Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Saint John Pilot Commissioners and The Attorney-General for the Dominion of Canada v. *The Cumberland Railway and Coal Company, from the Supreme Court of Canada; delivered the 28th October, 1909.*

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ASHBOURNE.
LORD COLLINS.
LORD GORELL.
SIR ARTHUR WILSON.

[*Delivered by Lord Gorell.*]

The question for determination on this Appeal is, whether certain vessels belonging to the Respondents were, when entering and leaving the port of St. John, New Brunswick, liable to pilotage dues under the provisions of the Pilotage Act, Revised Statutes of Canada, 1886, Ch. 80, Secs. 58 and 59.

Those sections are as follows:—

> 58. Every ship which navigates within either of the pilotage districts of Quebec, Montreal, Halifax or St. John, or within any pilotage district within the limits of which the payment of pilotage dues is, for the time being, made compulsory by Order-in-Council under this Act, shall pay pilotage dues, unless either—
>
> (*a*) Such ship is on her inward voyage, and no licensed pilot offers his services as a pilot, or
>
> (*b*) She is exempted under the provisions of this Act from payment of such dues.

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2. If such ship is on her outward voyage and the owner or master of such ship does not employ a pilot or give his ship into the charge of a pilot, such dues shall be paid, if in the pilotage district of Quebec, to the corporation of pilots for and below the harbour of Quebec, and if in any other pilotage district, to the pilotage authority of such district. 36 V., c. 54, s. 57, part.

59. The following ships, called in this Act exempted ships, shall be exempted from the compulsory payment of pilotage dues :—

(*a*) Ships belonging to Her Majesty ;

(*b*) Ships wholly employed in Her Majesty's service, while so employed, the masters of which have been appointed by Her Majesty's Government, either in the United Kingdom or in Canada ;

(*c*) Ships propelled wholly or in part by steam employed in trading from port to port in the same Province, or between any one or more of the Provinces of Quebec, New Brunswick, Nova Scotia, or Prince Edward Island and any other or others of them, or employed on voyages between any port or ports in the said Provinces or any of them and the port of New York, or any port of the United States of America on the Atlantic, north of New York ; except only in the ports of Halifax, Sydney pilotage district, Miramichi and Pictou,—as respects each of which ports the pilotage authorities of the district may, from time to time, determine, with the approval of the Governor in Council, whether any, and which, if any, of the steamships so employed shall or shall not be wholly or partially, and, if partially, to what extent and under what circumstances, exempt from the compulsory payment of pilotage dues ;

(*d*) Ships of not more than eighty tons, registered tonnage ;

(*e*) Any ship of which the master or any mate has a certificate granted under the provisions of this Act and then in force, authorizing him to pilot such ship within the limits within which she is then navigating ;

(*f*) Ships of such description and size, not exceeding two hundred and fifty tons, registered tonnage, as the pilotage authority of the district, with the approval of the Governor in Council, from time to time, determines to be exempt from the compulsory

payment of pilotage in such district; Provided always, that this paragraph shall not apply to the River St. Lawrence, where all ships registered in Canada, if not more than two hundred and fifty tons registered tonnage, shall be exempt. 36 V., c. 54, s. 57, part;—38 V., c. 28, s. 1;—40 V., c. 20, s. 3.

By Section 2 (*b*) of the Act the expression "ship" includes "every description of vessel used "in navigation, not propelled by oars."

In or about the year 1893 the Respondents had built for them five vessels for the purpose of carrying coal sent from the Respondents' mines at Spring Hill and shipped from Parrsboro, Nova Scotia, to the port of St. John and other ports along the East Coast of Canada and the United States of America.

The vessels were each of about 440 tons, and were described as "schooners" in the builders' statements and claims for drawback, and the certificates of registry in Nova Scotia certified that they had within themselves the power of independent navigation, though the facts show that this statement cannot be treated as being sufficiently explicit. They were constructed with two short masts, which were fitted as derricks, with gaffs for discharging cargo, and carried small, triangular sails and a jib. These sails were used to steady the vessels and assist them in strong breezes. The vessels could run before the wind, but could not be safely navigated as sailing vessels in the ordinary way, and were intended to be, and, in fact, were, towed from port to port. Each had a captain and crew, and was fitted with steering gear and anchors. If they had been fully rigged they would have been navigable by sails as ordinary schooners.

