HOUSE OF LORDS.

Friday, July 19, 1912.

(Before the Lord Chancellor (Viscount Haldane), the Earl of Halsbury, Lords Ashbourne, Macnaghten, and Atkinson.)

OWNERS OF STEAMSHIP "DEVONSHIRE" *v.* OWNERS OF BARGE "LESLIE" AND OTHERS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Ship—Collision—Tug and Tow—Collision with Third Vessel—Liability for Damage—Admiralty Rule for Division of Loss.

When a barge in tow of a tug was sunk by a steamer owing to the joint negligence of tug and steamer, *held* that the owner of the barge was not responsible for the tug's negligence, there being no relation of master and servant between them, and could recover the whole loss from either wrongdoer.

Appeal from a judgment of the Court of Appeal (FLETCHER MOULTON and BUCKLEY, L.JJ., with nautical assessors, VAUGHAN WILLIAMS, L.J., *diss.*), sustaining the judgment of Sir S. EVANS, President of the Admiralty Division, 1912, P. 21.

The respondents were owners of the barge "Leslie," which, on the river Mersey, whilst in tow of a tug which was responsible for the navigation, collided with the s.s. "Devonshire," and sustained such injury that she sank. In an action by the owners of the barge to recover their loss it was held that both the "Devonshire" and the tug were at fault. The plaintiffs claimed to recover the whole loss from the defendants the owners of the "Devonshire," who maintained (1) that the negligence of the tug was constructive negligence on the part of the tow; (2) that in any case by the Admiralty rule for division of loss the liability of the "Devonshire" was restricted to half the loss.

Their Lordships' considered judgment was delivered by

LORD CHANCELLOR (HALDANE)—[*After a narrative of the facts of the case*]—The defendants have appealed to this House. They accept the decision on the facts of the Judge of first instance, and their appeal is confined to the question of law, Whether, under the circumstances, they ought to have been condemned in the whole of the damages or merely in half?

Shortly stated, their case is that the tug as well as the "Devonshire" having been found to be in fault, the Admiralty rule as to division of loss applies, and the "Devonshire" as one only of two delinquents was liable for merely a moiety of the damage. They contend further that the owners of the tow having committed its navigation to the tug, cannot be treated as though the tow was in the position of a wholly innocent ship, and at all events cannot be in a better position than the owner of cargo on board a ship which is partly to blame, such owner being, they say, precluded from recovering more than half the damage to his cargo from the owners of the other delinquent ship. The questions thus raised involve to some extent consideration of the principles which govern the relations of the Admiralty Court jurisdiction to that of the common law, for by the common law, if the respondents were entitled to succeed, they would plainly be entitled to recover the whole of the damage, and this right can be cut down only by showing that there exists an Admiralty rule which displaces it.

It is not necessary for the purposes of this appeal to investigate in detail the origin of the jurisdiction of the Admiralty Court. It is sufficient to say that this jurisdiction had its origin mainly in the authority of the Lord High Admiral of England, the *custos maris*, who exercised the jurisdiction of the Crown in respect of the command and charge of the sea. The Admiralty Judge of later years was in theory his deputy. By degrees the Court of the Lord High Admiral acquired an extensive jurisdiction in civil suits relating to the sea and the estuaries of rivers, and a body of maritime law grew up founded on the unwritten usages of seafaring men and on the traditions of other countries, such as the so-called law of Rhodes and the customs of Oleron. It was inevitable that sharp conflict should arise between this jurisdiction and that of the courts of common law, and accordingly from the period of Richard II downwards statutes were from time to time passed which endeavoured to limit the title of the Court of Admiralty to take cognisance of rights relating to maritime matters but arising out of transactions on land. The popularity of the Court of Admiralty appears to have rested in a considerable measure on its freedom from certain technical rules of procedure which were applied inexorably by the Court of common law and on its power of proceeding *in rem*.

This power was so different from the procedure of the common law courts that the latter did not attempt prohibition against its exercise, and in consequence the system of initial arrest of the ship and cargo in order to found jurisdiction gradually developed into an extensive practice. Some account of its growth is to be found in the judgments in this House in the *Mersey Docks and Harbour Board* v. *Turner* (1893 A.C. 468). When the Judicature Act of 1873 was passed the Admiralty Court had thus come to possess a well-defined and large jurisdiction, which had frequently been recognised by statute and a body of law which it alone administered. By section 16 of the Act of 1873 the jurisdiction of the High Court of Admiralty was transferred to the new High Court of Justice, and the effect of section 24 (6) was to bind this Court to give effect to all rights and duties existing by custom, as did those under Admiralty law. Section 25 (9), which is an important section for the purposes of this appeal, however, enacted that in any cause or proceeding for damages arising out of a collision

between two ships, if both ships shall be found to be in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail.

