Tuesday, May 23.

THE TRUSTEES OF THE CLYDE NAVIGATION *v.* BARCLAY, CURLE, & COMPANY.

Ship — Collision — Reparation — Pilot — Merchant Shipping Act 1854, *sec.* 388.

Section 388 of the Merchant Shipping Act 1854 enacts—"No owner or master of any ship shall 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 such ship within any district where the employment of such pilot is compulsory by law."

Held that in order to entitle the owners of a ship to the benefits of this provision it is not enough for them to shew that the damage arose through the fault of the pilot, if there is reasonable ground for saying that there was contributory fault on the part of the master or crew.

Circumstances in which *held* (aff. judgment) that the owners had discharged the *onus* thus laid upon them.

On 17th February 1873 a new steamer, "Colina," built by the defenders Barclay, Curle, & Co., sailed down the Clyde from Glasgow on her trial trip, and was returning up the river on the afternoon of the 19th, when, the light being good and the weather clear, she ran into and sank a dredger belonging to the pursuers, the Trustees of the Clyde Navigation. At the date of the collision the "Colina" had not been taken over by the purchasers, but was still in the possession of the builders.

This action was for £6000, as the damage sustained by the pursuers through the sinking of their dredger.

The defenders, besides maintaining that the collision was not caused by their fault, pleaded "(3) *Separatim*, the collision having been occasioned by the fault or incapacity of a duly licensed or qualified pilot acting in charge of the steamer within a district where pilotage was compulsory by law, the defenders were entitled to absolvitor, with expenses."

This plea was founded on sec. 388 of the Merchant Shipping Act 1854, which enacts—"No owner or master of any ship shall 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 such ship within any district where the employment of such pilot is compulsory by law."

It was admitted that Luke Skelly, a duly licensed pilot, was at the time of the collision in charge of the "Colina," and that the collision occurred within a district where the employment of a licensed pilot was compulsory.

The pursuers maintained that the collision would have been averted if the hawser which connected the "Colina" with a steam-tug had been cast off when an order to that effect was given by the pilot, and further, that the pilot's order not being carried out resulted from the vessel not being properly manned. They therefore contended, that although there might be fault on the part of the pilot, there was contributory fault on the part of the master and crew.

The facts of the case as disclosed on proof are fully given in the report of the case in the Court of Session, and in the opinions of the Judges in this appeal.

The Lord Ordinary (MACKENZIE) assoilzied the defenders, and the Second Division (*diss.* Lord Ormidale, *abs.* Lord Gifford) adhered.

The pursuers appealed.

At delivering judgment—

LORD CHELMSFORD—My Lords, the only question upon which there is any dispute in this case is whether the owners of the Colina have done or omitted to do any act which contributed to the collision for which they are sought to be made answerable. Their defence is founded on the Merchant Shipping Act 1854, which enacts that "no owner or master of any ship shall be answerable to any person whatever for any loss or damage sustained by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." But although an accident may have been attributed originally to a pilot, yet if any fault of the owner or master of the vessel has contributed to it, the responsibilty still remains.

There has been some little confusion in the cases as to the *onus probandi* of the charge of contributory negligence. In a case relied upon in the judgment of the Court below, and mentioned in the argument at the bar, the case of the "Iona" (1st Law Reports, Privy Council, 426), Vice-Chancellor Kindersley is reported to have said— "It is not enough for the owners to prove that there was fault or negligence in the pilot; they must prove, to the satisfaction of the Court which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage." The learned Vice-Chancellor imposes upon the owners a species of negative proof which it is impossible for them to give. If, instead of saying "they must prove," &c., he had said "it must be proved that there was no fault on the part of the officers and crew," he would then have been perfectly correct.

The condition of exemption that the owners should prove that the accident arose entirely from the fault of the pilot, is one which must be fairly and reasonably interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in causing the calamity must therefore, in absence of proof of contributory fault of the crew, be held to have satisfied the condition on which exemption depends, and are not to be called on to adduce proof of a negative character to exclude the mere possibility of contributory fault. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions on the part of the crew may come out, and it will then be incumbent on the owners to show satisfactorily that those acts or omissions in no degree contributed to the accident. There are certain facts which are clear in this case. The "Colina" was under the compulsory charge of Skelly, a licensed pilot, and he was the main cause of the damage which occurred, which is attributable to his improper steering of the vessel at the critical time when

danger was imminent, when he appears not to have had complete command of himself. The original cause of the accident is beyond a doubt. Is the pilot then alone responsible? or were there any acts or omissions which contributed to the accident attributable to the owners and crew of the "Colina"? This vessel had just been built, and had not been delivered by the shipbuilders to the owners, but was upon her trial trip in the Clyde, having on board three persons who afterwards became the master and first and second mate, and a crew employed for the occasion, consisting of twenty-five men. The first act of contributory negligence imputed to the owners is the having a crew of this description; and the bye-laws of the Clyde Pilot Board are referred to, and the evidence of Skelly, the pilot.

