

particular, on the point that delivery ended on the goods passing into the hands of the harbour porters. *Grimond's* case in no way conflicts with the later case of *The Avon Steamship Company, Limited v. Leask & Company*, 18 R. 280, which simply decided that notwithstanding a similar provision in the charter-party, the ship was responsible, because when the cargo was being swung ashore, it was spilt between the ship and the quay—that is, to say, the Court held that the rule that responsibility ends when the goods cross the rail is subject to the qualification that those acting for the ship are not entitled to land the cargo in a careless manner or with defective plant.

Such a condition as occurs in this bill of lading may sometimes cause inconvenience to a consignee when taking delivery from a general ship if his bales are mixed up with those consigned to other merchants and require to be identified and separated. But all this was considered in *Grimond's* case and disregarded, for this amongst other reasons, that if delivery from the ship's tackles or over the rail of the ship were not taken as complete delivery, it would be difficult to find any other *punctum temporis* for delivery. Besides, in the present case the contract between the parties contains a special provision on the subject, and the case is not left to depend on any general rule or to be regulated by local custom.

The only other observation that occurs to me is this—There is a condition in the bill of lading that if the goods are not removed by the consignee, the master or agent of the ship is to be at liberty to land and warehouse the same at the consignee's expense. This, it is said, indicates that he is not entitled in any case simply to deposit the goods on the quay—that he is bound to warehouse them. But that condition, which is in favour of the ship, applies to the case of the consignee not being present or represented at the discharge. In the present case the defenders were represented by their clerk and the harbour porters from the first.

I am therefore of opinion that the defenders' case fails throughout, and that the pursuers are entitled to decree.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“Sustain the appeal, and recal the interlocutor appealed against: Find in fact (1) that the ‘Knight Bachelor’ arrived in Dundee on 13th January 1897 with a cargo of jute, part of which was consigned to the defenders; (2) that the said ship on her arrival was assigned a berth for discharging her cargo by the harbourmaster, which was a suitable berth for such discharge; (3) that at said berth the ‘Knight Bachelor’ discharged the whole jute consigned to the defenders with the exception of one bale, for which the pursuers have made payment to the

defenders; (4) that the jute consigned to the defenders was discharged by the ship's tackles on to the quay or jetty along which she was lying in the fore-said berth; (5) that the said jute was all delivered by the pursuer from the vessel in good order and condition as shipped, and was taken delivery of by the harbour porters, who were, in taking delivery, acting as the servants of the defenders; (6) that after delivery had been given and taken as aforesaid, said jute received damage at the place where it was piled or stored to the extent of £61, 7s. 6d. sterling; (7) that pursuers did not give any directions or instructions as to the disposal of said jute after the delivery thereof as aforesaid, and in particular did not direct or instruct that said jute should be deposited or stored at the place where the same was damaged; (8) that said damage was not occasioned by any fault or neglect on the part of the pursuers; and (9) that of the freight due in respect of said jute there remains (after payment of certain sums to account made by the defenders) a balance of £61, 7s. 6d. sterling due by the defenders to the pursuers: Find in law (1) that the pursuers are not responsible to the defenders for the damage sustained by said jute after the delivery thereof as aforesaid, and (2) that the defenders are liable to the pursuers for the foresaid balance of freight: Therefore repel the defences, and decern against the defenders for payment to the pursuers of the said sum of £61, 7s. 6d. with interest as concluded for: Find the defenders liable in the expenses in the Sheriff Court, and also in this Court, and remit,” &c.

Counsel for Pursuers—Jameson, Q.C.—Salvesen. Agents—Lindsay & Wallace, W.S.

Counsel for Defenders—Sol.-Gen. Dickson, Q.C.—Aitken. Agents—Skene, Edwards, & Garson, W.S.

Friday, July 1.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

PARKER v. NORTH BRITISH RAILWAY COMPANY.

Shipping Law—Harbour—Defective Condition of Harbour—Liability of Proprietors of Harbour for Fault of Harbourmaster or of Licensed Pilot Employed for Wages by Proprietors of Harbour.

A sailing ship was approaching the entrance to a harbour under the charge of a compulsory pilot. When she got within hailing distance the harbourmaster gave the orders “hard-a-port” and then “hard-a-starboard,” but before

she could answer the starboard helm she ran aground, owing to having been allowed to come too far round on a port helm. The place where the vessel stranded was a bank which had formed along a jetty which ran out from the dock gate. There was a channel of sufficient depth to float the vessel which ran out from the dock gates through the sands to the deep water. The jetty bank encroached upon this channel to some extent, but at its narrowest point it was 90 feet wide. When the ship was approaching the harbour the sands were covered with water, and there was nothing to mark out the channel, except that it was generally in the same line as the jetty. Three other ships had run aground in the channel before this one did so. The officials of the harbour had written to the proprietors intimating that owing to the existence of the bank the entrance was very difficult although not impossible if considerable skill were displayed, but no effectual steps were taken to get rid of the bank. The compulsory pilot who had charge of the ship was licensed by the Trinity House. He was paid a wage and provided with a boat by the proprietors of the harbour, and in return was bound to account to them for all pilotage dues earned by him. The reason for this arrangement was that the pilotage dues were not sufficient in amount to induce a competent pilot to practise at this port on his own account. *Held* that the proprietors were liable for the damage caused to the vessel by running aground upon the bank—(1) *per curiam*, on the ground that the stranding was due to the fault of the harbourmaster, and also (2), *per* Lord Justice-Clerk and Lord Moncreiff (Lord Trayner reserving his opinion on this point), on the ground that the entrance to the harbour was not in a reasonably safe state for navigation.

