

to hear the respondent on the question of proof or jury trial. Counsel for the respondent argued that there was no special legal difficulty to justify the Court in depriving the respondent of his right to a jury trial, and cited *Grieve v. The Turbine Steamers, Limited*, 1903, 11 S.L.T. 379, and *Caird v. Adam*, 1907, 15 S.L.T. 543, in which, though only in the Outer House, the pursuer's claim, in actions of a similar nature, to have his case determined by a jury had been sustained.

**LORD JUSTICE-CLERK**—This case is really a very exceptional one. During the debate no less than seventeen or eighteen cases were referred to, in all of which decisions on questions of law were pronounced. It seems to me that that in itself shows that this is an eminently unsuitable case to be sent to a jury. I certainly should not like to try it myself. The presiding Judge would have to listen—and the jury would have to sit and listen too—while practically the great mass of this debate was gone over again. I do not think that would be advisable, and I have no difficulty in deciding that the case should not go to a jury.

I quite understand that the Lord Ordinary, following as he did two cases which apparently were never brought before this Court after the issue was allowed, felt himself bound to do as the Judges had done in these two cases in the Outer House, but it is plain that what is decided in a particular case in the Outer House, or what the Lord Ordinary has done because he thought he must follow previous decisions there, cannot be binding upon us. Certainly in the ordinary case we should not interfere with the discretion of the Lord Ordinary, but in this particular case Lord Anderson has not proceeded except upon the idea that as other Judges had sent similar cases to jury trial he must send this too. He does not appear to have exercised his discretion in this particular case at all. On the whole matter I am satisfied that the proper course to take is to remit this case to the Lord Ordinary for proof.

**LORD DUNDAS**—In this case the Lord Ordinary approved of an issue and a counter-issue for the trial of the cause by jury. The defenders reclaimed, and argued at our bar that the case should be thrown out without inquiry of any sort. That was the main question argued at our bar—the only question, indeed, except the subordinate one which would arise in the event of there being inquiry, namely, as to the mode of the inquiry. At the back of this case there does seem to lie a legal question of great interest and probably of first-class importance. Upon the merits of that legal question I desire to say nothing at all, agreeing with your Lordship that there must be inquiry before it is dealt with. The pursuer's record even as amended seems to me to be far from artistic, but I am not prepared to throw the case out without inquiry into the facts. So far as the reported decisions go—and a great number of them were quoted to us—that would be a new departure in procedure, and it would, to my mind, be very

unsatisfactory to decide the question of law as an abstract one without precise knowledge of all the facts which might bear upon the decision. I think a good deal may turn upon the way in which the facts come out.

Upon the minor point I think the inquiry should be by way of proof and not by way of jury trial. For my own part I consider the case to be eminently unfitted for trial by jury, and, as your Lordship has pointed out, in sending it to proof we are not to be taken as overriding any deliberate exercise by the Lord Ordinary of his discretion. The Lord Ordinary, as I gather, allowed an issue in this case, not as the outcome of his own opinion or in the exercise of his own discretion, but upon the authority of a couple of Outer House decisions which he cites and which he thought he ought to follow. But these cases are not binding upon us, and therefore, as we consider the case to be ill-fitted for jury trial, we are free, and without interfering with any exercise of discretionary power by the Lord Ordinary, to send the case to proof.

I think, therefore, the amendment should be allowed, the interlocutor recalled, and the case remitted to the Lord Ordinary to allow a proof before answer in common form, and to proceed as may be just.

**LORD GUTHRIE**—That is my opinion also.

**LORD SALVESEN** was sitting in the Lands Valuation Appeal Court.

The Court recalled the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary to allow a proof before answer.

Counsel for the Pursuer and Respondent—Crabb Watt, K.C.—Thornton. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defenders and Reclaimers—Murray, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Friday, December 18.

## FIRST DIVISION.

[Sheriff Court at Glasgow.]

**AKTIESELSKABET "FJORD" OF KRISTIANIA v. THE STEAMSHIP "BEECHGROVE" COMPANY, LIMITED.**

*Ship—Collision—Pilot—Compulsory Pilotage—Collision Outwith Compulsory Pilotage Area, but where Pilot Necessarily on Board—Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), sec. 633—Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. c. cxlix).*

A steamship inward bound for Glasgow, while on her way up the Firth of Clyde in charge of a licensed pilot, collided with an outward-bound steamship within the area for which the pilot was licensed, and where he was necessarily on board under the local regulations, but before reaching that part of

the river in which pilotage was by statute compulsory. *Held* (diss. Lord Skerrington) that the owners of the inward-bound vessel were not liable if the collision were proved to have been due to the fault of the pilot.

The Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. c. cxlix) enacts—Section 75—"The limits of the river Clyde shall include the whole channel or waterway of the said river forming the harbour and as far down the said river as to a straight line drawn from the eastern end of Newark Castle on the south shore of the said river to the mouth of Cardross Burn on the north shore of the said river. . . ."

Section 128—"And whereas it is expedient that only one authority should exist for licensing pilots for the safe conduct and navigation of vessels in the river and Firth of Clyde, be it enacted that . . . the board (herein called the Pilot Board) for licensing pilots for navigating vessels plying in the river and Firth of Clyde within a straight line drawn due east and west from the southernmost point of the island of Little Cumbræ shall consist of sixteen members, viz. . . ."

