were "very much above the average class of mason work in tenements of this kind, workmanship good, and material good, all together a very creditable job."

The appellants have the benefit of the work constructed by the respondent under the contract terms and must pay the contract price.

The appeal should be dismissed with costs.

LORD WRENBURY—I have had the advantage of reading the opinions of the Lord Chancellor and of Lord Parmoor. With their conclusions I agree.

If I had found that the stipulations as to the dimensions of the rybats were contractual, I could not hold that the architect had authority to vary that or any contractual term. His authority is to control the performance of the contract, not to make it or vary it.

Further, if I had found that the contract had not been performed, I could not hold that the builder could sue for the contract price, and that the building owner could have a remedy in damages. The two things are, to my mind, wholly inconsistent. The builder can sue for the contract price only if the contract has been performed. The building owner can sue for damages only if it has not. The two rights of action cannot co-exist.

The question upon which the case turns is, in my judgment, whether the stipulations as to the dimensions of the rybats were contractual or not. The better view, I think, is that they were not contractual, that the measurements were inserted as a basis for pricing and not as a contractual obligation as to exact size, that the exact measurements and arrangement of the rybats was matter of construction over which the architect had control. It was within the authority of the architect to give directions as to construction in accordance with the contract plans. These plans left constructional detail in many respects unprovided for; it was for the architect to supplement them if and so far as necessary.

The case is not an easy one, but it is, I think, too narrow a view to say that these details of measurement, which in certain circumstances it was impossible to follow, were contractually obligatory.

For these reasons, my judgment is that this appeal shall be dismissed.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellants (Defenders)—Clyde, K.C.—Wilson. Agents—Beveridge, Greig, & Company, Westminster—Fraser & Davidson, W.S., Edinburgh.

Counsel for the Respondent (Pursuer)—Blackburn, K.C. — Graham Robertson. Agents—John Kennedy, W.S., Westminster—Anderson & Allan, Glasgow—J. L. Hill, Dougal, & Company, W.S., Edinburgh.

Monday, October 18.

(Before the Lord Chancellor (Buckmaster), Lord Shaw, Lord Parmoor, and Lord Wrenbury.)

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

(In the Court of Session, December 18, 1914, 52 S.L.R. 244, and 1915 S.C. 281.)

Ship—Collision—Pilot—Compulsory Pilotage Area—Ship Necessarily in Charge of Pilot, but not yet within Statutory Area—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 633—*Clyde Navigation (Consolidation) Act* 1858 (22 *and* 23 *Vict. cap. cxlix*), *sec.* 75.

The Merchant Shipping Act 1894, sec. 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 Clyde Navigation (Consolidation) Act 1858 defines the western limit of the river Clyde as a line drawn from Newark Castle to the mouth of the Cardross Burn—that is, about 4 miles east or up the river from Greenock—and it makes it unlawful for anyone to navigate without a pilot a vessel in any part of the river as defined by the Act. It also confers power on a pilot board to make bye-laws regulating the pilotage in the river and in the Firth. By these bye-laws Greenock is the place for taking up and dropping river pilots, and when on board a pilot is to be in control of the vessel.

Held (*rev.* judgment of the First Division) that there is no exemption from liability between Greenock and the line between Newark Castle and the mouth of the Cardross Burn, either under the Merchant Shipping Act 1894, or (*dub.* Lord Dunedin) at common law.

This case is reported *ante ut supra.*

The pursuers the S.S. "Beechgrove" Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—On the 2nd February 1914 the steamship "Blaenavon" left the port of Glasgow and sailed down the river Clyde on an outward voyage. She reached Greenock, which is outside the statutory limits of the river, at about 6 p.m. At the same time the steamship "Fjord" was sailing up the Firth of Clyde to Glasgow, and a collision occurred between the two vessels outside Princes Pier. The owners of the "Blaenavon" blamed the "Fjord" for the accident, and instituted the proceedings out of which this appeal has arisen for the purpose of recovering compensation for the damage that they suffered.

The actual question of who was to blame for this misadventure is not before your

Lordships' House, for in answer to the condescendence for the pursuers the defenders raised certain pleas-in-law, of which for the present purpose the second is alone material. It is in the following terms:—"(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."

The record being closed, the parties were heard on the points of law so raised, and on the 11th July 1914 the Sheriff-Substitute by an interlocutor of that date repelled the second plea to which I have referred. On appeal from this decision their Lordships of the First Division recalled the interlocutor of the Sheriff-Substitute and remitted the cause to him to allow proof. From this interlocutor the present appeal has been brought before your Lordships' House.

There is no point for your Lordships' decision except the bare question of law raised by the second plea of the defenders, but this is of some difficulty, and in order to make plain the exact circumstances under which it has arisen it is necessary to state at some length the provisions of the various Acts of Parliament, the interpretation of which is the main subject for your Lordships' consideration.

By the Clyde Navigation Act of 1858 provisions were established to secure the proper navigation of the river and the Firth of Clyde. By section 75 the limits of the river were defined as including the whole channel or waterway of the said river down to a straight line drawn from the eastern end at Newark Castle, on the south shore of the said river, to the mouth of Cardross Burn, on the north shore. By section 128 a pilot board was appointed for licensing pilots in both the river and the Firth, within a straight line drawn due east and west from the southernmost point of the island of Little Cumbrae, this island being some 20 miles further down the river than the western limits fixed by section 75. By section 134 the Pilot Board established for licensing pilots was declared to have the exclusive right of granting such licences to pilots for the navigation of vessels in the river and the Firth within the said limits. It should be observed that by these sections there is no distinction established between the pilotage for the river and the pilotage outside the river, for the whole of the pilots are equally under the same jurisdiction throughout the whole length of the river and the Firth up to the island of Little Cumbrae. By section 136, however, the statute imposes certain definite restrictions upon the navigation of vessels, and as much of the present dispute depends upon the effect of this section it is as well to state its actual terms.

They are as follows:—"It shall not be lawful for any person to navigate without a pilot, nor for any person, except the pilots licensed by the existing pilotage authorities or by the Pilot Board as hereinbefore provided, to act in piloting any vessel exceeding sixty tons burden in any part of the river as defined by this Act, and every person navigating or piloting, or attempting to navigate or pilot, any vessel exceeding the said burden in any part of the river without being so licensed shall for every such offence be liable to a penalty not exceeding five pounds."

Section 139 of the Act proceeded further, and granted powers to the Pilot Board, and indeed required them, to make bye-laws and regulations for the proper navigation of all vessels between the western limits of the river and the island of Little Cumbrae, and also for regulating the conduct of the master pilots and crews of such vessels. Bye-laws were accordingly enacted, and by these bye-laws the pilots were divided into two classes—the river pilots, who were licensed to pilot vessels between Glasgow and Greenock, and the deep-sea pilots, who were licensed to pilot them between Greenock and the island of Little Cumbrae. It should be observed that the dividing line which separated the one class from the other, Greenock, was not the same as that which divided the river from the Firth of Clyde, but was some four miles on the western side of the river boundary. Bye-law 19 prohibited any person from navigating any ship on any part of the river other than the river pilots. This is the only bye-law which imposes a penalty for not using the services of a pilot, and it is in the following terms:—"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 not exceeding five pounds for each offence besides all damages and expenses." Bye-law 31 compelled the pilots to reside at Glasgow or Greenock; and bye-law 37 enacted that pilots when on board should have sole charge of the vessel. Rates were also fixed by these bye-laws, and these rates were arranged between Glasgow and Greenock, and were in no way regulated by the river boundary.

In the present case the "Fjord," being bound for Glasgow, picked up her pilot at Greenock. It was the only place where the pilot could be obtained, and the pilot when he came on board took charge of the vessel, and was in fact navigating her at the time of the accident.

