

Queen (1), that s. 247 (then s. 213) of the *Criminal Code* is a "mere statutory statement of the common law."

The appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *E. Bayly.*

Solicitor for the respondent: *J. J. O'Connor.*

1929
THE KING
v.
BAKER.
Duff J.

THE SHIP *ROBERT J. PAISLEY* } APPELLANT; 1928
(DEFENDANT) } *Dec. 5, 6.

AND

JAMES RICHARDSON & SONS, LIM- } RESPONDENT. 1929
ITED (PLAINTIFF) } *Feb. 5.

THE SHIP *ROBERT J. PAISLEY* } APPELLANT;
(DEFENDANT) }

AND

CANADA STEAMSHIP LINES LIM- } RESPONDENT.
ITED (PLAINTIFF) }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA
(TORONTO ADMIRALTY DISTRICT)

Shipping—Collision—Ship in tow colliding with and damaging a moored ship—Whether tow in fault—Liability of tow for fault of tug.

The steamship *P.*, in winter quarters in Owen Sound harbour, with its engines and steering gear laid up, while being moved (under contract) by a tug to an elevator dock for unloading, went past the dock and collided with the moored steamship *S.* The owners of the *S.* and her cargo brought action *in rem* against the *P.* for damages sustained.

Held (1): Upon the facts and circumstances as disclosed by the evidence there was not, during the progress of the towing, any act or omission by those on board the *P.* constituting a fault causing or contributing to the accident.

(2.): Although the *S.* might not have sustained the damage which occurred if the *P.*'s anchor had not been in the position in which it was, and although the *P.*'s ship-keeper had encouraged the tug's captain to leave it in that position, yet the position of the anchor, if it were a fault, was not the fault of the *P.*'s owners; they had put the tug in

(1) (1900) 31 Can. S.C.R. 81, at pp. 87 and 88.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

charge, and their ship-keeper 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, and its position did not create liability on the part of the owners, upon well-known principles discussed in *Admiralty Commissioners v. S.S. Volute* [1922] 1 A.C. 129.

(3): Assuming, as was justified on the evidence and the course of the trial, that the tug was competent to the service for which it was engaged, the owners of the *P.* were justified in permitting it to be moved from its moorings to the elevator under the power, direction and control of the tug, and, being not otherwise guilty of any fault, had incurred no personal liability. Further, having regard to the facts (as found by this Court) that, in the towing, the governing and navigating authority was solely with the tug, that the *P.* had no power to assist either in the way of furnishing power or directing her course, that no one on the *P.* had any authority or duties which were unfulfilled with regard to the navigation, and all orders from the tug were duly executed, the *P.* was not liable to the plaintiffs for the damage which, in the circumstances, was sustained by reason of the negligence of the tug. *The Devonshire*, [1912] P. 21, at p. 49; [1912] A.C. 634, at p. 647; *Sturgis v. Boyer*, 24 How. 110, at pp. 121-123; *The Quickstep*, 15 P.D. 196, at p. 201; Marsden on Collisions at Sea, 8th ed., p. 195; *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, at pp. 767-8, referred to. It could not be said that, although the tow was innocent of any fault in itself, a maritime lien nevertheless attached to it, as being the instrument which, by reason of the tug's negligence, caused the injury (*The "American"* and *The "Syria"*, L.R. 6 P.C. 127; *The "Utopia"*, [1893] A.C. 492).

APPEAL by the defendant ship *Robert J. Paisley* from the judgment of Hodgins J., Local Judge in Admiralty, for the Toronto Admiralty District, of the Exchequer Court of Canada, in favour of the respondents, and condemning the appellant, in both of the actions herein, for the damages sustained by the plaintiffs as the result of a collision between the said defendant ship and the steamship *Saskatchewan* in the harbour at Owen Sound, Ontario, on January 18, 1927. The steamship *Saskatchewan* was owned by the plaintiff Canada Steamship Lines Limited, and its cargo was owned by the plaintiff James Richardson & Sons, Limited. Each plaintiff brought an action *in rem* to recover damages, and the actions were tried together as to the question of liability. When the collision occurred the defendant ship, which was in winter quarters in the harbour, with its engines and steering gear "laid up," was being moved (under contract with the owners of the tug) by a tug to an elevator dock for unloading, and the defendant ship claimed that the collision was not caused by

any negligence on its part, or on the part of its owners or those on board or in charge of it, and that responsibility for what happened did not lie upon it.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs, and the actions dismissed with costs.

R. I. Towers K.C. and *F. W. Bartram* for the appellant.

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

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

The judgment of the court was delivered by

NEWCOMBE J.—The steamship *Saskatchewan*, owned by the Canada Steamship Lines, Ltd., while lying moored in the harbour of Owen Sound, Georgian Bay, laden with grain, on 18th January, 1927, sustained damage in collision with the defendant steamship, *Robert J. Paisley*, in consequence of which, on the following day, she sank at her moorings, and her cargo, which belonged to James Richardson & Sons, Ltd., was also thereby damaged. The owners of the ship and cargo respectively brought these two actions *in rem* in the Exchequer Court in Admiralty, to recover their damages against the *Paisley*. The actions were, by consent, tried together, as to the question of liability. There are some differences, though not, I think, very material, upon the facts, and there is also a question of law to be determined, arising out of the fact that the *Paisley* was, at the time, being navigated by the tug *Harrison*, which belonged to and was under the direction of John Harrison & Sons, Ltd.

The *Paisley* is of 3,762 tons gross, length 266 feet, beam 50 feet, and moulded depth 28 feet, registered at Fairport, Ohio; and she was, at the time, engaged in the Canadian grain trade. It would appear that her owners had entrusted the management of the vessel to the Cleveland Cliffs Iron Company, of Cleveland, Ohio, of which Albert E. R. Schneider was the general manager, and that, on 6th November, 1926, William Richards, the superintendent of the Great Lakes Elevator Co., Ltd., which has a grain elevator at Owen Sound, wrote to the Cleveland

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

1929
 THE SHIP
 "ROBERT J.
 PAISLEY"
 v.
 JAMES
 RICHARDSON
 & SONS, LTD.
 —
 THE SHIP
 "ROBERT J.
 PAISLEY"
 v.
 CANADA
 STEAMSHIP
 LINES LTD.
 —
 Newcombe J.