Section 134—"The Pilot Board shall have the exclusive right and privilege of licensing pilots for the navigation of vessels in the river and Firth of Clyde within the said limits; and it shall be lawful for the Board from time to time to make such bye-laws and regulations as they shall think fit for fixing and regulating the wages and allowances for pilotage to be received or exacted . . . by the pilots to be licensed by the Board. . . ."

Section 136—"It shall not be lawful for any person to navigate without a pilot, nor for any person except the pilots licensed . . . by the Pilot Board . . . to act in piloting any vessel exceeding 60 tons burden in any part of the river as defined by this Act. . . ."

Section 139—"It shall be lawful for the Pilot Board, and they are hereby required, . . . to make such bye-laws and regulations as they shall deem necessary and expedient for all or any of the following purposes—for the good government, police, and proper navigation of all vessels, whether propelled by steam or otherwise, plying between the western limits of the river as defined by this Act and the island of Little Cumbræ. . . ."

In pursuance of their powers under the above-quoted sections of the Clyde Navigation Consolidation Act 1858, the Pilot Board passed bye-laws relating, *inter alia*, to pilots. These bye-laws provide—"18. The pilots licensed by the Board shall consist of two classes, viz., river pilots licensed to pilot vessels between Glasgow and Greenock, and deep sea pilots licensed to pilot vessels between Greenock and the island of Little Cumbræ, including vessels proceeding outwards from Port Glasgow or inwards to Port Glasgow. . . . 19. No person shall presume to navigate or to act in piloting any ship or vessel whatever, exceeding 60 tons register, on any part of the river Clyde, other than the river pilots duly licensed by

the Board, under a penalty . . . 30. All the river pilots shall be bound to take their respective turns inwards or outwards, unless a letter be transmitted to either of the pilot masters at Glasgow or Greenock, subscribed by the owner or agent of any vessel requesting the services of a particular pilot; . . . 37. No pilot shall leave any vessel after being appointed to the charge, unless with the sanction of the pilot master, until such vessel be properly moored at her place of destination, under a penalty . . . and the pilot when on board shall have sole charge of the vessel."

The bye-law fixing pilotage rates fixes river rates "from Glasgow to Bowling, Dumbarton, Greenock, or Tail of the Bank, or *vice versa*." No rate is provided applicable to the distance from Glasgow to the westmost limit of the river as defined by the Act, *i.e.*, the line between Newark Castle and the Cardross Burn.

The Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), section 633, enacts—"An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law."

The steamship "Beechgrove" Company, Limited, Glasgow, *pursuers*, brought an action against Aktieselskabet "Fjord" of Kristiania, *defenders*, for £5500 damages in respect of injuries sustained by their vessel the "Blaenavon" through being, as they alleged, run into by the *defenders'* vessel the "Fjord" near Princes Pier, Greenock, on 2nd February 1914. The collision occurred at a point about four miles to the westward of a line drawn from Newark Castle on the south bank of the river to the mouth of the Cardross Burn on the north bank, which line was the westward limit of the river Clyde in which pilotage was expressly compulsory. The pilot station was at Princes Pier, Greenock, and the s.s. "Fjord" had been boarded by a licensed river pilot at that station. The pilot on coming on board had taken entire charge of the vessel. The collision occurred after the pilot had taken charge, but before the vessel had reached the compulsory pilotage area.

The *pursuers* pleaded, *inter alia*—" (4) The *defenders'* steamer not being at the time of the collision in charge of a compulsory pilot within the meaning of the Merchant Shipping Act, they are not entitled to plead compulsory pilotage. (5) The bye-laws founded on being *ultra vires* of the Pilot Board, the *defenders* are not entitled to plead them in defence."

The *defenders* pleaded, *inter alia*—" (2) The navigation of *defenders'* vessel having been in charge of a pilot whose employment was compulsory within a pilotage district in the sense of the Merchant Shipping Act 1894, the *defenders* are free from liability in respect of said collision under section 633 of the said Act, and should be assoilzied with expenses."

On 11th July 1914 the Sheriff-Substitute (FYFE) sustained *pursuers'* fourth plea, re-

pelled the defenders' second plea, allowed a proof, and granted leave to appeal.

The defenders appealed, and argued—A shipowner was not liable for damage done by his ship, but for damage caused through the fault of his servants. There could be no liability in the present case on the part of the owners if at the time of the collision the relationship of master and servant did not subsist between them and the pilot. The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), section 633, was a statutory enactment of the common law rule that a shipowner should not be liable for the fault of a pilot whom he was compelled to take on board and place in charge of the ship—*The "Halley,"* 1868, L.R., 2 P.C. 193. The defenders' ship was under compulsory pilotage, and the fact that the compulsory area had not been reached when the collision occurred did not affect the question of liability—Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. cap. cxlix), sections 75, 128, 134, 139; *The "Guy Mannering,"* 1882, L.R., 7 P.D. 132. The pilot was not the defenders' servant, as they were compelled to take him on board without the power to choose from among the qualified pilots, to pay him from the start, to put him in control from the start, and to navigate a compulsory pilotage area. The pilot could not be treated as a passenger or as a member of the crew between his coming on board and the ship's entering the compulsory area—*The General Steam Navigation Company v. The British and Colonial Steam Navigation Company, Limited*, 1868, L.R., 3 Ex. 330, *aff'd*, L.R., 4 Ex. 238; *The "Charlton,"* 1895, 8 Asp. M.C. 29; *The "Sussex,"* [1904] P. 236; *Greenock Towing Company v. Hardie*, November 28, 1901, 4 F. 215, 39 S.L.R. 151. The bye-laws were *intra vires* of the Pilot Board—Clyde Navigation Consolidation Act 1858 (*cit. sup.*), section 139.