Opinion per Lord Justice-Clerk and Lord Moncreiff (Lord Trayner reserving his opinion on this point) that the proprietors of the harbour would not in the circumstances have been liable if, as contended by them, the stranding had been due to the fault of the pilot.

Opinion per Lord Stormonth Darling (Ordinary) *contra*.

This was an action at the instance of Evelyn Stuart Parker, shipowner, Liverpool, owner of the sailing ship "Genista," against the North British Railway Company, as proprietors of the dock, harbour, and jetty of Silloth, in the county of Cumberland. The pursuer concluded for payment of £5000 as damages for the stranding of the "Genista" in the entrance to Silloth Docks, which was caused, as he alleged, by the fault of the defenders, or of those for whom they were responsible.

The pursuer maintained that the stranding was due (1) to the fault of the harbourmaster, who was the defenders' servant, and (2) to the dangerous condition of the

entrance channel leading to the docks. He also maintained that even if the stranding of the vessel was due to the fault of the compulsory pilot who was in charge of her, the defenders were nevertheless liable in respect that this compulsory pilot was the servant of the defenders.

The defenders, on the other hand, maintained that the stranding was due to the fault of the compulsory pilot, and that they were not responsible for him. They admitted that if the stranding was caused by the fault of the harbourmaster they would be liable.

A proof was allowed.

The "Genista," a sailing ship of 1718 tons burden, was 270 feet long and 39 feet broad, and was drawing 21½ feet of water at the time of the accident. She arrived off Maryport, at the mouth of the Solway Firth, on 27th March 1896, with a cargo of wheat from Portland, Oregon. She then entered a district where pilotage is compulsory for vessels coming from a foreign port, and she took on board a duly licensed pilot named James Richardson. Next morning she proceeded up the Firth, with one tug ahead and another astern, on her way to the harbour of Silloth. When approaching the entrance to the harbour the pilot gave the order "port," and then "hard-a-port," immediately after which the defenders' harbourmaster, Gavin Mundell, who was standing at the end of the jetty in uniform and within hailing distance, gave the order "hard-a-port." The harbourmaster appeared to be somewhat anxious and excited, and he called out "hard-a-port" more than once. His next order was "hard-a-starboard," but just as the vessel was beginning to answer her helm she grounded on a sandbank close to the jetty and received considerable damage.

Plans and sections of Silloth Harbour were produced. The outer dock ran about north-west and south-east; its greater length being in this direction, and the entrance being in the north-western end. From the south-westerly pier at the entrance a jetty ran out in a north-westerly direction to a lighthouse which was situated nearly at the end of sands, which were covered with shallow water at high tide. Through these sands in the same direction as the jetty there was a channel which gave access to the harbour. The jetty and the channel were about 350 yards in length. Ships of the size of the "Genista" could only enter the harbour at high tide. There were no buoys to mark the course of the channel, and at high tide the neighbouring sands as well as the channel were covered with water. The sands in the Solway Firth shift frequently, and new banks frequently appear. Along nearly the whole length of the north-easterly side of the jetty a sandbank had formed. This was the sandbank upon which the "Genista" went aground. The total distance from the jetty to the line on the further side of the channel, where the depth of water at high tide became less than 22 feet, the depth necessary to float the "Genista," varied from 200 feet at the outer end of the jetty

to about 115 feet at a point 200 feet from the dock gate. Owing to the sandbank above mentioned, however, the width of the 22 feet deep channel, although 200 feet at the outer end of the jetty, was only 90 feet at the point 200 feet from the dock gate. At the place where the "Genista" went aground the width of the 22 feet deep channel was from 110 to 95 feet. On the north-eastern side of the 22 feet deep channel the 22 feet line ran from the dock gate pier nearly straight out at right angles to the pier, and in the same line as the jetty for a distance of about 700 feet at a distance from the jetty of about 115 to 120 feet. After this point it ran off in a more northerly direction to the end of the sands and the deep water. On the north-western side of the channel the 22 feet line ran in a sinuous curved line from the dock gate pier to a point nearly 200 feet from the outer end of the jetty. The points in this curve which were furthest from the jetty and nearest the other side of the 22 feet deep channel were situated about 170 feet and about 600 feet respectively from the dock gate. At these points the width of the channel was about 90 feet and 95 feet respectively.

The defenders had been warned by their engineers and others that the entrance to the harbour was not in a satisfactory condition, and shipowners had complained about it, but no effectual means had been taken to remove the bank. Three large vessels—the "Largiemore," the "Grasmere," and the "Bankhill"—had stranded while entering the harbour before the date when the "Genista" went aground. The means adopted to clear away the sand were (1) sluicing, and (2) putting men on with spades to dig it away at low water, but a dredger was not employed.