The "Blaenavon," on the other hand, had taken her pilot on board at Glasgow, and had not exchanged him at Greenock for a deep-sea pilot at the time of the accident. It might be that the pilot held both licences, in which case it would not be necessary that he should be changed.

The position of the vessels therefore was this—They were outside the limits of the river, and outside the area within which it was not lawful according to the terms of the statute to navigate without a pilot. The "Fjord" had had no opportunity of obtaining a pilot anywhere except at the spot where he had been taken on board,

and being on board the bye-laws provided that he was bound to have charge of the vessel.

Now by section 633 of the Merchant Shipping Act of 1894 it is enacted that the 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 first question therefore is—Was the spot where the accident occurred, although outside the western limits of the river, a spot where pilotage was compulsory by law? So far as the terms of the Statute of 1858 are concerned I am clearly of opinion that it was not. That Act gave a perfectly plain definition of the area within which it was unlawful to navigate without a pilot, and the only way of escaping from that difficulty is by deciding that the word "district" in the Merchant Shipping Act of 1894 covers an area wider than that defined by the Statute of 1858, and includes at least a convenient place for taking up and discharging a pilot outside the limits of the river, and possibly also the whole area down to Little Cumbrae.

I am unable to accede to this contention. I cannot think that the word "district" in the Act of Parliament was intended to mean neighbourhood, or to possess so vague and indefinite a meaning as must necessarily be attributed to it if once the actual statutory and defined limits are exceeded.

Several authorities, however, were quoted to your Lordships to support an extended meaning of the word, and they need careful examination. It is of course possible to avoid their effect by saying that this case has arisen in Scotland, and these decisions are all decisions of the English courts. In my opinion your Lordships ought not to take that course. The Act of Parliament which is the subject of construction applies to Scotland as well as to England. There is nothing in any of the circumstances of this case which requires the application of local custom or local law, and it seems to me unconvincing to decide this question on any considerations that would not be just as applicable to a collision that had taken place under similar conditions in the mouth of the river Thames. I realise that this imposes upon your Lordships the duty, if your view of the section be the same as that which I have expressed, of destroying the authority of two at least of the English cases which were the subject of decision by numerous and eminent judges. I feel the full force of this objection, but I am unable myself to follow the reasoning on which those judgments were based, and it is my view that they reached a wrong conclusion.

The first case to which reference was made was the case of *Lucey & Ingram*, reported in 6 M. & W. at p. 302. In that case a vessel in charge of a licensed pilot caused a collision as she was in course of removal from the St Katharine Dock in the port of London. It was alleged that the owners of the vessel were not liable by reason of the 55th section of the Pilot Act (6 Geo. IV, cap. 125), which exempted the owner or master of a vessel from liability for loss or damage occurring from the negligent act of any licensed pilot in the charge of any such ship or vessel, under or in pursuance of any of the provisions of the statute. The statute by its second section provided that all ships and vessels within certain limits there mentioned should be conducted by pilots to be appointed by the Corporation of the Trinity House, and by no other pilots or persons whatever. At the place where the accident happened it was not necessary under the statute that a pilot should be in charge of the vessel, but none the less it was held that the owner of the vessel was not liable for the damage because the pilot was bound to take charge of the vessel if called on, and he was in charge of the ship under the provisions of the Act. The case depended upon the construction of the fifty-fifth section of the Act of 1823, but the provisions of that section are quite different from those which regulate the liability in the present case, and I see no reason to doubt that this case was correctly decided.

The next case was that of the "*Stettin*" reported in 1 B. & L., at page 199. That decision, however, is of little assistance, since it was held that in no part of the area where the collision occurred was pilotage compulsory, and consequently the vessel responsible for the accident was not exempted from liability for damage. The two cases which follow are, however, more nearly in point. The first is *The General Steam Navigation Company* v. *The British and Colonial Steam Navigation Company*, reported in the Exchequer Chamber in Law Reports, 4 Exchequer Cases, at page 238. The statute applicable in that case was the Merchant Shipping Act of 1854, section 388 of which is to the same effect as section 633 of the Act of 1894, although its language differs in certain immaterial respects. In that case it was held as a fact that the vessel was navigating at a spot where pilotage was compulsory, and that the master and owner of the vessel were consequently exempt; but the learned Judges further dealt with the case upon the hypothesis that this assumption of fact was not well founded, and on this view they expressed their opinion on two points. The first was that as the pilot had been taken on board in an area where pilotage was undoubtedly compulsory, and was still in charge of the vessel when the accident occurred, the original relationship between the pilot and the master still continued, and no fresh contract of service had supervened.

The second point dealt directly with the meaning of the word "district," and upon this they said that the 388th section of the Act of 1854 "does not require that the pilot should be compulsorily employed where the accident happened but only that he should have been compulsorily employed within the district where it happened." Although this latter statement was not necessary for the decision of the case, it was treated as an authority and was followed in the later

case of the "*Charlton*," which is reported in 8 Aspinall's Maritime Cases at page 29. This was a decision of the Court of Appeal, who were bound by a decision of the Court of Exchequer Chamber, but they were not necessarily bound by the expressions of opinion of the Judges, which were not essential to the case. Notwithstanding this fact, the Court of Appeal, and notably Lord Justice Kay, treated them as binding, and expressed his own personal concurrence with the underlying principles on which these statements were based. In this case also the pilot had been taken on at a place where pilotage was compulsory, and the accident had happened outside the compulsory area.

It might be possible to distinguish these cases by reference to this circumstance. It is indeed a distinction between the facts of those cases and the facts of the present, but it is a distinction too fine for me to follow. If the liability is to be measured by considering the meaning of the word "district" in section 388 of the Act of 1854, or in section 633 of the Act of 1894, that meaning must be the same whether the pilot is taken on board within the compulsory area or without.

The learned Judges appear to have been much influenced in their view by the inconvenience of holding that a pilot's duties ended immediately the actual boundary was crossed. It seems to me that this is true—there may be great inconvenience, there may even be danger, in compelling a pilot actually to assume his duties at a moment when the ship is traversing an intangible and notional line. So far as the Act of Parliament is concerned, however, there can be no exemption by virtue of its provisions unless the accident is actually within the district (which I interpret as meaning the defined and fixed area) within which pilotage is compulsory.

It is, however, urged that the pilotage was in fact compulsory although outside the statutory limits, owing to the operation of the bye-laws to which I have referred.

Acceptance of this view might result in extending the area of the river Clyde, for the purposes mentioned in section 136 of the Act of 1858, to the area bounded on its western limits by the line drawn from the island of Little Cumbrae — a further distance of some 24 miles. I cannot think that the bye-laws have made or could make pilotage "compulsory by law" throughout the whole of this area, since, if that were so, there was no need for the careful definition of the area where pilotage is made compulsory by section 136, and no need for the distinction which the bye-laws draw between the area of river within which omission to use a pilot is visited by penalties and the area outside the river which is not subject to any such penalties.

There remains an argument that is independent of the Act of 1894, and it is this, that even if the point where the accident occurred was not within the district where pilotage was compulsory by the statute or the bye-laws, yet nevertheless the captain of the ship had no choice but to accept the pilot at Greenock on terms which compelled him to resign the navigation of the vessel into his hands, that accordingly the *rôle* of master and servant was never established between the owner of the vessel and the pilot, and that consequently he could not be rendered liable for the pilot's act.

It is, I think, open to doubt if this point is raised by the second of the defender's pleas, but it has been fully argued and no objection taken on that ground.

The fallacy of the argument is to be found in the assumption that the captain of the ship was compelled to resign the navigation into the hands of the pilot. There was in my opinion no such legal compulsion placed upon him. It is true that the bye-laws provide by bye-law 37 that the pilot should take charge, but there was no penalty of any kind imposed upon the master if the vessel was not surrendered into the pilot's hands before the boundaries of the river Clyde were reached, nor upon the pilot if he did not assume charge. This omission is significant when it is observed that obedience is enforced to the earlier provision of the same bye-law by the imposition of a penalty, and that performance of nearly all the other duties of the pilot is ensured by similar penalties — see, for example, bye-laws 30, 32, 33, 35, and 36.

