

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of James Playfair v. The Meaford Elevator Company, Limited; and of The Meaford Elevator Company, Limited v. The Montreal Transportation Company, Limited, from the Court of Appeal for Ontario (Privy Council Appeal No. 53 of 1912); delivered the 29th July 1912.

PRESENT AT THE HEARING :

THE LORD CHANCELLOR.

LORD DUNEDIN.

LORD ATKINSON.

LORD MOULTON.

[DELIVERED BY LORD DUNEDIN.]

The Plaintiffs in this case are the proprietors of a dock at the town of Meaford. In connection with the dock and on the quay thereof is a grain elevator which belongs to the Plaintiffs. The elevator is a tower-like structure, from which depends a long tube, commonly called the leg of the elevator, inside which are a travelling set of buckets on an endless chain, worked somewhat in the fashion of buckets in a dredger. The leg can be lifted up and let down and is in practice introduced into the hatch, and then, by an adjustable device in the end of it, kept at the proper level to bail out the grain.

On the 28th of November 1908 the steam barge "Mount Stephen" was lying at the quay, and the elevator was engaged taking grain out of her. She was secured with her stern towards the entrance of the dock, and was fastened by manilla ropes fore and aft and by two steel cables amidships attached in a fore and aft direction respectively. The cables on board the ship were led from winches round chocks, and the tightening was maintained by the steam power in the winch. Their Lordships are satisfied on the evidence, and it is so found by the Judges below, that the "Mount Stephen" was securely moored according to practice in a manner calculated to resist any ordinary strain, and to the satisfaction at the time of those in charge of the elevator.

While the unloading of the grain was going on another vessel, the "Kinmount," made its appearance in the dock, and approached the stern of the "Mount Stephen." A conversation ensued between the captain and one Wright, who was in charge for the Plaintiffs; and Wright to'd the captain of the "Kinmount" to turn round and lie against the quay beyond the "Mount Stephen" and bow to bow with her. It did not occur to anyone that this manœuvre would be attended with danger. The "Kinmount" accordingly proceeded to steam past the stern of the "Mount Stephen," proceeding on a port helm, so as to have her bow directed towards the opposite side of the dock. In the course of this manœuvre and its inception, it became evident that the moving vessel would go very near the stern of the "Mount Stephen," and the man in charge of the elevator, one Robertshaw, fearing the effect which any collision between the ships might

have on the leg of the elevator, drew up the leg of the elevator out of the hatch, No. 2, in which it was then engaged. The "Kinmount" passed on without fouling the "Mount Stephen," and Robertshaw, satisfied that the danger was passed, re-introduced the leg into the same hatch. Soon after this, having removed sufficient grain for the moment from that hatch, he ordered those in charge of the "Mount Stephen" to move the vessel forward along the quay, so as to allow of the elevator leg being introduced into hatch No. 6, the reason being in order not to disturb the trim of the vessel by lifting too much grain at one time out of the one end of the hold. The vessel was shifted forward about 70 feet and the leg let down into No. 6, when the unloading recommenced. The mooring of the vessel was done as before. In the meantime the "Kinmount" had not found the turning so easy as expected. Starting, as already said, on a port helm, she had turned so far as to be at right angles to the line of the quay at which the "Mount Stephen" was lying, when her bow grounded in the mud at the other side of the dock. She there remained for the time stuck, and then proceeded to try and get herself round by the expedient of putting out cables from the port side to the shore of the dock on the side away from the "Mount Stephen" and so to warp herself round by means of her winches. While doing so one of the cables broke. During all this time she was also working her screw. Soon after this the wire cable, which was directed forward from amidships on board the "Mount Stephen," suddenly snapped. Almost immediately thereafter the bow manilla rope parted and the "Mount Stephen" began to drift astern. Perceiving the movement Robertshaw attempted to

remove the leg from the hatch, but before he got it completely out it jammed by the continued motion astern of the boat, broke off and fell on the deck.

The present action is raised for the Plaintiffs, as proprietors of the elevator, for the damage done, and is directed against the owners of the "Kinmount" and the owners of the "Mount Stephen."

The trial Judge found both Defendants in fault and gave Judgment accordingly. The Court of Appeal exonerated the "Kinmount," but affirmed the Judgment as regards the "Mount Stephen."

The ground of action must be negligence on the part of both or either of the Defendants, and the finding affirmatively of such negligence is a necessary condition of success. Their Lordships make this remark because there was in the argument a disposition, on the part of the Plaintiffs' Counsel, to assume that if they successfully showed that the Plaintiffs had not been guilty of contributory negligence—which had been alleged against them and had been, as their Lordships think, rightly negatived by the learned Judges—it followed from their innocence that one of the Defendants, they cared not which, must be guilty. Such a view is erroneous and misleading as to the way in which the evidence should be approached. Each Defendant is entitled to have the case as against himself separately considered and unless the Plaintiffs make out that case they must fail.

As regards the physical cause of the accident there can be no doubt that it was a powerful rush or surge of water, which, getting in between the bow of the "Mount Stephen" as she lay at the quay and the quay, forced her away from the quay and broke the moorings.