In addition to the bank along the jetty there was a bank outside the entrance which made the approach to the harbour difficult.

Some further details with regard to the condition of the entrance and the correspondence relative thereto between the Railway Company and its employees will be found set forth in Lord Moncreiff's opinion, *infra*.

Silloth was situated in the Port Carlisle pilotage district of Trinity House. The defenders were not entitled to license or cancel the licences of pilots belonging to the district, licences for a Trinity House out-port district being granted and cancelled by the Trinity House. In the Port Carlisle district, which extends from Maryport to Annan, there were three pilots, James Richardson, who was on the "Genista" upon this occasion, and two others, named Coulthard and Kea. Coulthard was employed by the defenders to look after a lighthouse which they were bound to maintain. Kea sometimes acted as a pilot, but he was employed by the defenders as master of a tug. Richardson apparently never acted except as a pilot. He was provided with a boat and paid a fixed wage by the Railway Company, and he was bound to account to them for the

pilotage dues earned by him when acting as pilot. During the three years prior to 16th April 1896 the wages and allowances paid to him by the defenders in each year exceeded in amount the pilotage dues earned by him. There was not a sufficient number of ships entering the harbour of Silloth to ensure adequate remuneration to a pilot working in the district on his own account, and the Railway Company entered into the arrangements above detailed with the three pilots mentioned in order that there should always be a sufficient supply of pilots available for their port.

There was a conflict of evidence with regard to the course followed by the "Genista" in approaching the harbour.

The evidence for the pursuer was to the effect that the vessel came on a line curving round from a point well to the south-west of the entrance to the channel in a westerly direction, that this was the proper course for entering the harbour, and that the ship answered her helm well, but that in obedience to the orders of the harbourmaster she was brought too far round on this course on a port-helm, with the result that she ran into the bank on the south-western side of the channel, and that the harbourmaster ought not to have allowed the vessel to remain so long on a port-helm, but ought to have ordered the helm to be steadied before the time at which he ordered it to be put "hard-a-starboard."

The defenders' evidence on the other hand was to the effect that the ship was taken too far on before turning in to take the entrance, that she had not sufficient steerage-way, and did not steer well, so that she did not come round soon enough, that under the influence of the tide she ran on to the north-east of the entrance, that she came down in a south-easterly direction towards the sands at the north-eastern end of the channel, that she smelt the ground at that point and swerved off, that the harbourmaster shouted "hard-a-port" to keep her off these sands, and gave the order to starboard as soon as she was clear of them, but that although these were the best orders that could be given in the circumstances, the ship, owing to the course which she had taken before the harbourmaster shouted any directions, could not turn in time, and consequently went aground on the jetty bank. They maintained that in this view the stranding was due to the fault of the pilot in taking the vessel too far up the Firth.

On 18th March 1898 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Finds that on 28th March 1896 the 'Genista,' belonging to the pursuer, went aground on a sandbank within the harbour of Silloth, and that the defenders are liable for the damage thereby occasioned: Continues the cause in order that the amount of damage may be ascertained: Grants leave to reclaim."

Opinion.—[After stating the general facts as to the stranding of the ship]—"Now, this belongs distinctly to the category of

preventable accidents, and the question is—who was to blame? The pursuers say, in the first place, that the sandbank ought not to have been there; secondly, that the vessel was steered on the sandbank by the faulty navigation of the harbourmaster in keeping her too long on a port-helm; thirdly, that if not the fault of the harbourmaster, it was the fault of the pilot, who was, equally with the harbourmaster, a servant of the defenders. On the other hand, the defenders say that the accident was exclusively the fault of the pilot, for whom they are not responsible.

“With regard to the existence of the sandbank, I agree with the pursuers to this extent, that the entrance to the harbour would have been much better and safer without it. It considerably narrowed the entrance for vessels of the size of the ‘Genista,’ and there was nothing to indicate its presence. The defenders had been warned by their engineers that regular dredging was the only thing to keep it down, and in face of these warnings the defenders adhered to the old and ineffectual method of sluicing, entirely from motives of economy. Undoubtedly the owners of a harbour, who invite ship-owners to resort to it, are bound to use all reasonable diligence to ensure its safety. But while the existence of the bank constituted a danger, it was a danger which might have been avoided by skilful steering, and therefore it seems to me impossible to decide the case against the defenders, merely because they allowed the bank to be there; all the more that, if the bank had not been there, the vessel would probably have struck the pier.

“It thus becomes necessary to inquire who was responsible for the steering which sent the vessel aground? Clearly the master of the ‘Genista’ was not, because the vessel was either in the hands of the compulsory pilot or of the harbourmaster. I am of opinion, on the evidence, that from the moment the harbourmaster appeared at the end of the jetty and issued his orders, he took command of the vessel to the exclusion of everyone else. It may be quite true that a harbourmaster is not bound to navigate a vessel into harbour, but only to point out where she is to be moored. On the other hand, the regulations of this particular harbour, as of all harbours, are very rigorous in exacting implicit obedience to the orders of the harbourmaster when he is acting within his own jurisdiction. Accordingly, I think it would be a dangerous doctrine to hold that a shipmaster or a pilot was at liberty to disregard his orders merely because he thought the harbourmaster was making a mistake or was exceeding his strict duty. A harbourmaster might quite well have good reasons, unknown to those on board, for navigating a vessel in a particular way.

