Judgment of the Lords of the Judicial Committee of the Privy Council on the two Appeals of Maddox and others v. *Fisher and others, ships "Independence" and "Arthur Gordon," from the High Court of Admiralty of England; delivered on the* 15*th March,* 1861.

Present:

LORD KINGSDOWN.
SIR EDWARD RYAN.
THE MASTER OF THE ROLLS.
SIR JOHN TAYLOR COLERIDGE.

IN this case, on the 6th March, 1860, a collision took place off the Great Orms Head, between a brigantine of 347 tons, the "Arthur Gordon," and a steam-tug, the "Independence." The collision was so violent that both vessels shortly afterwards foundered, and cross-actions were brought by the owners of the brigantine against the tug, and by the owners of the tug against the brigantine.

The Court of Admiralty has decided that the "Independence" was alone to blame, and from this decision the present appeal is brought.

There is hardly any controversy as to the facts.

The two vessels were both bound in the same direction. The "Arthur Gordon," laden with a cargo of iron ore, was proceeding from the port of Barrow, on the Lancashire coast, to Neath, in Glamorganshire, and the steam-tug was towing a large ship of 1,000 tons, called the "I. K. L.," from Liverpool to Holyhead, on her way to Bristol. The wind was west, or west-by-south. The "Arthur Gordon" was standing north-north-west, close-hauled on the port tack. The steam-tug was standing west-north-west, or nearly head to wind. The tide was

running from the west; the sea was calm; the wind moderate. It was broad daylight, about 10 o'clock in the morning, and there was ample sea-room It appears that each vessel saw the other long before the collision, and noticed the direction in which the other was standing. Each vessel held its course till just before the collision, when the "Independence" starboarded her helm, and her stern caught the "Arthur Gordon" on her starboard quarter.

Upon this statement, it seems difficult to understand how, without some fault on the part of both ships, an accident could have happened.

It was contended on the part of the "Independence:" 1st, that the "Arthur Gordon" was alone to blame; but if not, 2ndly, that at all events she in part contributed to the accident, by negligence or misconduct on her part. 3rdly, that whatever might be the misconduct of the "Independence," the "Arthur Gordon" could not recover; for that the clauses in the Merchant Shipping Act which provide that under certain circumstances a ship which does not port her helm shall not recover damages, applies to this case, and that the "Arthur Gordon" did not port her helm.

Upon the last point their Lordships have no doubt. They agree with the opinion expressed upon that subject by the learned Judge of the Admiralty, which is supported alike by the language of the Statute and by the reasons on which the rule is founded:—that the Statute applies only to a case when vessels meet in opposite directions end-on, or nearly so, when the observance of the rule would make the vessels diverge so as to pass port-side to port-side.

If, therefore, the "Arthur Gordon" is on other grounds entitled to recover the whole or a share of the damage, there is nothing in the Act of Parliament to interfere with her right to do so.

It was urged in support of the decree that a steam-tug with a ship in tow is in no degree in a different situation from a steamer unincumbered, and that as such a steamer would have been bound to give way to a sailing ship close-hauled, the steam-tug in this case was equally bound to do so.

Their Lordships are not prepared to adopt that principle, and they agree with Dr. Lushington that

there is a very material distinction between the two cases.

A steamer unincumbered is nearly independent of the wind. She can turn out of her course, and turn into it again, with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. She is, therefore, with reason, considered bound to give way to a sailing-vessel close-hauled, which is less subject to control and less manageable.

But a steamer with a ship in tow is in a very different situation. She is not in anything like the same degree the mistress of her own motions; she is under the control of, and has to consider the ship to which she is attached, and of which, as their Lordships observed in the case of the "Cleadon," "she may for many purposes be considered as a part, the motive power being in the steamer, and the governing power in the ship towed." She cannot, by stopping or reversing her engines, at once stop or back the ship which is following her. By slipping aside out of the way of an approaching vessel, she cannot at once, and with the same rapidity, draw out of the way the ship to which she is attached, it may be by a hawser of considerable length—in this case of about fifty fathoms; and the very movement which sends the tug out of danger may bring the ship to which she is attached into it. Even if the danger of collision be avoided, it may be much less inconvenient for a ship close-hauled to change her course, than for a tug with a ship attached to her to do so. Their Lordships, therefore, are of opinion that it is not sufficient, to throw the blame exclusively upon the "Independence," to urge that she, as a steamer, was bound to make way for a sailing-vessel close-hauled, and that she neglected to do so.

They think that the law is accurately laid down by Dr. Lushington, in the case of the "Kingston-by-sea" (6 Not. of Cases, 651; 3 W. Rob., 155). He there says, addressing the Trinity Masters:—

"It may be necessary to point out to you the law of the case where a merchant-vessel is in tow of a steamer. It is well known that according to your rules (founded upon common sense and sound reason) a steamer is always to be considered as having the wind free." Then after some observations upon a different subject, he proceeds:—

"But it is said a steamer being always considered as having the wind free, is she not to be considered so when she has a merchant-vessel in tow? I consider that to be a wholly different case. It is true a steamer is always considered as having the wind free, but it does not follow that a steamer having a merchant vessel in tow is always free. That will depend upon the state of the wind and weather, the direction in which the steamer is towing, and what are the impediments to her course."

