cannot mean, I suppose, that the very sight of a chimney is nauseous and hurtful, and that it would depopulate the place immediately it was put up.

But then the question arises, is it against the conditions of the feu? I am of opinion with your Lordship that it is not. We have no concern with the superior, who assents to the erection of the shaft, and therefore we only determine under this head that it is not in violation of any obligations put upon feuars in favour of other feuars upon the Blythswood property. I do not enter into details; I think it is sufficient to state the conclusion, which is in accordance with the opinion which your Lordship has more fully expressed. It would be a sad pity if the ventilation of this underground railway was hindered or delayed merely because the people about Blythswood Square did not like the look of the chimney. If a nuisance results it will be stopped, or the nuisance will have to be abated in some way or other.

Your Lordship has noticed what was stated at the bar by the learned counsel, that this erection might be made ornamental, and as unlike a chimney as the ingenuity and the taste of an architect could devise. I am afraid that it would still maintain its distinctive appearance as a chimney, and I think there had better be no attempt made to disguise it. It may be built of stone, if that is thought more beautiful than brick, but I should think it would not be very long before it assumed a colour in which stone would not be distinguishable from brick; but that is of no moment. I agree with your Lordship that the Dean of Guild is wrong, and that the railway company should get the decree sought.

LORD RUTHERFURD CLARK—I am bound to follow the case of *Hislop*, and on the authority of that case I hold that the respondents are not entitled to enforce the conditions contained in the title of the appellants. I think it right, however, to say that I do not read that case as deciding that such a title can be given only by express words. I do not think, however, that it can be inferred from the deeds which are before us in the present case. The case of *Hislop* was in my judgment a much stronger one than the present for holding that the conditions might be enforced by the feuars, but the decision of the House of Lords negatives the existence of any such right.

LORD TRAYNER—I concur with your Lordships in thinking that the Dean of Guild has gone wrong in pronouncing the judgment brought under appeal, and I cannot help saying that the three reasons upon which the judgment seems to have proceeded are each and all of them in my opinion quite unsound. The last-mentioned, but which evidently bulks most largely and most influentially in the mind of the Dean of Guild, is, that the proposed erection would be a nuisance. I think that there he anticipates what is not an ascertained fact; and more than that, that he is assuming a jurisdiction that does not belong to him, because the question whether this is or may be a nuisance is one which the Dean of Guild is not competent to try.

The second ground of judgment which I would refer to is, that the railway company are not entitled to do this, because the proposed erection is outwith the limits of their deviation, and because it is against the statute. The Dean of Guild has misapprehended the provisions of the statute entirely. They are not proposing to put up this ventilating shaft under the statute, they are proposing to build the shaft upon property acquired by them as individual proprietors, and unless there be something in the title to the subjects which excludes their exercising this right as one of the rights of property, then they must be allowed to exercise it.

That brings me to the third and last of the reasons of the Dean of Guild in giving this judgment, which is that the proposed erection will be foreign to the conditions of feu. Upon that matter I need say no more than that I entirely concur with your Lordships in the views which you have expressed. I think the judgment of the Dean of Guild ought to be recalled, and the case remitted back to him with instructions to grant the lining.

The Court recalled the interlocutor of the Dean of Guild, and remitted to him to grant a lining for the proposed erection.

Counsel for the Appellants—Cheyne—Comrie Thomson—C. S. Dickson. Agents—Millar, Robson, & Co., S.S.C.

Counsel for the Respondents—Jameson—Aitken. Agents—Forrester & Davidson, W.S.

Friday, July 3.

FIRST DIVISION.

[Lord Low, Ordinary.

BURRELL AND OTHERS *v.* MACBRAYNE, *et e contra.*

Ship—Collision—Reparation—Compulsory Pilotage—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 388.

This section provides—"No owner or master of any ship shall be answerable to any person for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

The steamship "Strathspey" under command of a pilot left dock at Glasgow at half-past five on a January night to proceed down the Clyde. There had been an unusually high tide, and a heavy land-flood, and the seaward stream was very rapid. A strong gale was also blowing across the river from north to south. Of the two alternative

courses, of steaming at a dangerous speed to retain steerage-way, or steaming slow in obedience to the Clyde bye-laws and losing steerage-way, the pilot adopted the latter, and the result was that the force of the elements rendered the ship unmanageable. She sheered across from the northern to the southern side of the channel and came into collision with the s.s. "Islay" which was proceeding up the river. The accident occurred within the compulsory pilotage district.

