THE SHIP "WANDRIAN" (DEFENDANT) ..... } APPELLANT.

AND

BENJAMIN HATFIELD (PLAINTIFF) ..... } RESPONDENT.

1907

*Feb. 22, 25.
*April 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NEW BRUNSWICK ADMIRALTY DISTRICT.

Maritime law — Collision — Negligence — Tug and tow — Negligence of tow.

A tug with the ship "Wandrian" in tow left a wharf at Parsboro', N.S., to proceed down the river and get to sea. The schooner "Helen M." was at anchor in the channel and the tug directed its course so as to pass her on the port side when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M." changed her course, without giving any signal and tried to cross her bow to pass down on the starboard side and in doing so the "Wandrian" struck her, inflicting serious injury. In an action against the "Wandrian" by the owners of the "Helen M." the captain of the former insisted that the schooner was in the middle of the channel, which was about 400 feet wide, but the local judge found as a fact that she was on the eastern side.

Held, affirming the judgment of the local judge (11 Ex. C.R. 1) that the navigation of the tug was faulty and shewed negligence; that if the "Helen M." was on the eastern side of the channel as found by the judge there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel she could easily have been passed to starboard; and that in attempting to cross over and pass to starboard when she was so near the "Helen M." as to render a collision almost inevitable was negligence on the tug's part; and that the "Helen M." exercised proper vigilance and was not negligent in failing to slacken her anchor chain as the "Wandrian" was too close and had not signalled.

Held, also, that the tow was liable for such negligence in the navigation of the tug.

---

*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Maclennan and Duff JJ.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

APPEAL from the judgment of the local judge for the New Brunswick Admiralty District of the Exchequer Court of Canada (1), holding the "Wandrian" to blame for collision with the respondent's schooner "Helen M."

The facts of the case sufficiently appear from the above head-note and are fully stated in the opinions published herewith.

Hugh H. McLean K.C. for the appellant. This case was tried on the preliminary acts without pleadings; see Williams & Bruce's Admiralty Practice, (1886), p. 368. The court will never allow a party to contradict his own preliminary act at the hearing and an application to amend a mistake in his preliminary act will not be entertained. *The "Miranda"* (2); *The "Frankland"* (3); *The "Marpesia"* (4).

The fault attributed to the "Wandrian" was in not keeping in the centre of the channel. Had she done so she would have passed the "Helen M." to port and to the westward. It was the duty of the "Wandrian" to keep clear of the "Helen M."

The faults attributed to the "Helen M." were:

"(*a*) She was at anchor in the channel of the river.

"(*b*) No lookout.

"(*c*) Collision could have been avoided if "Helen M." had slackened her anchor chains."

The plaintiff by his preliminary act asked the court to determine that the "Wandrian" was in fault in not keeping in the centre of the channel. Our answer as stated, in our preliminary act, was that

(1) 11 Ex. C.R. 1.
(2) 7 P.D. 185.
(3) L.R. 3 A. & E. 511.
(4) L.R. 4 P.C. 212.

the "Helen M." was at anchor in the channel, about the centre of the channel, and it was impossible for us, the channel being blocked by the "Helen M." and the "Roberts," to have gone down on the western side of the channel. The fault of the "Helen M." anchoring where she did prevented us taking the proper course down the river.

There was "No Lookout" on the "Helen M." and she made no attempt to get out of the way even upon the order, given several times from the tug, to slacken out the chains. Nor did she attempt to put the jib up so as to assist in preventing the collision. There was plenty of time to slacken out chain or to put up the jib.

If the "Helen M." had dropped down the river a few feet the collision would have been avoided.

The collision was an inevitable accident, as laid down in the case of *The "Europa"*(1); *The "Marpesia"*(2); *The "Virgil"*(3); *The "Volcano"*(4).

We also rely upon *The "Shannon"*(5); *The "William Lindsay"*(6); *The "Sisters"*(7); *The "Industrie"*(8); *The "Telegraph"*(9); *The "Ogemaw"*(10); *The "Sapphire"*(11); *The "S. Shaw"*(12).