Their Lordships never intended to lay down in the case of the "Cleadon" that a steam-tug in charge of a ship must be considered as a free steamer. The case, in truth, did not raise any such question, and was in all its material circumstances a contrast to this.

In that case the "A. H. Stevens," a sailing-vessel close-hauled on the starboard tack, met the "Cleadon" in tow of a steam-tug proceeding in the opposite direction. The time of the collision was midnight; the lights only of the different vessels could be seen, and when they were first descried it could not be known by those on board the "A. H. Stevens" that the "Cleadon" was in tow of the steamer.

The vessels were on opposite but nearly parallel lines, and if the "A. H. Stevens" had kept her course as under the circumstances she was entitled and bound to do, it was in the opinion of their Lordships probable that the "A. H. Stevens" would have gone clear both of the steam-tug and the ship which she was towing. The steamer did keep clear of the "A. H. Stevens," and the "Cleadon" was following her when the "A. H. Stevens" suddenly ported her helm and ran stem-on into the starboard-bow of the "Cleadon." Their Lordships were of opinion that when the order to port was given, the "A. H. Stevens" must have known or ought to have known that the "Cleadon" was in tow of the steamer and could not possibly therefore do otherwise than follow her; that the act of the "A. H. Stevens" in porting her helm was wrong, and was the sole cause of the accident.

The first question of importance in this case then is, on which vessel was the duty imposed, under the circumstances proved in evidence, of giving way to the other. Now this question was distinctly put by the learned Judge to the Trinity Masters, but,

unfortunately, it received no distinct answer. The facts are not in dispute. The steamer, with a large ship in tow, was proceeding against both wind and tide; the schooner, with all her sails set, was sailing full-and-by, or, in less technical language, as near the wind as she could be without lifting her sails so as to impede her course through the water. In this state of things, our Nautical Assessors inform us that the schooner might, without any difficulty and with very little loss of time, have got out of the way of the steamer and the "I. K. L.;" that she might either have gone astern of the "I. K. L." or have tacked, or have hove herself up in the wind and thus have allowed the steam-tug and ship to pass; and they are clearly of opinion not only that she ought to have done so, but that the steamer had a right to rely upon her doing so, and accordingly to hold her own course. They think, therefore, that the "Arthur Gordon" was solely to blame.

We are not, however, prepared to adopt that conclusion. That one vessel did wrong by no means proves that the other did right. We think that both vessels were bound to take such measures as, when danger was seen to be imminent, would be calculated to avoid it.

It appears to us that the "Arthur Gordon," in this case, seeing that the steamer was bearing down on the line of her course, was not justified in attempting, as she did, to run across her bows, unless she was quite sure of effecting her object with safety both to herself and to the vessels which she was crossing. She was herself on her port tack, and she knew that the steamer had a ship in tow, and was not therefore in the same situation as a steamer unincumbered; she had no right to run into danger and depend on the steamer getting out of her way. We think that by the course which she pursued she occasioned the collision.

But the question remains whether the steamer did what ordinary prudence required in order to avoid it, and we are satisfied that she did not. It is plain that she might, with a very slight deviation from her course, after the risk of collision was apparent, have avoided it. She did not actually starboard her helm till the vessels were so close to each other that an accident was inevitable, yet even

then she all but cleared the schooner, striking her on the starboard quarter about three yards abaft the mizen rigging.

It is clear that if the "Independence" had starboarded a minute or two earlier she would have gone astern of the "Arthur Gordon."

The reason why she did not do so is apparent from the evidence. There was no proper person on deck to give the necessary directions. The master was below at his breakfast; the mate was ashore; the deck was left in charge of a common sailor, a young man of twenty-one, J. Williamson, who acted as mate, but was not competent to the task of managing the tug.

He says in his evidence that he had seen the schooner for nearly half-an-hour; that when he first saw her she was on her starboard tack; that she then went about on her port tack, bearing about four points on the port bow of the steamer; that she was approaching the steamer very fast under all sail; that he watched her from the look-out on the fore deck till shortly before she came in close quarters, when he went aft to the man at the wheel to give him orders to starboard the helm. Had he shouted to the helmsman instead of going aft, it is probable that he might have been in time. But the helm, he says, was not starboarded till those on board the schooner waved their hands to him to starboard. It was then too late. Had the master or mate been on deck and in charge of the tug, we have no doubt that the order would have been given in proper time and the collision avoided. Under these circumstances, we think it impossible to hold that there was not on board the "Independence" such want of reasonable care and skill as contributed to the accident.

We must, therefore, advise that the sentence below be altered by ordering the damages to be divided, and the costs below must be disposed of according to the rule of the Admiralty in such cases. There will be no costs on either side of this appeal.