This conclusion takes the present case out of the influence of any of the several authorities to which reference has been made, for upon examination they will be found to depend upon whether, having regard to the special provisions applicable in each case, there was in fact compulsion upon the owner to allow the pilot to have charge. The principle which they illustrate is stated at p. 103 of the report of the "*Maria*" (1839), in 1 W. Robinson's Ad. Reports, p. 95, in an extract from Lord Tenterden's work upon shipping in these words—"Where the master is bound by Act of Parliament under a penalty to place his ship in the charge of a pilot and he does so in compliance with the provisions of such Act, the ship is not to be considered as under the management of the owners or their servants."

Accepting this principle as accurate, the learned Judge in the case of the "*Maria*" examined whether or no the pilotage in that case was in fact compulsory, and found that it was, because the local statute which was applicable provided that the owners of foreign ships or vessels resorting, coming into or departing from the port of Newcastle, were "obliged and required" to receive, take on board and employ in the piloting licensed pilots, and in case of their refusal they were none the less compelled to pay the pilotage fees. The learned Judge in terms considers that this made the pilotage compulsory, and he so states at page 108 in these words—"I am most clearly of opinion that the section referred to is compulsory. If it had been enacted simply that a pilot should be taken without providing that in case a pilot was not taken the pilotage should be paid, the master would clearly have been liable to be indicted for a misdemeanour in refusing to take him, for every breach of an Act of Parliament within

British jurisdiction is an indictable offence." And he then considers the argument that the provision as to payment of the fees might take away the compulsory effect of the clause, and this argument he rejects; he consequently held that the master of the vessel was free from blame.

In the present case there is nothing in the statute to compel the pilot to be taken on board outside the limits of the river, nor is there anything in the bye-laws which in terms imposes on the master of the vessel any duty to use his services outside the area, for the only provision of a compulsory character relating to the use of pilots is that contained in bye-law 19, to which reference has already been made.

The case of the "*Halley*," in 2 Privy Council Cases, page 193, was also a case where the employment of the pilot was compulsory, and the statement of the common law, which is contained at page 201, is made in relation to this fact. There is a considerable difference between a boat being in charge of a pilot properly provided according to the bye-laws made in pursuance of an Act of Parliament and the necessity for compulsory pilotage within a limited area, and the contrast of the provisions of the Acts of 1854 and 1894, with those of the earlier Statute of 6 George IV. c. 125, shows, to my mind, that the later statutes were intended to confine exemption from liability within the narrower and take it out of the wider class.

In my view, therefore, the bye-laws did not make pilotage outside the area of the river compulsory within the meaning either of the Act of Parliament or the principle of the common law, and for these reasons I think that the appeal should succeed, that the interlocutor of the First Division should be recalled, and that of the Sheriff-Substitute should be restored.

LORD DUNEDIN—[*Read by the Lord Chancellor*]—I have found this case, to my mind, attended with difficulty and doubt, but that on one point only.

So far as the exemption craved is rested on the statutory words, I am clear that on a just construction of section 633 of the Merchant Shipping Act of 1894 there was not here, in view of the circumstances, a fault or incapacity of a qualified pilot acting in charge of the ship within any district where the employment of a pilot is compulsory by law.

I need not develop the subject, for I concur in all that the noble Lord on the Woolsack has said upon it, and I associate myself with the view he has taken of the decided cases.

Now if I could take the view of Lord Skerrington, that the statutory exemption forms a code and displaces the common law, there would be an end of the matter. But it is not said in the statute that the common law is to be displaced, and hitherto at least it has been said again and again by Judges and writers of text-books that the statutory exemption is only declaratory of a result to which under the circumstances of compulsion the common law would arrive.

Now this is not an action against the ship; it is a personal action against the owners, who personally committed no fault. It can therefore only be supported upon the ground of *respondeat superior*, or in other words of the relationship of master and servant between the owners and the person actually in charge of the ship, who committed the fault.

Your Lordships are prepared to hold that though *de facto* the shipowner can only obtain a pilot on the terms that the pilot is to be supreme, yet *de jure* that pilot is the servant of the owners. It is here that I hesitate, and I candidly confess that if left to myself I should have to come to the same conclusion as the majority of the First Division. But in face of the unanimity among your Lordships I do not feel justified in dissenting from the proposed judgment.

LORD ATKINSON—This is an appeal from an interlocutor pronounced on the 18th of December 1914 by the First Division of the Court of Session, recalling an interlocutor of the Sheriff-Substitute of Lanarkshire.

The facts necessary and legislative provisions necessary to be considered for the decision of the preliminary question which the parties have raised by their second plea-in-law, and desire to have determined in the first instance, have been clearly stated by the Lord Chancellor.

The river Clyde so defined by these several enactments may for convenience sake be styled in this case the "compulsory area."

The plea-in-law of the defenders raising the question which it is desired to have first decided runs thus—"The navigation of the 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 of 1894, the defenders are free from any liability in respect of the collision under section 633 of the said Act, and should be assoilzied with expenses."

The question accordingly for decision of this House is whether this is a good plea-in-law, having regard to the provisions of the Act of 1894, the local Acts dealing with the river Clyde, and the bye-laws made under these latter.

It is not pretended that pilotage is directly made compulsory on any portion of the waters of the Clyde or its estuary outside the river Clyde as defined, but it is contended on behalf of the respondents that the Clyde Pilot Board have power to frame bye-laws having the force of law providing that all river pilots shall board inward-bound vessels at Greenock, and shall on going on board take command of the vessel. Apart from this point upon the bye-laws to be hereafter dealt with, the respondents, as I understand, base their claim to immunity from the damage caused on two grounds. They contend (1) that section 633 of the Merchant Shipping Act of 1894 should, according to the authorities, be construed as if for the word "where" occurring in the last line but one of the section were substituted the words "in any part of

which," so that the section would run thus —"An owner or master of a ship shall not be answerable to any person whatsoever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district 'in any part of which' the employment of a qualified pilot is compulsory by law;" and (2) that the word district in the section so construed means any district for which the pilot in charge may happen to be licensed by the proper licensing authority, however extensive that district may be, and however distant the place of collision from the nearest part of the compulsory area.

The respondent next relied upon the principle stated most broadly and most recently in the case of the "*Charlton*," 8 App. M.C. 29, decided in the year 1893, namely this, that a pilot who navigates a ship through an area in which his employment is compulsory by law ceases to be a compulsory pilot as soon as he passes outside that area, but may nevertheless, if he be treated as if he had continued to be that which in fact he is not, secure to the owners of the vessel he pilots continued immunity from any claim for damages caused by his own negligence.