In cross actions of damages—*held* that the "Strathspey" was alone to blame for the accident, the primary cause of which was the vessel's leaving the dock in the circumstances; that no foundation had been laid in evidence for charging the master with contributing in any way to the accident; that the master was not responsible for allowing the ship to run into apparent danger, because the circumstances constituting the hazard were purely local conditions of which the pilot was the proper judge; and that the ship being within the compulsory pilotage waters the owners were not liable in damages.

These were conjoined actions of damages by George Burrell and others, owners of the steamship "Strathspey," against David Macbrayne, owner of the steamship "Islay," *et e contra*, for injuries occasioned to these vessels from collision with one another in the Clyde in January 1890.

The actions were raised in the following circumstances—About half-past five on the evening of the 25th of January 1890, the "Strathspey" left the Queen's Dock, Glasgow, and proceeded down the river Clyde. When she arrived a little above Pointhouse Wharf, she came into collision with the "Islay," which was proceeding up the river. Both vessels were injured by the collision. It was the duty of ships going down the river to keep to the north side, and of ships coming up the river to keep to the south side. It was averred for each vessel that she was on her proper side, and that the accident was caused through the negligence of the other.

In the action at the instance of Macbrayne against Burrell and others, the defender pleaded, *inter alia*—"(2) The collision having been occasioned by the fault of a licensed pilot acting in charge of the "Strathspey" within a district where pilotage was compulsory by law, the defenders are entitled to absolvitor."

Section 388 of the Merchant Shipping Act 1854 (17 and 18 Vict. c. 104) provides—"No owner or master of any ship shall be answerable to any person for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

The Lord Ordinary (Low) allowed a proof, which established that the accident happened within a compulsory pilotage district; that the pilot came on board before the "Strathspey" left the dock, and then and thereafter took command of her, the master and crew carrying out his orders; that the pilot caused the vessel to steam slowly in accordance with the bye-laws of the Clyde Trustees; and that the master had been fourteen or fifteen times up and down the river before the collision. The remaining facts sufficiently appear from the Lord Ordinary's opinion.

The Lord Ordinary pronounced this interlocutor: — Finds that the collision between the steamers "Strathspey" and "Islay," referred to on record, which took place on 25th January 1890, was caused by the fault of those on board and in charge of the "Strathspey," and for whom the owners thereof are responsible, and was not caused by the fault of those on board and in charge of the "Islay:" Therefore, in the action at the instance of Burrell and others, the owners of the "Strathspey," against Macbrayne, the owner of the "Islay," assoilzies the defender from the conclusions of the summons, and decerns; and in the action at the instance of Macbrayne against Burrell and others, finds that the defenders are liable in damages to the pursuer, &c.

"*Opinion.*— . . . In my opinion it is established that the collision took place on the south side of the river. The witnesses who had the best opportunity of seeing where the collision occured, are Mr Burns, the Deputy Harbour-master of Glasgow, who at the time was on duty on Pointhouse Wharf, almost opposite to which the collision took place, and Captain M'Dougall and Neil Darroch, the master and mate of the tug 'Vanguard,' which was going up the river a short distance ahead of the 'Islay.' These witnesses are all perfectly clear that the collision took place well over on the south side of the river. I think that it is impossible that they could have made a mistake as to the fact, and I saw no reason to doubt their credibility.

"Further, I am of opinion that the balance of the other evidence in the case is in favour of the view that the collision was caused by the 'Strathspey' sheering across to the south side, and certainly the probabilities of the case point to the accident having happened in that way.

"At the time when the 'Strathspey' left the Queen's Dock an unusually strong current was running down the river, and a gale, almost a hurricane, was blowing across the river from south to north. In such circumstances the skilled evidence establishes that it is difficult to keep a vessel coming down with the stream under complete control, without going at a rate of speed dangerous at that part of the river. If the vessel is not kept at such a speed as to give the helm complete command over her, she is necessarily, to a greater or less degree, at the mercy of the current, and may easily, in a narrow waterway such as the Clyde is at the place where the collision occurred, be carried or sheer to the one side or the other, before those on board can stop her or alter her course.