Cliffs Company, referring to a telephone conversation of the previous day, and informed the company that John Harrison & Sons, Ltd., of Owen Sound, had a good tug, and would write the Cleveland Cliffs Company in connection with the handling of any steamers which the latter company might send to the elevator. Mr. Richards represented that ice conditions were favourable at Owen Sound, that harbour being usually the last to freeze over and among the first to open in the spring; that the handling would be cheaper there than at other ports, and that every assistance possible would "be given steamers, and if you can see your way clear to favour us with a share of this business, we feel that we can take care of same to your entire satisfaction, and that it will turn out to be a mutual benefit." Following this, upon the same date, Harrison & Sons wrote the Cleveland Cliffs Company, at the suggestion of Mr. Richards, and further correspondence ensued. On 2nd December, the Harrison Company wrote Mr. Schneider that they were interested in the Elevator Company, and were anxious to give satisfactory service at Owen Sound, "so that you will be disposed to charter for this port more frequently," and they put forward their views "as to the cost of handling your three steamers to and from the elevator," and suggested delay in fixing the charges until the last of the winter fleet should have arrived. By letter of 11th December, the Harrison Company wrote Mr. Schneider, stating that,

Now that the winter storage fleet has been chartered with fair prospects of all being able to get here, we are prepared to undertake the moving of your steamers with storage cargoes to and from the elevator here at a flat average rate of one-quarter cent ($\frac{1}{4}$ c.) per bushel, as per Lake Bills (that is on a Bushel Basis), to include keeping the ice clear as long as possible.

This must be subject to immediate acceptance by owners of *all* storage cargo vessels in this Port; otherwise, we cannot undertake it.

In event of any of the steamers being on the bottom and requiring lightering, there will of course have to be an extra charge for this, but we do not anticipate anything of this kind.

We have already incurred considerable expense keeping Harbour open and notwithstanding the cold weather we have had, the Harbour is to-day entirely free of ice.

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

If all concerned are willing to give us instructions to undertake this work on above basis, we intend keeping Tug in commission and the Har-

hour clear of ice as late as possible. If any of the Owners are not satisfied with this offer, we will lay up the *Harrison* immediately.

Be good enough to telegraph us one way or the other not later than Tuesday, the 14th, and upon receipt of the acceptance of all the Owners, we will confirm this arrangement promptly.

There was some further discussion as to the rate, but by telegram of 13th December, Mr. Schneider accepted the Harrison Company's offer of $\frac{1}{4}$ cent per bushel, and on 20th December, the Harrison Company wrote him as follows:

We duly received your telegram accepting our offer to have tug *Harrison* keep harbour clear long as possible and move your steamers to and from elevator, for which we thank you.

The harbour is clear of ice and your steamer *Presque Isle* is under the leg to-day. Do not know whether they will be able to take all the cargo out at this time or not.

Presume your Charter covers that Shippers of Cargo will pay expense of more than one move. Please send us copy of your Charters, for our information, with reference to this and also give your wheat capacity of each Steamer for our records and oblige.

All owners have accepted this arrangement, with exception of Pater-son Steamship Line; they have only one small boat here, and we think surely they will be satisfied to come in.

It was upon the terms so disclosed that the towing operations were undertaken and carried out by the Harrison Company.

The owners of the *Paisley* having received the assurances and made the arrangements set out in the correspondence, the *Paisley* took up her winter quarters at Owen Sound, and was moored on the east side of the harbour, and somewhat to the southward of the elevator, which was situate on the opposite side of the harbour; her bow pointing southerly, or inwards, and immediately below her several other ships were lying moored, alongside of each other. The *Paisley's* engines and steering gear were "laid up"; the ship was generally put into condition for the winter; the officers and crew were discharged, and left the ship.

On 14th January, Mr. Schneider telegraphed the owners of the tug,

Elevator ready to unload steamer *Paisley*. Place accordingly and notify A. R. Penrice, Ship-keeper.

Mr. Telliard, the chief engineer of the *Paisley*, who was the last of her officers to leave, and who quitted the ship on the morning of 15th January, tells us that, on 13th or 14th January, Captain Waugh, of the tug, came on board

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

the *Paisley* to find out about raising her anchors. Mr. Telliard unlocked the windlass room and explained how it was fitted and cleared, and how the windlass should be worked with steam power supplied by the tug, and gave him further requisite information. Captain Waugh then left the ship, and, on the 15th, the ship-keeper arrived, and the engineer went home.

The ship-keeper was Alvin Roy Penrice. He was employed by the owners of the *Paisley* and, according to their agreement, which was dated 22nd December, 1926, and sets forth the terms under which he was acting from the time he took charge as ship-keeper, he was to receive \$65 per month, and his regular duties were to look after the boat he lived on, which was the *Paisley*, as well as other vessels of the company, that might be near him,

to sound all tanks, peaks and engine room well; record all movements of vessel and work done in connection with loading or unloading storage cargoes; get vessel ready to inspection or fumigation; look after repairs, and perform such work as chipping, scraping rust, painting, removing snow from hatches, as well as any other work called on to do, without extra compensation.

And he was to report in writing to the Cleveland Cliffs office, at Cleveland, every Monday morning; the contract to terminate at any time the owners or their representatives were not satisfied with his services or conduct.

Mr. Richards, the superintendent of the elevator, had informed Penrice that "the *Paisley* would be the next boat to go to the elevator."

Captain Waugh, with his tug, came alongside on the afternoon of 15th January, and raised the *Paisley's* anchors, supplying the power from the tug and using the ship's winch in the manner which had been explained by her engineer. The tug had a crew of three or four men, and Penrice assisted with the anchors. Both anchors were brought up into their hawse-pipes, but there was trouble with the stowing of the port anchor, and Captain Waugh considered that it projected so far as to interfere with the navigation of the tug, and it was accordingly lowered again, and permitted to remain suspended and partially submerged.

Penrice gives the following evidence as to the commencement of the towing operation, about which there is no dispute:—

Q. Now you have told us about the anchors being hove up on the 15th January. Then what was your next communication about shifting the vessel?