“If that be so, the harbourmaster must be held to have taken the ship out of the pilot’s hands when he gave the order ‘hard-a-port,’ and his fault consisted in keeping her too long on a port-helm. The defenders put forward an ingenious theory that the

pilot took the vessel too far up the Firth before opening the entrance of the harbour, that she then ‘smelt’ the bank on the east side of the entrance, and that she never had sufficient steerage-way on. But the witnesses who support this rather complicated theory are not very consistent, and I prefer the evidence of the three officers of the ship and of the channel pilot who brought her from Falmouth to Maryport. These witnesses, who were standing, some on the fore-castle head and some on the poop, are distinct in saying that she steered well; that she was taking the entrance properly, and that the mistake consisted in not steadying the helm before the order ‘hard-a-star-board’ was given.

“If therefore it were necessary to discriminate between the fault of the pilot and the fault of the harbourmaster, I should say the accident was directly due to the fault of the latter. But in my view the defenders are equally liable whichever was in fault. It is true that the defenders as owners of the harbour were under no obligation to provide pilots, and were not even entitled to license them, this being what is called a ‘Trinity House Outport District,’ where the licensing is done by the Trinity House through its sub-commissioners. If the defenders had let things take their natural course, no ship employing the services of Richardson would have had recourse against anybody but himself for any fault of navigation committed by him, and his liability would have been limited by section 620 of the Merchant Shipping Act of 1894. If the defenders had even contented themselves with making up his emoluments to a certain sum if his pilotage dues fell short of that sum, I do not think they would have been liable. But what they did was to make a contract with him, whereby they provided him with his boat, and paid him a weekly wage, receiving in return the whole of his drawings. That was a contract of risk by which they might have made a profit, although in point of fact they never did. In short, they farmed him out, and when in such a case a shipmaster who has employed him and has *ex hypothesi* been injured by his negligence finds that he has a principal behind him, I see nothing to prevent the shipmaster from suing the principal. The liability of the pilot himself is founded on the principle *spondet peritiam artis*, and his liability runs with the remuneration which he receives. But when the remuneration goes by contract into the pocket of another, it seems to me that that other becomes the sponsor, and is liable accordingly.

“In *Holman v. Irvine Harbour Trustees*, 4 R. 406, where the defenders were held liable for the fault of unlicensed pilots employed by them, it was said that if the commissioners had sent out a licensed pilot they would not have been liable. But that was plainly on the assumption that the licensed pilot would have been allowed to draw his own dues. Similarly, in *Ogilvie v. The Magistrates of Edinburgh*, which is reported in 1 S. 24, but much more fully in *Fac. Coll.*, 22nd May 1821, the defenders were

sought to be made liable for the fault of a pilot merely because they had licensed him. This view of course was rejected. But it is evident from the report that the Court attached great importance to the fact that the fees were drawn by the pilot himself, and were not accounted for to those who appointed him.

"I therefore hold the defenders liable, and shall continue the case in order that the damage may be ascertained as proposed by the parties."

The defenders reclaimed, and argued—(1) The evidence as to the course taken by the ship showed that the damage was caused by the fault of the pilot, and the defenders were not responsible for him. They could not license him, and they could not take away his licence—Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), secs. 618 and 622. He was not responsible to them for his conduct as pilot, and they could not interfere with him when acting as pilot. A pilot was a public official and was only responsible to the public. The ground of an employer's liability was *qui facit per alium facit per se*. The North British Railway could not act as pilots themselves, and they had no power under their Acts to employ pilots or undertake pilotage. The general rule was that harbour authorities were not liable for compulsory pilots practising at their ports—*Holman v. Irvine Harbour Trustees*, February 1, 1877, 4 R. 406; *Ogilvie v. Magistrates of Edinburgh*, May 22, 1821, F.C.; *Shaw, Savill, and Albion Company v. Timaru Harbour Board*, 1890, 15 App. Cas. 429; *Dudman v. Dublin Port and Dock Board*, 1873, Ir. Rep., 7 Common Law, 518. The fact that the defenders guaranteed Richardson a wage, and took from him the dues earned by him did not take this case out of the general rule. The case of a master being licensed as a pilot was different. There the two capacities of master and pilot were so difficult to distinguish, that the employer was held liable; and moreover, the combination of the two capacities in one man was for the owners' convenience. The defenders here were not in the same position as the shipowner who employed a pilot as master of his steamer. The true analogy would be a sheriff officer guaranteed a minimum wage by the procurators of a district to induce him to practice there. In such a case the procurators would not be liable. (2) Even on the pursuer's view of the facts the harbourmaster was not in fault. All that could be alleged against him was that he did not give the order to steady and starboard in time. That was not sufficient. When a harbourmaster gave the order "hard-a-port," that did not mean that the ship was to be kept on a port-helm until the harbourmaster gave another order. If the ship ran aground owing to being kept too long on a port-helm, that was the fault of the pilot. The order to port was not one which the harbourmaster was bound to give, and the question when the ship had gone far enough, and when the helm ought to be steadied and starboarded was for the pilot. If the helm was not altered soon enough,

