produced a state showing the various sums due by him, I cannot suppose that this judgment goes so far as to decide that in such a case the pursuer would have a right to decree in the face of such a defence. It seems to me to make the case worse and not better for the pursuer that he left the books in such an incomplete and confused condition that a precise and detailed statement cannot be given.

So far from thinking that it would be an injustice to the pursuer to refuse to give him instant decree, I regard it as a case of injustice to the defenders that, having alleged that the pursuer has £1200 of their money in his hands, they should nevertheless be compelled to pay the sums of smaller amount concluded for as salary and as the price of the shares, and I think there is no rule of law or of pleading which requires that this injustice should be done. I am of opinion that the whole case should be sent to proof.

The Court adhered.

Counsel for Pursuer—Rutherfurd. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Defenders — Asher—Mackintosh. Agents—Morton, Neilson & Smart, W.S.

Friday, February 2.

SECOND DIVISION.

[Lord Shand, Ordinary.

HOLMAN AND OTHERS *v.* IRVINE HARBOUR TRUSTEES.

Reparation — Harbour — Ship—Pilot — Master and Servant.

Harbour trustees who were by Act of Parliament appointed "a pilotage authority" within the meaning of the "Merchant Shipping Act, 1854," and were empowered to levy pilotage dues to be applied for general harbour expenses, authorised one of their servants (to whom they paid £1, 1s. a week to work in the harbour under the harbour-master) to act as pilot to vessels entering the harbour. The said servant had not been examined, nor was he licensed, as a pilot, and he did not receive any of the pilotage dues. A vessel which he was piloting into the harbour having been damaged through his fault, *held* (*rev.* Lord Shand) that the harbour trustees were liable to the owners of the vessel.

This was an action at the instance of John Holman and others, registered owners of the steamship "Gertrude" of Exeter, against the Irvine Harbour Trustees, and James Dickie, solicitor, Irvine, their clerk, for the sum £267, 14s. 6d., as the loss or damage sustained by the pursuers through the fault of the defenders and their servant in the following circumstances:—On 10th September 1875 the "Gertrude" arrived off the harbour of Irvine. The master, never having been at Irvine before, waited outside the bar for a pilot, and in a short time a boat containing three men came alongside, and one of the men, Jeremiah M'Gill, boarded the vessel, and intimating that he was the pilot took the helm and gave orders to steam ahead. When the vessel was entering the harbour M'Gill steered her too near the south side, and the consequence was that she struck the stone work which supported a beacon, and was damaged to so great an extent that it was necessary to put her into a dry dock for repairs. She was detained in the dry dock eleven days.

The pursuers averred that M'Gill was "acting under the instructions and was in the employment of the defenders," and this action was accordingly brought against the defenders for the loss which pursuers averred they had sustained, viz.:—for repairs, £148, 5s. 6d.; for fees of survey, £8, 8s.; and protest, £1, 1s.; and for eleven days lost, at £10 per diem, £110.

The defenders averred that M'Gill was a duly qualified pilot, and explained that they undertook no responsibility for any damage caused to vessels while under charge of the persons authorised by them to act as pilots.

The pursuers pleaded—"(1) The pursuers having sustained loss and damage through the fault of the defenders and their servant, in causing the vessel to come into collision with rocks or stones on entering the harbour, are entitled to decree for the sums specified in the said account, as concluded for; (2) *Separatim*, the pursuers are entitled to decree, in respect it was the duty of the defenders to keep the fair way of the harbour clear of obstructions."

The defenders pleaded, *inter alia*—"(2) The said Jeremiah M'Gill being a duly qualified pilot, the defenders are not liable; (3) The services of M'Gill having been accepted by the pursuers at their own risk, the defenders are not liable."