"Those who were on board the 'Strathspey' agree in saying that she did not go

fast down the river. The engineer, Robert Brown, depones that the engines were kept at slow, and occasionally stopped altogether for a short time. If this was the case I do not think that she could possibly have been at all times completely under control of helm, and if she was not it is not difficult to see how the collision came about. A ship in coming out of the Queen's Dock has her bow pointed somewhat across the river towards the south bank. It is therefore necessary in order to get her into her course down the northern side of the river to put the helm aport. Further, if the tide is running down it catches the port bow when the ship comes out of the dock, and that also has a tendency to send her to the north. When the 'Strathspey' came out of the dock, those in charge of her say that the helm was ported, and that she went over to and down the north side of the channel. There are two buoys between the entrance of the Queen's Dock and Pointhouse Wharf, and Patience, the pilot of the 'Strathspey,' says that she passed within ten feet of the first buoy and grazed the second buoy. Accepting this statement as accurate, it is evident that the 'Strathspey' was then on a course which, if continued, would have taken her right into Pointhouse Wharf. Therefore the helm must have been starboarded, which would have the effect of bringing the bow of the ship towards the south, and laying her to some extent across the current. If the ship was not under complete control, it is easy to see how in these circumstances she might get across to the south side of the river before she could be brought round again upon a port helm. After careful consideration of the whole evidence this seems to be what actually happened, the result being that the 'Strathspey' ran into the 'Islay,' which was on her own side of the river.

"In regard to the 'Islay,' she was proceeding up the river upon the south side of the channel. Her progress had been somewhat retarded by the 'Hallegarde,' which was being towed up in front of her, and she had stopped her engines altogether for a short time when opposite Pointhouse Wharf, but before the 'Strathspey' came down she had again steamed ahead. When the master of the 'Islay' saw that the 'Strathspey' was crossing the river he backed the engines in order if possible to get out of her way. To do so seems to have been the only chance which he had of avoiding a collision, and I am of opinion that no blame whatever attaches to those in charge of the 'Islay.'

"It is necessary now to consider an alternative defence stated by the owners of the 'Strathspey,' viz., that assuming that the collision was occasioned by fault in the navigation of that vessel, the owners are freed from liability under the 388th section of the Merchant Shipping Act of 1854, in respect that the vessel was in charge of a licensed pilot, and within a part of the river where pilotage is compulsory.

"To this alternative defence the owners of the 'Islay' reply that the fault which truly occasioned the collision lay in leaving the Queen's Dock in circumstances which rendered it dangerous to do so, and that that was a matter for which the master, and not the pilot only, was responsible.

"The question thus raised is one both of novelty and difficulty, but I shall state what I conceive to be the law applicable to such a case, and consider how it falls to be applied to the facts disclosed in evidence.

"The following propositions in law appeared to me to be settled—(1) Where in a collision a vessel is proved to be in fault, the master and owners are *prima facie* liable, and in order that they may take the benefit of the 388th section of the Merchant Shipping Act they must prove that the fault was that of the pilot, and of the pilot alone. If both the pilot and the master were in fault the owners are responsible. (2) The pilot, while the ship is under his charge, supersedes the master in all matters connected with the navigation of the ship, and (assuming that the collision was not due to defect in the ship or her apparel) it is sufficient to throw the fault upon the pilot to prove that the master and crew obeyed and properly carried out his orders; but (3) the fact that a pilot is in charge will not free the master from responsibility if he allows the ship to run into an apparent and obvious danger; for example, if he allows the anchor to be weighed and the ship to proceed in a thick fog.

"These propositions are, I think, all established by the cases of '*The Peerless*,' 13 Moore's P. C. Cases, 484, and the '*Julia*,' Lushington's Reports, 224.

"In the present case I think that it is clear that the pilot alone was responsible for all that occurred after the 'Strathspey' left her moorings in the Queen's Dock, because the ship was then under his charge, and it is not disputed that the master and crew carried out the orders which he gave. But the question is, whether the default which led to the accident did not consist in going out of the dock under the existing conditions of wind and tide, or at all events in going out without a stern tug to control the course of the vessel? Now, as I have already said, the ship left the dock at half-past five on a January night, when, although there was no fog, it was of course dark. The tide had then turned, and as there had been an abnormally high tide and a heavy land-flood the seaward stream was unusually rapid and powerful. Further, a gale of great violence was blowing. It was under these conditions that the 'Strathspey,' a vessel of 992 tons register, and a full bottomed cargo boat, built upon lines not adapted to expeditious handling (although for her class she appears to have steered well), was taken out of dock to navigate seaward a narrow and frequented channel. The alternative dangers to which such a proceeding exposed her were that she must either steam at a dangerous speed in order to keep steerage way, or run the risk of becoming unmanageable. In the view which I take of the evidence, it was the latter danger in which she became involved, and which resulted in the colli-