The barges or schooners, whichever they are called, were towed by a steam tug from Parrsboro to St. John, and also on the return voyage.

In summer there might be two or three in a line, but in winter only one at a time appears to have been towed.

The Appellant Commissioners are the pilotage authority for the pilotage district of St. John and entitled to collect the pilotage dues. The payment of these dues is made compulsory in the cases specified in the Act, but it is not compulsory upon an owner or master of a ship to employ, or give his ship into the charge of, a pilot, either on the ground of his being compelled to pay pilotage dues to any person or otherwise. (See Section 57 of the Act.)

From 1893 to 1903 the Respondents' said vessels were engaged in carrying coal to St. John in the way above referred to, and a dispute existed between the Commissioners and the Respondents as to whether the vessels were liable to pilotage dues. During this period it appears that the Respondents, while refusing to take pilots on their vessels, were compelled to pay pilotage dues in order to obtain the clearance of the vessels, and, in fact, paid the dues under protest. The amount thus paid between April 24th, 1893, and May 4th, 1903, was $15,680.08, of which $7,487.58 were paid more than 6 years before the commencement of the present suit, and $8,192.50 between September, 1897, and May, 1903, that is to say, within 6 years before the commencement of this suit. In consequence of a decision in the case of *The Ship Grandee*, hereafter referred to, pilotage dues were not paid in respect of the said vessels after May, 1903, but, if payable, the amount thereof in and from May, 1903, to the time of the action was $735.

In September, 1903, the Respondents brought this suit against the Commissioners to recover the pilotage dues paid as aforesaid. They sued on the common counts. The defendants pleaded

"never indebted" and the Statute of Limitations, and also claimed the said sum of $735.

The trial took place before McLeod, J., and on the 9th of October, 1905, he found in favour of the Respondents that the vessels were not liable to the pilotage dues, and he directed a verdict to be entered for the Plaintiffs for the sum of $8,192.50. He held that the rest of the Plaintiffs' claim was barred by the Statute of Limitations, and he gave leave to the defendants to move to enter a verdict on their behalf for the $735. The ground of the decision was that, in the opinion of the learned Judge, following the case of *The Ship Grandee*, the vessels came within the exemption of Sec. 59 (*c*) of the Act of 1886, as ships propelled by steam.

The defendants moved the Supreme Court of New Brunswick to set aside the verdict and enter a verdict for the defendants, or for a new trial. The motion was heard before Tuck, C.J., and Barker, Hanington, and McLeod, JJ., and was, on February 10th, 1906, refused, the Chief Justice dissenting. He expressed himself as differing entirely from the conclusion that, where a ship is being towed, and has no steam propelling power within herself, she is propelled wholly or in part by steam, within the meaning of the Act. The other Judges concurred with the judgment below.

An Appeal was then taken to the Supreme Court of Canada, and heard before the Chief Justice and Davies, Idington, Maclennan, and Duff, JJ. On the 26th of December, 1906, the judgment of the Court was given by Davies, J., dismissing the Appeal on the ground that the vessels either were not vessels "which navigate" within Sec. 58, as they had not practically the power of independent motion, or were "ships propelled by

steam" within Sec. 59. It is to be noticed that the view of the Court upon the first alternative was not that entertained in the Court of New Brunswick.

Before considering the language of the statute it may be desirable to refer to the case of *The Grandee*, decided in 1902, and reported in 8 Exchequer Court Reports, at p. 54, and on appeal at p. 79. The "Grandee" was a coal barge of about 1,000 tons register, employed in carrying coal from Sydney, Nova Scotia, to Quebec. She had no motive power of her own, either by sails or steam, and was towed by a steam collier. She was held exempt from pilotage dues in the pilotage district of Quebec. There does not seem to be any substantial difference between that case and the present, for although, in that case, it seems to have been stated that the vessel had no motive power of her own, the vessels in the present case had, for practical purposes, no motive power of their own which would enable them to make their voyages in safety. The case was heard before Routhier, J., the local Admiralty Judge for Quebec, who gave three reasons for his opinion: First, that a pilot was practically useless on such a vessel. This reason is to be found in some of the judgments in the present case, but it would, if correct, seem to apply equally to any vessel, though fully rigged, which was under the necessity of being towed into port. Second, that the tug (which is exempt) and tow are one vessel. This, however, cannot be correct, though for some purposes, *e.g.*, steering and sailing rules, they may to some extent be so regarded. Third, that the vessel was only an accessory or "chargement"—an object transported or dragged, as a carriage by a horse, and was not, properly speaking, a ship. This reason does not give effect to the term