With regard to the bye-laws of the Clyde Pilot Board, those bye-laws require that "All steam vessels must be supplied with a captain or sailing master, who shall be an experienced seaman, and must also be manned with a sufficient number of able-bodied and experienced seamen, for the safe navigation of the vessel." The judges who were in favour of the defenders spoke disparagingly of this state of things. The Lord Justice-Clerk says—"The vessel was still the property of Barclay, Curle, & Co., and she was manned on this her trial trip by officers and men who had no regular commission, but were there for the purpose of the trial trip. It is said that this is not sufficient compliance with the bye-laws. I think it was a slovenly state of matters, and not one to be commended." And Lord Ormidale says—"The evidence shows that the "Colina" was as regards her officers and crew in a very deplorable condition, so much so that it is not the least surprising that an accident occurred. With respect to the bye-law, one can only observe that it was totally inapplicable to the present case. The "Colina" was still in the shipbuilder's hands, and therefore could not have any captain or sailing master, or an established crew of seamen. And this may account for what was observed by my noble and learned friend in the course of the argument, that no charge is made by the Trustees of the Clyde Navigation—the author of the bye-laws—that there had been any fault by the non-observance of it. With respect to the constitution of the crew, it was necessarily one collected for the occasion, and could not consist of a master and officers strictly so called. There is no doubt that upon the trial trip of a vessel, although she cannot be officered and manned like a ship on a voyage, every provision must be made to navigate safely, and every precaution taken to avoid danger to other vessels. All that was necessary was that the pilot should be assisted by a sufficient crew to obey his orders and carry them out promptly and efficiently; and certainly, so far as number is concerned, there was a sufficient crew, for it appears that the "Colina" would, if properly manned, have a complement of sixteen men, whereas on the occasion of this trial trip there was no less a number than twenty-five men. But assuming any objection to arise from the constitution of the crew, the point to be established against the owners is that the accident was occasioned in some degree by this circumstance.

It was said that the accident was partly owing to the want of proper assistance given to the pilot. It is said that the master ought to have been on the bridge to advise the pilot. There was no master, as I have already observed, strictly so called; but there is no magic in the word master, and it appears that Durie, who was to be one of the officers of the "Colina," was on the bridge, and did what was necessary. It is further objected that the chief officer was not at the bow to repeat the pilot's orders, and it is said that if the chief officer had been there the hawser of the tug would have been sooner cast off. But Skelly, the pilot, says expressly that he did not want assistance for hailing the tug. He says—"I did not require any assistance in signalling the tug;" and he says in another part of his evidence that all his orders were obeyed.

Lord Ormidale sums up his objections to the conduct of the owners as contributing to the accident in these terms—"I am of opinion that in respect of want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect, and failure to keep a proper look-out, the defenders have failed to exonerate themselves." With regard to "the failure to keep a proper look-out," there is not the slightest evidence that there was not a look-out kept. With respect to "want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect," it is already answered by the part of the pilot's evidence to which I have directed your Lordships' attention.

Under these circumstances, I think your Lordships will be clearly of opinion that there is no ground for this appeal, and that the interlocutors appealed from ought to be affirmed.

Lord Hatherley—My Lords, I am entirely of the same opinion as that which has just been expressed by my noble and learned friend.

The law has been laid down with perhaps a little want of his usual carefulness and accuracy by Vice-Chancellor Kindersley in the case of the "Iona," as far at least as he is reported as expressing in the opinion delivered by him on the part of the Judicial Committee of the Privy Council the principle to be this, that there is thrown upon the owner of a vessel who wishes to escape from the consequences of damage done by his ship, by the application of the privilege of exemption given to him by the Merchant Shipping Act of 1854, the burden of proving that his own officers and his own men, who were under his control or employed by him, did not concur in producing the accident. I apprehend that the true rule, as was stated fairly enough by Mr Benjamin this morning, is that the mode of proof will be this:—In order to exempt yourself, by virtue of the provisions of the statute, from that which is a general common law liability, you who desire the exemption must bring yourself within the provisions of the statute, and the burden is therefore thrown upon you of proving that the mischief was occasioned by the pilot. There the case would rest if nothing more occurred; but the other side may prove that although the mischief was occasioned in one sense by the bad management of the pilot, there was, on the other hand, a default on the part of you, the owners of the ship, which default conduced to the accident, and that you, having therefore partly caused the accident which has occurred, having concurred with the pilot in occasioning the damage and in-