A proof was taken, from which it appeared that M'Gill was really a "hobbler," or workman employed by the defenders about the harbour. He had not been examined or formally licensed as a pilot, but as he was understood to know the navigation, he was verbally authorised, as occasion arose, to pilot vessels in. He was not paid by pilot dues, but by weekly wages of 21s. It was clearly proved that the accident was entirely caused by M'Gill. The defenders had under a Provisional Order in 1867 become "a pilotage authority" for the harbour under the Merchant Shipping Act of 1854. In the port of Irvine pilotage was not compulsory, but pilotage dues were payable whether a pilot was employed or not. The pursuers had not been charged pilotage dues. The further result of the proof sufficiently appears from the opinions of the Judges.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 15th November* 1876.—Having considered the cause, Finds that the pursuers have failed to prove facts and circumstances inferring liability against the defenders for the sum sued for or any part thereof; assoilzies the defenders from the conclusions of the action, and decerns.

"*Note.*—The questions of fact in this case do not appear to me to be attended with any difficulty, but the case raises a question of law of considerable importance and nicety. . . . .

"The result is, that the injury to the vessel was caused by the fault of M'Gill, and that the defenders, the Harbour Trustees, were not in

fault; but the legal question which remains is, Whether the defenders, the Harbour Trustees, are responsible for the fault of M'Gill, the pilot? That question seems to depend on this other question—Whether, when the captain accepted the services of M'Gill, who was sent out by the harbour-master as representing the defenders to bring the vessel in, the defenders undertook and contracted to bring the vessel in safely, or only undertook to give the services of one whom they believed to be duly qualified for the duty? I am of opinion that the defenders did not undertake responsibility for any fault which M'Gill, whom they believed to be a duly qualified pilot, might commit.

"In support of the view of the defenders' liability on which the action is founded, the pursuers rely on the fact that the defenders are proprietors of the harbour; M'Gill was their servant, paid by weekly wages, and dismissible at pleasure, and engaged not only to perform the duty of piloting vessels from the bar of the river in the bay of Irvine into the harbour, but of moving vessels from place to place in the harbour, taking soundings in the river, and performing such other duties in relation to the navigation as the harbour-master might require. It is proved that the relation of master and servant existed between M'Gill and the defenders, and the pursuers maintain that the defenders undertook the safe pilotage of the vessel, performing the duty by their servant, and that they are therefore responsible for his fault.

"I am, however, of opinion that, notwithstanding the relation which subsisted between M'Gill and the defenders, the latter are not responsible for his fault, and that in providing pilotage for vessels resorting to the harbour the defenders do not undertake more than that due and reasonable care shall be taken in the appointment of the persons who shall perform the duty of pilots. The defenders produced at the proof the local Act, 7 Geo. IV. c. 107 (1826), and two Provisional Orders, dated in 1867 and 1870, and it appears that under the first of these Orders the defenders became 'a pilotage authority' for the harbour under the Merchant Shipping Act of 1854. It is unnecessary to consider the effect of these documents for by the Irvine Harbour Act 1873, sec. 7, the local Act and the Orders of 1867 and 1870 were repealed in so far as related to the harbour of Irvine, and a new series of statutory provisions was then enacted. By this Act of 1873 the Provost, Magistrates, and Town Council of the burgh of Irvine, the Convener of Trades, and a certain number of owners of vessels belonging to the harbour, and of traders at the harbour, were incorporated as the Irvine Harbour Trustees. By sec. 17 the limits of the harbour were defined to be 'the beds or channels of the rivers Irvine and Garnock, in and through the harbour, and from the harbour to the bay of Irvine' and the foreshore in which the harbour and works are situated. The statute authorises a variety of works to be executed by way of improving the harbour, and sec. 42 provides that the trustees shall apply the money received from the rates levied under the Act generally in the mainentance, repair, management, and improvement of the harbour. The 32d section of the statute gives the trustees right to the rates specified in the schedule annexed to the Act on all vessels 'entering within or leaving the limits of the harbour,' and amongst the rates specified in the schedule is the following:—'Rates for pilotage. For all vessels entering or leaving the harbour, per registered ton, 2d.' Section 47 is in the following terms:—'The trustees shall be a pilotage authority within the meaning of "The Merchant Shipping Act 1854," and the Acts amending the same, and shall have all the powers conferred by those Acts on pilotage authorities and on local authorities.'

