with the learned judge that both vessels were to blame. I think the blame rests with the *M. C. Upper*, and that the *Belle* is entitled to full compensation, and the *M. C. Upper* should pay the whole of the damage, estimated at $2,000, and costs As then, I think the *Belle* went to the wharf in the usual way, and came out in the usual way, and had a right to assume that the *M. C. Upper* had placed no impediment in her way—and could and would have done so in safety if the anchor of the *M. C. Upper* had been where it ought to have been, or had been buoyed, as it ought to have been, or had the parties in charge of the *M. C. Upper* notified or indicated its position to the *Belle*, as they ought to have done, I can discover no negligence or any want of the exercise of ordinary or proper care on the part of the *Belle*.

The law as to negligence has been settled perfectly well and beyond dispute, as was said by the Court of Exchequer in *Radley* v. *The L. & N. W. Ry. Co.* (1):

> The first proposition is a general one to this effect: that the plaintiff in an action of negligence cannot succeed, if it is found by the jury that he has been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely: that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and negligence have avoided the accident which happened, the plaintiff's negligence will not excuse him.

I think there is nothing whatever in the objection that there was "no impact between the vessels." The hawser and anchor were as much a part of the *M. C. Upper* as her masts, sails or hull.

Therefore, I think the appeal should be dismissed and cross-appeal allowed, but as the court are equally

(1.) L. R. 9 Ex. 71. and 1 App. Cas. 754.

divided and the cross-appeal cannot be allowed, the appeal will stand dismissed but there can be no costs.

STRONG, J. :—

The learned judge before whom this case was heard in the Maritime Court found " that it is not usual to buoy the anchor in such a place as this ; that the custom of buoying the anchor has gone out of vogue (though it did prevail at one time) in consequence of the liability of propellers to pick up the buoys with their wheels ; that there is, as a rule, nothing to indicate to incoming vessels or propellers where the anchor of a vessel is, except the known or recognized custom which prevails among vessels of casting their anchor as nearly in a line with that side of the wharf at which they intend to land as they can get, so that the chain or cable would be, when hauled taut, in a direct line from the hawser hole to the place where the anchor would be, and parallel with, or in continuation of, the direct line of the east or west side of the wharf, just as the vessel may be on the east or west side thereof." This finding, it appears to me, at least so far as regards the abandonment of the procedure of buoying the anchor, was entirely justified by the evidence. It follows, therefore, that no negligence can be imputed to the vessel in the present instance for having omitted to affix a buoy to the anchor, that practice having been discontinued advisedly and for the purpose mentioned by the learned judge of avoiding the inconvenience caused by the buoys coming in contact with the wheels of propellers. That portion, therefore, of the judgment appealed from which determines that it was " misconduct and want of proper care and prudence on the part of the *Upper* " to drop her anchor where she did without buoying it, is not only not warranted by the proof, but is in direct contradiction to the express find-

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ing of the learned judge himself as a fair and just inference from the evidence.

This leaves, then, the question of negligence to depend altogether on whether the anchor of the *Upper* was dropped too far to the east.

The learned judge having, as I think, properly found that the suggestion or theory that the cable had been fouled by coming in contact with the remains of the old sunken pier is not supported by the testimony, it is clear that the locality of the anchor must have been exactly indicated by the cable on which the crew of the *Upper* were hauling at the time of the collision. Then the captain of the *Erie Belle* and other witnesses for the propeller, who were on board her at the time of the collision, distinctly say that the direction of the *Upper's* chain indicated that the anchor was in a line with the centre of the dock, or to the west of that line, and the hypothesis of the sunken pier being destroyed, the evidence establishes beyond a doubt that this must have been so. The finding of the learned judge upon this point is also, in this respect, directly in favor of the *Upper*. It is: "that the anchor of the *Upper* was about 200 feet south of the wharf and almost in line with the centre of the wharf extending in about 11 or 12 feet of water." This, therefore, disposes of the only ground for the imputation of negligence in the selection of the place of anchoring, and there remains nothing to support the decree of the court below.

I do not discuss the evidence in detail, as I entirely agree in the conclusions of fact at which the judge in the Maritime Court arrived. I only differ from him as regards the legal consequences of these facts, which, in my opinion, should have been directly opposite to those which the decree has attached to them.

The decree should be reversed and the action dismissed with costs to the appellant in both courts.

FOURNIER and TASCHEREAU, JJ. concurred with the Chief Justice.