" ship " as used in the Act, and, indeed, the judgment is based on what may be termed practical reasons, and not upon sufficient consideration of the language of the Act. On appeal to the Exchequer Court of Canada, Burbidge, J., affirmed the decision on grounds which are substantially the same as those given by Mr. Justice Davies in the present case.

It may be observed that the Statutes have been revised and re-enacted with some modifications in 1906. The Statute of that year, Ch. 1, Sec. 21, Sub-section 4, provides that—

> " Parliament shall not, by re-enacting any Act or " enactment, or by revising, consolidating, or amending " the same, be deemed to have adopted the construction " which has, by judicial decision or otherwise, been " placed upon the language used in such Act, or upon " similar language "

The legislation on the subject of pilotage in Canada extends back for many years. The Pilotage Act of 1873 repealed a number of old statutes in none of which, so far as their Lordships can trace, is there any enactment which would show any distinction between barges or schooners of the kind and size of those in question used for the purpose of sea-going voyages, and towed in or out of port, and any vessel of the ordinary sailing powers similarly towed. There is a provision in 12 Vict., Ch. 117, Sec. 23, which in one case gives a lower rate of pilotage for vessels towed, for under it a Montreal pilot only had half rates when a vessel was towed by a steamer, but the General Act of 1873 does not appear to contain any similar provision. The Act of 1873 was revised in 1886, and some important changes were made by Sec. 59 of the Revised Statute with regard to the exemptions which were specified in Sec. 57 of the Act of 1873. There would seem to be no reason for

placing different constructions upon the words "ships propelled wholly or in part by steam" used in these two sections. In the earlier it may be noticed that these words are used in relation to vessels proceeding on certain lengthy sea voyages upon which, in 1873, vessels without any motive power of their own would probably not be used. In the later section it may be further noticed that the word "steamships" is expressly used in the latter part of Sub-sec. (*c*).

The statutory provisions in question appear to have originated in times when vessels were either sailing vessels or steamships or river craft, and before barges of such a size as the Respondents' vessels were used for sea-going purposes. Exemptions from pilotage of vessels of small size are to be found in the Acts. It would seem from the letter of 19th January, 1903, from the Pilotage Authority of St. John to the Deputy Minister of Marine and Fisheries, Ottawa, that these large barges, or schooners, were a new development, and it is probable that the explanation may be thus found of the fact that no special provision in the Acts is to be found dealing with cases of towage of such vessels. There is nothing in the evidence which would justify an assumption that the Legislature, in framing the Acts, had in view the relief of a class of large barges moved by towage alone from pilotage dues, and the question is whether the Statute uses language which does or does not do so.

Before turning to the actual words of the Statute it may be useful to refer to the other Shipping Acts of 1886, Nos. 72 to 80, in which "ship" is defined in a manner substantially the same as that above stated, and "steamship or steamer" is in Cap. 73, Sec. 1 (*d*), defined as including "any ship propelled wholly or in part

by steam or other motive power than sails or oars." Steamboat is defined in Cap. 78, Sec. 2 (*a*), as including "any vessel used in navigation or afloat on navigable water and propelled or moveable wholly or in part by steam," and in Cap. 79, Sec. 1 (*c*), the expression "steamship or steamboat" includes "every vessel propelled wholly or in part by steam or by any machinery or power other than sails or oars." Sec. 2 of this Act also provides in Articles 4 and 6 as to the lights to be carried by vessels towing and being towed. In these definitions the word "propelled" is used with reference to the motive power possessed by the vessel, but the attention of the Courts below does not appear to have been called to this.