sion. The pilot steamed slowly, as by the bye-laws of the Clyde Trustees he was bound to do in that part of the river, and the result was that the force of the elements rendered the ship unmanageable. Short of going at greater speed—which under the bye-laws he was not entitled to do—I do not find any evidence that the pilot when once in the stream could by more skilful navigation have averted the catastrophe. The cardinal mistake was in my opinion venturing into the river at the time when the ship left the dock. She could have left in safety an hour or two earlier, because the tide would have been against her, and she would have had the advantage of daylight. Probably she might also have started in safety later in the evening when the downward rush of the tide had lost its force. But to start at the time she did, when the ebb tide was running its strongest, and the wind and the darkness increased the peril, was, in my judgment, according to the preponderance of evidence and as the event proved, rash in the extreme.

"The question is, was the pilot alone responsible for allowing the 'Strathspey' to start when she did, or was the master also responsible? I think that the answer to that question depends upon whether the danger was one of such a purely local nature that the master could not reasonably be expected to know of or appreciate it, or whether it was so patent that any master with a competent knowledge of his profession could see it for himself. If the danger was of the latter character I do not think that it can be said that no duty or responsibility rested upon the master. No doubt when the ship is once under way the pilot has, unless in very exceptional cases, the sole and supreme command. But I cannot but think that it is for the master to decide whether the ship is to be got under way or not. If he is doubtful he may properly enough avail himself of the local knowledge and experience of the pilot; and if in a land-locked channel like the Clyde the pilot assured him that there was no danger to be apprehended, probably the duty of the master will be discharged. In the present case the master did not consult the pilot. Both he and the pilot assumed—erroneously, as it turns out—that there was no danger; or, being anxious to start, ignored the danger. Was then the danger one which the master might reasonably be expected to have foreseen? I think that it was. According to the evidence, it seems to me that the danger was obvious enough, and must have been apparent to any seaman who took the trouble to consider the matter. The master must have known that the tide had been extraordinarily high, that the heavy rains had added to the flood, and that a strong stream when the tide turned would be the result, and he saw that it was blowing hard and that the night was dark. Further, he had been fourteen or fifteen times down the Clyde, and as many times up again, and could not plead that he was in a locality wholly unknown to him. In these circumstances it was, in my opinion, contrary to his duty to leave the dock at the time he did, and to say that he did not know of the state of matters in the river is in my judgment no excuse, because he ought to have ascertained them. No doubt the pilot ought to have warned him of his danger, but in my opinion the circumstances were such that the master ought himself to have seen and considered the risk.

"There was a great deal of evidence led as to the use of a tug astern a vessel going down with the tide. Many of the most experienced witnesses say that on such a night a tug would have been of little use. I am inclined, however, to think that if a stern tug had been employed, no blame could have been justly attributed to the master in allowing the ship to start. As, however, a tug was not employed, the matter does not seem to be important. Whether the fault lay in starting at all, or in starting without a tug, I think that the master was equally responsible.

"I am therefore of opinion that the plea rested upon the 388th section of the Merchant Shipping Act cannot be sustained.

"The result is, that I assoilzie the owners of the 'Islay' in the action at the instance of the owners of the 'Strathspey,' and find them entitled to damages in the action at their instance."

The pursuers (Burrell & Company) reclaimed—(It was now admitted that there was no fault attributed to the "Islay," and that the Lord Ordinary was right in the opinion which he had expressed as to the proximate cause of the accident).

The pursuers argued—If any danger arose from leaving the dock, this was occasioned by some local condition, which it was the pilot's duty to have known. There was not here any obvious or manifest danger. There was a gale and a flood, but the taking of the vessel out under these conditions was purely a pilot's question. On the respective duties of pilot and master—*Wood* v. *Smith*, 1874, L.R., 5 Privy Council, 451; *The "Christiana,"* 7 Moore's Privy Council Rep., p. 160; *The "Lochlibo,"* 7 Moore's Privy Council Rep., p. 427; *The "Oakfield,"* L.R., 11 Prob. Div. p. 34. The object of compulsory pilotage was to secure that there should be in command one who had knowledge of the local conditions, tides, currents, winds. Also the question of a stern tug was one for the pilot to determine—*The "Peerless,"* 1860, 3 Moore's Privy Council App., 484; *The "Maria,"* 1861, 1 Admir. and Eccles. Rep. 358; *The "Lochlibo,"* 1850, 3 Rob. Admir. Rep., 310. If there was any mistake, it was committed by the pilot. The vessel was well navigated, and as she was within compulsory pilotage waters the owners were not liable.