There is error in the judgment below holding that the tug was merely the servant of the tow and that, therefore, the tow was liable. No general rule of that

(1) 14 Jur. 627.
(2) L.R. 4 P.C. 212.
(3) 2 Wm. Rob. 201.
(4) 3 Notes of Cases 210.
(5) 1 Wm. Rob. 463.
(6) L.R. 5 P.C. 338.
(7) 1 P.D. 117.
(8) 3 Ad. & Ecc. 303.
(9) 8 Moo. P.C. 167.
(10) 32 Fed. Rep. 919.
(11) 11 Wall. 164.
(12) 6 Fed. Rep. 93.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

kind can be laid down, *The "Quickstep"*(1) *per* Brett J. at page 200; *The "Devonian"*(2), at pages 229-230; *The "Niobe"*(3), at page 60; *The "American"* and *The "Syria"*(4).

We refer also to *Jones* v. *Corporation of Liverpool*(5); *Mabey* v. *Cooper*(6); *The "Niobe"*(7), on appeal.

Coster K.C. for the respondent. The application for amendment of the preliminary act was refused in this case; it would have defeated the object of preliminary acts. *The "Frankland"*(8).

In reply to the contention that the "Helen M." was improperly anchored in the channel, we submit that in the absence of local regulations there was no particular place in the river where the "Helen M." should have been anchored. The preponderance of evidence is that she was anchored near the eastern bank of the channel. Even if she was anchored in the middle of the channel, there was no possible excuse for the "Wandrian" colliding with her in broad daylight, as there would have been ample room to pass on either side in the channel, which is four hundred feet wide at the place of the collision. *The "Lancashire"*(9); *The "Meanatchy"*(10); *The City of Peking"*(11); *The "Batavier"*(12).

There was a lookout on board the "Helen M." who saw the "Wandrian" leave Huntley's Wharf and watched her until the time of the collision. Every

(1) 15 P.D. 196.
(2) (1901) P.D. 221.
(3) 13 P.D. 55.
(4) L.R. 4 Ad. & Ecc. 226; L.R. 6 P.C. 127.
(5) 14 Q.B.D. 890.
(6) 14 Wall. 204, at p. 212.
(7) (1891) A.C. 401.
(8) L.R. 3 Ad. & Ecc. 511.
(9) 29 L.T. 927.
(10) (1897) A.C. 351.
(11) 14 App. Cas. 40.
(12) 10 Jur. 19.

possible effort was made on board the "Helen M." to avoid the collision.

As to whether or not the collision could have been avoided if the "Helen M." had slackened her anchor chains;—

No signal was given by the tug or tow (Art. 28, "Merchant's Shipping Act, 1897"), that they were changing their course, and as the "Wandrian" had some of her head sails hoisted, which would have the effect of keeping her head over to the western bank of the channel, the "Helen M." would not have been justified in slackening the anchor chains until the collision was so imminent that it could not have been averted by so doing.

The contention that the tug alone was liable was not set up in the preliminary act, but it is absolutely answered by the judgment in the court below and cannot be maintained. The master of the "Wandrian," hired the tug to tow his vessel to sea. The tug was, therefore, the servant of the "Wandrian," and the "Wandrian" was liable. In matters of collision, the tug and the tow are one vessel. Towed as the "Wandrian" was, the motive power is in the tug, and the governing power in the ship. *The "Cleadon"*(1); *The "American"* v. *The "Syria"*(2); *The Devonian"* (3); *The "Niobe"*(4).

Under these circumstances, the "Wandrian" has not relieved herself of the responsibility placed upon her, or shewn that this accident was inevitable and she must be held to be entirely in fault.

We would also refer to *The "Mary"*(5); *The "Sin-*

(1) 14 Moo. P.C. 92.
(2) L.R. 6 P.C. 127.
(3) (1901) P.D. 221.
(4) 13 P.D. 55.
(5) 5 P.D. 14.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

quasi" (1), *and The "American" and The "Syria"* (2), at page 133.

THE CHIEF JUSTICE.—As explained by my brother Davies who has made a detailed statement of the evidence there is little, if any, difference between the parties to this appeal as to the facts connected with the collision except possibly with reference to the exact location of the respondent's schooner in the channel.

By consent of parties the evidence was taken under the rule on the preliminary acts and no pleadings were filed. The defence of inevitable accident which was urged most strenuously here does not appear to have been averred. *The "E. Z."* (3).

The collision occurred at three o'clock on the afternoon of the 28th November, 1904. The schooner "Helen M." of 62.25 tons burden was lying at anchor, somewhat above the most frequented part, in the Parrsboro River about the middle of the channel as alleged by the appellant, and on the eastern side of the channel as found by the trial judge. In my view of the case the exact location is not material. The channel at this point is about 400 feet wide. The tide was within half an hour of flood; the current flowing up the river at the rate of about half a mile an hour; the wind was N.N.E. blowing a good breeze, about four miles an hour, down the river.