There existed no cause for the water being thus set in motion except the action of the screw of the "Kinmount." But the disastrous effect of the movement of the water really depended on the current being so directed as to get between the vessel and the quay. The main direction of the current, in their Lordships' view, is not clearly accounted for, but it may be surmised was due to the particular angle at which the "Kinmount's" stern lay and at which her helm was directed, taken along with the reflecting angle which would be obtained by water flowing from the direction of the "Kinmount's" stern and striking against the inner end of the dock. In other words, their Lordships think, upon the evidence, that the water pressure put upon the "Mount Stephen," in the direction of driving her away from her moorings, was not a natural or anticipated result of the manœuvre which the "Kinmount" was performing. It is here that the case against the "Kinmount" fails. She was executing an ordinary manœuvre, having been told to turn by the Plaintiffs' own manager. It is true that he says she might have turned lower down, but she began to turn as she did with no word of protest at the time, and it did not occur to anyone that there was any danger in what was being done so long as there was no collision between the vessels as the "Kinmount" passed the stern of the "Mount Stephen." The practical proof of this is that Robertshaw, who had removed the leg while collision was possible, replaced it as soon as the "Kinmount" had passed on and was content to resume the operation of dipping.

Is there, then, any evidence to show that the subsequent manœuvre of the "Kinmount" was

conducted in a negligent manner? Their Lordships think not. Her screw was moving all the time, at least till she stuck. The attempted operation of warping was a reasonable one, and the fact of her cable parting an accident. The evidence is left very vague as to exactly what happened after the cable parted, but it is evident that, warping being no longer possible, the only way which the turning movement could be maintained would be by using the screw coupled with a certain direction of the helm. It is a matter of surmise that it was this renewed action of the screw combined with the direction of the helm that set up the current that did the mischief, but there is undoubtedly no evidence of such undue or sudden action on the part of the "Kinmount" as to bring home to her a charge of negligence with its resulting liability. To do so it would have to be found that the "Kinmount" executed a sudden manœuvre of which the ordinary consequences would be danger to the other vessel. As it is, no one, their Lordships think, anticipated, or could have anticipated, that the current set up by the screw could be reflected by the walls of the dock in the only way that made it dangerous to the "Mount Stephen."

It now remains to consider the case of the "Mount Stephen." As has been already said, their Lordships think it clearly proved that the "Mount Stephen" was sufficiently and securely moored with regard to any normal strain which could be put upon her. The only ground of liability must therefore be found in a failure at the moment these incidents occurred to take extra precautions, or a failure to communicate the danger to those in charge of the elevator which was not apparent to them but was apparent to those in charge of the "Mount

Stephen." As regards extra precautions, their Lordships are satisfied that the dangerous rush of water was a sudden occurrence, and that the breaking of the steel cable occurred before any extra ropes could be used. The failure to warn those in charge of the elevator is the ground on which the learned Judges below have founded liability. Their Lordships are unable on the facts to come to this conclusion. To do so they would have to be convinced on the evidence that the abnormal current, of a force to suggest that under the strain caused thereby the existing moorings might give way, was observed and appreciated by those in charge of the "Mount Stephen" in time to have warned the elevator men of the impending danger.

Now, that the great current was a sudden happening seems certain. The mere working of the "Kinmount's" screw during the earlier stages of the manoeuvre had caused current, but nothing of an abnormal character. Robertshaw had apprehended danger by collision but none by working of the screw. And, indeed, had it not been sudden and of short duration, it is impossible to suppose that it would not have been noticed by Robertshaw and the other men on the elevator. It is the very suddenness and shortness of the accident that absolves them from contributory negligence. So far as the evidence for the Plaintiffs is concerned, there is really no proof that the danger was seen and appreciated by the "Mount Stephen" men in time to communicate with the elevator men. Wright, the manager of the Elevator Company, saw from the window of his office the water surging and immediately thereafter the cable broke. Mott, who was on the elevator, saw the cable break, but saw nothing that indicated that a current was coming from the screw of the

“Kinmount.” Robertshaw, who had been afraid of collision, thought that all danger was over when that danger was past, and was satisfied that the “Mount Stephen” was securely moored after she had been shifted, and he observed nothing abnormal till the cable parted. Cowel in the elevator saw the cable break and had observed nothing abnormal; and Garfield, who also saw the cable break, though he says he saw a current from the screw, is not examined at all as to whether there was any changing or sudden augmentation of that current. Then the case for the Plaintiffs ends. The Plaintiffs’ Counsel was really forced to rely entirely on certain portions of the evidence of David Bourke (the passage of Edward Bourke’s evidence has evidently reference to the earlier stages of the manœuvre, when the “Kinmount” was passing the “Mount Stephen”). Their Lordships think this insufficient, because (1st) there is inextricable confusion in the testimony between the various stages of the manœuvre. Taken literally it would prove a dangerous current from the very beginning, a state of affairs sworn to by no one else and negatived by the *res ipsa loquitur* of the behaviour of Robertshaw; (2nd) Bourke was very anxious to make out that he had warned Robertshaw a second time. The trial Judge disbelieved him, and it would, in their Lordships’ opinion, be very dangerous and unfair to the Defendants to reject that part of his evidence and accept all else with which it was connected as an accurate version of facts as to which the Plaintiffs’ own witnesses had made no case.

Their Lordships are therefore of opinion that the case against the “Mount Stephen” also fails. They have come accordingly to the conclusion that the effect of the “Kinmount’s” screw in causing the abnormal current was an unforeseen

and fortuitous circumstance; that the accident was in the circumstances unavoidable and that neither blame nor responsibility can be thrown on anyone, from which it follows that the loss must be borne where it fell.

Their Lordships will therefore advise His Majesty that the Appeal of the "Mount Stephen" ought to be allowed and the Action dismissed with costs in all Courts, and the Appeal of the Meaford Elevator Company dismissed. The Meaford Elevator Company will pay the costs of the Appeals.

In the Privy Council.

JAMES PLAYFAIR

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THE MEAFORD ELEVATOR COMPANY,
LIMITED ;

AND

THE MEAFORD ELEVATOR COMPANY,
LIMITED

?

THE MONTREAL TRANSPORTATION
COMPANY, LIMITED.

DELIVERED BY LORD DUNEDIN.

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