It was held in the "*Maria*," 1839, 1 W. Rob. Adm. 95, that section 55 of the 6 Geo. IV, cap. 125, which is somewhat similar to section 633 of the Act of 1894, embodied this principle of the common law, that the doctrine of *respondeat superior* cannot apply where the law compels an owner to put and keep in charge of his ship for the purpose of navigating her a person he cannot himself select, and of whose skill and competence he may know nothing. As long as the statutory compulsion operates, the person in charge of the ship is not the owner's servant, and the owner is therefore not responsible for his acts. Thus at common law the basis of the owner's immunity is the legal compulsion upon him. These two must synchronise in their operation, and are conterminous in their reach. When and where compulsion ceases immunity ceases, and no agreement, express or implied, which the owner or his agent the master may make with the pilot can, I think, at common law prolong or renew as regards third parties the one or the other. If the owner or his agent the master should request or permit the pilot to continue in command of the ship beyond the time he is bound by law to permit him so to do, then the relation between the owner and pilot becomes at common law a contractual relation of service, to which the maxim of *respondeat superior* directly applies. In the case of the *Clyde Navigation* v. *Barclay*, 1 A.C. 790, 13 S.L.R. 753, Lord Hatherly, at p. 795 (S.L.R. 754), lays down the rule as to the burden of proof in cases such as the present in the words following:—"In order to exempt yourself by virtue of the provisions of the statute (*i.e.*, the Act of 1854) 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 to prove that the mischief was occasioned by the pilot. But the other side may prove that although the mischief was occasioned in one sense by the bad management of the pilot, yet there was a default on the part of the owners of the ship, which default conduced to the accident." And Lord Selborne, at p. 796 (13 S.L.R. 757), said—"Your Lordships will observe that there are three things necessary to be proved—first, that a qualified pilot was acting in charge of the ship; secondly, that the charge was compulsory; and thirdly, that it was his fault or incapacity which occasioned the damage. I apprehend that if a defendant proves all these things, then the burden of proof is on the pursuer." I fancy that in these passages both these noble Lords had in their minds actual, not fictional or notional, compulsion. As I understood it was not disputed—it could not, I think, be successfully disputed—that the compulsion which secures immunity from the claims of third parties must be imposed in the first instance by statute, or by bye-laws made *intra vires* having the force of a statute. No obligation springing from any agreement, express or implied, entered into between a pilot and the owners of a vessel, either directly or through their agent their master, touching the control or navigation of that vessel, however binding on the parties to it, can, I think, *per se* prejudice in the way suggested the rights of third parties. The main questions in controversy are whether under any, and if so what, circumstances the operation of the compulsion imposed in the first instance in respect of the compulsory area can be extended beyond that area so as to secure continued immunity for the owners; and second, whether those circumstances exist in the present case. The two authorities most strongly relied upon by the respondents on this point are the "*Charlton*" case, already referred to, and the case of the *British Steam Navigation Company* v. *The General Steam Navigation Company*, L.R., 4 Ex. 238, upon which the decision in the "*Charlton*" case was based.

Lest if I stated in a condensed form what appears to me to be the result and bearing of the judgments of the distinguished Judges who decided that case I might do them an injustice, I venture to quote at length the relevant portions of their judgments. Lord Esher, at 8 Asp. M.C. 30, expressed himself thus — "A Bristol pilot was compulsory where he (*i.e.*, the master of the ship) took him. . . . When the vessel had passed out of the port of Bristol . . . I have no doubt myself that he was no longer a compulsory pilot. Therefore when the accident happened he no longer was a compulsory pilot. But when he was taken on board this ship and put in charge he was a compulsory pilot. And although he had passed out of the limits where he was a compulsory pilot he was still in charge as pilot, and in charge without any alteration of the relations between him and the master of the ship. He was still the pilot. He was in charge of the ship, for he had not gone to such a place as that he was no longer a licensed pilot. He was in the district where he was a licensed pilot, and although he had gone beyond the port

where he was a compulsory pilot, it is under such circumstances that the master could not properly be called upon to determine whether the compulsion had ceased or not. Then the necessities of the case require that you should not make him a servant of the owners when they had no real opportunity of determining whether he was or was not their servant. They were compelled to take him without his being their servant, and they had no real opportunity of seeing that that relation which had been put upon them had ceased. I have no doubt that it was on that ground—that to decide that the master of a ship was to take charge of the ship in such circumstances would put upon him a most dangerous liability and responsibility—that the decision of the Exchequer Chamber in the *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company, Limited*, 4 Ex. 238, was come to. It does not signify whether the spot is one at which the compulsion has ceased. The mode of treating him by the master as a compulsory pilot has not ceased, and therefore we are to treat the master and owners of the ship as still having their ship in charge of the pilot whom they took by compulsion. If so he was not a servant of the owners, and if so the owners were not liable for the negligence which was solely his negligence. I cannot help thinking that that is the decision of the Court of Exchequer." L.JJ. Kay and A. L. Smith concurred in and approved of this judgment. The former added—"I cannot think it would be the 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, 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 should not be liable for the collision which happens by his fault." And the latter said that in his opinion the remarks of the Court of Exchequer in the above-mentioned case upon this point were not *obiter*.

In fact the district for which the pilot was licensed in that case extended down to Lundy Island, many miles below the port of Bristol. It was not disputed that over this great reach of the estuary of the Bristol Channel, from the port of Bristol to Lundy Island, any ship was free to sail without any pilot, or again, that if she never had entered into the compulsory area she would not be protected from liability by reason of the presence of a licensed pilot on board and in charge of her; but it appears to have been considered that the mere fact that the pilot she was compelled to take on board while traversing the compulsory area was permitted to remain in charge in effect extended the area of immunity down to the open sea. I own I have considerable difficulty in following Lord Esher's reasoning. I do not quite appreciate what he means by saying that the owners "had no real opportunity of seeing that that relation which had been put upon them had ceased." Surely he cannot have supposed that the owners, who might live in Australia or South America, should be communicated with by their agent, the master, to ascertain whether the latter would depose the pilot and himself take command as his ship passed out of the compulsory area. The master is the agent of the owners, with full power on their behalf to employ, hire, or drop pilots.

Again, I am unable to understand how as regard third parties and their common law rights the mode in which the master "*treated*" the *pilot* is to determine anything. In my view, if the master had made a specific agreement with the pilot that the latter should navigate the ship to Lundy Island and have absolute control over her till she reached that point, the rights of third parties would not be affected, because it is statutory compulsion, not contractual obligations of service, which deprives them of their rights. The master might of course continue the pilot in charge if he desired his assistance. The appellants do not suggest that he should not be entitled to do so, but they do insist, reasonably enough I think, that the pilot does not carry compulsion with him, and that if he were continued in charge beyond the compulsory area he was in precisely the same position as if he had been taken on board at Lundy Island and employed to pilot the ship up to the seaward limit of the port of Bristol.

I find nothing in the decision to the effect that the master might not have deposed the pilot and have himself taken the command of his ship as she passed out of the compulsory area. The very fact that his continued treatment of the pilot as a pilot is regarded as a determining factor would imply that he might have altered the situation by treating him otherwise.

There is no such maxim of the mercantile laws as "once a compulsory pilot always a compulsory pilot," and I am quite unable to see how the mere omission by the master to take the command out of the hands of the pilot amounted to treating him as a compulsory pilot, resulting in the forfeiture of the rights of innocent third parties.

The case of the *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company*, reported in the Exchequer Division (1861), 3 L.R., 3 Ex. 330, and in the Exchequer Chamber, 4 Ex. 238, upon which the decision of the "*Charlton*" is expressly based, and upon which the respondents so much relied, is somewhat different in character.

There the defendants' vessel, registered in and belonging to the port of London, through the fault of a pilot taken on board at Dungeness who had actual control of the ship, came into collision with and damaged the plaintiffs' vessel at a point between Yantlett Creek and Gravesend. If the port of London extended to Yantlett Creek the defendants' vessel was at the time of the collision in her own port. If, on the con-

trary, it only extended to Gravesend she was not at that time in her own port.

It was admitted that pilotage was compulsory under the Mercantile Marine Act 1854 within the London district, which extended from Dungeness to London Bridge. A pilot taken on board at Dungeness would, in the ordinary course of things, navigate the ship to Gravesend and there be put on shore, receiving for that service a fee fixed by the regulations. By the 59th section of the General Pilot Act (6 Geo. IV, cap. 125) it is enacted that the master of any vessel not being a passenger vessel may pilot his ship while she is in the waters of the port to which she belongs.

The contention of the defendants was that the London district was one entire and indivisible thing, though in practice and for convenience sake licences were never given to the same pilot to pilot ships above and below Gravesend; that Gravesend was the place to which the master was bound to carry the pilot before dropping him; that even if the limit of the port of London lay seaward of Gravesend the whole course to Gravesend was one indivisible thing, and that the pilotage having been compulsory when originally commenced at Dungeness continued so to be up to the point where the pilot was to be dropped.