A. On Tuesday, January 18.

Q. Yes?

A. The tug came over in the forenoon and Captain Waugh came aboard bringing with him a short piece of chain and said he was going to shift us to the elevator that morning.

By His Lordship:

Q. What do you mean by a short piece of chain? One you had never seen before?

A. I had never seen this piece of chain before. I went with Captain Waugh to the stern of the *Paisley* and he put this chain around the bitts on the stern of the *Paisley*.

Q. Where was the bitt?

A. On the fan tail of the stern of the *Paisley*. I asked Captain Waugh what the chain was for.

Q. You had no idea, I suppose?

A. I didn't know what he was going to use that for. He said that was to hook his towing cable into. He made the chain fast. The cable was pulled aboard from the tug, the towing cable, and made fast to this chain.

By Mr. Towers:

Q. Was that in the forenoon?

A. It was before noon, January 18.

Q. Had you any men besides yourself on board then?

A. I had one man when the tug came. Shortly after the tug arrived my other two men.

By His Lordship:

Q. The towing cable from the tug was made fast to this chain?

A. Made fast to the chain.

Q. Then what was done with the chain, left on the bitts?

A. Left on the bitts. After that was done the lines were taken in; that is, the mooring lines.

Q. That is, of the *Paisley*?

A. On the *Paisley*.

Q. That means she was afloat then, does it?

A. Yes, sir.

By Mr. Towers:

Q. You said you had some other men on board. Who were they?

A. Mr. Sykes and Mr. Holmes and Mr. Bechard.

By His Lordship:

Q. Employed under you?

A. I arranged to have them.

Q. Employed under you?

A. Yes, sir.

By Mr. Towers:

Q. For what purpose did you have them?

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

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.
Newcombe J.

By His Lordship:

Q. Were they aboard this morning?

A. They were.

By Mr. Towers:

Q. Well, then once you were afloat, what happened?

A. The tug pulled our stern out away from the dock and then straightened us out and pulled us down the harbour, that is northward.

By His Lordship:

Q. Stern first, I suppose?

A. Stern first.

At this point, according to the chart in evidence, the general direction of the harbour, going inward, is south-westerly, and the direct distance from the *Paisley*, as she lay at her moorings, to the elevator on the opposite side of the channel, is about 700 feet. The course was unobstructed, but, owing to the fact that other vessels were lying at the stern of the *Paisley*, the master of the tug found it advisable to tow her out in a northerly direction, and so he made fast to his cable, which he had attached to the chain affixed to the stern bitts of the *Paisley*, and proceeded outwards on a northerly course for a distance of about 1,000 feet, which brought the ship to a position about mid-channel, or perhaps somewhat closer to its western side, and to the northward of the elevator, where those on the ship, by the tug's direction, cast off the cable from the ship's stern, and the tug passed upward between the western shore and the starboard side of the ship, and sent up a cable to Sykes, one of the men on board, to make fast to her bow. There was some unimportant delay here, because Sykes attached the cable to the *Paisley's* starboard bitts, whereas the tug master desired to use the bitts on her port bow, and, this direction having been executed, the tug proceeded, towing the ship southwesterly by a tow-line the length of which, as between tug and tow, is stated to have been fifteen feet, and with the intention, no doubt, of bringing the ship in some manner to the elevator. At the same time, Mr. Richards, who was in charge at the elevator, sent out four of his employees, who were engaged at storage, to attend to what would be necessary upon the part of the elevator in securing lines and in the mooring of the tow, when she came to her station alongside of the dock. It is here that a difference develops in the testimony as between the tug master and his mate, on the one

hand, and those at the dock and on board the ship, on the other hand.

Captain Waugh had given no directions to the ship-keeper, and there was no arrangement or understanding between him and Penrice, or any of the men on the ship, as to the mooring of the ship when she was brought to the dock; but Penrice seems to have supposed that it would be his duty to see to the mooring, and he had his mooring lines and cables on deck, ready for the purpose. There is no apparent reason why the tow should not have been brought directly up to the dock, as her course was nearly parallel with the dock's face, and the lines would then naturally have been passed over to the elevator employees, who were waiting on the dock to receive them. Captain Waugh, who was the plaintiffs' witness, indeed, says, in answer to the question, "Where were you intending, on that dock, to land the *Paisley*?—A. I was intending to land her along the dock. Q. How far along? You must have had some definite idea where you were going?—A. We were supposed to put her right at the elevator." What happened, however, according to Captain Waugh, was this:—

Q. Now how close in to the dock did you get the *Paisley* before she was abreast of the elevator? You didn't measure it, but tell His Lordship as near as you can what the distance was from the nearest part of the *Paisley* to the face of the dock just before she got to the elevator?

A. When she was immediately northeast of the elevator she was within thirty feet of the dock as closely as I could go, or judge.

By His Lordship:

Q. Within thirty feet of that dock when she was northeast of the elevator?

Mr. Wood: When her bow was, my Lord.

Q. That is her bow?

A. Her bow.

By Mr. Holden:

Q. How near does a ship like that need to be to get her line ashore, with the heaving line first and so on?

A. Well, I think it is practicable for—Well I shouldn't say I think; I know it is practicable for a man to get a heaving line ashore from a greater distance than that from the dock.

Q. How great a distance?

A. Some men can put a heaving line further than others. They should be able to put a heaving line a hundred feet.

Q. Then did the *Paisley* get her line ashore when she was thirty feet off, about, before reaching the elevator, as you intended? Did she get a line ashore there?

A. She didn't get a line ashore.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.
JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.
CANADA
STEAMSHIP
LINES LTD.
Newcombe J.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

There was, at the time, no order or gesture by the tug that any attempt should be made to heave a line, although the tug master says that

I kept on ahead with the steamer till we got past the elevator, expecting that he was getting a line out.