jury, the burden is thrown upon you. It being established that there has been some miscarriage on your part, if you wish to repel that you must say and prove—"True it is that there may have been some miscarriage on our part, but the miscarriage you have pointed out had nothing to do with the accident which has occurred; and therefore we again come back to the original proposition, that the damage was occasioned by the pilot and by the necessity of our having that pilot; for if there were any defects in our own organisation and management they had nothing to do with contributing to that particular damage which is alleged."

I think that the defenders in this case have entirely satisfied the conditions which are required to be satisfied in order to exempt them from the ordinary consequences of an injury done by a vessel. There is no question—indeed it has not been denied by the counsel for the pursuers—that the mischief here was occasioned by the orders given by the pilot. The only question therefore which remains to be discussed is, whether or not the defenders or their agents in any way conduced or contributed to that mischief?

The points raised on the part of the pursuers are two—They say, first, you had not the proper complement of persons on board for the navigating of this vessel in this river, which is peculiarly liable to accidents from its crowded state, and which is subject to particular rules and regulations in consequence. The accident has been occasioned by the want of your having the proper number and complement of persons on board as well as by the pilot's mistake, and in that manner you have contributed to the injury occasioned by the pilot's error. My Lords, the mode of proving this has been by producing certain orders of the pursuers themselves as trustees of the River Clyde Navigation, which orders do not appear to me, I confess, to have any application to a vessel on her trial trip, or to the present case, beyond indicating (as they may do) what may be considered to be the reasonable number of persons to have on board to discharge the duties, and beyond directing the attention of all of us who have to determine this case to the fact that a certain number of persons are required for the discharge of such duties, and thereby endeavouring to induce us to infer that where such a number of persons are not to be found sufficient assistance is not given to the pilot in navigating the vessel, and therefore there is a contributing to the mischance which has happened through his mismanagement in consequence of his not having that sufficient assistance.

The pursuers say, We will make out our case in two ways—First, we will show that if the pilot had had sufficient assistance he might have been advised at the moment when his error first commenced, in leaving the helm too long a-port; he might have been told of that error if anybody had been standing with him on the bridge in the position of an ordinary master of a vessel, who might be standing by the side of the pilot, although the pilot had the vessel in charge, and might give him an intimation of any danger he himself saw, such as the danger of having a dredger ahead or the like, or the danger of continuing the vessel in the wrong course. They say the pilot had not that advice and assistance, and if he had had it the accident would not have occurred. Secondly, they say that the vessel might have been saved from occasioning this damage by running her, without danger or injury to herself, on to a soft bank on the south side of the river, lower down than the dredger which she encountered by not taking that course; and that this collision would not have happened if the hawser which attached the steam-tug to the "Colina" had been promptly cast off. There were two steam-tugs in this case, one at the bow the other at the stern of the vessel, and it is said that if the hawser which attached one of the steam-tugs to the bow of the vessel had been relaxed and cast off, so that the pull to the northward which was given by that first steam-tug at the bow would have ceased, and if the vessel therefore had been allowed to fall off to the southward and to run upon the mud bank which was in rear of the dredger in question, the vessel's course would have been arrested by her being thrown upon the mud below the point where the dredger was, and the dredger would have been saved from destruction. The argument has been this—First, that there was no person to advise the pilot of the danger of his running upon this dredger; and secondly, that there was no person to assist him in giving such effective orders to the steam-tug as would have enabled the tug by casting off her hawser to leave the steamer in a position to run upon the mud bank on the south side of the river.

Now, my Lords, it appears to me that all this is really open, in the first place, to the very serious objection which was taken in the course of the argument by my noble and learned friend opposite (Lord Selborne). Here are the Trustees of the River Clyde, who give their orders with respect to the proper and due navigation of the river; they are the pursuers in the present case, and they do not appear to have thought it worth while to raise this question in any shape or form whatsoever upon the pleadings. True it is that the evidence has been directed (and Mr Benjamin called our attention to it) to this species of misfeasance, namely, the want of a due supply of men on board the vessel. But the pleading seems to have been directed altogether to a point which wholly failed, namely, the defective construction of the ship, so that she was not in a proper condition to have been navigated upon this her trial trip on a river so crowded as the Clyde was. That part of the case was not pursued, but another part of the case which was not referred to, or, if at all referred to, referred to only in the most distant manner by the pleadings, has been the part that has been insisted upon in the evidence. My Lords, I do not wish to rely upon the absence of that pleading in this matter, although I think it is a point of considerable importance, as tending to throw doubt upon the case of the pursuers when they attempt to attribute the disaster to a want of sufficient assistance afforded to the pilot.