HENRY, J.:—

I adopt all the conclusions of the learned judge before whom this case was tried, except the one as to the right of the respondent to recover.

To sustain the action it is necessary to establish by evidence that the appellant's schooner was guilty of negligence in dropping her anchor where she did; that the damage to the *Erie Belle* was caused by the striking on the anchor; and that the *Erie Belle* was not guilty of contributory negligence.

According to the facts as found by the judge, there was not any negligence on the part of the schooner. He negatives the allegation that there was any custom in relation to placing buoys over the anchor in such places, and clearly shows that it having been so at one time it was abandoned.

There was then no want of duty on the part of the schooner in not buoying her anchor.

Was she otherwise guilty of negligence? If so I cannot see in what it consists. It was an exposed situation, and it has been shown to have been a necessary and customary caution for vessels going to the wharf to drop their anchors about two hundred yards from the wharf to haul off by, and, in case of the wind blowing hard on the south end of the wharf, particularly necessary. The finding of the judge shows she dropped anchor in a line with the centre of the wharf and hauled in on the west side of it. If she had dropped it in a line with the east side of the wharf, or further east of that line, there might in such a case have been a liability to intimate its position by a buoy or otherwise, so that a steamer or other vessel might have the power of

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avoiding it, but placed as it was I can see no obligation that rested on the schooner to give any intimation whatever. The commander had no reason to suppose that every steamer coming to the east side of the wharf would touch an anchor so placed, and the fact that the *Erie Belle* came in to the wharf safely shows that the anchor was not improperly placed, and had she gone out as she should have done by the same course the damage would not have been occasioned. The schooner was not guilty of the breach of any law or custom. She had the common law right to do as she did, and the contributory negligence of the *Erie Belle*, as so properly found by the judge, was the sole cause of the damage. In such a case the law throws no liability on the schooner to pay damages. In cases of collision if both vessels are to blame each party bears his own loss.

Abbott at page 614 (11th ed.) says:

But of the sea as of the road the law recognizes no inflexible rule, the neglect of which by one party will dispense with the exercise of ordinary care and caution in the other, one person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action—a collision by default of the defendant, and no want of ordinary care on the part of the plaintiff.

Where damage has been caused in cases of collision and both vessels were found in fault.

The principles upon which judgments have been so given are, however, inapplicable to this case. The respondent, as I view the law, cannot recover if guilty of contributory negligence, and such has been found by the judge.

The law of the road, I consider, is that to govern the decision of this case, and under that law a party guilty of contributory negligence cannot recover. I, however, am of the opinion, independently of that defence, that the schooner was not in fault.

Besides, by the evidence of the captain of the *Erie*

Belle striking took place 100 yards from the wharf, while it is shown that the anchor was dropped 200 yards from it. In that case the striking must have been on a rock or part of the old pier.

I think, therefore, the appeal should be allowed and judgment given for the appellants with costs.

GWYNNE, J.:—

The evidence fails to satisfy my mind that the persons in charge of the defendant's vessel, the *M. C. Upper*, were guilty of any actionable negligence.

The plaintiff's case as stated in his petition is, that the *M. C. Upper*, while moored at the west side of a pier at *Kingsville*, situate on the open shore of *Lake Erie*, had her anchor dropped in the channel by which vessels calling at *Kingsville* usually enter and depart, and that by reason of there being no buoy to indicate the position of the anchor, that plaintiff's vessel, the *Erie Belle*, backing out from the pier by the said channel, struck the anchor of the *M. C. Upper* and was damaged, and the plaintiff averred that the said disaster and the losses and damage consequent thereon occurred through and are imputable solely to the wrongful neglect and improper conduct of the master and crew of the *M. C. Upper* in placing and allowing the said anchor to remain in a shallow channel used for purposes of navigation without any buoy, signal or other thing whatsoever to indicate its position; and had a buoy or other signal been placed where the said anchor lay the said accident would not have occurred, and the plaintiff averred that it is the custom and usage of the said port for all vessels having an anchor out to mark its position by a buoy or signal, and that the defendant, in ignoring said custom and usage and refusing to conform to it, directly brought about the said disaster. The defendant, in his answer, alleged that