The question for decision therefore was not, as in the "*Charlton*" case and as in the present case, the extension of the operation of compulsion beyond the limits of the compulsory area, but the suspension of compulsion within a compulsory area, and it was insisted that the master by taking on board the pilot to carry him to Gravesend and paying him for piloting the ship to that place contracted himself and his principals the owners out of, as it were, the statutory exception. The decision turned to some extent on the meaning of the words used in the 59th section of the Pilot Act of 1825. Baron Martin inclined to the opinion that these words only applied to vessels navigating from place to place within the port to which the vessel belongs, but bowed to the existing decisions. He was clear, however, that if the master of the defendants' ship though signalling all the way from Dungeness for a pilot had failed to get one before his ship passed into the waters of the port of London, he would not then though in a compulsory area be obliged to take a pilot; but he held nevertheless that even if Yantlett Creek was the boundary of the Port of London, "when the pilot was taken on board at Dungeness and employed to navigate the ship to Gravesend, the ship did not when she arrived at Yantlett Creek become a ship navigated within the limits of the port to which she belonged so as to constitute the pilot the servant of the owners and render them liable for his default." He was further of opinion that under the provisions of the Acts of Parliament the pilot was entitled, if not bound, to pilot the ship to Gravesend, and that no liability was cast upon the defendants by the mere circumstance that the ship had arrived at Yantlett Creek.

He refused to recognise the case of the "*Stettin*" (Browning & Lush, 199) as an authority in the case, because *Lucey* v. *Ingram*, 6 M. & W. 302, had not been cited in it.

Baron Channel concurred in this judgment, and Baron Bramwell, who only heard part of the argument, concurred so far as he had heard it. Kelly, C.B., dissented, holding on the facts that Yantlett Creek was the limit of the Port of London, that it was distinctly so decided in the "*Stettin*" case; that it was not compulsory on the master of a ship belonging to the Port of London to employ a pilot at a point within that port; that the case of *Lucey* v. *Ingram* was decided upon the special provisions of the 55 and 72 sections of the General Pilot Act, 6 Geo. IV, c. 123, and not on the Act of 1854, the wording of which was altogether different (in which statement he was perfectly accurate). The case came on appeal before the Exchequer Chamber. The Court was a very strong one. It was composed of Byles, Keating, Montague Smith, and Hannen, JJ. The unanimous judgment of the Court was on the 4th of May 1869 delivered by Byles, J. They held that the Port of London did not extend beyond Gravesend. Consequently, as the collision occurred at a spot further down the river than Gravesend, it did not occur in the Port of London, and there was an end of the case. At p. 244 of the report Byles, J., is reported to have expressed himself thus—"Two questions arise. First, whether the accident happened at a spot within the limits of the Port of London, for if it did not then the defendants' captain was bound to have on board a pilot, and the defendants are not responsible for the pilot's want of skill or care. Secondly, whether, assuming the spot where the accident happened to be within the Port of London, the defendants nevertheless are protected from liability, although the vessel belonged to that port, the pilot having been compulsorily taken on board at Dungeness to pilot the vessel from thence to Gravesend." At page 247 he distinctly states, however, that even if the Port of London extended to Yantlett Creek the Court thought the defendants would not be liable. And he gives as his reasons—"By the table of pilotage charges, which is part of the Act 17 and 18 Vict. cap. 104, pilots engaged from Dungeness . . . may be taken to go first to the Nore or Sheerness and next to Gravesend, which is clearly within the Port of London; and no pilot can be hired for any other intermediate distances. . . . It was compulsory on him to take a pilot for that distance at least. The pilot could insist on being paid for 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. It is plain that during the first portion of the transit . . . 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."

And the learned Judge proceeded to say that "the 388th section of the Act 17 and 18 Vict. cap. 104, does not require that the pilot should be compulsorily employed where the accident happened, but only that he should have been compulsorily employed *within the district* where it happened. This is not only the literal interpretation of the statute, but it obviates all the mischief which might be apprehended from captains of ships unnecessarily and improperly employing pilots to escape the responsibilities of navigation, while it preserves the sole responsibility of the pilot in the whole of the district for which he was employed."

It must be remembered that the Court was, as I have said, dealing with a case of exemption from compulsion in a compulsory area, and the judgment should be read *secundum subjectam materiam*. I find nothing, however, in the earlier part of it inconsistent with the right of a master to take from a pilot, originally employed in a compulsory area, the command of his ship as soon as she passes beyond that area. It is possible he might be liable to the pilot under such a contract as was made in that case for breach of contract but nothing more. Nor do I find anything inconsistent with the conclusion that in such a case from the time the ship passed out of the compulsory area the pilot was no longer a compulsory pilot, but stood to the master and the owners of the ship merely in the relation in which a pilot hired in a non-compulsory area stands to them.

With reference to the construction of the 388th section of the Act of 1854, I am unable, with the most profound respect for the learned and distinguished Judges who decided this case, to find anything in reason or justice to sustain their construction of this section. A pilotage district may be very vast. In the "*Charlton*" case it extended many miles down the Bristol Channel beyond the compulsory area, the port of Bristol. In the present case it extends at least four miles, perhaps more, beyond the compulsory area. I am quite unable to discover upon what principle the fact that the pilot was originally employed in the compulsory area is to secure to him the privilege of negligently running down or injuring, in every part of the district for which he is licensed, the vessels of third parties, without any risk of loss to the owners he serves. In my view this construction disregards the common law rights of third parties, and ignores the principle upon which the immunity of the owner of the ship in fault is based. I think the construction is erroneous and I respectfully decline to adopt it. Within one month and two days after the delivery of this judgment, the Judicial Committee of the Privy Council, composed of the then Master of the Rolls, Lord Romilly, Sir William Earl, Sir James Colville, and Sir Joseph Napier, decided the case of *The Owners of the Steamship "Lion" v. The Owners of the "Yorktown,"* L.R., 2 P.C. 525, in which was cited, not only the decision of the Court of Exchequer, but possibly that of the Exchequer Chamber in the last-mentioned case. The collision in that case took place on the river Thames, and was due to the negligence of a licensed pilot in charge of the steamship "Lion" at the time. The owners of this ship were sued for damages. The preliminary question raised was whether the "Lion" was at the time of the collision a passenger ship or not. If she was a passenger ship, then under section 397 of the Act of 1854 the employment of a pilot was compulsory, if not it was admittedly optional. It was held that the "Lion" was not at the time of the collision a passenger ship, and therefore that the employment of the pilot was optional. The cases of *The "Stettin,"* Browning and Lush, 199, and *Lucey* v. *Ingram*, 6 M. and W. 302, were cited. The decision in the former was approved of and followed, and it was pointed out, as it already had been done by Kelly, C.B., that *Lucey* v. *Ingram* was no authority whatever upon the point in dispute, since it was decided upon the special wording of section 72 of 6 Geo. IV, c. 125, which is wholly different from that of section 389 of the Act of 1854. The latter section is identical with section 633 of the Merchant Shipping Act of 1894.

Lord Romilly, after criticising at length these several cases and others, at page 534, says—"According to the principle of these decisions the owners are not exonerated from responsibility for the default of the pilot whom they have selected and placed in charge of their ship when by law there was no obligation imposed on them to take such pilot and put him in charge. . . . And secondly, that having taken a pilot, even assuming that the pilot was bound to act, this does not in such circumstance exonerate the owners from responsibility for the errors committed by the pilot in a case where they were not compellable to take a pilot and put him in charge of the vessel."