The pilot seems evidently to have been assisted in every way. As regards the number of men on board, although for the most part they were not sailors, they were carpenters, they were men employed in building ships, and accustomed to make trial trips of this kind. But more than that, the person who was afterwards appointed as captain of the vessel was on board. Certainly I agree on this point with the remarks which were made by

the counsel for the pursuers in this case, that although he who afterwards became the captain of the vessel when the vessel was handed over to the purchasers, was on board, making his observations no doubt, and sometimes throwing out useful observations, he was not there (as he himself says) in any capacity as commanding the vessel. Not only was he not in charge of her, but he was not taking any active part in her navigation. But, on the other hand, there were two other persons on board who afterwards became the first and second officers of the vessel when she was handed over to the purchasers, and they were both of them performing active duties in connection with the navigation. I will not refer to the passages of the evidence proving this, because they have been discussed so much by the counsel, and a good deal of the evidence has been recently referred to this morning, therefore it is not necessary for me to refer in detail to it again; but you have it, in the first place, that Durie, an experienced officer, was on the bridge with the pilot the whole of the time that the vessel was steaming up the river; whether or not he left the bridge to sound the whistle is left apparently a little in doubt in the evidence, although I read his evidence as saying that he was on the bridge the whole time, and I presume he was able to arrive at the whistle whilst he was on the bridge, although, of course, he would not be at the pilot's side at the moment whilst he was sounding the whistle; however, he was on the bridge with the pilot. There was also another man who had had considerable experience, namely, Corrigall, who was afterwards second officer of the vessel when the purchasers took her in hand; he was placed at the wheel-house expressly for the purpose of seeing that the pilot's orders were promptly and explicitly obeyed. Besides that, there were four men at the wheel; one of them was Quigley, a young man only twenty-two years old last year, so that at the time of the accident he was probably about twenty years of age. However, he was accustomed to the sea, and he had as his assistants at the wheel three ship's carpenters, all of whom were superintended by Corrigall.

Then what does the pilot say? He says that every order he gave was attended to; there is no doubt about that, so that nothing whatever could be attributed to any defect on the part of those who were on board to assist him. Any danger or difficulty that did arise must have arisen from the unfortunately mistaken orders of the pilot—when I say "mistaken" I mean erroneous—not mistaken by those who received them, for they were carried punctually and implicitly into effect by those who received them; with respect to that he had every possible assistance in the men who were placed at the wheel, and in the man who was superintending them, and in Durie also. I apprehend it would be a strange thing to say that a party had contributed to the mischief because he did not point out an error to the pilot, who alone had charge of the steering; still, if it were necessary that somebody should be there to point out such an error, Durie was the man, and he did point out to the pilot that the course was erroneous in consequence of the helm of the vessel being kept so long a-port

Then, my Lords, as regards the steam-tug, the point that is raised is this. It is said several of the witnesses have declared that if the rope had been cast off at the time when the pilot first shouted out to the tug the accident would have been avoided, because the vessel would have run on the south bank; if the steam-tug had then immediately dropped the hawser, the vessel would have run upon the south bank, short of the the dredger, and avoided the injury. It does seem a very strange measuring cast which is called in aid in this part of the case when, in the first place, Durie says very distinctly, when he is cross-examined on the subject, that he does not think that anything would have saved the collision. As the other tug steamer at the stern operated upon the steerage of the great steamer much more importantly than the tug at the bow, he says that he does not think that any such result would have taken place.