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the place which in the plaintiff's petition had been called the "Port of *Kingsville*," is a place on the shore of *Lake Erie*, where vessels go to load timber and staves, but is not a regular port, and that vessels which go to load there, on account of its exposed position and the danger that might be occasioned to them by shifting or rising winds, are compelled, for their safety and to prevent their grounding, to have an anchor and from 50 to 70 fathoms of chain out so as to be ready to heave upon it and haul the vessel off shore in case it should be necessary, and that the said vessel, the *M. C. Upper*, then being in charge of the defendant's servants, the master and crew of the said vessel, was loading at the dock at *Kingsville* and had her anchor out, and at the time of the alleged disaster the crew of the said vessel were endeavoring to haul the said vessel off as the wind was rising and the vessel was grounding astern, and the person in charge of the *Erie Belle* and her crew knew that the said *M. C. Upper* had her anchor out and that her crew were hauling on it and endeavoring to haul the said vessel off, and that if the damage to the *Erie Belle* was occasioned as alleged by the anchor of the *M. C. Upper*, the same arose from the negligent and careless manner in which those in charge of the *Erie Belle* backed that vessel out, and the defendant alleged that there is no such custom or usage at the place as stated in plaintiff's petition as to mark the position of the anchor when out by a buoy or signal.

At the trial the contention of the plaintiff was, that while the *M. C. Upper* was moored on the west side of the wharf at *Kingsville*, her anchor was dropped some distance out in the lake east of the eastern side of the wharf extended, thus bringing her cable directly across the end of the wharf from east to west, and that though the cable when hauled taut, as it was when the

Erie Belle entered, did indicate that the anchor was about in range with the westerly side of the wharf extended, that circumstance was attributable to the fact that the cable was fouled with an obstruction consisting of the corner of an old pier or crib, and that by reason thereof the true position of the anchor which was on the east of the east side of the wharf extended, which was the course of the *Erie Belle* to enter and leave by, was not indicated.

The defendant's contention, on the contrary, was that there was no custom or usage there of buoying anchors, and that the strain on the anchor chain, when the crew of the "*Upper*" were hauling on it all the time the *Erie Belle* was at *Kingsville*, truly indicated the position of the anchor as well as a buoy, which position was the spot where the plaintiff contended that the *Upper's* cable was fouled by the corner of the old pier.

The learned judge before whom the case was tried came to the conclusion that *Kingsville* is situate as described in the defendant's answer, and that it is not usual, nor is there any custom, to buoy the anchor in such a place. That there was nothing left of the pier which the plaintiff contended had fouled the chain of the *M. C. Upper's* anchor, which could foul or obstruct that chain, and that the theory of the plaintiff, that if the trend of the chain from the *M. C. Upper's* hawser hole would indicate that her anchor was not as far east as the plaintiff contended it was, that was owing to the fact that the chain had caught on and been fouled by the corner of the old pier, must be abandoned, and he found further that in fact the anchor of the *M. C. Upper* was dropped about 200 feet south of the wharf extended, and about in line with the centre of the wharf extended in about 11 or 12 feet

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of water. The precise position, I think, upon the evidence, would be at a point from 10 to 15 feet west of the centre line of the wharf produced, and, in fact, at the place where the anchor cable when hauled taut indicated it to be, that is to say, at the spot which the plaintiff insisted was the corner of the old pier; and that being the position of the *M. C. Upper's* anchor, such position was as well indicated by the hauling on the anchor as if it had been buoyed, and, moreover, the evidence shows that if such was the position of the anchor it was not in the line by which the *Erie Belle* entered and by which she should have backed out, and that in fact those in charge of the *Upper* were not guilty of the negligence charged or of any negligence. How the learned judge notwithstanding could find, as he did, that it was misconduct and want of proper care and prudence on the part of the *Upper* in dropping her anchor where she did without buoying the same, I fail to see. This latter finding is not, in my judgment, supported by the evidence, nor is it consistent with the other findings of the learned judge himself.

The plaintiff has, in my judgment, failed to establish the position on which he based his claim, and if the anchor of the *Upper* was, as I think it is established to have been, to the west of the centre line of the wharf produced, its position was sufficiently indicated to those in charge of the *Erie Belle* by the strain upon it in hauling in the cable, and if, under such circumstances, it was the *Upper's* anchor which did to the *Erie Belle* the damage complained of, I cannot see that those in charge of the *Upper* can be said to have been guilty of any negligence to which such damage can properly be attributed.

I think, therefore, that the appeal of the defendant

should be allowed, and the cross appeal of the plaintiff dismissed, with costs.

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Appeal and cross appeal dismissed without costs.

Solicitors for appellant: *Miller & Cox.*

Solicitors for respondent: *Patterson & McHugh.*