The respondents argued—When a shipowner claimed the benefit of the statutory exemption from liability he must show that he was clearly within its limits. The present case differed from those cited by the defenders, as in them compulsory pilotage had already existed and had ceased, whereas in the present case it had not yet begun. There was no compulsion to put the pilot in charge till the ship actually reached the compulsory area. *The General Steam Navigation Company, Limited v. British and Colonial Steam Navigation Company, Limited (cit.)* and *The "Charlton" (cit.)*, founded on by the defenders, followed *Lucey v. Ingram*, 1840, 6 M. and W. 302, and proceeded on an erroneous view of the law. *Lucey v. Ingram* proceeded on a special Act, the Pilotage Act 1825 (6 Geo. IV, cap. 125), which was not analogous to the Merchant Shipping Act 1894, section 633. The correct statement of the law of England was in *The "Stettin,"* 1863, Br. and Lush. 199. "District" in section 633 of the Merchant Shipping Act 1894 meant the actual area where pilotage was compulsory by law, not a district in part of which it was compulsory. To uphold the defenders' contention would be to extend arbitrarily and indefinitely the owners'

exemption. The *onus* lay on the defenders to show they were within the exemption—*Clyde Navigation Trustees v. Barclay, Curle, & Company*, May 23, 1876, 3 R. (H.L.) 44, 13 S.L.R. 753; *Clyde Shipping Company Limited v. Miller*, 1907 S.C. 1145, 44 S.L.R. 920; *Owners of the "Strathspey" v. Owners of the "Islay,"* July 3, 1891, 18 R. 1048, *per* Lord Kinneir at p. 1058, 28 S.L.R. 787, at p. 793. The voluntary employment of a pilot made him a member of the crew and the servant of the owners, and there was such voluntary employment here—Marsden on Collisions, 6th ed. p. 216, quoting Dr Lushington in *The "Maria,"* 1839, 1 W. Rob. 95, at p. 99. The bye-laws were *ultra vires* of the Board, as they went beyond the powers given in section 136 of the Clyde Navigation Consolidation Act 1858 (*cit. sup.*)—*Dick and Another v. Badart Frères*, 1883, 10 Q.B.D. 387.

At advising—

LORD PRESIDENT—On the evening of the 2nd February 1914 the steamship "Fjord," inward bound for the port of Glasgow, came into collision with the steamship "Blaenavon," outward bound from the port of Glasgow. This is an action raised by the owners of the "Blaenavon" against the owners of the "Fjord" to recover damages for the injury done by the collision to the former vessel.

The collision occurred at the Tail of the Bank, off Greenock, about four miles to the westward of Newark Castle. At the time of the collision the "Fjord" was in charge of a licensed pilot, and the owners plead that if they can demonstrate (as they undertake to do) that the collision was brought about solely by the fault of the licensed pilot, they are exempt from liability for the consequences. I am of opinion that that plea is well founded.

It is true that by the 136th section of the Statute of 1858 pilotage is expressly made compulsory only within the limits of the river Clyde as defined by that section. It is likewise true that the limits of the river Clyde as defined by the statute do not stretch further westward than an imaginary line drawn from Newark Castle on the south side of the river to the Cardross Burn on the north side, and consequently that the collision took place outside the limits within which pilotage is made compulsory by express enactment. Nevertheless I consider that if the owners of the "Fjord" are able to establish that the fault was exclusively that of the pilot they are entitled to be liberated from liability for the reasons which I am about to state.

By the 128th section of the statute, on the narrative that it is expedient that there be but one licensing authority for the river and Firth of Clyde to ensure safe navigation, a Pilot Board is set up and is authorised to license pilots for navigating vessels plying on the river and Firth of Clyde within the statutory limits, which extend to the Little Cumbrae. By the 134th section of the statute exclusive right is conferred upon the Pilot Board of the privilege of licensing pilots for the navigation of vessels on the river and Firth of Clyde within the

limits as defined by the statute. And by the 139th section of the Act of 1858 the Pilot Board is authorised to make bye-laws and regulations for the proper navigation of vessels plying within the western limits of the river, as defined by this Act, and the island of Little Cumbrae.

Now by virtue of the statutory powers so conferred the Clyde Pilot Board passed certain bye-laws many years ago which have an important bearing on the question we are now considering, for by the 18th of the bye-laws the pilots licensed by the Board are to consist of two classes—river pilots, those licensed to pilot vessels between Glasgow and Greenock; and deep-sea pilots, those licensed to pilot vessels between Greenock and the Little Cumbrae. By the 19th bye-law "No person shall presume to navigate or to act in piloting any ship or vessel whatever exceeding sixty tons register on any part of the river Clyde other than the river pilots duly licensed by the Board, under a penalty. . . ." And by the 37th bye-law no pilot shall leave any vessel after being appointed to the charge, unless with the sanction of the pilot-master, until such vessel be properly moored at her place of destination, under penalty, and the pilot while on board shall have sole charge of the vessel; and then by the bye-law fixing pilotage rates owners are compelled to pay for their pilot from Glasgow to Greenock, and are not entitled to escape by paying from Glasgow down to the imaginary line between Newark Castle and the Cardross Burn.