The evidence of the witnesses on the part of the pursuers is somewhat singular on this point. There is a little obscurity as to whom M'Donald called out to. M'Donald was one of the men on board the dredger, and he was called by the pursuers to prove part of their case; I think he was the first witness. He and Barrie were in the dredger. What M'Donald says is—"She had two tugs attached to her, one fastened to the bow and another to the stern. The "Colina," when I first saw her, was coming right across our stern, from the north to the south side of the river. I saw that if she continued on the course she was taking she would clear our stern and go upon the south bank of the river. I cried out to the people on board to let go the tow-line of the tug ahead of her." It would appear as if he called out to the people on board the great steamer, not to the person on board the tug. "If they had done that she would have gone clear of us. The front was rather to the north, so as to pull the head of the "Colina" round to the north. The bottom of the south side of the river is a kind of soft clay bottom. The tug did not slip the hawser at the time I called out, but did so a little afterwards. The steamer was very close on our stern before the rope was let out." Then Barrie, who gives evidence upon the same point, says that he heard M'Donald call out "at the time she took the second change, when her head was put round to the north again, the front tug was hauling her in that direction." In another place he says—"If the hawser had been slipped before the vessel altered her position, she would have run clear of us altogether. I think the hawser was slipped, as nearly as possible, about the same time that the vessel struck us. I heard M'Donald calling out to the tug to let go the hawser. If that had been done when he called, I think the collision would not have taken place."

Really the question there raised is this; and observe what the measuring cast is. They say—here is the pilot calling out to the tug, if there had only been a man on the forecastle, or near the forecastle, when the pilot shouted out, so that the pilot might have shouted or sent a quick message to the man at the forecastle to shout, instead of his own shouting, that other man might have been heard. Now, as far as I can make out the position of the vessel from the map, the dredger was rather nearer to the tugging vessel than either the pilot or any man on the forecastle of the principal steamer could have been. M'Donald did shout out, and he evidently seems to have shouted out at the same time as

the pilot, because the witnesses say that when M'Donald shouted there would have been time to have prevented the accident if the parties had attended to it; but evidently the parties did not hear this shouting, and accordingly nothing was done.

It appears to me, my Lords, that independent of any evidence of that kind about who did or who did not shout, the evidence being at last this, that no one seems to have heard any shouting at all, as far as I can make out, but the real result was achieved by the waving of the hand, it only comes to this—if the pilot, who must have been aware that paddle-wheels do prevent people from hearing signals made to them by means of the human voice, had waved his hand in the first instance instead of shouting, nothing of the kind would have occurred.

That being so, I think it would be quite preposterous to say that the owners of a vessel can be made liable for damage of this kind, because, if they had placed somebody at the head of the vessel, or if there had been somebody with a louder voice than the pilot to call out, the accident would have been averted, and therefore they must be held to have contributed to the mischief in consequence of the want of having so placed a person. I apprehend that if the pilot had taken the course at first which he did at last, of waving his hand, he might have saved the dredger and avoided the accident. That is the conclusion at which I arrive, looking at the whole evidence, especially that of Durie, who seems to have been a man of great carefulness and watchfulness, as well as skill. Durie's opinion is that it would have saved it. But I hold that it is not necessary to have recourse to his evidence at all. I hold that if the difficulty did arise from the pilot not being able to make himself heard, that difficulty might have been avoided by his resorting to other means of communication. It seems to me that under these circumstances there is no possible pretence for saying that the defenders in this case contributed to the injury to the dredger.

Lord Selborne—My Lords, the argument for the appellants has been mainly founded upon the suggestion of there being some special rule of law different from the ordinary principles regulating *onus probandi* between parties applicable to cases of this particular kind. I myself see no reason for inferring from any of the cases which have been cited the existence of any such special or peculiar principle applicable to the burden of proof in this class of cases. If we look at the case on general principles, apart from any *dicta* in any of the authorities, it would seem to be not difficult to apply those principles to a case of this kind.

In the first place, the pursuers coming into Court to obtain damages for the improper running-down of their vessel, have, of course, an original *onus probandi* laid upon them to show that the dredger was in fact run down through some fault on the part of those navigating the steamer. That, no doubt, is a burden of proof very easily discharged. Then the burden of proof is shifted to the defenders; and they, in order to relieve themselves from liability under the Merchant Shipping Act 1854, must prove that the loss or damage was "occasioned by the fault or incapacity of a qualified pilot acting in charge of the ship within a district where the employment of a pilot is compulsory by law." Your Lordships will observe that there are three things necessary to be proved—1st, That a qualified pilot was acting in charge of the ship; 2d, That that was compulsory; and 3d, That it was his fault or incapacity which occasioned the loss or damage.