The steam tug "Flushing" with the "Wandrian" in tow started from a place called Huntley's Wharf about two thousand feet distant up the river from the "Helen M." to go down the river and out to sea. To

(1) 5 P.D. 241. (2) L.R. 6 P.C. 127.
(3) 33 L.J. (Adm.) 200.

do this it was necessary to pass the "Helen M." which lay in full view of both tug and tow from the time they started on their voyage. It is to be noted that the head sails of the "Wandrian" were set and she was drawing about 17 feet of water. The total length of tug, tow line and tow was 420 feet (tug 125, hawser 150 and tow 145).

The theory of the appellant is that the "Helen M." was anchored about the centre of the channel and the course the tug was bound to follow with her tow after passing the small island called "The Middle Ground" was to the west over towards the Newville wharf and then down the starboard side of the river; that in attempting to do so the tug saw the channel was blocked by reason of the fact that a schooner called the "Roberts" was hauled out from the beach on the west side into the starboard channel 160 feet and lay in this position at a distance of about 160 feet to 200 feet below the "Helen M." and if the tug with her tow had passed the schooner at anchor on her port side she could not get between her and the "Roberts" without risk of collision and because of these conditions the tug was obliged to cross over with her tow to the eastern side of the channel under the bow of the schooner at anchor and in attempting to carry out this manoeuvre the collision occurred.

The captain of the "Wandrian" at page 116 of the case says that the only chance of avoiding a collision on that day was to pass down on the eastern side, and in his opinion that was the proper course to take. Why this course was not taken at an earlier stage does not appear and no satisfactory explanation of the delay has been offered. If, as found by the judge, the schooner was at anchor upon the eastern

1907

THE SHIP "WANDRIAN" v. HATFIELD.

The Chief Justice.

side of the channel then there was ample room to pass on her port side without danger. If, on the contrary, she was, as alleged by the appellant, anchored in the centre of the channel there was ample room to go down passing starboard to starboard and the fault on the part of the tug and tow consists on their own theory in not having attempted this sooner and having delayed too long the collision happened.

Admitting as contended by the appellant that under ordinary circumstances the starboard side after leaving the island was the proper side to take and that channel being blocked by the "Roberts" the tug and tow were forced to go over to the eastward or port side, and to do so were obliged to cross under the bows of the "Helen M." was this not an extremely hazardous undertaking? In view of the condition of the tide, the direction and strength of the wind, the head sails carried by the "Wandrian," the fact that she drew 17 feet of water, the attempt of the tug with a long mass behind her to cross the bows of the schooner was not only hazardous but under the circumstances quite unnecessary and the result was inevitable. The people on board the tug and tow should have realized the position sooner and directed their course at an earlier time to the eastern side of the channel. Of course this assumes the accuracy of appellant's statement of conditions which is at variance with the facts as found by the trial judge, and a careful examination of the evidence has confirmed the conviction left with us when the argument closed that the findings of fact by the trial judge were justified by the evidence, and as he tells us he had the great advantage, which is in such a case as the present unappreciable, of hearing all the witnesses and observing their demeanor.

There are really but two questions to be considered: First, did the schooner "Helen M." keep a vigilant lookout and take all the precautions to avoid the collision which the circumstances of the anchorage required?

The trial judge found: First, that proper vigilance was exercised by those on the schooner to avoid the collision: Secondly, that the tug gave no signal to indicate her intention to alter her course and cross over from the western to the eastern side of the channel: Thirdly, that when the two men on the "Helen M." became first aware of the change in the direction of the tug they went forward to let out the chain but the "Wandrian" was too close to do anything and that their explanation of the failure to let out the chain was adequate. If in consequence of the change in the course of the tug the schooner at anchor was expected to take action to avoid the collision, such change in her course should have been indicated by proper sound signals.

In the *"Batavier" Case*(1), Lushington J. says:

> The principle of law where a vessel is run down by another I take it to be this: That the vessel running down the other must shew that the accident did not arise from any fault or negligence on her own part * * * and it is the duty of every vessel seeing another at anchor whether in a proper or improper place and whether properly or improperly anchored to avoid, if it be practicable and consistent with her own safety, any collision.