Now the effect of these enactments and bye-laws appears to me to be this—Ships inward bound to the port of Glasgow must stop at Greenock and there take on board a licensed pilot. The licensed pilot when taken on board must be placed in charge of the vessel from Greenock to her destination. He is not permitted to leave the vessel until she is safely moored at her destination, and the owners must pay rates for that pilot from Greenock to Glasgow. They are not entitled to and cannot stop at Newark Castle to take the pilot on board there and to put him in charge of the ship at the imaginary line.

The bye-laws, it appears to me, are well within the statutory powers conferred upon the Pilotage Board, and if their effect is as I have stated, then the legal consequence appears to me to be that the relationship of master and servant is never constituted between the owner and the pilot from the moment the pilot is taken on board at Greenock until the ship is safely moored at her destination. The owners of the vessel have no choice in the matter. They cannot even, except within very narrow limits, pick and choose among the licensed pilots. They must take the man who in his turn is sent out to navigate their vessel, and when he is taken on board they must place him in charge of the ship and pay the rate for the full stretch from Greenock up to the port of Glasgow.

Now that was exactly what happened on the present occasion. The "Fjord" took on board her pilot at Princes Pier. He it is alleged was in charge of the vessel at the

time when the collision occurred, and if it can be established that he alone was to blame, then it appears to me that the owners are released from liability.

The defenders' exemption from liability depends, in my opinion, not merely upon the statutory enactment—now the 633rd section of the Merchant Shipping Act of 1894—but also upon the common law. That doctrine was, it appears to me, laid down as far back as the case of the "*Maria*" (1 W. Rob. 95, 99; Marsden, Collisions at Sea, p. 216) by Dr Lushington when he said that "The leading principle of the Legislature in exonerating owners from any liability for damage occasioned by their vessels having pilots on board is this—that the masters are compellable to take pilots on board, and the owners are not responsible for the acts of the persons to whom they are thus forced to commit the management of their property, and over whom they have no control. This, I apprehend, is a rule founded upon the great principle of justice and equity."

The same doctrine was authoritatively laid down by Lord Justice Selwyn when delivering the judgment of the Privy Council in the case of the "*Halley*," (1868) L.R., 2 P. C. App. 193, at p. 201, when he says—"Their Lordships agree with the learned Judge in his statement of the common law of England with respect to liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel while under the control of a pilot whom the owner was compelled to take on board and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third parties are concerned, must always be considered as the acts of the owner. This exemption of the owner from liability when the ship is under the control of what has been termed a 'compulsory pilot' has also been declared by express statutory enactments"—*vide* Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104), sec. 388.

And the doctrine is laid down in similar terms, in the year 1882, by Lord Justice Brett, in the "*Guy Mannering*," (1882) 7 P. D. 132, where he says—"The owner of the ship is not liable for the consequences of the wrongful or negligent acts committed by the pilot whom he is compelled to employ. But if the ship goes wrong in consequence of a failure of duty by the lookout man, it is not the fault of the pilot, and the owner is responsible. If the pilot's orders as to steering the ship are not obeyed, and if mischief in consequence ensues, the owner cannot escape from liability. It may be that when the owner of the ship is compelled to take a pilot on board, and is compelled to pay him fees for the whole of a certain distance, he is protected from all the consequences of the pilot's negligence wherever they may happen, although during part of the distance pilotage is not compulsory—in fact, obligatory payment of a

pilot may be deemed to stand on the same footing as compulsion to take him on board." I understand that when the learned Justice speaks of "compulsory pilotage" there he is referring to pilotage within areas where it is declared to be compulsory by express statutory enactment.

In a case decided in the following year—that is, the year 1883—the "*Hector*," (1883) 8 P.D. 218—the same learned Judge says—"In my judgment the enactment is not really wanted, but it was put into 17 and 18 Vict. cap. 104, in order that there should be no doubt. Before this Act of Parliament, when a pilot was on board a vessel by compulsion, the common law, and all laws one would think, held that the owners of the vessels should only be liable for the negligence of their own servants." There the doctrine is laid down, I think, with great clearness and precision.

Now the law so laid down was followed in two cases to which our attention was drawn—the *General Steam Navigation Company, Limited v. British and Colonial Steam Navigation, Limited* case, (1868) L.R., 3 Exch. 330, and the case of the "*Charlton*," (1895) 8 Asp. M.C. 29. In both of these cases the vessel at the time of collision was in charge of a pilot within waters which, in one case certainly, in the other case probably, were non-compulsory pilotage waters—that is to say, waters within which pilotage was not compulsory by express enactment. In the *General Steam Navigation* case the question was keenly debated whether the vessel was within waters where pilotage was compulsory by express enactment or not. But both in the Court of Exchequer and in the Court of Exchequer Chamber judgment was given on the footing that the vessel was within waters where it would not have been in her case compulsory by express enactment to have a pilot on board and in charge; and the ground of judgment in the Court of Exchequer was very well expressed by Baron Martin, where he says (at p. 340)—"By the ordinary rule of law the owner of a ship is responsible for the negligence of the master and crew; they are in contemplation of law his servants; he selects them and pays them, and is responsible for their misconduct in the course of the employment. But a pilot taken compulsorily is not a servant of the shipowner. He does not select him. By section 378 of the Act he is bound to take the first that offers, and in the words of the statute 'shall give the charge of the piloting his ship to such pilot.' He pays him a fixed charge made by the authority of the statute, and is forbidden to pay him either more or less. . . . Under such circumstances the shipowner would not be responsible for the fault of the pilot at common law." And later in the opinion he says (p. 344)—"In my opinion the argument on behalf of the plaintiffs is grounded on the fallacy that when the ship was once brought within the limits of the port of London the relation between the defendants and the pilot was altered and converted into that of master and servant. In my opinion such relation never did exist between them, and if it did not the defendants are not liable, for no

other relation except that of master and servant would create the liability. For these reasons I am of opinion that the defendants are entitled to our judgment."