The first question is, whether the 58th Section imposes the compulsion upon these barges unless they are exempted by Sec. 59. It applies to "every "ship which navigates within" certain districts, unless exempted under the provisions of the Act, or when there is no opportunity of obtaining a pilot. The word "ship" being defined to include every description of vessel used in navigation not propelled by oars, these barges are ships within the meaning of the section. Then comes the question whether they are ships which "navigate" within the district of St. John. The word "navigates" is, of course, used in the sense of "is navigated." From the context it appears that it is not used as descriptive of any particular kind of ship, or with any reference to her motive power, but is used in relation to something which a ship is caused to do; that is to say, so far as affects the present case, to perform a voyage into or out of the Port of St. John.

There is nothing in the words of the section, when the definition of the word "ship" is considered, to indicate that at the time of moving

in the pilotage waters a ship, to be under compulsion, must at the time possess independent practical power of moving herself. If that were so, it would seem to follow that any ordinary sailing vessel which was necessarily towed into port would not be within the section, and this can scarcely be the true meaning of the section. The argument that, because the barges are towed, they do not need a pilot, will not alter the express language of the section, and, moreover, it is reasonably clear that, although a pilot may not be so useful on large barges in tow of a tug as he would be if they were capable of making their own way into or out of port, yet the same argument would apply to any case of towage, even of a properly rigged sailing vessel, and yet, wherever pilotage is compulsory, the pilot is usually found on the tow where he can exercise such control of the navigation as is possible and give such directions and assistance as may be required. The fact that the tug may have more vessels than one in tow does not alter this position.

Their Lordships consider that the 58th Section applied, and that the vessels in question were liable to the payment of pilotage dues unless exempted by the 59th Section.

That section exempts "The following ships," and then in sub-sections (*a*), (*b*), (*c*), (*d*), (*e*), and (*f*) it enumerates the ships exempted. It is important to notice again the use of the word "propelled" in the definition of the word "ship," for the second question turns mainly on the use of that word in sub-section (*c*). In the definition clause the word "propelled" is obviously used in its ordinary sense, and does not embrace the idea of traction. It is used as it was by Cicero—"propellere navem remis"—with reference to the motive power possessed by the vessel herself,

and in this sense it is, in their Lordships' opinion, used in sub-section (*c*). "Ships propelled wholly or in part by steam" are steamships which have either no motive power but their steam engines, or have steam engine power and some sailing power, and this is made plain by the actual use of the word "steamships" in the latter part of the said sub-section, where this word is used as equivalent to "ships propelled "wholly or in part by steam." This express reference to steamships has a very important bearing on the construction of the earlier words of the sub-section, but the arguments and judgments given in the record do not touch upon it.

Provision is made in sub-section (*d*) for the exemption of ships of not more than 80 tons registered tonnage, and in sub-section (*f*) for the exemption in certain cases of ships not exceeding 250 tons registered tonnage. These provisions meet the case of ordinary barges within the limits of tonnage mentioned, but do not assist the Respondents owing to the size of their barges. If the masters or mates of the barges had the necessary pilotage certificates, the barges would be exempt under the provision in sub-section (*e*).

The statutes were again revised in 1906, and the 58th and 59th Sections of the Pilotage Act (Revised Statutes of Canada, 1886, Ch. 80) were re-enacted in the Canada Shipping Act, 1906, Ch. 113, Secs. 475 and 477, with some alterations which, however, do not seem to make any alteration with regard to the liability or exemption of such vessels as those in question. If it were material to consider this Act, the language used in the definition clause and other clauses would support the views now being expressed.

Their Lordships, after giving very full con-

sideration to the case, have come to the conclusion that they are compelled to differ from the decisions below, which, as they at present stand, have been reached by placing a construction upon the Act which is founded on practical considerations (according to which it might be thought reasonable so to construe the Act that, having regard to the peculiar circumstances attending their navigation, the barges in question should be exempted from pilotage) rather than upon a natural construction of the words used, and for the reasons given above they think that the construction which has been adopted is not in accordance with the proper and ordinary meaning of the language used in the Statute. If it be thought right that these large, sea-going barges should be exempted from pilotage dues, the matter will have to be dealt with by the Legislature.

Their Lordships will therefore humbly advise His Majesty to order that the verdict entered for the Respondents and the judgments in the Courts below be set aside, and the verdict and judgment be entered for the Appellants for $735 with costs in the said Courts, to be paid by the Respondents to the Appellants.

The Respondents must pay the costs of the Appeal.

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