The second question: Is the tow responsible for the consequences of the collision in the circumstances? It was laid down in *The "Energy"*(2), that the master and crew of the tug are the agents of the owners of the ship and for damage done to a stranger

(1) 10 Jur. 19.

(2) L.R. 3 Adm. & Ecc. 48.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

The Chief Justice.

solely through the fault or incapacity of the crew of the tug both parties are answerable.

In the case of *The "Niobe,"* (1) Sir James Hannem suggests that possibly if the collision had been brought about by sudden manoeuvring on the part of the tug which the tow could not control that the tow might be held blameless, but for the purposes of this case it is sufficient to adopt the language of the Privy Council in *The "American" and The "Syria"* (2):

> The tug is in the service of the tow, the tow is answerable for the negligence of her servants, and is for some purposes identified with her.

And there is no evidence to shew that the manoeuvre which resulted in the collision was adopted without the concurrence of the tow. The contrary would appear to be the case. Those in command of the tow might have refused to execute the orders of the tug as they would in case of gross negligence by a pilot. *The "Duke of Manchester"* (3).

In the appellants' factum the circumstances out of which the collision arose are thus given:

> The tug finding the starboard channel blocked changed her course to the eastward and on her starboard helm so as to take the "Wandrian" across the channel in front of the "Helen M." and go down on the port side of the channel or to the eastward of the "Helen M." The captain of the "Wandrian" was at the wheel and as soon as the tug changed her course he put his helm hard a-starboard and put it in the becket. The tug was drawing about nine feet of water and the "Wandrian" drawing sixteen feet ten inches. The "Wandrian" being loaded could not, of course, answer her helm as quickly as the tug. The tug put her helm hard a-starboard so as to assist the "Wandrian" to swing to the eastward.

(1) 13 P.D. 55. (2) L.R. 6 P.C. 127.

(3) 2 Wm. Rob. 470, 479.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

The Chief Justice.

In the case of *The "Energy"* (1), Sir Robert Phillimore says:

> So long ago as the 23rd of November, 1867, this court decided that a vessel called the "Lizzie Aisbitt," in tow of a tug called the "Energy" was alone to blame for a collision with a vessel called the "Mary." The case was argued before me by the present Mr. Baron Cleasby and Mr. Justice Brett; and I was assisted by Trinity Masters. The collision took place in St. Clement's Reach, in the River Thames, between 9 and 10 a.m. of the 1st of April, 1867. In that suit the pilot on board the "Lizzie Aisbitt" and the master of the tug "Energy" were both examined on behalf of the "Lizzie Aisbitt," but the evidence of the pilot was that the collision was caused by the misconduct of the tug, *for which, of course, so far as concerned the "Mary," the "Lizzie Aisbitt" was responsible.*

I have not been able to find that the law as stated by Sir R. Phillimore has ever been doubted.

The appeal should be dismissed with costs.

GIROUARD J.—I concur in the opinion of the Chief Justice.

DAVIES J.—This appeal is from the judgment of Mr. Justice McLeod, the local judge in Admiralty for the District of New Brunswick, condemning the ship "Wandrian" for damages to the schooner "Helen M." caused by a collision between the two ships in the Parrsboro river on the 28th November, 1904, about three o'clock in the afternoon and about half an hour before high water.

The "Wandrain" was at the time being towed from Huntley's wharf where she had loaded, down the river to the sea.

The main questions in dispute were: First, whether the collision was caused by the negligence

(1) L.R. 3 Adm. & Ecc. 48, 51.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

and want of care and skill on the part of the tug or was due, as contended by the "Wandrian," to inevitable accident; Secondly, if due to the want of care, judgment and skill on the part of the tug, was the "Wandrian" responsible?

After hearing the argument of Mr. McLean on behalf of the "Wandrian" we were all of the opinion that the collision was not the result of inevitable accident but of the unskilful and improper management and manoeuvring of the tug. A careful examination of the evidence since the argument has convinced me that we were right and that the findings of the trial judge were proper.

The evidence has been carefully analysed and reviewed by the trial judge and agreeing as I do with him generally I do not see that any good purpose would follow a repetition of the reasoning he has adopted.

The collision took place in broad daylight in fine weather with hardly any tide running and only a few hundred yards from the wharf from which the tug had taken the "Wandrian" in tow.

The schooner "Helen M." was lying at anchor in the channel of the river which at that place was about 400 feet wide, and some distance below the "Helen M.," a vessel called the "Roberts" was being kedged or hauled from the flats on the western side into the channel and was lying almost her entire length in the channel.