This last paragraph meets much of the argument that was addressed to your Lordships on behalf of the respondent, based on the following words occurring in the 27th bye-law—"And the pilot when on board shall have sole charge of the vessel." These words are of no avail however when the act of taking the pilot on board is a voluntary act. No provision such as this made by the body licensing the pilot, and no stipulation made by the pilot himself when he is being hired, as to his having complete control over the ship, will secure immunity for the owners if the taking of the pilot was not compulsory by law, because compulsion by law is the true basis of immunity, and *cessat ratio cessat lex.*

As the master was not compelled by law to keep on the pilot after the ship passed from the port of Bristol, I think the decision of Lord Esher on this point is in conflict with the law as laid down by Lord Romilly.

The case of *The "Stettin,"* 1 Browning and Lush, 199, was decided on the 6 Geo. IV, c. 125.

The vessel belonged to the Port of London, and was inward bound from Bordeaux to London. She took on board a Trinity House pilot, by whose negligence she came

into collision near Regent's Canal in the river Thames with another ship or barge. By section 59 of the 6 Geo. IV, c. 125, she was relieved from the obligation to take compulsorily a pilot while she was navigating the port to which she belonged. Dr Lushington held that as she was not bound to have the pilot on board her owners were not protected, and the Judicial Committee, consisting of Lords Kingsdown and Chelmsford, Sir Edward Ryan, and Sir L. Peel, upheld that decision, thinking it was right. Sir Robert Phillimore refers to the case of *The "Stettin"* in the case of *The "Hankow,"* L.R., 4 P. 197, the decision in which, however, turned upon section 59 of the Pilotage Act 1825, 6 Geo. IV, c. 125. He does not, I think, disapprove of the decision in *The "Stettin"* case. He also deals with the decision in *The General Steam Navigation Company* v. *The British Colonial Steam Navigation Company* in these words, he said—"I am unable to extract any assistance from that case, and I find myself rather perplexed in reading the judgment." I confess I share in that perplexity.

Your Lordships' House is not bound by the decision of the Court of Exchequer Chamber or that of the Court of Appeal. In view of this conflict of authority one must rely upon the principle upon which immunity is based. In my view the immunity of the owners of ships for injuries caused by those ships through the negligence of the pilot in charge of them rests upon this, that they are compelled by law to have that pilot in charge at the time and place the collision occurs, that because of that compulsion the pilot is not the servant of the owners, and they are therefore not responsible for his acts. I further think, with all respect for the great Judges who decided these cases, that these decisions are unsound in principle and are in conflict with decisions almost, if not altogether, as authoritative as themselves, and I decline to follow them.

Then, as to the bye-laws, it is not contended that they are *ultra vires*. I concur with Lord Skerrington in thinking that they do not purport to extend the area of compulsory pilotage as fixed by section 136 of the Act authorising the making of them. If they did they would be *ultra vires*. By bye-law 31 river pilots are required to reside at Greenock and Glasgow, where they may be picked up and discharged respectively. These arrangements may be very convenient. That, however, is beside the point, and, of course, a master may with great prudence leave the control of his ship to a pilot, both in the river and Firth of Clyde. Nobody contends that he should be deprived of that advantage.

I further concur with Lord Skerrington in thinking that there is nothing in these bye-laws to prevent the master of an incoming ship, who picks up a pilot at Greenock, from keeping control of his ship till he reaches the compulsory area. Nor to prevent the master of an outerbound vessel who has taken a pilot on board at Glasgow from putting the pilot aside and taking the command of his own ship as soon as she passes out of the compulsory area.

I see none of the dangers to which Lord Esher alludes on the *"Charlton"* case in enabling him so to do.

Mr Laing urged that these statutes and bye-laws should be reasonably construed and enforced, and it would be very difficult for masters to know precisely when they passed into or out of the compulsory area, or to be prepared for a change of control.

The first difficulty could be got over by buoying, or in some other way easily ascertainable marking, the boundary of the river. The second is, I think, fanciful.

On the whole I am of opinion that the decision appealed from was wrong and should be reversed, that the decision of the Sheriff-Substitute was right and should be restored, and this appeal should be allowed, with costs here and below.

LORD SHAW—[*Read by Lord Atkinson*]—The appellants are owners of the British s.s. "Blaenavon," and the respondents of the Norwegian s.s. "Fjord." At a point on the estuary of the river Clyde nearly opposite Princes Pier, Greenock, these two vessels collided. The present proceedings ensued. The appellants sue for £5500. The respondents counter-claim for £600. Each ship blames the other. The present appeal, however, has arisen in connection with the defence set up by the owners of the "Fjord," the respondents. Their defence was repelled by the learned Sheriff-Substitute (Fyfe), but has been upheld by the majority of the First Division of the Court of Session. I am humbly of opinion that the dissent from that judgment by the learned Lord Skerrington was on all points correct, both in reasoning and result, and that the judgment appealed from should be reversed.

The appellants' (defenders) plea is as follows—"The navigation of defenders' vessel having been in charge of a pilot whose employment was compulsory within the 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." This is not a common law defence; it is a defence founded upon the statute, and it is that defence which has been upheld.

There has been so much reference to decided cases, both in the Courts below and in the argument on this appeal, that it appears to me advisable again to quote section 633, which is the groundwork of this plea. It is, as your Lordships are aware, truly a temporary provision. In a few years time such an exemption from liability will have disappeared from the Merchant Shipping Code.

The section is as follows—"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."

Geographically the position of the matter

is this—A straight line drawn from the eastern end of Newark Castle, on the south shore of the Clyde, to the mouth of Cardross Burn, on the north shore, divides by section 75 of the Clyde Navigation Act of 1858, the river Clyde from the estuary, the "river" being to the eastward of that line up to Glasgow, and the "firth" being to the west of that line down to Little Cumbrae. By the Act a Pilot Board was created. It had certain powers over the whole of this area, and, in particular under sections 127 and 134, powers to license pilots for both river and firth. The section dealing with compulsory pilotage applies solely to "any part of the river as defined by this Act." Within that area it is not lawful for any person to navigate without a pilot any vessel exceeding 60 tons burden; to that area—the river—compulsory pilotage extends. Outside of that, as far as the Cumbraes, the pilotage is not compulsory. Geographically the language of the Act of Parliament is as plain and incontrovertible as this.

There is power given for the Pilot Board to make bye-laws *quoad* the river (119) for "regulating the conduct of the owners, masters, pilots, and crews of vessels," and *quoad* the firth or estuary (139) "the good government, police, and proper navigation of all vessels." With regard to the point for decision in this case there the statutory provisions end. I am humbly of opinion that these sections are not in conflict, but that, upon the contrary, the power of making bye-laws was for the purpose of carrying out, and in no respect whatsoever of limiting, restricting, or controverting the other provisions of this statute. Section 139, defining the geographical limits of the river, stands, and must stand, exactly as the Act has defined them. To the east of the Newark-Cardross line compulsory pilotage is prescribed, and the area so defined could not without violation of this statute be extended in any direction by bye-law, or apart from statutory amendment, alteration, or repeal.

When section 633 of the 1894 Act accordingly speaks of a "qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law," it can, in my humble judgment, not extend, so far as the Clyde is concerned, to any district west of the Newark-Cardross line. To the east of that line and up to Glasgow "the employment of a qualified pilot is compulsory by law," to the west of that line it is not. With every respect to the English Judges who have come to the decisions analysed by your Lordships, I think that this case depends upon statute, and that it ends at this point.

The actual place of collision was at the tail of the bank opposite the Princes Pier at Greenock, four miles west of the Newark-Cardross line, and well within the voluntary pilotage area. The scheme of the bye-laws appears to have been to have two sets of licensed pilots—one for the river and the other for the firth. According to the practice which however prevails one man obtains a licence for both districts, and in working out this plan it has been found for the convenience of all parties expedient that pilots should reside in Greenock and be available for call at that port. Bye-laws appropriate to these topics are made, and one of these bye-laws says that when the pilot boards the vessel he should be in charge of the vessel. He might be taken on at Greenock or he might have been taken on as far west as the Cumbraes, but the argument presented to your Lordships' House is that he being on the ship and in charge of it the bye-law operates *ipso jure* as an extension of the "district where the employment of a qualified pilot is compulsory by law."