"From these provisions it appears that the defenders are entitled to charge all vessels entering or leaving the harbour a rate 'for pilotage,' and this of itself, and at least taken in connection with the clause providing that the defenders shall be a pilotage authority, it may be assumed, imposes on them the obligation of making some provision for the pilotage of vessels entering and leaving the harbour. Such a duty and obligation seems to be a necessary consequence of the existence of a harbour to which access is obtained by a navigable river channel, and certainly of the existence of a bar-harbour in which the banks are liable to shift, with the effect of altering the channel more or less from time to time. Harbour trustees have generally the duty of making provision for pilotage, and are usually authorised to levy rates in return for the pilot service. The owners of vessels, on the other hand, have the important advantage of the local knowledge of the peculiarities of the harbour, possessed by persons employed in the peculiar service of pilots at that place. In the present case Captain Parnall has stated that he would not have himself ventured to take the vessel into port, particularly as he knew Irvine was a bar-harbour, and probably if he had taken this duty upon himself his employers would have forfeited any right to claim indemnity under any insurance effected on their behalf. See authorities cited by Mr Kay in his work on Shipmasters and Seamen, vol. ii. p. 756.

"In the port of Irvine there is no compulsory pilotage. In practice, vessels frequently enter and leave the port without taking the services of a pilot, and vessels which hail from the port, or frequently resort to it, and the captains of which are familiarly acquainted with the harbour, are probably better in the hands of their own commanders than in those of the pilots appointed by the Harbour Trustees. Vessels are liable to pilotage dues, and pay such dues accordingly, whether they take the services of a pilot or not; but any vessel desiring such services is entitled to have them.

"The provisions of the Merchant Shipping Act of 1854 recognise the existence of two classes of pilots,—'pilot' meaning any person not belonging to a ship 'but has the conduct thereof,' and 'qualified pilot, any person duly licensed by any pilotage authority to conduct ships to which he does not belong.' Section 2 contains provisions giving full power to pilotage authorities to determine the qualifications of pilots and grant them licenses, to make regulations for the conduct of pilots, and for ensuring their attendance and effectual performance of duty either at sea or on shore, to fix the remuneration to be received by pilots, to arrange the limits of their districts, to make regulations for the approval and licensing of pilot-boats and ships and otherwise (section 333). The statute (section 337) also provides that every pilotage authority shall deliver periodically

to the Board of Trade, to be laid before both Houses of Parliament, returns embracing a number of particulars showing the regulations relating to pilots, or pilotage in force in each district; 'the names and ages of all the pilots or apprentices licensed or authorised to act by such authority, and of all pilots or apprentices acting either mediate or immediately under such authority, whether so licensed or authorised or not, the rates of pilotage for the time being in force, with the total amount received for pilotage, and receipt and expenditure of all monies received by or on behalf of such authority in respect of pilots or pilotage.' This section of the statute obviously contemplates the case, which is probably not an uncommon one, at least in the coast harbours of Scotland, of pilots acting under the pilotage authority although not holding a formal license. The clauses of the statute (365-6-7) relating to the offences of pilots and the penalties to which they are to be subject under the statute, also recognise the existence of licensed pilots as distinguished from pilots acting without a formal license.

"From the provisions of the statute of 1854, thus noticed in conjunction with the enactment contained in the Irvine Harbour Act of 1873, it is clear that the defenders were entitled to license pilots, who should be subject to such regulations as they might think fit, and whose remuneration they were entitled to fix. If the defenders, in the performance of their duties under the statute, had adopted this system, and become practically a licensing board only, such as the Trinity House of Leith or the Elder Brethren in England, it is not maintained that they would have been liable for the fault of the pilot or licensed pilot; at least it is not maintained there would have been liability if the defenders had not gained benefit by the pilotage dues. In the case of a pilotage authority, which is substantially a licensing board only, it seems clear that no responsibility for the fault of the pilot would attach to the Board. In this instance the defenders did not license the pilots at the port so as to make them "duly qualified" pilots under the statute, but merely appointed them to the office. It appears to me to be a reasonable extension of the general principle to hold in these circumstances that there is no such responsibility on the defenders as the pursuers seek to enforce.