Then, having passed the elevator, the tug manoeuvred in the following manner:—

Q. And then what happened, Captain?

A. I put the wheel hard aport, swung her stern out to clear the steamer, and backed up on her.

Q. Swung her stern out, that is the tug's?

A. The tug's.

Q. And then you backed up on the tug?

By His Lordship:

Q. Swung the tug's stern out and backed up. For what purpose? What was your object in that?

A. We were supposed to back up and put her nose against the steamer and push her in to her moorings to the elevator.

Q. Well, where did you push her in, at the bow or stern?

A. Well, it would depend on—

Q. What did you do?

A. I didn't—I backed up and I saw that they didn't have a line out and the man on the bow of the *Paisley*—when I backed up our men carried their line forward on the tug—

Q. Well?

A. And Jimmy was going to let go our line.

By Mr. Holden:

Q. That is Jimmy Sykes on the *Paisley*.

A. Yes. and I saw they hadn't a line on the dock, when I got back far enough I saw there was no line on the dock and that the tow had to be stopped some way.

By His Lordship:

Q. So what did you do?

A. So I sung out to Jimmy to not throw the line off; I told the mate to take a turn on the timber head forward on the tug.

Q. Do what?

A. Take a turn on the line.

By Mr. Holden:

Q. When you say you sang out, this is your line on the tug?

A. Yes.

Q. That is your own mate?

A. Yes.

Q. And then—?

A. I backed up on the tug to check the *Paisley*.

Q. The *Paisley* was still going ahead, not enough to run ashore?

A. The *Paisley* was still going ahead.

By His Lordship:

Q. And you backed up on the tug in order to put a pull on her?

A. To stop her.

Mr. HOLDEN: You see, my Lord, as she drifted ahead she was pointing right for the *Saskatchewan*.

By Mr. Holden:

Q. And then what happened? When you tried to stop her what happened?

A. Well, I backed up on the line; the line commenced to slip on the timber head on the tug.

By His Lordship:

Q. The what?

A. The timber head. It is a snubbing post. I went ahead on the tug again to give the mate a chance to make fast—The line by this time had all run out but about 4 feet.

Q. Yes?

A. The mate—there was an eye on the inside end and he threw the eye over the timber head.

Q. Yes?

A. I backed up on the tug again.

Q. Yes?

A. And when she got the line tight—taut is a more nautical way of putting it—I rang up for full speed astern.

Q. Yes?

A. And the line parted.

In consequence, the tow, detached from the tug and deprived of power and steering capacity, pursued her course, and, although another line was substituted and made fast, it was too late to prevent the collision, the *Saskatchewan* being moored, as depicted on the chart, not more than 350 feet above the elevator, and, as was said in one of the above extracts, directly athwart the *Paisley's* course, as set by the tug. There is a suggestion that they were rather slow on the tow in receiving or making fast the substituted line, but Captain Waugh answered, in his examination in chief, that the collision and the consequent breach in the *Saskatchewan's* bow could not have been prevented, even if the delay which he alleges had not occurred.

The evidence of Mathewson, the mate of the tug, who was also the plaintiffs' witness, is in substantial accord with that of his captain, although he says he could not see very well, as he was standing low, at the stern of the tug. He says that when they cast off from the stern of the *Paisley*, and commenced to tow her forward by the port bitts, she was stationary, and that "it looked to me as if it would be an easy job to take her to the elevator"; that at that time their course was due west, two points south, which would bring them almost directly to the land; that he thinks the *Paisley's* bow came within thirty feet

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

THE SHIP
"ROBERT J.
PAISLEY"
v.
JAMES
RICHARDSON
& SONS, LTD.

of the elevator dock when she was less than half way in to the elevator, heading southwest, her stern being further out than her bow, and that he did not know whether she changed that course before striking the *Saskatchewan*. He makes the following important statement, however, which is consistent with his captain's evidence:—

THE SHIP
"ROBERT J.
PAISLEY"
v.
CANADA
STEAMSHIP
LINES LTD.
Newcombe J.

Q. After the tug had passed the elevator, then what happened?
A. Well, I had been standing right at the tow post.
Q. Yes?
A. Watching after my own work. I was expecting a call from the Captain to carry the line up, to move the line off the tow post. At that time I thought they were getting a line out on the *Paisley*.
Q. And then what happened?
A. Well, they got orders to carry the line up, the Captain told me he was going to throw his stern out and back down on the port side of her.
Q. What for?
A. To get back in place ready to shove her into the dock.
Q. And then what happened her?

By His Lordship:

Q. The Captain said he was going to do what?
A. The Captain said he was—he told me to be ready to—He was going to back the tug down on the port side of her and told me to be ready for to carry the tow line up forward to the forward timber head.

By Mr. Towers:

Q. Where was the Captain, up at the bow of the tug?
A. The Captain was up in the wheelhouse.
Q. A hundred feet away from you?
A. He could stand out there and call to me; I can go up any time he calls.
Q. Did he call you?
A. I happened to walk up the side.
Q. I thought you said you were at the bitts?
A. I did, but I walked up the side knowing that we had the *Paisley* up in its place.
Q. When you had the *Paisley* up to its place, what did you have to walk up the side for?
A. To find out if the Captain—to get my orders to move this line.
Q. To get your orders to move the line. You knew what you would have to do with the line if you were up at your place, the same as you always do?
A. I knew what I had to do with it, but I wouldn't do it until I was ordered.

In addition, Captain Waugh gives the following answers in his cross-examination:—

Q. Well then, had there been no slipping on your forward bitts, would you have taken the way off?
A. Well, if the line hadn't parted.
Q. You think you would?
A. Yes.

Q. And then, when you did get a strain on her, if the line hadn't parted, do you think you would have held it from going down on the *Saskatchewan*?

A. I think we could have stopped her.

* * * * *

By His Lordship:

Q. Do you think you could have stopped her if the line had not parted, but the slip had occurred, before that?

A. Independent of the slip?

Q. Yes?

A. The slip—I think we could have stopped before she hit the *Saskatchewan* if the line had of held, hadn't of parted.

Q. A slip before wouldn't have prevented you stopping if the line hadn't parted?

A. No, it would give us probably a couple of minutes.

It seems, therefore, to be a necessary inference that, from the beginning, the project must have been to stop the progress of the tow by reversing the tug, and that this manoeuvre was adopted, not by reason of any emergency, nor because of any failure of anticipated action by the tow to put her mooring lines ashore, but because it was a part of the towing operation, as deliberately designed and attempted by the tug, that the towing should be reversed when the tow had reached the point beyond the elevator where the tug master had directed his mate to shift the tow-line. Admittedly neither he nor his mate knew, nor had tried to ascertain, whether or not any line had been put ashore by the tow, nor had either of them made the ship-keeper aware of any intention or desire on the part of the tug that the ship should, in the circumstances, endeavour to heave a line.