Now that ground of judgment rested upon the hypothesis that the vessel at the time of the collision was within waters where pilotage was not compulsory by express enactment. I ought to say in passing probably that I do not agree with the learned Judge in thinking the case was covered by the authority of *Lucey v. Ingram*, (1840) 6 M. & W. 302. On examination of the report in that case I find that the decision turned exclusively upon the construction of an Act of Parliament which it was held conferred the exemption, even although the master was at liberty to take a pilot on board or not as he thought fit.

The judgment of the Court of Exchequer was affirmed by a very strong bench in the Court of Exchequer Chamber, (1869) 4 Ex. 238, where the opinion of the Court was delivered by Mr Justice Byles, and on the assumption that the vessel at the time of the collision was within waters which in her case were not by statute compulsory pilotage waters the learned Judge thus states the ground upon which the Court liberated the offending owners from liability—"If the master of the defendants' ship wanted to go to Gravesend or beyond he could not take a pilot for a shorter distance. It was compulsory on him to take a pilot for that distance at least. The pilot could insist on being paid all the way to Gravesend, and could insist on being carried to Gravesend. There had been in effect a contract between the captain and the pilot that the pilot should go to Gravesend, should be paid to Gravesend, and should act as pilot to Gravesend." For "Gravesend" supply "Greenock" and you have the very case before us. "Suppose a storm or fog or other emergency to have arisen endangering the life not only of the crew but of the pilot himself, surely the pilot could have insisted not only on being carried to Gravesend but on piloting the vessel thither according to his contract. It is plain that during the first portion of the transit between the Downs and Gravesend the relation of master and servant did not exist between the owner of the defendants' vessel and the pilot, and we cannot see any indication of a fresh contract as to the latter portion of that transit." In short, the relationship of master and servant which did not exist between Glasgow and the imaginary line between Newark Castle and the Cardross Burn did not exist between the imaginary line and the Tail of the Bank.

The case of the "*Charlton*" was decided on similar grounds. There the ship was in charge of a compulsory pilot for the first part of her voyage. When I say "compulsory pilot" I mean a pilot taken on board in compliance with express statutory enactment. But at the time the collision actually occurred she had passed out of these compulsory pilotage waters and was in waters where by no statute were the owners compelled to take a pilot on board. Nevertheless the pilotage authority had prescribed that

the pilot should be taken the whole distance (in that case) from Bristol to Cardiff, and the owners were compelled to pay the man's charges throughout the whole distance. Following the judgment in the *General Steam Navigation* case the Court of Appeal absolved the owners from responsibility for the collision. And I find that Lord Justice Kay in expressing the ground of judgment says this—"This case seems to me completely within that decision"—*General Steam Navigation*—"and therefore this appeal must be taken as though he were, though in fact he was not, a compulsory pilot on the spot where this collision took place." Now I understand by that expression the learned Judge to mean that he was a compulsory pilot in the sense that he was not there by express statutory enactment. "I feel strongly," he goes on, "what the Master of the Rolls has expressed already, that if it were not so the master of the ship would be placed in great difficulty. At any rate, he may not have been able himself to draw the line in the water of the Bristol Channel, which was in fact the northern limit of the port of Bristol, and he was put in this danger, that the moment the ship passed over that line the compulsory pilotage would cease, and he would be bound to take the ship out of the charge of the pilot and navigate her himself, though he was in a channel of which he knew nothing about the navigation. I cannot think that would be a convenient or proper construction to put upon this section of the Merchant Shipping Act of 1854, and it seems to me that it is reasonable to say that where a pilot has been taken under compulsion to take a ship to a point in the Bristol Channel within the limits of his licence, that although that point is somewhat beyond the limits of the port of Bristol yet if the pilot goes on taking the ship beyond that limit and the collision happens he should be treated for this purpose as a compulsory pilot, and that the master and owners of the ship should not be made liable for a collision which happens by his fault." And Lord Justice Smith says—"It seems to me that we are guided by the authority of the case in the Exchequer Chamber which is on all-fours with this case. Sir Walter Phillimore in his able argument tried to escape that decision by saying that the second branch of that judgment was only a dictum, but I wish to point out that it is not a dictum at all but one of the bases of the decision. The Exchequer Chamber expressly held that if a ship is to take a pilot by compulsion on board, and an accident occurs in the district he is licensed for, though not in a place where compulsion is necessary, the shipowner is exempt from responsibility for the act of that pilot on the ground that the relationship of master and servant did not exist."

Now these two cases seem to me to be virtually on all-fours with the case which is now before us. These judgments are not binding on us, but they are of very high authority. They have been commented on with approval in subsequent cases, and appear to me to rest upon sound principle.

I hold, then, that in this case the owners of the "Fjord" were compelled to take a pilot on board off Greenock; were compelled to place that pilot in charge of their vessel from Greenock up to the harbour of Glasgow; were compelled to pay for the pilot's services from Greenock to the harbour of Glasgow; and, accordingly, that the relationship of master and servant did not exist on any part of the voyage from Greenock to Glasgow between the owners and the pilot. Consequently, if they can show that the collision was due exclusively to the fault of the pilot they are released from responsibility for the consequences.