"Under the statute the defenders being bound to provide pilotage for those who desire it, may either license persons or simply appoint them to do the pilot's duty. If the defenders found it necessary, in order to provide competent men for the service, they might no doubt pay away all the pilotage dues received, or, it may be, give the pilots right to receive the dues directly; but if they do not find it necessary to expend the whole pilotage dues on that service, then their statute provides that the dues received shall be applied for the general harbour purposes. The form of the appointment of pilots or the mode of their remuneration does not appear to me to affect the legal responsibility of the Board for the pilots' acts; nor do I think the circumstance that the remuneration is given by the Board out of the pilotage dues, in periodical payments, instead of being in the form of direct payments from the shipowner, makes any difference. In all these cases alike it appears to me that the duty and obligation which lies upon the body of trustees, acting as a pilotage authority towards the owners and traders resorting to the port, is to take reasonable care to provide men whom they believe to be fitted for the duty of pilots. There is certainly no express contract to do anything more, and I do not think that the relation between the parties creates a legal power with higher obligations. It is true that in one sense pilots, employed as those in Irvine, are the servants of the trustees, under their orders, and liable to be dismissed by them. But these pilots are there truly in the performance of the public service, in the same way as duly licensed pilots are, and in each case in which they act they are for the time the servants of the owner or trader of the vessel under their charge. The service cannot, I think, be regarded as one which the trustees themselves perform by their servant or deputy. It would be a very serious responsibility that harbour trustees, by the appointment of pilots for the public benefit and service, should be held absolutely to undertake the safe pilotage of vessels within their district, becoming responsible for the faults of the pilots appointed, and no example of such responsibility can be cited by the pursuers.

"In the present case, no doubt, the defenders might have formally issued licences to the three pilots who are required for the work of the harbour, and the probability is that if they did so men of better capacity for the office, and probably with somewhat better remuneration, would be selected, to the benefit of the public. It is difficult, however, to see how the defenders in practice could have adopted any other system of remuneration. It would probably yield the pilots but small returns to give them the dues, or a large portion of the dues, payable for each vessel which they brought in or took out of the harbour, for many of the vessels prefer to dispense with the pilot altogether. The only practicable mode of payment appears to be that adopted by the defenders, and which they would most probably act upon whether they license pilots or not, viz., to give them so much a-week or month for their services. If the defenders paid away the whole pilotage dues in this way, it would be extremely difficult for the pursuers to maintain the argument that the defenders incurred liability for the default of the pilots. In that case, though no doubt to some effect the legal relation of master and servant would subsist, yet in substance the pilots would, I think, be truly the servants of the public, and the defenders merely intervene to perform, for the benefit of the public resorting to the harbour, the duties of selecting the pilots and regulating their conduct and remuneration. It does not, in my opinion, make a difference in this case that the pilots do not receive the whole pilotage dues. It may fairly be assumed that under the general head of pilotage the ship is paying for something more than mere pilotage, including maintenance of pilot-boats; as, for example, such items as are mentioned in the return, No. 81 of process, of lights, and expenses in sounding the channel, and the like. In that view, the proper charge for the services of the pilot are truly paid by the owner or trader to the port, but for the sake of convenience, by the hands of the trustees. In any view, however, I think the owner or trader taking the benefit of a pilot's service is for the time his employer, and not the employer of the trustees; that the pilot, and not the trus-

tees, undertakes the duty of bringing in the vessel to the harbour; that the trustees are the persons by means of whom the remuneration is given by the owner or trader to the port, the balance of the pilotage dues being, as authorised by Parliament, applied to harbour purposes. If this be the substance of the arrangement between the trustees and those who resort to the harbour, or the nature of the obligation which the law imposes on the Harbour Trustees, there is obviously no responsibility on the part of the trustees for the pilot's acts.

