Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Union Steamship Company v. *The Owners of the "Aracan" (Ships "Aracan," "American," and "Syria"), from the High Court of Admiralty of England; delivered 24th July*, 1874.

Present :

Sir James W. Colvile.
Sir Montague Smith.
Sir Robert P. Collier.

THE "American" and the "Syria" are two large steam vessels belonging to the Union Steam Navigation Company, plying between the Cape of Good Hope and London.

The "Syria," on her voyage home, became disabled, through some damage to her machinery, and put in at Ascension Island. The captain of the "American" also, on his voyage home, calling at Ascension, and finding the "Syria" disabled, determined to tow her home, and attached her to his ship by long hawsers. He entered the British Channel with the "Syria" thus in tow, and was at a distance of about 16 miles off Portland, at 11 P.M. on the 8th March, 1874, when the collision, the subject of the suit, occurred. "The American" had two white lights on her foremast, and both vessels had the usual red and green lights; the night was moderately clear, the wind west, or west-south-west. The "American," with the "Syria" in tow, was steering east by north-half-north, and going at the rate of about five knots an hour.

The "Aracan" was a sailing-ship of 788 tons register, and was going down the channel on a voyage from London to Hong Kong, and was beating against the wind.

There were cross suits in the Admiralty Court.

The account of the "Aracan" is substantially this: that she was close hauled by the wind on the starboard tack, heading about south, when she saw "the white light" (she never saw the two white lights) "of the 'American,'" at a distance of between 4 or 5 miles; that at a distance of 2 miles she made out the red lights of both vessels, and understood that one was towing the other; that, acting under the 15th and 18th Admiralty Rules, she kept her course, expecting the towing-steamer to get out of her way by starboarding her helm and passing to the stern, until finding a collision imminent, she ported her helm, as the best mode of lessening its force.

The case of the "American" and "Syria" is, that the captain of the "American" saw the green light of the "Aracan" first at a distance of a mile or three-quarters of a mile, although a good lookout was kept. That, impeded as he was by his "tow," he was unable to starboard his helm sufficiently to pass to the stern of the "Aracan," that he could not slacken his pace, because he would not have had sufficient steering way, and might have run a risk of fowling his tow or the hawsers, and that nothing remained to him but to port his helm, thereby giving the "Aracan" "more room;" that he did this, and that his ship went off one point on the port helm; that the "Aracan" starboarded her helm and so caused the collision, whereas she ought to have ported it, and either turned round on the opposite tack or have passed under the stern of the "Syria."

The learned Judge of the Admiralty Court, found that the "Aracan" was in no respect to blame, and that the collision was wholly caused by the negligent navigation of the "American." He appears to have found as a fact that there was no negligence on the part of the captain or crew of the "Syria" conducing to the accident; but after hearing further argument on this subject, he came to the conclusion that, in point of law, the "Syria" must be pronounced also to blame, on the ground that she must be taken to have been, in intendment of law, one vessel with the "American."

The present Appeal is from this Judgment.

The Appellants have much relied on the case of the "Independence," decided by this Board, and reported in 14 More's, P. C., p. 103, where a dis-

tinction is pointed out between the situation of a steamer unencumbered, and of a steamer with a ship in tow. Lord Kingsdown there observes—

"A steamer unencumbered 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."

It is true that this case was decided before the promulgation of the present regulations for preventing collisions at sea, which, in terms, direct that where the courses of two vessels involve risk of collision, the steam-ship shall keep out of the way of the sailing-ship, and that the sailing-ship shall keep her course, subject to due regard to dangers of navigation, and to special circumstances rendering a departure from the rule necessary in order to avoid immediate danger.

But the rule of navigation, though formulated, can scarcely be said to have been altered by the regulations, and the distinction taken between the relations of an encumbered and an unencumbered steamer is manifestly a just one, and still applicable. It does not go the length of absolving altogether the encumbered steamer from obedience to the rules which apply to all steamers, but it necessitates allowances being made under the circumstances of each case for the comparatively disabled condition of the encumbered steamer, and imposes upon the sailing-ship approaching her the duty of additional caution. It may be observed that, in 1863, an additional article was promulgated requiring the

towing-steamer to exhibit two white lights instead of one, doubtless for the purpose of warning all approaching vessels that she was encumbered, and not in all respects mistress of her movements.