Both the "Helen M." and the "Roberts" were in full view of the "Wandrian" and her tug while starting from Huntley's wharf on the river and there was nothing to obscure or prevent the lookouts on both tug and tow from seeing the relative positions of both

these vessels from the time the "Wandrian" started until the collision occurred a few hundred yards down the river.

A copy of an official plan or chart shewing the river with its channel and the flats on either side and the depth of water on the flats and in the channel at "average high water ordinary spring tides" was in evidence.

From the plan or chart it appears that the depth of water in and across the channel at about 300 feet south of the collision was almost uniform and was between 23 and 24 feet, while on the flats it was somewhat less.

No evidence was given shewing that there was any difference between the depth at the actual spot where the collision occurred and the line a few hundred feet further down where the soundings were marked on the plan.

The weight to be attached to the argument of Mr. Maclean that the tug and tow were obliged owing to the alleged shallowness of water on the eastern side of the channel after passing the shoal or island called the Middle Ground marked on the plan to hug the western side of the channel obviously depended upon the existence of evidence shewing this shallowing of the channel at that particular spot, and that it would consequently have been unsafe for the tug to have towed the "Wandrian" down the centre of the channel or along the eastern side of the channel which from his contention barring shallowness was perfectly clear and open.

Time and again during the argument we asked for the evidence or proof of this fact so essential for the defendant's case, but no evidence was or could be

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

produced, the only evidence to which our attention was called being that of witnesses who spoke of the necessity of vessels after passing the Middle Ground keeping towards the eastern shore because the flats ran out a little and formed a small point there and there was somewhat of a bend in the channel. Not a single witness however stated or proved that so far as the channel itself was concerned its depth was not the uniform depth marked on the chart a few hundred feet lower down.

The theory of the counsel for the "Wandrian" was that the "Helen M." was anchored on the western side of the channel and that the tug proceeded with her tow down the river and after passing the Middle Ground kept to the western side of the channel intending to pass between the "Helen M." and the western edge. That the tug had almost reached the "Helen M." when the captain suddenly discovered he could not safely pass down on the port side of the "Helen M." and determined to pass on the starboard side, starboard to starboard.

That to effect this he put his helm a-starboard, crossed the bows of the "Helen M." and fearing that his tow might not successfully do so pressed his helm hard-a-starboard so as to pull her up the river and escape collision.

He was not successful, however, in executing this manoeuvre and his tow with her head sails up came into collision with the anchored vessel and caused the damage complained of.

The initial mistake in the navigation of the tug and tow was in proceeding as far as the spot where a sudden change of course was determined upon and the mistake was duplicated in then attempting to cross as

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

was attempted the bows of the "Helen M." there lying at anchor. As it was evident from the evidence of the captain of the tug that this manoeuvre was a somewhat hazardous one the keeping of the head sails on the "Wandrian" with the wind blowing down the river and the chances of collision so strong, seems to indicate carelessness and want of judgment on the part of those in command of that ship.

When the captain of the tug had reached the position when he concluded he could not safely continue his course between the "Helen M." and the western bank of the river, it might have been better for him to have made the best of a situation created by his want of judgment, and to have taken her to the Newville wharf, abreast of which he was, as suggested by the trial judge. In our opinion, however, if the "Helen M." was anchored where the defendant contends she was, on the western side of the channel, the tug and tow should have passed down on the eastern side and not have crossed over to the western at all. Why, granting the position of the "Helen M." in the river to have been where defendant contends, this was not done we cannot understand. The road was open, everything clear, and the depth of water ample with the risk of collision nil. If, on the contrary, the position the "Helen M." was anchored at was on the eastern side of the channel as found by the learned trial judge then the sudden change of course on the part of the tug and tow across the bows of the anchored vessel in order to pass her on her starboard side was at the moment it was taken, altogether too late and indefensible. They should, in that case, have passed down on the western side of the "Helen M."

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

as the trial judge has found and granting he has correctly found the anchored location of the schooner his conclusion seems irresistible.

I am utterly unable to accept the theory of inevitable accident. On the contrary I am of opinion that the collision was caused by the want of skill and judgment of those in charge of the tug and tow.

On the second question as to the liability of the tow for a collision between it and the anchored ship caused by the unskilful navigation of the tug, I have reached the conclusion that in the circumstances of this case the tow is liable.