"The case of *Ogilvie* v. *The Magistrates of Edinburgh*, 22d May 1821, 1 S. 24, was mentioned in the course of the discussion. The report does not contain the opinions of the judges, but the case appears, when fully examined, to be a direct authority in support of the judgment I have pronounced. The session papers were not referred to by the defenders, but an examination of them made after this opinion was written has satisfied me that the judgment of the Court proceeded generally on the grounds to which I have given effect. The case appears to have been very elaborately argued in written papers, and must have been the subject of anxious consideration by the Court, who obtained reports from the various harbour authorities in the kingdom as to the practice in regard to pilotage. These reports are printed in the appendix to the pleadings. The case did not to any extent turn on any fault on the part of the magistrates as harbour trustees in not removing the sand-bank referred to in the report, but was decided on the footing of the accident having occurred through the fault of the pilot. The only difference between that case and the present appears to be, that the magistrates regularly licensed the pilots who were employed at the port of Leith. The pilots received two-thirds of the dues from the magistrates, the remaining third having been paid to the shore-master. He was referred to by the magistrates as pilot-master, but it appears to be clear from the papers that it was not in that limited capacity that he received a third of the dues. The case in substance appears to me to be scarcely distinguishable from the present, and the argument which received effect is very much based on the grounds on which the present judgment rests.

"It was pleaded on the part of the pursuers that the three persons in the position which M'Gill occupied were not to be regarded as pilots at all, but as what is called "hobblers," whose proper duty was working in or about the harbour only. There is, I think, no room for this view on the evidence. It is sufficient to observe that the persons referred to performed the duties of pilots between points specified in the statute as the limits of the harbour for which pilotage dues were paid.

"In conclusion, I may say that if I had taken a different view of the defenders' liability, and had held them responsible for the fault of M'Gill, I should have found the pursuers entitled to £240 in name of damages. It appears to me that the part of the pursuers' account which was incurred in consequence of the beaching of the vessel, and the expense incurred in consequence of the unsuccessful attempt of the tug to drag her off the beach, was the reasonable and natural result of the injury caused by the pilot's carelessness, and I think it is proved that the pursuers' loss amounted to not less than that sum."

Against this interlocutor the pursuer reclaimed' and argued—It is not now disputed that the defenders' pilot was in fault, and the trustees are liable for their pilot. There is here no compulsory pilotage. The defenders were a pilotage authority, but they did not proceed under the statute to license the pilot as a public officer, which would have protected them. They levied compulsory pilotage dues, part of which goes to general harbour purposes, and invited vessels to come in for safe berthage, and yet they sent out as pilot a "hobbler" from the dock, who was their own servant on shore, who was not properly qualified, and received no instructions. The pursuer's contract was with the Harbour Trustees, and their obligation was to give safe berthage and to take vessels in and out safely. A verbal authority was not sufficient to license a pilot under the Merchant Shipping Act.

Authorities—*Mersey Docks and Harbour Board Trustees* v. *Gibbs*, 5th June 1866, L. R., 1 E. and App. 93; *Virtue* v. *Police Commissioners of Alloa*, 12th December 1873, 1 R. 285; *Thompson v. North-Eastern Railway Company*, 1st February 1862, 31 L.J., Q. B. 194; *Indermaur* v. *Dames*, 6th February 1867, L. R., 2 C. P. 311; *Smith* v. *London and St Katherine's Dock Company*, 24th April 1868, L. R., 3 C. P. 326; *Stephen* v. *Police Commissioners of Thurso*, 3d March 1876, 3 R. 535; *Thomson* v. *Greenock Harbour Trustees*, 10th December 1875, 13 Scot. Law Rep. 155; *Hammond* v. *Blake*, 25th January 1830, 10 Barn. and Cress. 424; *Ogilvie* v. *Magistrates of Edinburgh*, F.C., 22d May 1821; *Gen. Steam Navigation Co.* v. *Brit. and Col. Steam Co.*, 14th May 1869, L. R., 4 Ex. 238; *Smith v. Steele*, 25th January 1875, L. R., 10 Q. B. 125; *Officers of State* v. *Christie*, 2d February 1854, 16 D. 454.