Argued for the respondent—There was here joint fault, both of the pilot and of the master. If the leaving of the dock was the proximate cause of the accident, then both the master and the pilot were to blame for this. Both thought it was the desire of the owners that the vessel should start, their

joint mistake being (1) in leaving at all, and (2) if they felt obliged to leave, in not providing a stern tug. The conditions that night were not local, but were such as any competent sailor ought to have known —Marsden on Collisions, p. 246. The pilot was not fully in charge when the ship left the dock, because the voyage could not strictly be said to have at that time commenced, and so the question of compulsory pilotage did not touch the question. It was the duty of the master to give the orders for the ship leaving the dock, and as this was the true cause of the collision he alone was to blame, or alternatively, in conjunction with the pilot. The question being a novel one, and depending to a large extent on circumstances, the cases on the other side did not apply—*The "Belgic,"* 1875, L.R., 2 Prob. Div., p. 57; *The "Ocean Wave,"* 1870, L.R., 3 Privy Council App., 205; *The "Girolamo,"* 1834, 3 Haggard's Admir. Rep., 169; *The "Julia,"* 1861, 1 Lushington's Privy Council Rep., 224.

At advising—

LORD KINNEAR—The question that we have to consider is, whether the owners of the s.s. "Islay," or the owners of the s.s. "Strathspey," or either of them, are responsible for the consequences of the collision which took place between these two vessels in the Clyde on the evening of 29th January 1890? The Lord Ordinary has given us in his opinion a very clear account of the material facts. It is not disputed that his Lordship's opinion is perfectly sound so far as he finds that no fault is to be attributed to the "Islay;" and, on the other hand, it is not very seriously disputed that he is also right in saying that the collision is to be ascribed to the fault of some person or persons in charge of the "Strathspey." Nor do I think it is very seriously disputed that his Lordship is right in the opinion which he has expressed both as to the proximate cause of the accident and as to the particular fault—if there be any fault—which he holds to be proved against the "Strathspey."

The "Strathspey" was lying at the east end of the Queen's Dock in Glasgow. The Lord Ordinary says that at the time she started to go down the river the tide had just turned, and as there had been a very heavy land flood, and an abnormally high tide, the seaward stream was unusually rapid and powerful. Further, a gale of great violence was blowing. In these circumstances the Lord Ordinary points out that the alternative dangers to which a ship going down the river was exposed, in navigating seawards so narrow and so frequented a channel as the Clyde, were that she must either steam at a dangerous speed in order to keep steerage-way or run the risk of becoming unmanageable. If she steamed at a dangerous speed, one of these dangers might be averted; on the other hand, if she was not going through the water at a considerably more rapid rate than the water itself was moving, it was impossible to gain steerage-way so as to bring the ship fully under the command of the helm. Now, the Lord Ordinary thinks it was the latter of these two dangers in which the ship became involved. When the collision became imminent, or at all events when the risk of the two ships coming into collision became obvious to those on board the "Strathspey," it is not, I think, suggested that any wrong or improper order was given by the persons in charge, but the ship was going at such a speed that she had not, for the reasons which the Lord Ordinary has pointed out, and to which I have adverted, complete steerage-way. She therefore became unmanageable and helpless, and when the proper order was given for bringing her to the north side of the river, which was her own proper side, she did not answer the helm, but was carried or sheered towards the south, and came into collision with the "Islay."

Now, I quite concur with the Lord Ordinary as to the result of the evidence of the cause of the accident, and that being so, the first question which it appears to me to raise is, whether there was any fault on the part of those in command of the "Strathspey" in steaming at so slow a rate of speed as they had actually adopted—a rate which they must have known must expose the ship to the danger of becoming unmanageable in consequence of the rapidity of the current at the time. The Lord Ordinary says this was not a fault, because the regulations and bye-laws of the Clyde made it necessary to steam slowly at that particular part of the river, and because the officer in charge therefore could not have gone faster without infringing those bye-laws. I am not satisfied that it is proved that the officer in command could not have gone at greater speed without infringing the bye-law; nor am I satisfied that it is quite satisfactorily proved that he could not do so that night without running into some other hazard such as that which he encountered by doing as he did. But I do not think it is material to consider whether that is proved or not, because I think the Lord Ordinary is quite right in saying that the "Strathspey" was at that moment exposed to alternative hazards; and even if it were proved that the officer in command, in choosing between two risks, had taken one which led to disaster, while if he had chosen to encounter the other he might have taken the ship down the river in safety, I do not think that that would amount to fault on the part of the officer in charge for which he or his owners could be made responsible, because if he came into a position without any fault of his own in which he had to exercise his judgment between two alternative hazardous courses, and did exercise his judgment and take the course which he thought best, I do not think it would be possible for the Court to say he was blameable for the choice he had made. I therefore agree with the Lord Ordinary in thinking that we must go further back to find fault—if there was any fault—on the part of those in charge