At common law, unless the tow in the present case is to be regarded as having been so identified with the tug as to have been guilty with her of faulty navigation, there is no doubt that the owners of the tow, as being an innocent vessel, would be entitled to recover the whole of the damage from the appellants.

The first question which arises is therefore whether the tow is to be regarded as thus being in fault like the tug. Then there is the further question, whether, if the tow is not in fault, an Admiralty rule precludes her from recovering more than half her damage from the "Devonshire" by reason of the latter having been only one of two guilty ships, the tug having been the other. It seems clear that by Admiralty law the whole of that damage to an innocent ship by collision could be recovered if the party defendant was exclusively to blame, and that whether his proceedings were *in rem* or *in personam*. If, however, the owner of one ship brought an action against the owner of another for damage by collision, and both the plaintiff and defendant ships were found to blame, the party proceeding recovered only a moiety of the damage. Perhaps the best exposition of the principles on which these rules rest was given by Lord Stowell in the case of "*The Woodrop Sims*" (1815, 2 Dods 83), which was approved in this House in *Hay* v. *Le Neve*, decided in 1824, and reported in 2 Sh. App. 395). In "*The Milan*" (1861, Lush. 388) Dr Lushington did not extend the fourth of Lord Stowell's principles to the case of an innocent cargo owner whose cargo was on board one of two ships in fault, and decided that the cargo owner could only recover half his damage against the particular ship sued. He came to this conclusion, however, not on the ground that the owner of the cargo was constructively to blame, as had been contended in reliance on the common law case of *Thorogood* v. *Bryan* (1849, 8 C.B. 115), but because he held that the Admiralty rule limited the liability to half of the damage in the case of each of two ships both to blame, and that the cargo owner was not entitled to affix to the ship which he had selected as defendant more than half the blame and damage. In so far at least as he refused to follow *Thorogood* v. *Bryan*, his decision was approved by this House in the case of "*The Bernina*" (1888, 13 A.C. 1).

I have now to consider whether the principle thus applied to cargo on board one of two ships both to blame applies also to a tow under the control of a tug which is equally to blame with a defendant third ship. In the case of "*The Quickstep*" (1890, 15 P. D. 196), Butt, J., in delivering the judgment of Sir James Hannen and himself, laid down that where a tug and its tow come into collision with an innocent ship the question whether the owners of the latter can recover damages against the owners of the tow depends on whether the relation of master and servant obtains between the owners of the tow and those of the tug. Unless this relation is established, he said that there was no liability on the part of the tow.

I think that as the doctrine of identification as enunciated in *Thorogood* v. *Bryan* has now been swept away, the principle so laid down was right, and that it is a simple application of the rule established in the well-known case of *Quarman* v. *Burnett* (1840, 6 M. & W. 499). No relation such as that of master and servant was established in the present case, and the tow was therefore an innocent ship, and its owners are at common law entitled to recover the whole of their damages from the owners of the "Devonshire." This disposes of one of the appellants' contentions, and on principle I think that it also disposes of the contention that blame for breach of sailing regulations can be affixed to the tow — *Morgan* v. *Castlegate Steamship Company*, 1893 A. C. 38, *per* Lord Watson, and "*The W. H. No. 1*" and "*The Knight Errant*," [1910] P. 199, [1911] A.C. 30.

The second point made by the appellants is that the analogy of the decision in "*The Milan*" as to the right of the owners of cargo on board one of two ships to blame being limited to one half the damage as against the other ship, applies to the case of the "Leslie."

The first question which arises on this point is whether there was a rule in force in the Court of Admiralty which limited the right of an innocent tow to recover in such a case as the present. I have examined the authorities such as they are, and I do not think that they establish any general rule which covers the case. "*The Milan*" is the authority which comes nearest to suggesting what the appellants contend for. But when the judgment of Dr Lushington is examined I think that it appears that while he rejected the case for identification so far as based upon the common law principle said to be laid down in *Thorogood* v. *Bryan* with reference to a passenger in an omnibus he still may be taken to have considered that the fact of the cargo having been on board one of the ships to blame was a circumstance material to be taken into account in deciding whether the cargo owner could so dissociate his cargo from the ship as to be outside the Admiralty rule.