Argued for defenders—The defenders are a pilotage authority under the Merchant Shipping Act. They make up and render accounts or pilotage returns to the Board of Trade under the 18th sect. They are entitled to pay pilots by wages or salary instead of giving them the whole or a percentage of dues. They are not bound to issue a written license, as the Act distinguishes "licensed" and "authorised" pilots (secs. 333–47, and interpretation clause), nor are they bound to frame regulations for the examination of pilots if they satisfy themselves as to qualifications, and the pilot is really competent. A license would not protect from liability for incompetent pilot. The pilotage dues are all discharged by expenditure for pilotage purposes, and could not be carried to general harbour account. The contract was either with pilot, or it was implied contract with pilotage authority to supply a competent pilot, not to pilot safely. In a non-compulsory district the pilot is undoubtedly the servant of the owner, who is liable for the pilot's negligence—Shearman and Redfield on Negligence (2d ed.) sec. 81 *a*; Story on Agency, sec. 456 *a*. If so, he cannot be also the servant of the harbour authorities. Maclachlan on Shipping (2d ed.) p. 267, n. 4, where it appears from Dr Lushington's judgment in "The Maria," (1 W. Rob. Adm. 95,) that the two cases on the Liverpool Act (*Att.-Gen.* v. *Case*, 3 Price 303, and *Carruther's* v. *Sylebotham*, 4 M. and Sel. 77) did not conflict, the one relating to a vessel outward bound, the other to a vessel coming up the river, and therefore requiring a pilot. Parsons on Shipping, ii. 116–7.

At advising—

Lord Ormidale—This is a case of importance and interest, and has evidently been treated so by the Lord Ordinary. The main ground upon which the defenders' liability is maintained is that the injury was caused through the fault of the defenders' servant Jeremiah M'Gill, who acted as pilot on the occasion in question, in allowing her to strike against some stones or other obstructions on entering the harbour. The defenders deny their liability, on the ground that they are not in law responsible for the fault of M'Gill. It is not, however, matter of dispute either that loss and damage to the amount claimed have been sustained by the pursuers, or that they were caused by the fault of M'Gill. Nor is the defenders' liability disputed on the ground that they are a corporation and that their corporate funds and estate cannot be applied to the compensation of the pursuers for the injury of which they complain. It is clear, indeed, that no such plea could now be maintained, having regard to the judgment of the House of Lords in the *Mersey Dock and Harbour Board Trustees* v. *Gibb*, Law Reports, 1 English and Irish Appeals, p. 93; and that of *Virtue* v. *The Commissioners of Police of Alloa*, 1 Rettie, p. 285, in this Court, as well as subsequent cases.

The pursuers, however, maintain that the defenders are liable to them irrespective of the fault of M'Gill, in respect that, contrary to their duty, they allowed the obstructions by which the ship was injured to exist in the harbour; but as I have not been able to satisfy myself that the Lord Ordinary is wrong in holding this ground of liability not established, I shall proceed at once to consider the more important ground of liability, and that which was chiefly relied on by the pursuers, viz. the liability of the defenders for the fault of M'Gill, their servant.

In reference to this part of the case, it has to be observed that Captain Purnall, the master of the pursuers' ship, says he saw at Glenarm, in Ireland, before he started from that place on the voyage to Irvine, the "Mariners notice as to Irvine Harbour," No. 62 of Process, which among other things contains the following announcement—"A powerful paddle-tug and pilots are in attendance at tide-time, night and day, and every facility is given for the loading and discharging of cargoes." The shipmaster was therefore entitled to rely on obtaining when he approached Irvine a pilot sufficiently qualified to take his vessel safely into that harbour, and this, in his case, was indispensable, for he says he was himself unacquainted with the harbour, never having been there before. He accordingly waited in the offing for a pilot; and he then states—"A pilot-boat came out from the harbour with three men in it, one of whom, Jeremiah M'Gill, came on board the 'Gertrude.' I asked him if he was a pilot of the river Irvine. He said he was, and demanded the helm. This was my first voyage to Irvine, and I would not have attempted to enter the harbour without a pilot. I allowed him to take the helm. He took full command of the vessel. I stood by the telegraph to the engine and obeyed his orders. The 'Gertrude' answered her helm very well."