he was to blame. On the defenders' view of the facts the orders given were the only possible orders in the circumstances, and therefore the harbourmaster was not to blame for giving them, although it was very doubtful whether at the stage when they were given anything could have kept the ship from going aground. (3) There was a sufficiently wide and safe channel into the harbour. The pursuers' case upon this point involved the assumption that everything to the channel side of the jetty had to be kept open as channel for a certain distance, and that the defenders guaranteed this channel should be straight. This was not so. All that the defenders were bound to provide was a channel of such width and formation as to enable a skilful person with local knowledge like a compulsory pilot to navigate it. Such a channel of sufficient width, if skill had been displayed, had been provided here, but owing to the pilot not displaying sufficient skill, he failed to bring the ship through it, and the ship went aground. That was the fault of the pilot, and the defenders were not liable.

Argued for the pursuer and respondent—(1) The evidence showed that the ship went aground owing to the fault of the harbourmaster. Once the harbourmaster took charge of the ship, whether he was bound to do so or not, no-one else was entitled to interfere with the navigation of the ship, or to do anything but obey the harbourmaster's orders—*Renney v. Magistrates of Kirkcudbright*, March 31, 1892, 19 R., H.L. 11; "*Tyne*" v. "*Talisman*," February 15, 1898, 35 S.L.R. 398 (H.L.). Owing to the difficulty of the navigation the harbourmaster acted quite rightly in taking charge of the ship. In any view of the evidence the harbourmaster was to blame, because either (1) when he took charge it was possible for the ship to be brought in safely and he failed to do so, or (2) it was not possible, in which case he ought not to have ordered her to come on but to be towed back. It was not disputed that the defenders were liable for the fault of the harbourmaster. (2) The defenders were also liable in respect that the stranding was due to the dangerous state of the entrance. It was quite plain that everyone who had to do with the matter thought that the channel was not safe for large vessels like the "*Genista*" as long as the jetty bank was not removed, but no effective means were adopted to do so; moreover, the channel, such as it was, was not marked in any way. (3) Even if the stranding was due to the fault of the pilot the defenders were liable for him. They had seen fit for their own convenience to employ this pilot at a weekly wage, and he was their servant. There were many instances in which a person was liable for the acts of a servant whom he employed to do things which he could not do himself, and which he was bound to employ an authorised person, with whom he was not entitled to interfere, to do for him. The liability of a shipowner for his shipmaster, and of a mine-owner for his certificated manager, were instances. But the closest

analogy to the present case was the case of a shipowner employing a licensed pilot to act as master of his vessel, as was frequently done in the case of steamers plying on and to the Clyde, where pilotage was compulsory. It had always been held that the shipowner was liable for a pilot so employed. The question whether the Railway Company were entitled under their Acts to employ a pilot was one between them and their shareholders. In a question between the company and a shipowner using their docks the company was just in the same position as any private individual. The case of *Shaw, Savill, & Albion Company v. Timaru Harbour Board, cit.*, was decided upon the ground that the Harbour Board were not liable for their harbourmaster when acting as a pilot simply because they had licensed him to act as such. That case had consequently no bearing on the present. *Holman v. Irvine Harbour Trustees, cit.*, was an authority in the pursuer's favour.

At advising—

LORD JUSTICE-CLERK—This case can be decided on very simple and clear grounds. The pursuer's vessel on approaching the mouth of the defenders' harbour at Silloth, and when it had entered the limits of the harbour, was ordered by the harbourmaster to put its helm up or down, as he thought right for bringing it safely into dock, and the orders he gave were obeyed by those steering the vessel. At the time he gave the orders he was entitled to take charge of the ship, and non-attention or disobedience to his orders would have been fault on the part of those in charge. As the result of the orders given and their being obeyed by the ship, she ran aground on a bank which had been allowed to accumulate on one side of the fairway, the existence of which made the fairway very narrow. It is proved, as I think, that the bank had been allowed to silt up to such an extent that the bringing in of any long vessel into dock was a very hazardous operation. More than one vessel had already taken the ground and been in imminent risk of serious injury from this cause. The harbourmaster had frequently reported to the superior officials of the company the state of the entrance as being unsatisfactory, but nothing had been done, and it is evident that when he had to take charge of a large vessel coming in, he was from his knowledge of the danger nervous and excited. My opinion upon this matter differs from that of the Lord Ordinary. I consider that the harbour was in a faulty state and dangerous to a degree which was not excusable.

I cannot doubt that had there been nothing which the defenders thought could be alleged as abnormal in the course of the vessel, in coming towards the mouth of the harbour, and before the harbourmaster took charge, it would have been felt that there could be no defence, seeing that the injury was done to the ship when she was under the control of the defenders' servant. In such a state of matters the grounding

could only be caused by the faulty state of the harbour, or the faulty handling of the harbourmaster, or both. But the attempt is made to prove that the ship went too far to the northward of the entrance in taking the sweep to the harbour mouth, and so went close to the bank on the north side of the channel, and there smelt the ground.