Now, as to the distance at which the *Paisley* passed the elevator dock going southerly, and as to whether those on board could reasonably have been expected to put a line ashore in the circumstances, and at that distance, the appellants called the elevator employees, who, when the tug and tow were approaching, had been sent out by their superintendent to attend to the mooring. There were four of them: Dault, Colquette, Ney and Yeo. And, in considering their testimony, it should be remembered that, according to the correspondence, the tug was interested in the elevator company, and had been recommended by the superintendent of the elevator, and, of course, both tug and elevator were concerned in the success of the towing operation and the mooring of the tow.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

THE SHIP
"ROBERT J.
PAISLEY"
v.
JAMES
RICHARDSON
& SONS, LTD.
—
THE SHIP
"ROBERT J.
PAISLEY"
v.
CANADA
STEAMSHIP
LINES LTD.
—
Newcombe J.

Dault, as he testifies, came out of the elevator when the *Paisley* was to the north of it, coming southwest; "too far out to look for a line," and during her passage she remained still too far away. The dock was in course of construction at the time, and had been completed only to, or for a very short distance above, the southern side of the elevator. Beyond that there was piling, and Dault walked along, opposite the ship, as she passed. Ultimately a line was thrown, which landed upon a cluster of piles, from which it was recovered, but not in time to be of any use, for, if for no other reason, it was 65 feet out from the nearest post to which a cable could be fastened. Dault was asked,

Q. What do you say now as to whether it would have been any use or not to try to get a cable to stop the boat there?

A. Well, at the distance the boat was away from the first piling, I don't think they could have done it.

He says that the piling upon which the heaving line fell was about 100 feet south from the south side of the elevator.

Colquette testifies that, when he came on the dock, the *Paisley's* bow was to the south of the elevator, possibly about 75 feet, and that he did not expect a line, because she was further out than usual; that in practice the tow comes right up against the dock, or within a few feet.

Ney, the foreman at the elevator, who went out with Dault, says that when the vessel passed, he did not expect a line, because she was too far out, and that, when the line was actually thrown, she was "around in the neighbourhood of 150 feet, I would say," from the south end of the elevator, and that, as a rule, the tow is brought right in to the centre of the elevator, to touch the dock.

Yeo came out of the elevator on the south side, and then the ship was passing the elevator, and the pilot house of the *Paisley* was in view. Asked whether, when he got to the dock, he expected a line to be thrown, he answers:—

No, we weren't looking for one just then.

Q. Why not?

A. Well, the boat was out further than usual.

He is the man who recovered the line that was thrown from the ship to the piles south of the elevator.

These are the witnesses from the elevator, called by the defence. Then comes the testimony of Penrice and his assistants on board the tow, Sykes, Bechard and Holmes.

Penrice tells us that the *Paisley* passed the elevator dock too far away to land a heaving line with which to pull a cable ashore by hand. He estimates the distance at 100 feet, and, according to other evidence, that is a long cast, under favourable circumstances. He had been aft, on the starboard side of the *Paisley*, and came forward to the forecastle. His testimony in the record, at pages 162, line 9, to 165, line 28, and, in cross-examination, at page 183, lines 9 to 24, is worth quoting.

A. I looked at the winch to make sure that the forward line was ready for mooring purposes.

Q. Where had you got to? You only said you came forward up the starboard side. Where did you get to?

A. I came forward to about No. 1 hatch, between No. 1 and No. 2.

By Mr. Towers:

Q. Where was your forward windlass?

A. My forward windlass was in the windlass room and the mooring winch was between No. 1 and No. 2 hatch.

Q. The mooring winch?

A. Yes, sir.

By His Lordship:

Q. That is the one you looked at, is it?

A. Yes, sir.

By Mr. Towers:

Q. What did you look at it for?

A. To make sure the line was ready to heave a line for mooring purposes.

Q. And was it there?

A. It was.

Q. Did the situation cause you any thought—?

His LORDSHIP: Why suggest that to him? Just get what was done. If he was under any apprehension that is what he will tell you.

Q. We have got the mooring line there; you saw it was all right, did you?

A. Yes, sir.

Q. What next?

A. Went from there onto the forecastle, onto the bow.

Q. What did you see there?

A. Saw the tug pulling on us.

Q. At that time?

A. At that time.

Q. Pulling in which direction?

A. Well, I don't quite understand that question.

Q. Well, in which direction was the tug pulling you?

By His Lordship:

Q. Towards the elevator or away from it?

A. Well, he was pulling us about like that. (Indicating).

Q. That is parallel to the dock line, is it?

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

THE SHIP
"ROBERT J.
PAISLEY"
v.
JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY" the
v.
CANADA
STEAMSHIP
LINES LTD.
Newcombe J.

A. Practically parallel.

By Mr. Towers:

Q. Well how long did that continue?

A. Oh, maybe two or three minutes.

Q. And did you stay there during that time?—A. I did.

By His Lordship:

Q. Did you say anything to anybody on the tug?

A. I remember of—as the bow of the *Paisley* at this time was past the elevator, considerably past—

Mr. HOLDEN: Past the south side?

A. (Cont'd.): The south side of the elevator, and I passed the remark that it was time—

Q. I know, did you pass it to the men on the tug?

A. No.

Q. I don't care what you talked among yourselves.

A. That was amongst ourselves. I had no communication with the tug whatsoever.

By Mr. Towers:

Q. Up to that time had you made any attempt to get a line ashore?

A. I had not.

Q. Why?

A. I couldn't. It was too far away.

Q. Had any other man on board, to your knowledge, made such attempt?

A. They had not.

By His Lordship:

Q. Did you give any instructions to the men at this time? You saw the mooring winch was all right and the mooring line was there and you saw the tug pulling you along and you said something to them on board. Did what you said include any order to them?

A. No order to the tug at all.

By Mr. Towers:

Q. To any of your men on the boat?

A. No, it did not include any orders.

Q. Well then, what happened?

A. The tug stopped pulling and backed across our bow, that would be from the starboard bow to the port, slackening up his tow line.