of the "Strathspey." His Lordship says that the fault consisted in leaving the dock at all at the particular time and under the particular circumstances under which the "Strathspey" started, and I further agree with his Lordship in that opinion. I think the evidence shows that to leave the dock and proceed down the river at the time when the "Strathspey" started, when the ebb tide was at its strongest and the wind and darkness increased the peril, was, according to the evidence, a very imprudent course to take. Now, if that be so, I think that is a fault for which the owners of the "Strathspey" would be responsible if the ship at the time was under the command of the master for whom they are answerable, and if the fault which I think was proved was committed by the master.

But then the defenders say they are free from liability in consequence of the provisions of the 388th section of the Mercantile Shipping Act, because their vessel was under the charge of a licensed pilot, and in a part of the river where pilotage was compulsory. The question therefore comes to be, whether the pilot or master of the vessel is responsible for taking her down at the particular time, and in the circumstances in which she left the dock. Now, there is no question as to the obligation of owners of ships of this class to have a duly licensed pilot on board. A pilot had accordingly been engaged to take the "Strathspey" down the river, and he came on board while she was still in dock. I think the duty of the master when his ship was ready to start was to put her in charge of the pilot, and thereafter to obey the pilot's orders, and see that they were obeyed by his crew. I think that was his sole duty. The evidence of the pilot is conclusive to the effect that this duty was fully performed. The pilot took charge of the vessel before she proceeded from the dock, and from the moment that he took charge the conduct of the navigation belonged exclusively to him. He was therefore responsible for carrying her through the dark out of the dock into the river, and down the river seawards so long as she remained within the limits of the water where pilotage is compulsory. I think it follows that it was for the pilot and not for the master to determine the particular time at which it would be prudent to leave the dock and enter the river. I cannot assent to the proposition which was urged upon us very forcibly by respondent's counsel that it was the master who was responsible for getting the ship under weigh and that the pilot was responsible only for her navigation after she had begun to move through the water. There can be no divided authority on the ship on a question so vital to her safety; and it appears to me that the pilot who is responsible for taking the ship safely out of the dock and down the river must be the sole authority to decide whether she can prudently leave her moorings and enter the river at any particular condition of wind and tide.

It is said that the owners are responsible because the fault consisted not merely in starting in circumstances which made it dangerous to leave the dock, but in starting in those circumstances without any tug astern. I agree with the Lord Ordinary in thinking that it is not proved that a tug would have been of any particular service in the particular circumstances of this case. But however that may be, it is clear upon the evidence that although it may be useful or necessary to employ a tug for vessels of a certain length which cannot readily take the bends of the river without such assistance, it is not necessary nor expected that a tug should be employed for a ship such as the "Strathspey." If the abnormal condition of the river made it prudent or necessary to take unusual precautions, it was for the pilot to point out the necessity. It was for him to say either that he could not start at all while the river was running so strongly, or that he could not start without the additional help if he thought additional help was useful. Therefore if I am right in thinking it was for the pilot to decide whether he could safely go down the river at all, it seems to me to follow that it was for him to say whether he could start with the ship in her ordinary condition, or whether he required a tug and some exceptional precaution—to have unusual assistance—because of the exceptional state of the river. It is not suggested that he asked for any such assistance, or that he had any doubt as to his ability to take the ship down the river safely without it; and indeed it is evident from his own evidence that he had no such doubt, because he says that the difficult part of the task was in taking the vessel from the dock which was crowded with shipping, and that when he got clear of the dock he thought all his difficulties were at an end.

Agreeing therefore with the Lord Ordinary as to the blame which is imputed to the "Strathspey," I am of opinion that the fault lay with the pilot. He was bound to know the state of the tide and the state of the current, and the rate at which he could steam, and to consider whether steaming at such a rate and in such circumstances it would be possible to keep steerage-way upon the ship—to know the risks to which he was exposed in going down the narrow channel of the Clyde at that place. It was for him alone, considering all these matters, to decide whether it was safe to leave the dock; and if there was blame in coming to the decision to take the ship out of the dock, I think the blame lies with him and not with the master.