The evidence upon that matter is conflicting, and I hold it not to be proved that she did smell the ground, or that she was so far to the north as the defenders allege. But whatever may be the true state of the facts on that matter, she was taken command of by the harbourmaster, and those in charge of her were bound to obey his orders. It was for him to judge whether at the time he took command of her he could manœuvre her safely in, or whether it was necessary to keep out, and make another manœuvre before trying to bring her into what on his own showing was a very narrow channel for such a vessel. The orders he gave had the effect of running her aground, by which she was injured, and I hold that the condition of the harbour was dangerous, and that there was faulty handling, for both of which the Railway Company are responsible.

Taking this view, it is unnecessary to consider the question whether the pilot who brought her up to the entrance was in fault, and whether, if he was in fault, the defenders would be responsible for him. Had it been necessary to do so, I could not have agreed with the Lord Ordinary and held that the Railway Company was responsible for the pilot. It is true that in order to encourage owners of large vessels to send them to their port, the company made arrangements by which qualified pilots were induced to attach themselves to their harbour. But I cannot hold that if any vessel was picked up by one of these pilots, the company were responsible for him as their servant, because they had an arrangement with him that in respect of their providing him with a boat and a fixed weekly payment he agreed to hand them the fees which he drew from ships which he boarded and piloted in.

If your Lordships agree with these views, the result will be to adhere to the Lord Ordinary's interlocutor. I understand that if the defenders are held liable, parties are agreed that the damages shall be ascertained by arbitration.

LORD TRAYNER—The pursuers in this case maintain that the defenders are liable for the damage done to the "Genista" in consequence of her stranding at the entrance to the harbour of Silloth (the property of the defenders), on three grounds: 1st, because the entrance to the harbour was in a dangerous condition by reason of the sandbank which was there; 2nd, because the damage arose from the fault of the defenders' servant, the harbourmaster; 3rd, and or because the damage was occasioned by the fault of the pilot, who was also the defenders' servant. The Lord Ordinary is against the pursuer on the first of these grounds, in respect that although the

sandbank constituted a danger, it was a danger that might have been avoided by skilful steering. I am not at present inclined to adopt that view. If the dangerous bank had not been there, as I think it should not have been, then the unskilful steering would not have stranded the ship. The ship might, of course, have been otherwise injured, as the result of bad steering, but she might not have been. She would not have been damaged by stranding. So much is clear; and whether she would have been otherwise injured or not is only matter of opinion or speculation. I think there can be no doubt that the proprietors of a harbour are bound to keep it, and their accesses to it, in such a state that vessels entering and using the same may do so safely, and that there is *prima facie* a liability on them for damage arising from or occasioned by their neglect of such a duty. On the other hand, I am not prepared to say, as the Lord Ordinary has done, that the fault of the pilot was one for which the defenders are in the circumstances responsible. He was to some extent, perhaps, the servant of the defenders, but whether he can be regarded as their servant when performing duties which the defenders could neither compel him nor forbid him to perform is a difficult question. On these two points I prefer to reserve my opinion, as in my view it is not necessary to decide them in order to dispose of this case. For I agree with the Lord Ordinary in thinking that the damage claimed was occasioned by the fault of the harbourmaster (for whom the defenders are responsible), and that for the reasons which his Lordship has stated.

LORD MONCREIFF.—I agree in the result at which the Lord Ordinary has arrived, but not in all the grounds of his judgment. The Lord Ordinary's ultimate decision is rested on the view that it is not necessary to decide whether the accident occurred through the fault of the pilot or the fault of the harbourmaster, because in his opinion the defenders are equally liable whichever was in fault. I do not concur in this view, because if I were of opinion that the accident occurred solely through the fault of the pilot, I should not, as at present advised, be prepared to hold the defenders responsible. But I agree in what is evidently the opinion of the Lord Ordinary that the accident really occurred through the harbourmaster taking the vessel out of the pilot's hands when it came within the limits of the harbour, and giving improper orders for its management, which resulted in the vessel grounding on a bank of sand adjoining the jetty.

I prefer to rest my judgment upon that ground, but if it fails another ground of liability is averred, to which I attach more importance than the Lord Ordinary does. Even if the "Genista" did not ground solely in consequence of the orders of the harbourmaster, there are strong reasons for holding that the defenders are nevertheless responsible for the result owing to their failure to remove the bank of sand in question and other banks upon the opposite

side of and just outside the fairway, thus leaving the approach to the harbour in a very dangerous condition. This view is alternative, and depends upon the assumption of facts different from those upon which the main ground of action rests and which I hold proved. I therefore adopt it only as alternative.

Even if it be not regarded as a substantive ground of judgment, the condition of the approaches to the harbour at the time of the accident is of considerable importance as throwing light upon the leading ground of action; and therefore for that purpose, as well as for the purpose of explaining my alternative view, I shall consider the evidence in some detail.

It appears from correspondence which is printed in the appendix that for four years before the accident to the "Genista" frequent complaints were made by Mundell, the harbourmaster, and by traders, to the defenders' officials as to the dangerous condition of the approaches to Silloth Harbour, and especially as to banks of sand alongside and opposite and outside the jetty.

In the first letter, 12th February 1892, Mundell writes—"The bank alongside of jetty is extending into entrance channel."