Q. Did you see that?

A. I saw that.

By His Lordship:

Q. She backed across your bow?

A. Across our bow, and the men on the tug disconnected the tow line from the stern of the tug and carried the bight of it forward on the tug.

Q. Did you see that?

A. I saw that operation.

Q. You saw it perfectly. With any difficulty or without difficulty?

A. They got the bight of the line forward and they seemed to have trouble in getting sufficient turns on it; the speed of the *Paisley* going and the tug going astern they didn't have enough slack in their line to make it fast around the bitts, it was surging or rendering on them.

By His Lordship:

Q. The tug was backing, the *Paisley* going on, is that right?

A. Correct.

Q. And the result?

A. The men could not handle the tow line.

Q. They could handle it all right; you said something about they couldn't get sufficient turns?

A. Sufficient turns on the snubbing post forward.

Q. That is what you saw, or was that what you thought?

A. Well I saw that, and they also had trouble carrying the line past the stays on the side of the tug.

Q. Past what?

A. The stays.

By Mr. Towers:

Q. Well then, what, if anything, did you do?

A. When I saw them having trouble getting the line by I left the fore-castle and went down on deck where my mooring line was on the forward winch.

By His Lordship:

Q. That is the main deck?

A. Main deck.

By Mr. Towers:

Q. You went to the mooring winch?

A. Well, down to the starboard side, that would be abreast of the mooring winch, picked up a heaving line and endeavoured to pass it ashore.

By His Lordship:

Q. What did your endeavour consist of, throwing it?

A. Throwing it.

By Mr. Towers:

Q. What distance would you say you threw it?

A. Oh, I threw it 75 feet.

A. And where did it light?

A. The end of the line lit on these spring spiles, the furthest spiles to the south'ard on the dock.

By His Lordship:

Q. Did you pay it out then?

A. Well I had no more to pay out, sir. I had the end of the line in my hand.

By Mr. Towers:

Q. Well then would the *Paisley* going ahead carry it off at once?

A. Well it would tend to do that but I walked down the *Paisley* towards amidships so it wouldn't be pulled off these spring spiles.

Q. I show you Exhibit C-2 where "Piles where Yeo got heaving line" are shown. Is that correct?

A. That is correct.

Q. Then what?

A. One of the elevator men secured the end of the line; by this time I was nearly amidships on the *Paisley*; I called for another heaving line, intending to tie the two of them together and make it fast to the cable.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

By His Lordship:

Q. Whom did you call to?

A. One of the two men I had on the boat, Mr. Bechard.

Q. For another heaving line?

A. Yes.

Q. And—?

A. He was bringing me the heaving line and I sized up the situation and decided I couldn't get a line ashore, that is a cable ashore.

Q. Yes, and—?

A. And I told Mr. Yeo on the dock to let it go.

By Mr. Towers:

Q. Had you seen anything more of the tug in the meantime?

A. I had not; I was busy endeavouring to get that line out.

Q. And why did you decide you couldn't do it?

A. Oh it was impossible for—

By His Lordship:

Q. Yes, but why? Why was it impossible? You must have had some reason for making up your mind?

A. Well, the winches were dead, had no steam, I couldn't pull them out; I had experience with that with the other boat.

Q. Well, but I thought you said the winch was all right, the mooring winch?

A. It was ready; what I mean by that, sir, the cable was out and through the chock and on the deck to take a heaving line there, but to get that line out you have to pull it out by man power.

Q. Yes, well?

A. And that is a very slow operation when there is no steam on a winch.

By Mr. Towers:

Q. Those were the conditions under which you started, were they?

A. They were.

Q. Now you say that you sized up the situation and decided you couldn't get a cable ashore. Now just elaborate the reasons that made you come to that conclusion?

A. Well it was too far off, firstly.

Q. Yes?

A. To pull a cable and get it to a spile.

Q. Yes. Next?

A. And the fact the winches were dead, it is a very slow operation getting the cable out.

Q. Yes?

A. And also the amount of cable I would have had to put out to reach a spile would be a considerable heft.

By His Lordship:

Q. A great weight, I suppose?

A. A great weight, and would take a long time to pull it out there.

Q. And other factor? Any other reason?

A. Well, that is about all I know of.

By Mr. Towers:

Q. How close was the nearest spile it could be put on?

A. Oh it would be 125 or thirty feet from the line.

By His Lordship:

Q. From where?

A. From the mooring cable that I had ready.

By Mr. Towers:

Q. You don't mean that these piles are the ones that the mooring cable was to be put on?

A. No. You couldn't put that on them, they were no good.

Q. And the other one was no good?

A. Yes; 65 or 70 feet from that.

Q. Now you had this mooring cable ready and passed through the chock and lying on deck, you say?

A. Correct.

Q. How did you expect to manoeuvre the boat when you left your other berth?

A. Well, I expected the tug would put us right to the dock and I would pass the eye of the cable on the dock.

By His Lordship:

Q. You expected the tug to do what?

A. To put the *Paisley* alongside of the dock.

Q. Without any lines being thrown from your ship?

A. Without throwing any heaving lines, yes, sir.

* * * * *

Q. When you did go forward, her stem then being a little south of the south wall of the elevator, what instructions did you then give to your three men?

A. I came forward and went up on the forecastle and—. Oh, there was a conversation; I don't remember anything definitely, only I do remember this: That I passed the remark: He has got us going pretty fast. He had better check us pretty soon now. It was more speaking my own mind out loud than anything else.

Penrice says also, in another place, that he had two wire cables and two manilla lines, "ready to put ashore," and "for tying up the *Paisley* when she arrived at the dock."

Sykes was examined; he says nothing as to the possibility of putting a line ashore, except that "If we were close enough, we might have got a line ashore, and checked the vessel." Bechard says the tow was too far out. Holmes was also called, but he does not testify as to the distance at which the *Paisley* passed the elevator. His impression of the accident is naively summed up in the following answers. He had assisted Sykes in putting the towing line on the port bitts:—

Q. Then after that what happened?

A. Well, I couldn't just say.

Q. How long a line was that? How long was it pulled up? After you put it on the port bitts what distance ahead did the tug go?