But then it was maintained that in order to give the owners the benefit of the 388th section of the statute it is necessary for them to prove that not only was the pilot in fault but that he was solely in fault, and therefore that they must prove that there was no fault at all on the part of the master. And it was said that they had failed to discharge that burden, because they had not proved that it was in fact the pilot and not the master who had given the order to get under weigh. It is not

enough, according to the argument, to say that a pilot was in charge; it must further be shown that the master did not interfere with his counsel and authority and give orders to start either without consulting, or in disregard of him if he was consulted.

Now, there is undoubtedly some authority in support of the argument which was so maintained to us; and in particular there is the authority of the judgment of the Privy Council in the case of the "*Iona*," which was delivered by Sir Richard Kindersley, in which that learned Judge says this—"It is not enough for the owners to prove that there was fault or negligence in the pilot. They must prove to the satisfaction of the Court which has to try the question that there was no default whatever on the part of the officers and crew of their vessel, or any of them which might have been in any degree conducive to the damage." But the question whether the doctrine of law so stated ought to be followed was considered, and decided in the negative by this Court in the case of *The Clyde Navigation Trustees* v. *Barclay, Curle, & Company*, and the decision of the Court was upheld by the House of Lords on appeal; and as the question is one of very general importance, and was argued to us upon the footing that the law was either unsettled, or that it must have been held to have been fixed in accordance with the opinion which I have just read, it seems to me to be very important to call attention to what was said by the learned Lords who advised the House in the case of *The Clyde Navigation Trustees*. Lord Chelmsford quoted the passage I have mentioned in the judgment of the Privy Council, and said that the statute "imposed upon the owners a species of negative proof which it is impossible for them to give." Lord Selborne in considering it said that he did not consider that the expressions used in that case were intended to lay down any arbitrary rule inverting the general principles of *onus probandi* as applied to this particular class of cases; and then he proceeded to lay down what in his judgment is the true position of a shipowner pleading the exception accorded by statute. And his Lordship says this:—"There are three things necessary to prove—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 the defender proves all these three positions and proves nothing more, then the burden is upon the pursuer, not upon the defender, to lay some foundation, at all events, for alleging that, notwithstanding the proof given that there was a qualified pilot in charge, and that he had committed some fault or showed some incapacity by which the loss was occasioned, yet there was also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for a case of contributory fault must be laid, and the question is upon whom it lies to show that. I apprehend it is clear that the general principle is that the burden of that rests upon the pursuer, not upon the defender." And then his Lordship goes on to say, quoting what had been said by Lord Moncreiff in the Court below, that "the true principle is that it is not enough for the owners to say that the damage arose through the fault of the pilot, if there is reasonable ground for saying that there was contributory fault on the part of the master. The proof of circumstances which *prima facie* show such reasonable ground for saying that there was contributory fault on the part of the master or crew, no doubt would throw upon the defender the burden of explaining those circumstances so as to satisfy the Court that in point of fact the *prima facie* conclusion from these circumstances is not correct. The nature of the proof his Lordship goes on to consider. But upon that authority the only question which we have to consider upon this part of the case seems to be whether there is any reasonable ground for holding that the master contributed in any way largely to the fault which I hold to be proved against the officer in charge of the ship. It is said that we cannot hold that the pilot gave the order to get under weigh because it is not proved that the master did not give that order. I think if the relative duties of master and pilot are as I have described, it was for the pursuer who intends to allege that the fault was attributable to the master, to lay some foundation, at all events, for making that charge against him, and there is absolutely none to be found in the evidence.

But then there remains a different ground to which the Lord Ordinary has given effect. His Lordship holds that although the pilot was in charge of the ship, and although it may have been primarily his duty to consider and decide at what time the ship should get under weigh, the master also is responsible because he allowed the ship to run into an apparent and obvious danger. Now, that appears to me to raise a much more difficult question, because now that we have the whole facts before us, and know what happened in consequence of the vessel leaving the dock, it does seem, upon a full account of the whole circumstances which we have before us, an exceedingly dangerous thing to start upon that voyage at that time. But then the question is, whether that was so obvious a danger that any seaman of competent skill ought to have foreseen it so clearly while his ship was still in dock as to throw upon him the duty of taking the ship out of the hands of the pilot and taking the responsibility upon himself of relieving the pilot of that responsibility by ordering him not to start. I do not think that in considering that question we ought to take into account the circumstance upon which the Lord Ordinary relies, that the master of this particular ship had been in the Clyde on various occasions before this occasion into which we are now inquiring. If the master had been in the Clyde before, I presume his ship was on those previous