My Lords, I apprehend that if a defender proves all these three propositions, and proves nothing more, then the burden is upon the pursuer, not upon the defender, to lay some foundation at all events for alleging that notwithstanding the proof given that there was a qualified pilot in charge, and that compulsorily, and that he committed some fault or showed some incapacity by which loss or damage was occasioned, yet there was also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for such a case of contributory negligence must be laid, and the question is upon whom it lies to show that. I apprehend it is clear on general principle that the burden of laying that foundation rests upon the pursuer, not upon the defender. The defender, if he has simply proved what he was obliged to prove to exonerate himself, and proved nothing more, is not obliged to travel into the indefinite region of negatives, or to anticipate by denial that for which no foundation is laid to call upon him to deal with it. No doubt the pursuer may discharge the onus lying upon him in that respect either by direct proof tendered by himself or by showing that in the proof brought forward on the part of the defender there are matters appearing from which fault or negligence which may have contributed to the mischief is legitimately and reasonably to be inferred. Unless he does that he does nothing. When that is done no doubt a further *onus probandi* is thrown on the defender to rebut the *prima facie* evidence which has been given of contributory negligence on his part.

Whatever may be the precise expressions to be found in any of the judgments, I see no reason whatever, referring them as they ought to be referred to the facts of the particular cases in which these expressions were used, for supposing that an arbitrary rule was meant to be laid down, inverting the general principle of *onus probandi* as applied to this particular class of cases. The Lord Justice-Clerk seems to me to have expressed the matter very properly, with the exception perhaps of one single word, which I confess I should prefer to alter, when he says—"I should prefer to state the law to be that it is not enough for the owners to show that the damage arose through the fault of the pilot, if there is reasonable room for saying that there was contributory fault on the part of the master or crew." I confess, my Lords, I should not have used the word "room;" I should have used the word "ground," and have said—"if there is reasonable ground for saying that there was contributory fault on the part of the master or crew." The proof of circumstances which *primâ facie* show such reasonable ground for saying that there was contributory fault on the part of the master or crew no doubt would throw upon the defender the burden of explaining these circumstances, so as to satisfy the Court that in point of fact the *primâ facie* conclusion from

these circumstances is not correct. If he fails to do that he fails altogether. So much with regard to the principles of law; and I think when they are correctly understood there is no difficulty whatever in applying them to the facts of this case. My Lords, in this case the argument has ultimately turned upon the want of proper officers on board the ship. In the first instance it took perhaps a wider range, and it was said that the ship was not properly manned and officered; but ultimately it was reduced to that, and in connection with that reference was made to the bye-laws made by the pursuers in their official character for the navigation of the river Clyde, which are printed at pages 103 and 104. My Lords, I must say, after having studied those bye-laws, that even if it were clear that they did apply to trial trips as well as to other occasions in all respects, I am by no means satisfied that there is any proof whatever given in this cause that they were not strictly complied with, substantially complied with at all events. My Lords, these bye-laws are two. The first is—"Every vessel shall during the day-time have one person, and from sunset to sunrise or in time of fogs two persons, properly qualified, stationed at the bow as a look-out, to give notice in due time of any obstruction or danger, who shall be furnished with a trumpet or horn or whistle, to be used when there is reason to believe another vessel is near." I do not know whether the words "stationed at the bow" point to anything different from being stationed on the bridge, but in this case the evidence makes it quite clear that the proper place for a look-out was the bridge; and, as a matter of fact, the evidence is that this accident occurred in the day-time, when, according to that bye-law, one person only would be sufficient for the look-out, for there was plenty of light and no fog—no fog is suggested. There was only one person, the pilot, and another, Durie, who practically acted as an officer, on the bridge the whole of the time, to say nothing of a third person, Ferguson, whom I will mention presently, who was there too, but who may not perhaps have been properly qualified. But that the pilot and Durie were properly qualified for this purpose is perfectly clear. They were in the proper place during the whole time, and there was a trumpet to give proper notice; therefore it seems to me that that bye-law, at all events, was duly complied with in this case.

The second bye-law is—"Every steamer navigating the river shall be manned by an experienced captain or sailing-master and a sufficient number of able-bodied and experienced men, and shall in all cases have a person or persons stationed as a look-out, in terms of article 2." I have already dealt with article 2. There was a person, in fact there were two persons, stationed as a look-out. It is not now denied that there were "a sufficient number of able-bodied and experienced men," because it is admitted that no case can be made of a want of a proper crew of seamen. The sole question therefore upon that bye-law would be reduced to this—Was the requirement that every steamer should be manned by an experienced captain or sailing master duly complied with? My Lords, I venture to say that the pilot was the sailing-master in this case, and if there be nothing more than the mere language of that bye-law, considered as applicable, at all events, to a trial trip, I cannot conceive any ground for saying that a pilot might not be a sufficient sailing-master within the meaning of the bye-laws. So much, my Lords, with regard to the bye-laws.