A. Well, I couldn't exactly say that either.

Q. Well, about how far?

A. Well, I should say about a hundred feet.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.
JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.
CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

Q. And then what happened?

A. Well, I think he backed up, if I am not mistaken, and while they was backing up they was trying to make for to bring the line up to the forward snubbing post on the tug and it busted.

Q. The line busted?

A. Yes, sir.

Q. Then, where did the vessel go?

A. I think the vessel went towards the amidships.

Q. On what?

A. Towards the amidships of the *Paisley*.

Q. You mean the tug went?

A. The tug.

Q. Where did the *Paisley* go after the line bust?

A. The *Paisley* went on ahead.

Q. And where did she pull up?

A. She pulled up against another boat.

As to the rate of speed at which the tug and tow passed up on their southwesterly course opposite to the elevator dock, there are various estimates by the observers, running from half a mile an hour to two or three miles, and there seems to be no doubt that it was involved in the operation, as designed by Captain Waugh, that, at some point beyond the elevator, he would cast off the tow-line from the tug's stern, carry it forward and make it fast at her bow, and, by reversing the tug and backing up on that line, check the speed of the tow, so as to enable him to push her into place by bringing the tug into contact with the side or bow of the ship; or, as described in the evidence, by "nosing" the ship into place, a manoeuvre which did not in any wise depend upon any action on the part of Penrice, or any of his men, in the way of landing a cable, to be made fast on the dock for the purpose of checking the *Paisley's* speed.

The trial judge finds for the plaintiffs, upon the ground that the tug and tow were jointly negligent, and he says,

I accept the stories of Waugh and Mathewson that they got the bow of the *Paisley* within thirty feet of the dock, and that the course taken would throw the stern in, and I have no doubt that had those on her been ready, and proper arrangements made to have men at the dock to receive them, they could have got their lines out in time to have helped to check the steamer and, with the shoving of the tug, to safely dock her.

Now, with all due respect for the learned judge's finding, and with full realization of the difficulties, if any, involved in the case, I am persuaded, upon the whole testimony and the attendant circumstances, that the judge is mistaken, both in his finding and in permitting that finding

to influence his determination of the case. The evidence of Waugh and Mathewson, as to the distance of 30 feet, depends upon the assumption that the tug, after making fast to the forward port bitts of the *Paisley*, directed her course at a very broad angle to the face of the elevator dock, or towards the west shore of the harbour. It is not less than 175 feet from the north side of the elevator, to the place where, on the chart, Captain Waugh put the encircled cross, to which he says he headed the tug, and, if he did that, and continued in that direction, the tug would, of course, have been ashore long before the tow got within thirty feet of the dock, or any distance approximating to it. Therefore, if the tug, after shifting her line to the *Paisley's* bow, really set out upon the course which her captain says she did, she must immediately have swung considerably to the southward, because she seems to have passed the elevator dock with her tow about parallel with the dock, and on her course to collide with the *Saskatchewan*. Captain Waugh says he was immediately northeast of the elevator, when the *Paisley's* bow came within thirty feet of the dock, "as closely as I could go or judge," but the *Paisley* was being brought to the elevator in order immediately to discharge her cargo, and the intention evidently was that she should lie with her starboard side to the dock, and under the leg of the elevator. Captain Waugh, with the interest which his owners had in the elevator, and his experience in towing vessels there, knew perfectly well what should be done, and he says, "We were supposed to put her right at the elevator"; and the suggestion that he anticipated that the ship-keeper would put his lines ashore from the ship's bow to the northward of the elevator, even if he could, is impossible to accept, especially when it is evident that Captain Waugh did not intend to cast off, reverse and nose the tow in, until he had reached the point beyond the elevator where that process was attempted, and failed. Moreover, Captain Waugh never gave any order or instruction for the handling of the lines, thus shewing, since he was in charge of the enterprise, that no action on the part of the tow was at the time expected or anticipated; and, indeed, it would have been a very imprudent and perhaps hazardous step on the part of the ship-keeper and those on the dock, without direction from the tug, to have attempted

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

to check the speed of the tow while the tug was still deliberately moving her forward.

THE SHIP
"ROBERT J.
PAISLEY"

Penrice seems fully to have realized that, if a line were to be put ashore from the ship, he would be the one to do it, and the elevator employees were on the dock for no other purpose than to receive and make fast the mooring cables when landed; but not one of them considered that the vessel was within reasonable distance for that; and it is most unlikely that any of these men, who were at the time responsible for the mooring, and not unaccustomed to that service, would be apt to misjudge the situation, which was perfectly simple—unobstructed sea room, adequate tug power, an experienced master in absolute control, men at hand to execute his order. The idea of a long, flying shot, without orders, in the absence of any emergency, in the hope of checking the vessel before the tug had made known its plan and method of approach, and without any direction from the tug, can, I think, be suggested only to be rejected. It was when, in pursuance of the captain's project, he had cast loose from the tow and was endeavouring to move his tow-line to his forward bitts, and when it was discovered that the mate was having trouble with the lines, that Penrice, as a forlorn hope, made the cast which fell on the piles at a distance of 75 feet from the ship, and where the line was 65 feet from the nearest snubbing post on the dock.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

These are the facts and circumstances, as disclosed by the proof, and I can only regard the tug master's testimony as an effort on the part of the tug to excuse her own faulty navigation by alleging neglect of the tow to land her mooring lines; it is an excuse for which there is no justifiable foundation in fact. I cannot discern that, during the progress of the towing, the ship-keeper did or omitted to do anything which caused or contributed to the accident, and I see no reason to charge the owners of the *Paisley* with any fault relating to the navigation, after the *Paisley* was taken by the tug from her moorings.

Even supposing that the tug did, at one stage of her progress, bring the bow of the *Paisley*, at a speed of one-half mile an hour, to within 30 feet of the elevator dock, as the speed and distance are estimated by the tug master and his mate, that cannot, I think, be considered as completing the movement of the ship to the elevator, and it

still remaind for the tug to bring the ship alongside, where she could be moored, and where her cargo could be discharged. Penrice, the ship-keeper, had no authority, either from his owners or from the tug, to exercise independent judgment as to anything concerned with the navigation, or as to when, so long as the ship was in charge of the tug, good seamanship required that he should cast a line or perform any service connected with the movement of the ship. He was not employed by the owners of the ship for that purpose, and he had no order or authority from the tug master. It certainly did not seem to him that the time had come for mooring, and the towing or moving to the dock had not been completed when the *Paisley*, on her southerly course, was passing the dock, even if her bow were, at one stage of that passage, only thirty feet from the dock.