Their Lordships have given the benefit of all these considerations to the "American," but are unable to come to the conclusion that the Judge of the Admiralty Court was wrong in pronouncing her to blame. They do not think (and in this they are confirmed by their assessors) that her not seeing the green light of the ship until the vessels were within a mile or three-quarters of a mile of each other, is sufficient to convict her of negligence in not keeping a sufficient look-out. But they think that to attempt, with the long mass behind her, to cross the bows of the ship was an extremely hazardous, and not a necessary act. Their Lordships are of opinion that she might have slackened speed, as it was her duty to do, even if she could not have starboarded, and that the collision might then have been avoided.

The "American" charges the "Aracan" with starboarding; she denies it. There is much conflicting evidence on the subject, and the learned Judge, who had the advantage of seeing and hearing the witnesses, believes the case of the "Aracan." Their Lordships, though not quite satisfied on this subject, after consultation with their nautical assessors, are not prepared to reverse this finding.

She saw at a considerable distance, according to her account two miles, two large steamers, one towing the other, with a great length of hawser between them, and she saw the red lights of both. It has been contended that inasmuch as she must or should have seen that the leading steamer was not starboarding but was porting, or, if not, keeping on her course, that she ought not to have persisted in her endeavour to pass before the bows of the steamer, but should have ported her helm, stopped her course, and turned round on the other tack. Considering, however, that the "Aracan" might reasonably have expected the "American" to keep out of her way by either starboarding her helm and slackening her speed, and that if the "Aracan" had stopped with a view to tacking this very manœuvre might have thrown her in the way of the "American" if the "American" had starboarded, their Lordships are unable to pronounce the "Aracan" to blame for

keeping her course as it was her duty to do, unless departure from it was necessitated by special circumstances to avoid immediate danger.

For these reasons their Lordships are of opinion that the "American" was to blame for the collision.

The question remains whether the "Syria," though free from blame in fact, must nevertheless be held to blame by intendment of law. The decision of the learned Judge upon this point appears to be based upon the principle shortly stated by Lord Kingsdown, in the passage which has been before cited as that on which the "Cleadon" (14 Moore, 97) was decided, viz., that the motive power was in the tug, the governing power in the ship towed. The Judge of the Admiralty Court applying this principle to the present case held that the "American" and the "Syria" constituted one vessel in intendment of law. This is no doubt an accurate representation of the relations usually subsisting in this country between the tug and the tow. The tug is in the service of the tow, the tow is answerable for the negligence of her servant, and is for some purposes identified with her. Some American cases have been cited which, though differently decided, illustrate this principle.

It appears that, in the large American rivers and lakes it is usual for a tug, which is spoken of as a public vessel, to take a number of small vessels in tow, some alongside of her, some astern. She assigns to each of these vessels its place, and they are under her direction. Under these circumstances, the American Courts have held that a vessel towed is not liable for the negligence of the tug, because the "governing power" is in the tug, not in her. The master of the "American" appears to have undertaken to tow the "Syria" under circumstances quite exceptional. Their Lordships collect that he determined to take home the "Syria," partly because he thought it his duty to his employers, who owned both vessels, partly with a view to obtain salvage from the owners of the "Syria's" cargo (which he succeeded in doing). There is no evidence of his having been hired by the captain of the "Syria," or having acted in any way under the captain of the "Syria's" control. On the contrary, it would appear that the "governing power" was wholly with the "American."

Under these circumstances, their Lordships are of opinion that the principle on which the "Cleadon" was decided does not apply to this case; that the "Syria" cannot be deemed in intendment of law one vessel with the "American," or liable for her negligence. Nor do they think that the fact of the "American" and "Syria" belonging to the same owners affects the question whether or not the "Syria" was to blame.

Their Lordships will, therefore, humbly advise Her Majesty that, in the suit of the owners of the "Aracan" against the owners of the "American" and "Syria," the Judgment be varied by declaring that the "American" alone was to blame; that in the suit of the owners of the "American" and "Syria" against the "Aracan" the Judgment be affirmed. There will be no costs of these Appeals.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—28/7/74.