Now I come to the pleading; and it does seem to me that if ever there was a case in which the pursuers were to be bound by the inferences to be drawn from their own pleadings, this is a case of that description. For who are the pursuers? They are a public body, who have made these bye-laws—a body expressly charged with the care of the navigation of the river Clyde, and whose duty it would therefore be to use all the proper means to prevent all improper practices in the navigation of the river. It is not alleged that they discovered after these pleadings were put in any fact which they did not know at that time. They knew, therefore, both what was usual in the case of trial trips, and what was reasonably to be required and expected, whether under their own bye-laws or otherwise, in respect of the officering and manning the vessel; and knowing all the facts, they distinctly put upon their pleading this averment, that the accident was due to two causes, or to one or other of those causes, not alleging any other cause besides.

Those two causes were—First, "Negligence or want of proper care and skill on the part of those navigating or steering the vessel;" that is one. The other is—"Gross and culpable defects in her construction and apparel;" in another place more fully expressed thus—"in the hull, machinery, steering-gear, and other appliances of the vessel." Therefore, they distinctly alleged two causes—one, improper steering and navigating at the time, and the other, improper construction and fitting up of the vessel itself. But there is a total absence of allegation either that the ship was improperly manned or not properly officered, or that the want of proper manning or proper officering had anything to do with the accident which occurred.

It is impossible, my Lords, for me to doubt that they would have alleged a want of proper manning and proper officering if, when the pleadings were put in, they had taken that view of the subject which, in default of anything else to rely upon, has been pressed on their behalf at the bar; and when I look at the evidence—bearing in mind that that is the pleading of the pursuers themselves—I cannot but come to the conclusion that if there were any doubtful points in the evidence, any ambiguous points, any room for the suggestion of possible inferences tending to the conclusion that the ship was improperly officered, all doubt and all ambiguity upon that subject ought to be removed when we bear in mind that those who best understood the matter, and whose interest it was to suggest these objections, if there were any ground for them, have themselves not made such suggestion, and have shown that they did not rely upon that view of the case.

But, my Lords, I think there is no real ambiguity in the matter, for this seems to be the state of the evidence. It is proved, and not in any way disputed, that the ship was manned as is usual on trial trips. I should be very sorry indeed to say anything which could give countenance to the notion that as much care was not to be taken by putting a proper number of

skilled persons on board to prevent accidents and to navigate the ship properly upon a trial trip as upon any other occasions; but it would be most unreasonable to suppose that you should put on a crew and officers engaged and commissioned in the same way as they would be engaged and commissioned when the ship is to be sent to sea, at a time when she is still only in the hands of the builders, when a temporary purpose is in view, and when she is not delivered over to those whose business it will be to engage the officers and the crew. All that is required is, that substantially something should be done by putting on board a sufficient number of men capable of navigating the vessel and obeying orders, and a sufficient number of intelligent persons who will be capable of acting as in the nature of officers, and assisting the pilot in charge in every way in which assistance ought to be given. That being all that can be necessary, and it being proved that the manning was such as is usual in similar cases, that in itself, I think, raises a considerable presumption of sufficiency, because the navigation of the Clyde is a very important matter, and these pursuers would probably make rules to prevent danger and improper navigation upon trial trips as well as at other times.

That being so, your Lordships have this evidence, that the pilot was in sole charge, and I apprehend, in order to give the defenders the benefit of the exemption under the statute, it was necessary that he should have been so; the pilot was in sole charge, but he had, as my noble and learned friends have pointed out, the assistance not only of a competent crew and of four persons at the wheel (one of them a quartermaster), but also of Durie and Corrigall, who were in substance acting as officers though not having the engagement of officers at that time. Did they or did they not do all that was needful, and were they or were they not in such a position as to make it a right and reasonable conclusion that the pilot had all the assistance which he could possibly require? My Lords, the pilot, whose interest it was, as has been pointed out, rather to exonerate himself than otherwise, does in the result of his evidence say that he has no reason whatever to doubt that all his orders were properly obeyed and attended to, and that he needed no assistance with which he was not provided.