occasions, as on this, in charge of a pilot, and therefore his presence on board the ship would not necessarily give him any local knowledge which ordinarily competent seamen in command of seagoing vessels would not obtain. But if the question depended to any extent upon local knowledge, then it seems to me to be clear that it is the local knowledge of the pilot, and not that which the captain may have accidentally obtained, which must prevail. Therefore I think the question must be decided upon the consideration of whether this was an apparent and obvious danger which no competent master would allow his ship to encounter irrespective of any local knowledge which the particular master might have happened to have acquired. Now, I am unable to agree with the view taken by the Lord Ordinary upon this question, because I think that all the circumstances which made it so hazardous for the ship to start upon her voyage were purely local conditions of which the pilot was not only in law the proper judge but of which he was by far a more competent judge than the master could be. There is no evidence that it was at all impossible for such a ship as the "Strathspey" to steam down the Clyde merely because the river was running at a particular pace in consequence of the combination of the ebb tide and a land flood. The "Strathspey" might have been able to go down the Clyde and go to sea with perfect safety, but what made her voyage dangerous was the particular rate of speed at which the river was running in relation to the rate at which it was necessary for the "Strathspey" to steam; and in considering whether that was a danger which the master was bound to estimate for himself to the exclusion of the judgment of the pilot, it appears to me that there are two considerations to which the Lord Ordinary has adverted which are very material. In the first place, his Lordship says that the cardinal mistake was in leaving the dock at the particular moment that the ship did leave. "She could have left in safety an hour or two earlier, because the tide would have been against her, and she would have had the advantage. Probably she might also have started in safety later in the evening when the downward rush of the tide had lost its force." Now, it appears to me these are considerations the weight of which it was for the pilot to judge. But then the other point to which his Lordship adverts is this, that the whole difficulty and danger arose from the impossibility of steaming at a greater speed than that actually adopted. Now, if it was in consequence of the bye-laws of the Clyde Trustees for the regulation of the navigation of the river that the pilot was compelled to adopt the rate of speed which he adopted, it appears to me that was eminently a consideration for which he was not only the proper judge but the only competent judge. Then, if the bye-laws were not so rigorous as to involve any infringement or breach of rule on the part of the pilot, if he had chosen to steam at a somewhat more rapid pace than he actually chose, that again was a question of judgment for the pilot in command of the ship and nobody else. The question therefore is, whether the master was not fairly entitled to believe that a pilot who undertook to take his ship safely down the river seawards was to be trusted with the decision of the question, whether either the bye-laws of the Clyde Trustees, or any other consideration, made it possible for him to steam at the proper pace which was necessary in order to navigate the Clyde safely. That was the whole question the pilot had to consider. It appears to me it was a question for the pilot, and I am unable to agree with the Lord Ordinary in thinking that the considerations which the pilot had to assume ought to have presented so apparent and obvious a danger to a shipmaster who had not the local experience of the pilot as to show him his ship was being carried to destruction, and to compel him to take her out of the hands of the proper and responsible officer.

I am therefore, on the whole, of opinion that the judgment of the Lord Ordinary is right, and ought to be adhered to in so far as he found that the collision between the steamers was caused by the fault of those on board and in charge of the "Strathspey," and was not caused by the fault of those on board and in charge of the "Islay," and therefore that in the action at the instance of the owners of the "Strathspey" against the owners of the "Islay," the defender should be assoilized. But I am unable to agree with the other conclusion at which his Lordship has arrived, and I think it ought to be altered so far as it finds that the owners of the "Strathspey" are responsible to the owners of the "Islay" by reason of the fault of the officers in charge being a fault for which they are answerable. I think the second plea-in-law for the defenders in the action at the instance of the owners of the "Islay" is well founded.

LORD M'LAREN—I am of the same opinion.

LORD PRESIDENT—So am I; and I am authorised by Lord Adam to say that he also concurs in the judgment.

The Court, in the action at the instance of Burrell and others, the owners of the "Strathspey," against Macbrayne, the owner of the "Islay," adhered to the Lord Ordinary's interlocutor and assoilzied the defenders from the conclusions of the summons; and in the action at the instance of Macbrayne against Burrell and others, recalled the Lord Ordinary's interlocutor and sustained the second plea-in-law for the defender.

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