In these circumstances I do not think that the pleas-in-law on either side ought to be touched at this stage, and, accordingly, that the judgment of the learned Sheriff-Substitute should be recalled.

LORD MACKENZIE—The ground upon which the defenders are sought to be made liable is fault. From this it follows that the pursuers cannot succeed unless they show that at the time of the accident the defenders' vessel was being navigated by one who was their servant and for whom they were therefore responsible.

This principle is recognised in section 633 of the Merchant Shipping Act of 1894, which provides—" . . . quotes, v. sup. . . ."

The rival contentions upon the application of this principle are (1) that it applies only to pilotage within a compulsory area, which is what the pursuers say, and (2) that it applies wherever a pilot is compulsorily in charge of the vessel, which is the argument for the defenders. I think the latter is the reasonable view. It is consistent with the English decisions cited to us. In the case of "*The Maria*," 1839, 1 Wm. Rob. 95, Dr Lushington laid down the principle in these terms—"If the taking a pilot on board was compulsory, and the collision was occasioned by the fault of that pilot, I shall hold the owners of the '*Maria*' exempt from responsibility, upon general principle, without reference to Acts of Parliament, for in that case the pilot was not their servant, and the maxim *qui facit per alium facit per se* does not apply. If on the contrary the taking a pilot was voluntary, then he was the servant of the owners, and the owners are responsible." This principle was recognised in the later cases to which we were referred. The collision here happened between Greenock and the imaginary line, drawn at Newark Castle, which under section 75 of the Clyde Navigation Act 1858 constitutes the western boundary of the river Clyde. The pursuers say that under section 136 of that Act the compulsory area is confined to the river, and that the vessel was outside that area when the collision happened. It is, however, quite clear that in the case (as here) of a vessel bound up the river the licensed pilot must join the ship at Greenock. As the Sheriff-Substitute says—"The nearest landing-place where a pilot can join or leave a ship is Greenock." This is about four miles lower down than the imaginary line referred to. The position therefore is this. Under

section 134 the Pilot Board have power to licence pilots; they may under section 139 make bye-laws for the proper navigation of vessels within the district where this collision happened, and for the conduct of masters and pilots of such vessels. The master was bound to take the pilot on board at Greenock, and the owners had to pay him from that point. Bye-law 37 provides that "the pilot when on board shall have sole charge of the vessel." The practical difficulty of holding in such circumstances that the master was bound to remain on the bridge between Greenock and the western boundary of the river are so great that I think it must be held that from the time he came on board the pilot was in charge of the ship. This involves the view that bye-law 37 is *intra vires* to this extent, that the Pilot Board could attach as a condition to putting a pilot on board that he was to have sole charge. Then arises the question whether, with reference to a pilot shipped in his turn (under byelaw 30) with regard to whom the owners have no power of selection, whom they were compelled to receive, and whom they had no power to remove, the authority of the master was superseded or not. I think it was, and that the pilot could not in such circumstances be held to be the servant of the owner. The English cases cited to us bear out this view. In "*The Charlton*," 1895, 8 Asp. M.L.C. 29, the circumstances were analogous, for I am unable to accede to the argument for the pursuers here, that there is a difference between that case and the present, because there the vessel had passed out of the compulsory area with the pilot in charge, whereas here the vessel with the pilot in charge had not passed into the compulsory area. I refer more particularly to the judgment of Kay, L.J., who proceeds upon the case which was founded on in the argument to us of the *General Steam Navigation Company v. British and Colonial Steam Navigation Company*, L.R. 3 Exch. 330, 4 Exch. 238. Kay, L.J., says with reference to that case—"It was decided that assuming the collision not to have been within a compulsory pilotage area though 'within the district' for which the pilot was licensed, though he had passed the limits of the port in which he was a compulsory pilot, the relationship of master and servant did not exist between him and the defendants at the time of the collision, and as his negligence caused the collision the defendants were exonerated from liability for his negligence. . . . I feel strongly what the Master of the Rolls has expressed already, that if it were not so the master of the ship would be placed in great difficulty." To the same effect is the judgment of Smith, L.J.—"The Exchequer Chamber expressly held that if a ship has to take a pilot by compulsion on board, and then an accident occurs in the district he is licensed for, though not in a place where compulsion is necessary, the shipowner is exempt from responsibility for the act of the pilot on the ground that the relationship of master and servant did not exist, and that section 388 applies."

I am of opinion that the same considerations apply to the present case.

Therefore if the collision was due to the fault of the pilot the owners are not responsible.

LORD SKERRINGTON—As a matter of strict relevancy I think that the defenders ought to have alleged that if the collision was due to the fault of any person on board their ship it was caused by the sole fault of a pilot whom the law compelled them to employ. They have made no such averment but in conjunction with the pursuers they have asked for a judgment on the question whether the pilot was a person for whose fault (if any) the defenders were legally responsible. Though I do not like the form of the procedure which has been adopted I think we may decide this question at the present stage and so probably save expense to the parties. If the defenders' pilot was in fault, the fault was committed in the Firth of Clyde where the employment of a pilot is optional and outside of the river Clyde where pilotage is compulsory. The Sheriff-Substitute has affirmed the liability of the defenders upon the simple ground that the collision took place some four miles to the west and outside of the imaginary line which separates the river on the east from the firth to the west, and I think that he was right in so doing. Counsel for the defenders and appellants referred to various English decisions in support of the proposition that the common law and statutory exemption of a shipowner from liability for the negligence of a compulsory pilot may extend to an act of negligence committed by the pilot outside the area of compulsory pilotage. I am not concerned with the soundness of these decisions because the present question arises under different statutes both private and public and under different bye-laws from those which were before the Courts in the English cases. I may say, however, that various passages in the opinions of the learned Judges who decided these cases seem to me to be difficult to follow, and if I understand them rightly I do not agree with them.

The Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. cap. xlix) creates, secs. 128 and 134, one pilotage authority within the limits of the river and Firth of Clyde, which includes the whole district between Glasgow and the Little Cumbrae. It also confers power on the Pilot Board to make bye-laws with reference to pilots and also navigation (sections 134 and 139). Section 136 prohibits navigation without a licensed pilot in any part of the river Clyde which is defined (section 75) as including the channel of the river from Glasgow downwards to an imaginary line running northwards from Newark Castle. The parliamentary burgh of Port-Glasgow is situated within less than a mile of and to the west of this line. The Pilot Board have by their bye-laws created two classes of pilots, viz., river pilots and deep sea pilots, but for some reason they have not taken Port-Glasgow as the station at which river pilots are to be picked up by vessels going inwards and to be put on shore by vessels going outwards,

but have selected for that purpose another parliamentary burgh—Greenock—which lies four miles to the west of the imaginary line. According to bye-law 18 (which, however, may be altered at any time) "the pilots licensed by the Board shall consist of two classes, viz., river pilots licensed to pilot vessels between Glasgow and Greenock, and deep sea pilots licensed to pilot vessels between Greenock and the island of Little Cumbrae, including vessels proceeding outwards from Port-Glasgow or inwards to Port-Glasgow." No one challenges this bye-law as *ultra vires*. Even if bye-law 18 had appointed Glasgow and Port-Glasgow as the eastern and western limits within which river pilots should be qualified to act, and even if bye-law 31 had directed that the river pilots should reside at Glasgow and Port-Glasgow (and not at Glasgow and Greenock as it actually does), the question would still have arisen whether a river pilot navigating a ship from the point where he came on board at Port-Glasgow became a compulsory pilot until he actually crossed the imaginary line which forms the western boundary of the river. Of course I am not here referring to the case of passenger ships which by the Merchant Shipping Acts of 1854 and 1894, now superseded by the Pilotage Act 1913 (2 and 3 Geo. V, cap. 31, sec. 11), were and are required to have a licensed pilot while navigating in any pilotage district whether pilotage is compulsory or not compulsory in that district.

I do not propose to examine minutely the Act of 1858 and the relative bye-laws, because two things seem to me to be abundantly clear. In the first place, the bye-laws do not purport to extend the compulsory pilotage area to the west of the imaginary line fixed by the statute. In the second place, it would have been *ultra vires* of the bye-laws to attempt to do this. Bye-law 19 is conclusive to my mind as to the meaning and intention of the bye-laws. Bye-law 37 was very much founded on by the defenders' counsel. It is a general bye-law referring both to deep sea pilots and to river pilots. I cannot construe it as making it illegal for the master of a ship bound inwards to Port-Glasgow to pick up a deep sea pilot a mile west of the Cloch Light under an agreement with the pilot that the latter shall take charge only when the ship reached the Cloch Light and should be paid accordingly. Equally I see nothing in bye-law 37 to prevent a shipmaster who is compelled to pick up a river pilot at Greenock from informing the pilot that he is not to take charge until the ship reaches Newark Castle. Of course no sensible shipmaster would in the ordinary case deprive his owners of the services of an expert for which they had to pay whether they employed him or not. Further, in certain states of the weather it might be imprudent to change the responsible navigator at any part between Greenock and Glasgow. Accordingly shipmasters inward bound have very strong reasons for putting the river pilot in charge from the moment he comes on board at Greenock. Equally shipmasters outward bound have good

reasons for leaving the river pilot in charge from Newark Castle to Greenock. But the fact that there is a strong and even an overpowering motive for employing a licensed pilot in a non-compulsory area does not make the employment compulsory. I am accordingly of opinion that the defenders have failed to demonstrate what is essential to their success, viz., that they were compelled by law to have their ship navigated by a licensed pilot from the moment at which the pilot came aboard at Greenock. If such was the true effect and intent of the bye-laws they constitute an *ultra vires* invasion of a common law right which the Act of 1858 and the public statutes relating to pilotage reserved to the master of every ship not carrying passengers, viz., to navigate his own vessel in every area where pilotage is not compulsory.

It follows, in my opinion, that the defenders are according to the principles of the common law of master and servant responsible for the fault of a person whom they voluntarily permitted to navigate their ship. It seems to me, however, that the liability of a shipowner for the fault of a compulsory pilot must now depend solely upon the terms of section 633 of the Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60). That section, like its predecessor in the Act of 1854, was based on the common law, but, in my opinion, superseded the latter *quoad* this chapter of the law. Accordingly, if the section when rightly construed imposes a wider or a narrower liability than would have been imposed by the common law, the words of the section must prevail and regulate the rights of the parties.