That being the result of the pilot's evidence, we have also the evidence of persons connected with the owners and the builders, Mr Curle and Mr Ferguson. Mr Curle is asked, at letter E on page 34, "Did any other body advise him or assist?—(A) "Yes; the chief officer Durie was on the bridge beside him, and was there to assist him." My Lords, he was not the only person on the bridge, for Mr Ferguson, who was one of the builders, and though probably not a sailor, yet doubtless experienced in these matters, and intelligent, and very much interested in them, was also on the bridge the whole time, and (as his evidence proves) assisting the pilot in the way in which such a person might be expected to do. He says in his evidence, at page 36 at letter B, "I was on the bridge for about a quarter of an hour before the collision occurred. The pilot was on the bridge all the time from Greenock up to Glasgow. He had sole charge." Then he states the circumstances. At letter F he says—"I thought that the vessel's course was all wrong at this time, and I said to Skelly that they had given her too much helm." At page 37 he says, between letters B and C,—"When I saw the little boat I suggested that the whistle should be blown, because the boat was not moving," and so on; so that is clear that Mr Ferguson besides Durie was there, and was giving intelligent and careful assistance, and making suggestions when it was proper to make them. He says at page 38, letter E—"There were two officers on board." I quite agree that Marr is to be put out of the case. Marr was not there rendering any efficient assistance for these purposes, but he says—"There were two officers on board; the second stood at the wheelhouse the whole time to see that the pilot's orders were carried out. I cannot say whether these orders were promptly carried out by the officers. I know that the men at the wheel were very attentive. The other officer was going backward and forward between the deck and the bridge ready to carry out any orders the pilot might give. There were three or four seamen on board. The remainder of the crew were carpenters who had been to sea, and were perhaps as good as seamen for a new vessel, or better. There were four men at the wheel, one of whom I understand was a quartermaster, and he was in the wheelhouse at the time of the collision. We had engineers and firemen on board as usual. I cannot say whether Durie had been appointed chief mate at the time of the trial trip, but he was going backwards and forwards in the ship. (Q) Was he on duty as mate during the trial trip? (A) He was on duty certainly, and acted as mate. He was an experienced seaman. There was no officer over him except the captain, and the captain did not take an active part in the ship. Durie was practically in command after the pilot, and after Durie was the second mate." Then, my Lords, there is the evidence of Mr Marr, who, I agree, was not himself giving the assistance which a *quasi* officer would give, but who was there, and he speaks with sufficient opportunities of knowledge as to what he says. I will not read to your Lordships all the passages to this effect, of which there are many in his evidence; but he too says, that although the officers were not officially connected with the ship at the time, they were placed there by the pilot to see that his orders were promptly and carefully obeyed. At letter F—"The other officers were there to assist. I was not there to assist." And with regard to the general result of the matter, he says at page 48—"There were plenty men on board to carry out the pilot's orders, and these orders were carried out so far as I saw." Then he says—"It is not the practice for the master or any in the service of the owner of the vessel to interfere with the pilot who is in charge of the vessel." And with regard to the causes of the collision, he says at page 45, between D and E—"I saw that both first and second officers were at their posts. All the pilot's orders were promptly obeyed. The collision was not due in any way to any defect in the vessel, or to any failure on the part of the officers and crew to obey the pilot's orders. I can only attribute the cause of the collision to this, that the pilot must have forgotten the telegraph was standing at port, or that he did not starboard in time, either the one or other." If it were necessary to give negative evidence, that

is strong negative evidence; and Durie's evidence is to the same effect.

I need not trouble your Lordships with many passages in which Durie speaks of that which, though not under any official responsibility, he was in fact doing, and doing with great attention and activity, but he says at page 55, letter E—"There were plenty men on board to carry out the pilot's orders. They were ready for their work, and his orders were thoroughly carried out. I was in the employment of Donaldson Brothers. I was doing all that I could to see that the pilot's orders were carried out. The vessel was altogether in a thoroughly efficient condition in every possible way. The collision was not in any way attributable to her condition, or to any failure on the part of any of the men to carry out the pilot's orders."

My Lords, I will not add anything to what your Lordships have said as a suggestion, for which I find no ground directly laid in any portion of the evidence, that if there had been somebody stationed at the bow of the vessel at the moment at which the orders were given to the tug, which were not heard, those orders could have been transmitted within the half minute—which was a material space of time—so as to enable the tug to receive them and act upon them sooner than she did. All that I will say upon the subject is, that I could not, as a reasonable man, draw any such conclusion as within the limits of any degree of probability—I might almost say possibility—from the evidence before your Lordships. With regard to look-out, there was plenty of look-out; and the whole result is that the particular causes of the accident alleged by the pursuers stand thus: the first is proved, but then that was due to the fault of the pilot, for which bye-law the defenders are not responsible; the second the pursuers did not even attempt to prove, and they have entirely failed in my judgment in the attempt to fish out from the evidence a third, which they did not allege.

Therefore, my Lords, I entirely agree that this appeal must be dismissed.

Appeal dismissed.

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END OF VOLUME XIII.