With regard to the port anchor, there is no doubt that Penrice, on 15th January, when the tug master 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 ship-keeper 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, and its position does not create liability on the part of the owners, upon well-known principles, which were recently discussed in the case of *Admiralty Commissioners v. S. S. Volute* (1).

For similar reasons, the evidence as to the manner in which Penrice had placed or employed his three men upon the ship during the passage, for the purpose of providing facilities and expedition for the mooring of the vessel, at the elevator, does not affect the case, because, even if Penrice had actually complied with all the conditions which the plaintiffs suggest, it is obvious that the accident would nevertheless have occurred as and when it did. I do not consider, however, that the plaintiff has succeeded

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

in attributing any fault to the ship-keeper or his men in this particular.

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

It may, I think, be fairly and safely assumed, having regard to all the evidence and the course of the trial, that the tug was competent to the service for which she was engaged; and, upon this assumption, the owners of the *Paisley* were, in my view, justified in permitting their vessel to be moved from her moorings to the elevator, as they did, under the power, direction and control of the tug, and, being not otherwise guilty of any fault, have incurred no personal liability; but the question remains whether the ship itself has become liable to the plaintiffs for the damage which, in the circumstances, the latter sustained by reason of the negligence of the tug.

Now it is evident that, in the towing of the *Paisley*, the governing and navigating authority was solely with the tug, and that the ship, in the condition in which she was, had no power to assist in the operation, either in the way of furnishing power or of directing her course. It was not contended at the hearing that the tug was in any wise the servant of the tow. Neither the ship-keeper, nor the three men whom he had employed to assist on board and at the dock in the discharge of the vessel's cargo, had any authority or duties which were unfulfilled with regard to the navigation; the ship-keeper appears to have been prepared and willing to give effect, so far as possible, to any order which he might receive from the tug master, and all such orders were in fact duly executed; it is observable, too, in this connection, that, by the Harrison Company's letter of 11th December, the only service to be rendered by the ship-keeper for which the tug stipulated was to "direct the mooring of steamers *after being unloaded*." The case therefore falls within the rule stated by Fletcher Moulton, L.J., in *The Devonshire* (1), where he says, referring to the towing of barges or other craft of the like kind,

In such cases the tow has no control over those navigating the tug. The tug is in the position of an independent contractor who performs the service of towing the barge to its destination, and who chooses for himself how he shall perform that service. I can see no reason why the misconduct of such an independent contractor should be imputed to the innocent tow, who is, in fact, no party to the wrongful act. So to impute it would be inconsistent with the general principles of our common law, and I should decline to do so unless I found a well-settled principle of admir-

(1) [1912] P. 21, at p. 49.

alty jurisprudence evidenced by a course of consistent decisions which required me to do so. When the decisions are examined, the contrary is found to be the case.

And he proceeds to consider those decisions.

In *Sturgis v. Boyer* (1), an Admiralty action *in rem*, which originated in the United States District Court, Olifford, J., pronouncing the judgment, upon appeal to the Supreme Court of the United States, used the following language:—

Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined where the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. * * * But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; * * * Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach 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 supposed, is no more responsible for the consequences of a 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 * * *.

These passages are quoted and adopted by Butt, J., sitting with Sir James Hannan, in *The Quickstep* (2); and in Marsden on Collisions at Sea, 8th ed., at p. 195, the learned author makes the following comments:—

The extent of the liability of a shipowner for engaging an unseaworthy tug does not appear to have been fully considered in this country (as to liability for employing tugs of insufficient power, see *The Bristol*

1929

THE SHIP
"ROBERT J.
PAISLEY"

v.

JAMES
RICHARDSON
& SONS, LTD.

THE SHIP
"ROBERT J.
PAISLEY"

v.

CANADA
STEAMSHIP
LINES LTD.

Newcombe J.

1929

City (1) ; in other respects this statement seems to be a correct exposition of the principles upon which the respective liabilities of tug and tow are to be determined.

If, as I conclude, the *Paisley's* owners were not guilty of any fault, it follows that they have not incurred any personal obligation. *River Wear Commissioners v. Adamson* (2), per Lord Blackburn; *The Devonshire* (3).

It is suggested, however, that a maritime lien nevertheless attaches to the tow, although innocent of any fault in itself, seeing that it was the instrument which, by reason of the tug's negligence, caused the injury. The cases were reviewed by Hill, J., in *The Sylvan Arrow* (4); but the question is, for the purposes of this appeal, in principle ruled against the plaintiff by the decisions of the Judicial Committee in *The "American"* and *The "Syria"* (5), and particularly in the case of *The "Utopia"* (6). In the latter case the judgment was pronounced by Sir Francis Jeune, who says, at p. 499:—

It was suggested in argument that, as the action against the *Utopia* is an action *in rem*, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognized. No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because, by reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed. In the recent case of *The Castlegate* (7), in the House of Lords, language used by the present Master of the Rolls in the case of *The Parlement Belge* (8), which expresses the above view, was quoted with an approval which their Lordships desire to repeat.

The appeals should, in my opinion, be allowed, and the actions should in each case be dismissed, with costs.

Appeals allowed with costs.

Solicitors for the appellant: *Galt, Gooderham & Towers.*

Solicitors for the respondent James Richardson & Sons, Limited: *Casey Wood & Co.*

Solicitors for the respondent Canada Steamship Lines Limited: *Rowell, Reid, Wright & McMillan.*

(1) (1921) 37 T.L.R. 901.

(5) (1874) L.R. 6 P.C. 127.

(2) (1877) 2 App. Cas. 743, at pp. 767, 768.

(6) [1893] A.C. 492.

(3) [1912] A.C. 634, at p. 647.

(7) [1893] A.C. 38, at p. 52.

(4) [1923] P. 220.

(8) (1880) 5 P.D. 197, at p. 218.