It would not have occurred to me that section 633 could be construed as exempting a shipowner from liability for the fault of a licensed pilot committed within a pilotage district but outside of any area where pilotage was by law compulsory. There are judicial opinions in favour of that view, but the suggested construction seems to me to be unnatural and unreasonable. The section in question must, however, now be construed along with an entirely new fasciculus of clauses which did not occur in the Merchant Shipping Acts of 1854 and 1894, but which appear for the first time in the Pilotage Act of 1913. This statute came into force (section 59) on 1st April 1913 before the date of the collision, and it repealed sections 572 to 632 inclusive of the Act of 1894. This repeal is not to affect any enactment or bye-law "with reference to pilotage affecting any pilotage district in particular," but I do not refer to the Act of 1913 for any such purpose. The Act of 1913 is to be construed as one with the Act of 1894 (section 62), and it may in my view be referred to as throwing light on the true construction of section 633. Section 10 (2) and section 14 of the Act of 1913 support the view that a shipowner's exemption from liability is confined to the area of compulsory pilotage and does not extend to the whole of a pilotage district which includes a compulsory area. I am therefore for affirming the judgment appealed against.

With reference to the judgment which

your Lordships are about to pronounce I should have had no difficulty in concurring if I could have brought myself to think that the Clyde Navigation Act of 1858 committed to the Pilot Board a discretionary power to define and extend the area within which it should be compulsory for a shipowner to employ a pilot, and if I could have held that the Board by its bye-laws had purported and intended to exercise this power. It seems to me, however, that nothing short of an affirmative answer to both of these legal propositions can justify that judgment.

The Court recalled the interlocutor of the Sheriff-Substitute and remitted the cause to him to allow a proof.

Counsel for the Pursuers and Respondents—Horne, K.C.—Paton. Agent—Campbell Faill, S.S.C.

Counsel for the Defenders and Appellants—Sandeman, K.C.—Normand. Agents—J. & J. Ross, W.S.

## VALUATION APPEAL COURT.

Saturday, December 19.

(Before Lord Johnston, Lord Salvesen, and Lord Cullen.)

### ARBROATH ELECTRIC LIGHT AND POWER COMPANY *v.* ARBROATH ASSESSOR.

*Valuation Cases—Value—Electric Lighting Undertaking—Revenue Principle—Profits of Preceding Year or Average of Three Preceding Years.*

The assessor valued the electric light and power undertaking of a company at £1215, based upon the profits of the immediately preceding year. The company appealed. It sought to have the valuation based on the average profits of the three preceding years. The company, who had only been in being for a very few years, had earned increased profits each year, the increase in the immediately preceding year being large owing to the temporary breakdown of machinery in a factory which in consequence had taken power, and it had just spent £8000 on extensions. The previous year's valuation was £600. The Valuation Committee fixed the valuation at £1100 in respect of the abnormal circumstances, while of opinion that the capital expenditure would have warranted a valuation at the figure proposed by the assessor. On an appeal by the company the Court *upheld* the Committee's valuation.

*Per Lord Johnston*—“I therefore think the reasonable course is to take a three years' valuation. But your Lordships think otherwise, and I readily accept your Lordships' decision, for the object is to fix a rule which shall govern all similar cases.”

At a meeting of the Valuation Committee of the royal burgh of Arbroath, held on the 11th day of September 1914, the Arbroath Electric Light and Power Company, Limited, *appellants*, appealed against the following entries of the assessor, *respondent*, in the valuation roll for the year 1914-15, viz.—

No. on Roll.	Description and Situation of Subject.	Proprietor.	Occupier.	Yearly Rent or Value.
2434	Works and Generating Station, South Grimsby	Arbroath Electric Light and Power Company, Limited, per E. Howard Collins & Company, 45 Parliament St., Westminster, London, S.W.	Proprietors	£683 0 0
2435	Mains within burgh	do.	do.	532 0 0 £1215 0 0

and craved that the valuations be restricted to £280 and £220 respectively.

The Committee fixed the valuation at £1100, whereupon the appellants craved a case for the opinion of His Majesty's Judges.

The Case contained no statement of facts, but the evidence was appended. The assessor, *inter alia*, stated—“... The valuations for 1908-9, 1909-10, and 1910-11 were made by my predecessor by an arrangement with the appellants and without any definite basis. In 1911-12 I worked out the valuation on the revenue basis of £628. The company objected and referred me to the decision in the *Coatbridge* case. I agreed to adopt the basis laid down in that case. This brought out a valuation less than £280, taking an average of the two years 1909-10, but the company agreed to allow the valuation to stand at £280. The entry for stores, &c., is not contested. In 1912-13 the valuation, worked out in accordance with the *Coatbridge* case, but taking a three years' average, came to slightly over £280, but I continued the valuation at £280. In 1913-14 the valuation came to £600, that was taking an average of three years. The Arbroath and St Vigeans Parish Council complained against this valuation of £600, on the ground that the valuation should have been based on the profits of the preceding year instead of on an average of three years, and there was also an appeal by the company; both complaint and appeal were withdrawn.

“For the present year I put down the works and mains at £1215. . . . My figures are based on the accounts of the company for the year ending 31st December 1913. . . .

“In making this valuation I have been guided by the decision of the Land Valuation Appeal Court in the case of the *Coatbridge and Airdrie Electric Supply Company*, which I have carefully studied. I depart from that decision in two respects—(Firstly) I have estimated the amount of the tenants' floating capital at five months' expenses instead of four and a-half. (Secondly) I have allowed 12½ per cent. on tenants' capital to cover interest, repairs, and depreciation of plant, in place of the 10 per cent. allowed by the Court in that case. I was pressed by the Arbroath Company to make a larger allowance than 10