Passing over intermediate letters, he writes again on 7th October 1892—"There is a very bad bank alongside of jetty which makes very awkward docking large ships, entrance channel so narrow half-way along jetty." This letter is addressed to Mr Anderson, district engineer to the defenders' company at Carlisle, and on 12th October Anderson communicates it to Barrett, the inspector in the engineer's department of the defenders' company at Carlisle.

Although the intervening letters are important I now pass to Mundell's letter to Anderson of 9th January 1895—"Barque 'Grasmere' got the ground in docking yesterday on that bank alongside of jetty by huts. It is very narrow there."

On 7th January 1896, that is, a year later (no dredging having been done in the meantime), Mundell writes to Anderson—"Bringing ship 'Largiemore' in yesterday afternoon tide, the pilot got too far above the jetty and ship got aground on east, and after getting off ebb-tide carried her on to bank alongside of jetty. Tried to get her off this morning, but could not move her."

In his evidence Mundell says—"When the 'Largiemore' stranded in January the bank would be about the same size as when the 'Genista' stranded. The 'Largiemore' took the bank upon the same place as the 'Genista'; she came about over the same road as the 'Genista.'"

In this connection I would also refer to the evidence of Richardson the pilot—"The vessels which went aground before were the 'Largiemore,' the 'Grasmere,' and the 'Bankhill.' They were all large vessels. The harbourmaster gave the orders for steering of them into the dock. . . . I took the entrance to the harbour with the 'Genista' just as I had taken it on previous occasions. It is not the case that I went past the entrance, too far up the

Solway. . . . I had to go round the point of the bank."

The passages which I have last quoted have an important bearing on the case. In the first place they fully explain the excitement and anxiety of Mundell when he saw such a large vessel as the "Genista" about to enter the harbour. On three previous occasions large vessels steering the same course—Mundell and Richardson differ as to what that course was—were grounded in the same way. Secondly, if what Richardson says is true, viz., that on all these occasions the vessels which grounded were steered according to the orders of the harbourmaster, great probability is given to the pursuer's evidence that the accident to the "Genista" resulted from or followed from orders given by the harbourmaster himself, and that if there was fault it was that of the harbourmaster. Thirdly, assuming that the pilot and not the harbourmaster directed the steering of the vessel, if on three occasions large vessels steered by an experienced pilot were unable to enter the harbour without grounding either on a bank to the east or a bank to the west of the fairway, a serious doubt arises whether these repeated accidents were not really due to the dangerous condition of the entrance.

I now come to a letter written by Anderson to Mr Conacher on 30th March 1896 in reference to the accident to the "Genista." I quote it mainly because it contains a terse statement of the case by one of the defenders' officials, who is certainly not a hostile witness. In it he says—"Messrs Carr now bring much larger vessels, which are more difficult to dock than those that came in the time of the old dock, and the complaint is that the channel and entrance are not safe for that class of vessel. The channel gets narrow as it nears Silloth, and it is necessary to turn the ship sharp round across the tide immediately before entering the entrance-channel alongside the jetty, so that if there is any tide running the vessel is liable to drift on to the banks on either side of the entrance."

This really goes to the root of the whole case. There was a bank of sand adjoining the jetty on which the "Genista" grounded, and there was also a bank of sand immediately opposite at a distance of little more than 100 feet, and there was a third bank just outside the jetty. The sketch which Mr Anderson appends to his letter of 30th March 1896 shows that vessels entering Silloth Dock are obliged to take a very sharp turn before entering. No doubt, notwithstanding the existence of the sandbanks, there was a sufficiently wide navigable channel for the passage of vessels of the size of the "Genista;" and when the weather and tide were favourable it should have been possible to bring them safely in. But it will readily be seen that with an unfavourable wind and a strong tide running, it can have been no easy matter to steer a large vessel into the dock, especially as at high water the banks in question were covered and not marked.

Mr Anderson proceeds—"There have

been three cases of ships grounding since the new dock was opened, but in the last two cases at least I am of opinion that the mishap was due to mismanagement and not to the channel or entrance." If the accident were due to mismanagement, the mismanagement was that either of the harbourmaster or of Richardson, and yet until the grounding of the "Genista" the defenders do not seem to have blamed either of them. Mr Anderson adds—"We might make improvements in the entrance channel by dredging away the sandbanks, but as the Solway sands are continually shifting, a heavy expenditure would be incurred. As it is, we keep a fair entrance, and with the usual run of vessels there is no reason of complaint."

These letters show that the dangerous condition of the harbour for large vessels was well known to the defenders' officials. They also, as I have said, sufficiently account for the excitement and anxiety of the harbourmaster, with whom, I confess, I feel considerable sympathy. In many respects I think his evidence is incorrect, but I also think that he was, and with some reason, induced by previous experience, in a state of nervous apprehension that this large vessel would not be able to take the fairway properly. He seems to have been particularly, perhaps unduly, apprehensive that she would ground on the sandbank on the east side of the fairway, as he says the "Largiemore" did, and that probably accounts for the repeated orders which he gave to put the helm hard-a-port.