There may be a difference in the application of the legal rules and principles governing such cases between the English and American courts, and it does seem difficult if not impossible to reconcile all the authorities. But we are bound to follow the English decisions and we think they clearly indicate liability on the part of the tow for such a collision as this. Of course we have nothing to do with the rights and liabilities of the tug and tow *inter se*.

The question is confined to the liability of the tow for damages caused by a collision between her and a third ship even if brought about by the faulty navigation of the tug.

Here there were no exceptional circumstances to take the contract of towage out of the ordinary rule. That rule I deduce from the authorities to be that under an ordinary contract of towage the tow has control over the tug and the latter is bound to accept the directions and orders of the former. There are exceptions to this rule notably in the cases of dumb barges and canal boats having little or no control over their own movements and where, by custom,

contract or necessity, the control of the tow is in the tug. But in the absence of any such factors I take it to be clear under the English authorities that the control is in the tow.

Mr. Marsden in his work on Collisions (5th ed.) after a review of the English Admiralty Cases has reached that conclusion; see pp. 169 and 173.

In the case of the *Union Steamship Company* and *The "Aracan," The "American"* and *The "Syria"*(1), the Judicial Committee reversing the decision of the High Court of Admiralty held that having regard to the exceptional circumstances under which the towing in that case was undertaken the governing as well as the motive power being wholly with the tug the tow was not liable to be condemned in damages occasioned by the collision. At page 132 their Lordships say:

> 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"* (2), 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 "Syrian" 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.

The case of *The "Niobe"*(3), is also in point. There it was held by the President, Sir James Han-

(1) L.R. 6 P.C. 127. (2) 14 Moo. P.C. 97.
(3) 13 P.D. 55, 59.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

nen, that where a tug with a vessel in tow came into collision with another vessel which was seriously injured by the tug but not by the vessel in tow, and where the collision might have been avoided had there been a good lookout on the vessel in tow and had she warned the tug that the latter was in danger of collision by continuing on her course, the owners of the tow were liable.

In the case before us the scope of hawser was about 25 fathoms only and there are no circumstances whatever to indicate any difficulty on the part of the tow in directing the control of the tug's movements. The evidence of the captain of the tow makes it plain that he took no pains in the matter at all, but left the tug to manoeuvre as it pleased. This, however, cannot absolve his vessel from liability if the control was in him. His duty was to exercise that control and his failure to exercise that duty cannot enable him to escape liability where a collision occurred through the tug's fault.

In the later case of *The "Devonian"* (1), where the tow was held liable for the fault of the tug in exhibiting misleading lights the relative liabilities of tug and tow are discussed.

Sir F. H. Jeune P. who heard the case, in his judgment, at page 230, says:

> It appears to me the tow is responsible for the conduct of the tug so far, at least, as she can practically and reasonably exercise the control.

On appeal Lord Chief Justice Alverstone delivering the judgment of the Court of Appeal holding the tow liable, says:

(1) [1901] P.D. 221.

With regard to her responsibility, (that is the tow's), apart from the statute, I do not think there is any doubt about the law, though there was difficulty about its application until the case of *The "Cleadon"*(1) (in 1860), when it was recognized that where one ship is in tow of another the two ships are by intendment of law for some purposes to be regarded as one, the commanding or governing power being with the tow, and the motive power with the tug.

The contract of towage in this case before us being a general one, there being no special circumstances shewing the control to have been in the tug the action of the master of the tow in hoisting and keeping up his head sails and the short distance between the two ships shewing the exercise of control by the tow to have been both practical and possible and to some extent at least to have been exercised all combine to remove this case from the exceptions which appear to exist in the towage of dumb barges and canal boats or such cases as *The "American" and The "Syria"*(2), from the judgment of the Judicial Committee which I have quoted above and where it was held that the motive power and the control were alike in the tug.

I think we are bound to apply in this case the general rule laid down by the Privy Council in the cases of *The "Cleadon"*(1), approved of by the Court of Appeal in 1901; in *The "Devonian" Case*(3) and in the case of *The Union Steamship Co.* and *The "Aracan"*(2) quoted above.

The appeal should, therefore, be dismissed with costs.

MACLENNAN J. concurred with Davies J.

DUFF J.—I agree with the Chief Justice.

(1) 14 Moo. P.C. 92, 97. (2) L.R. 6 P.C. 127.
(3) [1901] P.D. 221.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Appeal dismissed with costs.

Solicitor for the appellant: *Fred R. Taylor.*

Solicitor for the respondent: *C. J. Coster.*