It is fortunately highly inexpedient to elaborate this point, for, in the view which I take, it would be totally incompetent for a Pilot Board so to act as to extend the district where the employment of a qualified pilot is compulsory by law. And if any bye-law has purported to do that it would not be carrying out, but controverting, the express provisions and geographical limitations of the 1858 statute.

There is no Scotch case which gives sanction for doing this, and with regard to the English cases I do not, speaking with respect and for myself, find that (dealing as they do with different statutes and different circumstances) they illustrate this particular Act of 1858 in such a way as to permit me to construe it apart from these geographical limitations to which I have referred. The statutory provision is not affected, or controlled by, and it makes no stipulation on the subject of the point where the employment of the qualified pilot took place or the tract of water (a great part of which may lie outside the district in which pilotage is compulsory) for which a pilot's services are engaged. But what the statute has to do with is, I repeat, "the district where the employment of a qualified pilot is compulsory by law."

I put this case during the argument, and I cannot say that I received any satisfactory answer to it—Assume a vessel outward-bound from Glasgow, and therefore under the charge of a pilot, to reach the Newark-Cardross line, and to pass, that is to say, from the river, in which the employment of a qualified pilot is compulsory by law, into the firth, where it is not. Assume this vessel to meet an inward-bound steamer, and the inward-bound steamer having sailed to that limit which it can do without any contravention of either statute or bye-law without a pilot. Then, being about to enter the river, she requires a pilot, and the pilot from the outward-bound vessel is thereupon transferred to it. He takes charge on or near the actual line which is the western boundary of the river by law. Is there anything contrary to law in that? Is there anything in any bye-law which would compel the vessel in such circumstances to go back to Greenock and go through the form of taking up the pilot there? I humbly do not think there is? The illustration is not fantastic. It would apply to-day in the same way to any vessel sailing from Port Glasgow to Glasgow, a

pilot being picked up at the former port. At a point actually three or four miles to the west of that and down the firth, this collision occurred. It humbly appears to me to have no bearing upon the case to say that the vessel had to pick up the pilot opposite that point, namely, at Greenock. If the meaning of that is that it was an excellent or convenient arrangement and in accord with the bye-law, good and well. That cannot affect the statutory limitations. But if the meaning of it is that it so far affected them as to produce a result equivalent to extending the river four miles to the west of its specified boundary, I cannot hold this to be in accordance with law. The respondents' case necessarily involves that the same reasoning would apply if the pilot was picked up at the Cumbraes. He would be a duly licensed pilot; his district would include a large tract of water within which pilotage was voluntary, and a smaller tract of the river within which it was compulsory. The illustration is merely given to show how strange would be the results of leaving the plain geographical limits set forth by the statute.

With regard to the English decisions, I agree with the analysis and reasoning upon those given in the judgments read by my noble and learned friends who have preceded and are to follow me. I only presume to add to these judgments these two points —First, without differing in any way from Lord Wrenbury's view as to the case of *Lucey* v. *Ingram*, I must say that the statute there under construction was couched in language very different from section 75 of the Clyde Act of 1858. In the second place, I think, if I may respectfully say so, that confusion has been introduced into this department of the law by the expression "compulsory pilot." What the statute deals with is a place, area, or district where pilotage is compulsory. But if the word "compulsory" is to be applied to the man—the pilot—then once a licensed pilot is on board of a vessel he carries this adjective or quality with him (such is apparently the inference) in such a way as to put the ship itself under compulsory pilotage and to convert the area into a compulsory area, although with regard to the latter the point of collision was out of bounds, and with regard to the former compulsory pilotage was not prescribed! All this in my opinion is concluded adversely by the consideration that the place of employment or the place to which the employment can be extended either before the compulsory pilotage area is reached or after it is left, is truly an irrelevant consideration in view of the clear and very plain language of the Merchant Shipping Acts.

I agree that the appeal should be allowed.

LORD PARMOOR—[*Read by Lord Wrenbury*]—I concur in the opinion which Lord Wrenbury is about to read. Under the statute the employment of a qualified pilot is not compulsory outside the river area. The bye-law "that the pilot when on board shall have sole charge of the vessel" does not make the employment of a pilot compulsory by law outside the river area. It does no more than constitute a contractual condition to which the master of the ship assents on obtaining the services of a qualified pilot. If the bye-law purported to extend the area of compulsory pilotage outside the statutory limits, it would in my opinion be invalid and not within the bye-law powers of the Pilotage Board.

If the above construction of the statute and bye-law is correct, there is no separate question of common law. Having regard to the full examination which had been made of the authorities, it is not necessary to further refer to them.

The appeal should be allowed, with costs.

LORD WRENBURY—The question here is whether at the time of the collision the "Fjord" was in charge of a pilot whose employment was compulsory, with the result that her owners are free from liability. The question has been argued under two heads, viz., (1) whether the owners are within section 633 of the Merchant Shipping Act 1894, and (2) whether at common law the relation of master and servant ever arose between the owner and the pilot so as to render the former liable for the negligence of the latter.

Having regard to sections 136 and 75 of the Clyde Navigation Consolidation Act 1858, the "Fjord" at the moment of the collision was not at a place where she was bound to navigate with a pilot. She was entitled at that place to navigate by her own officers. She had taken a pilot on board at Greenock, which was, under the regulations, a proper place to take him, but she was in waters in which, so far as the Clyde Act of 1858 was concerned, she was entitled to keep charge of the navigation by her own officers, and not to give charge to the pilot.

The Pilotage Board constituted by section 128, however, had made (as by section 139 they were entitled to make) bye-laws for the proper navigation of vessels at places which included the place where the collision occurred, and had by bye-law 37 provided that "the pilot when on board shall have sole charge of the vessel." They had also by bye-law 17 provided that pilots should be licensed in two classes, viz., river pilots licensed to pilot between Glasgow and Greenock (which was the present case) and deep sea pilots licensed to pilot between Greenock and Little Cumbrae.

The question to be determined upon the Acts and bye-laws is whether, for the purposes of section 633 of the Merchant Shipping Act 1894, the pilot was on these facts acting in charge of the ship within a district where the employment of a qualified pilot is required by law. Two questions arise—the one on the word "district," the other on the words "required by law."

As regards the latter, in my judgment the employment of a qualified pilot was not, under the circumstances of this case, "required by law." My reasons for this opinion are as follows:—First, the law required a pilot in the circumstances mentioned in section 138 of the Clyde Act. The

power to make bye-laws did not extend to allow of an extension of section 138. It empowered only bye-laws for the proper navigation of vessels having regard to section 138. *The "Ruby,"* 6 Asp., N.S. 577, is not an authority that the area of compulsory pilotage can be enlarged by bye-law under such a power to make bye-laws as is contained in the Act of 1858. The decision in *The "Ruby"* is based upon the fact that the local Act, 53 Geo. III, cap. clxxxiii, by its preamble and by section 17, contemplated acts and gave power to the Commissioners to do acts for establishing and regulating the pilotage of ships, and that the subsequent Act of 1845 gave, by section 158, power to make bye-laws for regulating the pilotage, and that, having regard to the Act of 1813, this meant establishing pilotage. Under these provisions it was held that a bye-law could make pilotage compulsory. That is not this case. The definition of the area of compulsory pilotage is the definition of an area within which third parties will, in case of collision, be deprived of a right which otherwise they would have against the owners. The Clyde Act of 1858 had defined what that area was. The bye-laws could not extend it. Secondly, the provisions in the bye-laws by which it is said that they extended the area is found in bye-law 37—"The pilot when on board shall have sole charge of the vessel." In my opinion this provision was contractual only and not compulsory.