Such being the harbourmaster's state of mind, I now come to the evidence as to the course which the "Genista" took in entering the fairway. Two conflicting stories are told by the witnesses for the pursuer and the defenders respectively. The Lord Ordinary believes the former, and even if I were more doubtful than I am I should not be prepared to differ from his view of the evidence. But after examining the proof carefully, I think that the evidence for the pursuer is much the more reliable. The evidence for the defence to the effect that the "Genista" passed the entrance to the fairway, and in seeking to regain it on a port helm "smelt" the bank upon the east side of the fairway, strikes me as improbable.

On a review of the evidence I hold it proved that the "Genista" grounded because she was kept too long on a port helm, and that this was due to orders given by the harbourmaster, that she did not pass the entrance to the fairway, or touch or "smell" the ground at the bank to the east of the fairway, and that if the harbourmaster had not interfered she would have entered the fairway in safety, although, having regard to the direction of the wind, and the strong tide running and the dangerous condition of the entrance, it would have required careful and accurate steering. There is undoubtedly a great conflict of evidence, but, in my opinion, the witnesses for the pursuer had better means of observation than those adduced for the defenders. In the evidence of the latter there is

to be found much that is improbable and inconsistent, partly due perhaps to the imperfect view which the witnesses had of the vessel's movements, and the fact that the position of the sandbanks was concealed by the water.

This view, if well founded, is sufficient for the decision of the case. If, however, it were held that the harbourmaster did not take control of the "Genista," and that while under the orders of the pilot she touched or "smelt" the eastern sandbank, and ultimately grounded near the jetty, a more difficult question would arise, but one which need not necessarily be answered adversely to the pursuer. Richardson was a pilot of great experience, and he had as much knowledge of the condition of the entrance to Silloth Harbour as anyone. It is not said that he was drunk while he was in charge of the "Genista," or that those on board had any reason to find fault with him, and yet on this as on two previous occasions we find that large vessels under his charge took the ground almost precisely at the same place and in the same way. He says himself that it was impossible to take a large vessel in in safety owing to the bank. That statement, if taken literally, is, I think, an exaggeration, because it appears that the fairway left was of sufficient width if the conditions were favourable. But if it merely means that under unfavourable conditions it was very hazardous to take a large vessel in, I think there is much to support it, both in what is proved as to the position and extent of the sandbanks, and in what happened on three previous occasions in the case of large vessels. If the entrance to a harbour to which large vessels are invited to resort is kept in such a dangerous condition that even when steered by an experienced pilot, they run a serious risk of taking the ground, there is much to be said for the view that the owners of the harbour are responsible when a vessel grounds, even although the pilot might by the exercise of exceptional skill or good fortune have been able to avoid the sandbanks.

If the accident were due solely to the fault of the pilot, I am not satisfied that the defenders would be liable. I do not think that in steering the "Genista" Richardson was acting as the defenders' servant. Their arrangement with him simply was that in order to secure his services for vessels coming to the port of Silloth, and as an inducement to vessels to come there, the defenders guaranteed him remuneration up to a certain amount, he in return accounting to them for the whole of the fees drawn. I think that this arrangement was entirely outside his position as pilot, and that therefore it would not be safe to hold that he was acting as the defenders' servant when the accident occurred. That is my present impression, but it is not necessary to decide the question.

The result is that I think the Lord Ordinary's interlocutor should be adhered to.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers—Ure, Q.C.—Salvesen—Younger. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders—Balfour, Q.C.—Johnston, Q.C.—Aitken. Agent—James Watson, S.S.C.

Tuesday, July 5.

SECOND DIVISION.

[Sheriff of the Lothians.]

FERRIER v. READMAN.

Lease—Conditions of Lease—Repair of Fences—Landlord Bound to have Ground "Always Duly Fenced."

By the lease of a farm certain portions of the lands occupied by collieries, brickworks, and roads and railways leading thereto were exempted from the lease, and the landlord reserved power to resume for feuing or other purposes. It was declared that the landlord should be bound "to have the ground excepted from or taken out of the lease always duly fenced, either by himself or his tenants in such ground." The landlord also bound himself as at the term of entry "to put the houses and fences upon said lands into tenantable order," and the tenant bound himself, "on the houses and fences being put into said order," "to maintain and uphold the same, and any additional buildings, fences, dykes, and roads which may be made on the lands."

Held, in an action by the tenant against the landlord for damages resulting from the fences of part of the originally excepted ground not being kept in tenantable repair in certain specified years during the currency of the lease, that the landlord was bound in terms of the lease to keep the fences of the ground excepted from or taken out of the lease in tenantable repair.

This was an action brought in the Sheriff Court at Linlithgow by William Cochrane Ferrier, tenant of the farm of Whittockbrae, Bathgate, Linlithgowshire, against George Readman, advocate, proprietor of said farm, in which the pursuer sought decree for the sum of £47 as damages due to him in respect of his being deprived of the use of certain grass parks on the farm, which he alleged that he had been unable to use for grazing purposes owing to their not being kept properly fenced by the landlord in terms of the lease.

The defender maintained that he was not bound under the lease to repair the fences in question.

By the lease, which was for 19 years from Martinmas 1881, the defender's predecessor let to the pursuer "All and whole the farm and lands of Whittockbrae . . . but reserving from said lands of Whittockbrae all land which at the commencement of this lease was occupied by collieries, brickworks, and roads and railways leading