The language of his judgment appears to me to be open to the criticism that he does not make it plain whether he was influenced by a view which would account for his conclusion if he held it, or whether he meant to lay down the much broader principle now contended for, to be applied in all cases where an innocent third party sued one of two delinquent ships. If the former, then the decision in "*The Milan*" is an authority for the application of the rule to the case of cargo on board one of two delinquent ships, an application which was approved by this House in "*The Drumlanrig*" (1911 A.C. 16), but for nothing further. If he meant to lay down the more

general proposition it is sufficient to say that it was unnecessary for a decision concerned merely with cargo forming one *res* with the ship, though differently owned, and that the general proposition is, to say the least, by no means clearly borne out by either the older or the subsequent authorities.

Where as in the present case the tow was completely under the control of the tug, and did not stand to the latter in the relation of master and servant, I think that the tow is to be considered as an innocent ship in no sense identified with the delinquent tug, and I see no reason for extending to a tow so situated the analogy of cargo on board a ship to blame. I agree with the reasoning on this point in the judgments of Fletcher Moulton and Buckley, L.JJ.

I have come to the conclusion that the appellants have failed to show that there was a rule in force in the Court of Admiralty that the owners of an innocent ship could not recover the whole of the damage which she had sustained against one or two ships both to blame for a collision with her. Apart from section 25 (9) of the Judicature Act 1873, I am therefore of opinion that the respondents are entitled to succeed. This renders it unnecessary to decide the point whether when the conclusion has once been reached that the tow was innocent the section in question entitles them to succeed on another ground. This is not a case in which the ships of the appellants and respondents have both been found to be in fault, and if not the section does not apply to the case.

It has been argued that the words mean to go further, and to exclude any other case than that of ships both to blame, and that the Legislature intended to provide that as between ships both to blame, and in such cases only, the Admiralty rule should prevail if these were at variance, and it is said that this may well have been because those who framed the statute considered that it was only in such instances that there was substantial variance in the rules as to liability for collision. On this question I think it best to express no opinion in the present case. I have arrived at the result which I have indicated independently of any conclusion about it. I move your Lordships to dismiss the appeal with costs.

The EARL OF HALSBURY, LORDS ASHBOURNE, MACNAGHTEN, and ATKINSON concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellants—Leslie Scott, K.C.—Dawson Miller. Agents—Pritchard & Sons, for Collins, Robinson, Driffields, & Kusel, Liverpool, Solicitors.

Counsel for the Respondents—Bailhache, K.C.—D. Stephens. Agents—Alfred Bright & Sons, for Batesons, Warr, & Wimshurst, Liverpool, Solicitors.

PRIVY COUNCIL.

Monday, July 22, 1912.

(*Present*—Lords Macnaghten, Dunedin, Atkinson, and Sir Charles Fitzpatrick.)

SAMSON *v.* AITCHISON.

(ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.)

Reparation—Negligence—Negligent Driving of Motor Car—Retention of Control by Owner.

Where the owner of a conveyance who is himself present allows another to drive he does not thereby give up his right to control the way in which the conveyance is to be driven and is therefore liable for the negligence of the driver.

This was an appeal from the Court of Appeal of New Zealand (CHAPMAN, DENNISTON, and EDWARDS, JJ., STOUT, C.J., *dissenting*), affirming the judgment of WILLIAMS, J., in favour of the respondent in an action by her for damages for personal injuries sustained in a collision with the appellant's motor car.

The *facts* sufficiently appear from their Lordships' judgment, which was delivered by Lord Atkinson as follows:—

LORD ATKINSON—This is an appeal from a judgment of the Court of Appeal of New Zealand, dated the 9th August 1911, affirming a judgment of the Supreme Court of New Zealand (Otago and Southland District) whereby the respondent was awarded £750 damages and £97, 6s. 4d. costs in respect of personal injuries inflicted upon her through the negligent driving of the appellant's motor car.

The person by whom the motor car was driven at the time of the accident, and who was guilty of the negligence, was one Albert Collins, the son of one Mrs Collins, an intending purchaser of this car from the defendant; and the sole question for decision is whether the majority of the Court of Appeal were right in holding that, having regard to the evidence, to the findings of the jury on the issues of fact left to them at the trial, and to those inferences of fact subsequently drawn by the trial judge in exercise of the power by the consent of the parties conferred upon him, the relation between Albert Collins and the appellant at the time of the accident was such as to make the appellant responsible for Collins' negligence. This again turned upon the question of fact, whether or not the appellant had control over his car and over Collins, the driver of it, at the time the respondent was struck and injured.

The facts, so far as material, are as follows—Mrs Collins, who lives at Oamaru, some distance from Dunedin, was in April 1910 minded to buy a Ford motor car, and desired to obtain a loan of £100 from the appellant to enable her to pay for it. On the 5th April she came to Dunedin for the