Inasmuch as the ship was, under the circumstances mentioned in section 138, bound to have a pilot, the Pilotage Board was I think bound reasonably to supply one. They could not attach any conditions they liked to supplying one; they could I think attach reasonable conditions. I doubt whether it would be a reasonable condition which they could lawfully impose that the master should give over the charge of his vessel to another when he was not in law bound to do so. But assuming the condition to be reasonable, its acceptance by the ship created a contractual and not a compulsory obligation. If the pilotage authority says I will give you a pilot if you will give him charge from the time he comes on board, and the ship consents, the result is that a contractual and not a compulsory obligation is imposed upon the ship. Compulsory for the present purpose does not mean the compulsion of necessity which leads the ship to acquiesce, but the compulsion of law which prevails whether the ship assents or not.

As to the latter point, it is contended that section 633 is operative not only at the point where the employment of a pilot is compulsory, but in "any district where the employment of a qualified pilot is compulsory by law," and it is argued that "district" means "pilotage district," and that the words mean "within any pilotage district in any part of which the employment" is compulsory. The pilotage district here, it is said, is Greenock to Glasgow, for the pilot's licence was to pilot between those places, and in some part (although not this part) of that district pilotage was compulsory.

To my mind the contention does violence to the language. The rights of third parties are not to be taken away by words which as they stand and without altering "where" into "in any part of which" do not affect them. In the present case, if the contention is right, the whole voyage from Little Cumbrae to Glasgow could have been made the subject of compulsory pilotage if the Pilotage Board had elected (as they might) to licence a pilot for the whole of that distance, with the result of making it one pilotage district.

Upon the question of section 633 of the Merchant Shipping Act 1894 I think the appellants are right.

As regards the common law, I am far from clear that there is any separate question. But I will assume that apart from section 633 there may be an arguable point. The point, if it exists, is this—When the pilot was taken on board at Greenock, and in fact took charge of the vessel, did he take charge by the request or with the assent of the master so as to constitute the pilot the servant of the owner, or did he take charge adversely to the master and because he had the right so to do? This vessel was going from free waters into compulsory waters. As a subsidiary question would the result be different if she had been coming from compulsory waters into free waters?

In my judgment there is no difference between the two cases. In each case it seems to me that at the moment when the vessel is in free waters the pilot can only take or keep charge, and by implication he did take or keep charge, by the request of the master. Take the present case. The pilot came on board on the terms (see bye-law 37) that he should have sole charge. I have stated my reasons for thinking that that was a contractual term. The pilot takes charge by the contractual consent of the ship. The owners have adopted him as their servant. Take the case of the pilot who had been shipped, say at Glasgow, had come down the river, had crossed the arbitrary line, and was no longer in the river but in the firth. When she crossed the line the master (but for the contractual term) could have said, "I shall now take charge," and the pilot could not have said him nay. He did not do so Why? Because by contract, after the line was crossed, he was to leave the pilot in charge. He was there from that moment by contract, and the relation of master and servant existed.

So far I have abstained from all reference to authorities. I go on to consider what the authorities are.

In *Lucey* v. *Ingram*, 6 M. & W. 302, it was held that the owner need not have employed a pilot at all. But he did so. The ship was held to be within section 72 of the Pilot Act (6 Geo. IV, c. 125), a ship "wanting a pilot" because she wished for a pilot. Under these circumstances the Court held that the pilot was "acting in the

charge of such ship under" the provisions of the Act within section 55, because under section 72 he was bound to take charge. I am unable to agree. The obligation of the pilot to serve arose under the provisions of the Act. But his acting in the charge of the ship arose, not under any of the provisions of the Act, but by reason of the ship's asking him to act, from which it resulted that under the provisions of the Act he was bound to comply. *Lucey* v. *Ingram* I think was wrongly decided.

The "Stettin," Br. & Lush. 199, in the Privy Council, was a case in which the vessel inward bound to the Port of London came into collision within her own port, but was at the time being navigated by a duly licensed pilot. She had passed from an area of compulsory pilotage—had entered an area in which she was not compelled to have a pilot—but remained in fact in charge of the pilot. The ship was held liable for damage. This decision concurs with my own opinion. It is applicable to the present case unless a distinction is to be drawn (and I have said that in my opinion it is not) between the case of a ship passing from compulsory into free waters and that of a ship passing from free into compulsory waters.

In *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (L.R., 3 Ex. 330, 4 Ex. 238) the Court of First Instance followed *Lucey* v. *Ingram* and not *The "Stettin."* In the Exchequer Chamber it was held that the ship was not at the time of the collision within her own port and that pilotage was therefore compulsory. The point therefore did not arise, and what was said upon it was but dictum. I am bound, however, to say that I do not agree with the dictum. The grounds relied upon are two—first, that up to Gravesend pilotage was compulsory and that "we cannot see any indication of a fresh contract as to the latter portion of the transit." Fresh contract there could be none, for the previous relation was not contractual but compulsory. A contract (not a fresh contract), as I have already said, was, I think, to be inferred so soon as the compulsory relation terminated. Second, that the words of the Act are "within the district." I have already expressed my opinion upon the effect of these words. Lastly, the Court distinguished *The "Stettin"* on the ground with which I have already dealt, viz., that in *The "Stettin"* the vessel was passing from compulsory waters into free waters. *The General Steam Navigation Company* is, upon the point before the House, dictum only and not decision, and with the dictum I cannot agree.

In *The "Charlton,"* 8 Asp. N.S. 29, however, the case was by inadvertence treated by the Court of Appeal as a decision binding upon that Court. The "Charlton" was proceeding from compulsory to free waters. Lord Esher, M.R., decides the case on the ground that the pilot was no longer a compulsory pilot, but that he was still "in charge without any alteration of the relations between himself and the master of the ship." I cannot follow this. The original relation was that the pilot was *dominus*; it mattered nothing whether the master wished him to have charge or not, he was compelled to let him have charge. The subsequent relation was that the pilot was not *dominus* at all. The master could have told him to go below and could, adversely to the pilot, have taken charge himself. Secondly, the Master of the Rolls decides on the word "district." This is the point upon the statute with which I have already dealt. Lastly, he decides it on the ground of expediency, of the difficulty which would arise in determining when the terminus of compulsory pilotage had been reached. The rights of third parties cannot, I think, be taken away on grounds of expediency. Kay, L.J., adds no further ground. A. L. Smith, L.J., decides upon *General Steam Navigation* in the Exchequer Chamber.

In *The "Lion,"* L.R., 2 P.C., 525, it was held that the vessel was not carrying passengers and was therefore not bound to take a pilot. The Board followed *The "Stettin"* and not *Lucey* v. *Ingram.*

These are the authorities. Upon authority the balance is, I think, in favour of the view which I expressed in the earlier part of this opinion. However this may be, I submit to your Lordships that when this collision occurred the ship was in charge of the pilot, not compulsorily against the master, but contractually by the implied request and consent of the master, and that as towards third parties the owners cannot protect themselves from liability upon the ground of compulsory pilotage.

It results that, in my judgment, this appeal succeeds.

Their Lordships reversed the judgment appealed from and restored the interlocutor of the Sheriff-Substitute, with expenses.

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Monday, October 18.

(Before the Lord Chancellor (Buckmaster), Lord Haldane, Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Parker, and Lord Sumner.)

CARNEGY *v.* JOSEPH.

(In the Court of Session, February 19, 1915, 52 S.L.R. 370, and 1915 S.C. 490.)

Entail—Succession—Destination—"Heirs-Male of my Body and the Heirs whatsoever of their Bodies."

An entailer destined his estate to "the heirs-male of my body and the heirs whatsoever of their bodies, whom failing to the heirs-female of my body and