But who was M'Gill, and who sent him out from Irvine to take command of the pursuers' ship? In regard to these questions there can be no doubt, for on the record the pursuers say that M'Gill, "acting under the instructions, and in the employment of the defenders," came on board and took the command of their ship for the purpose of taking her into the harbour of Irvine; and the defenders explain in answer to that statement, that "the three men, including the said Jeremiah M'Gill, were duly qualified pilots, and that they were authorised to act as pilots by them," and went out and boarded the "Gertrude." If M'Gill was a duly "qualified pilot," as thus stated by the defenders, it may be that they have plausible, if not sufficient, ground for maintaining that they are not responsible for him; but if, on the contrary, it should appear that M'Gill was not a duly qualified or licensed pilot at all, but merely a servant of the defenders, working about the harbour, the question of their responsibility will, I apprehend, present itself in a very different light. In regard, then, to this important matter, Alexander Muir, the defenders' engineer, says—"I knew M'Gill who was the pilot in charge of the 'Gertrude' at the time of the accident. I do not know what was his character or experience as a pilot." But William Wilson, the harbour-master, by whom M'Gill was engaged, furnishes more particular information regarding him. He says—after explaining that he had engaged him only shortly before the accident—"I did not make any examination of him. I gave him no special instructions except as to bringing in vessels safely. I did not give him any particular instructions as to how he was to do so." And he further explains that M'Gill and the other two men who were sent out to the 'Gertrude' on the occasion in question "were paid a weekly wage of 21s. each out of the Harbour Trust funds. They are engaged in transporting vessels from one part of the harbour to another, in placing vessels, and in piloting vessels in and out. In the book of directions they are called pilots, but 'hobblers' is the proper name for them, as they do not generally go outside the bar. A 'hobbler' is a man who moors vessels, and does not work in the open sea. These men are subject to my orders. They do no other general work for the Harbour Trust except, perhaps, sounding the bar, and so on. (Q) They make themselves generally useful subject to your orders?—(A) Yes. I engage and dismiss them and have the entire control over them." And in answer to the Lord Ordinary, this witness concludes his testimony by saying—"The Harbour Trustees do not issue any license to pilots; they just employ them as their servants at weekly wages." And M'Gill himself says he "never held a license as pilot. When I went to Irvine I received no instructions from any one as to the navigation of the river. The only instructions I received were, that I was to obey the harbour-master in everything he wanted done. Nothing was told me as to the line of safety between the perches marking the channel. I saw no chart of the river." And he afterwards says that he and his two comrades were called "hobblers," and that he was not aware of the stones or obstructions in the harbour against which the 'Gertrude' struck.

The true character and position of M'Gill thus appears very clearly. That he was not a licensed pilot is indisputable. But to be a "duly qualified pilot," as he is represented by the defenders in the record, he required to be licensed; for a "duly qualified pilot" and a "licensed pilot"

I hold to be the same thing. This, I think, is made sufficiently plain by the Merchant Shipping Act, 17 & 18 Vict. c. 104, under and in reference to which there is evidence that the defenders professed to regulate themselves in regard to the pilotage of Irvine, taken in connection with their own Harbour Act of 1873. By section 32 of the latter Act the defenders are authorised to demand and receive the dues there referred to, consisting, amongst others, of two-pence per registered ton "for all vessels entering or leaving the harbour;" and by section 47 it is enacted that the defenders "shall be a pilotage authority and local authority within the meaning of the Merchant Shipping Act 1854." Now, I find that part 5 of the Merchant Shipping Act, besides conferring extensive powers on pilotage authorities, contains a code of directions for the examination and licensing of pilots. It is certainly not made clear that the defenders as a pilotage authority were bound, although they had the power, to examine and license pilots; nor do I think that this is of much moment in reference to the question of the defenders' liability in the present case. Clear it is, however, that no examination of M'Gill by the defenders or any one else ever was made, or any license ever granted to him. How then could the defenders take upon them to say in the record that M'Gill was a "duly qualified" pilot? At the debate, subdivision 2 of section 337 of the Shipping Act was referred to as justifying this. By that section it is enacted that every pilotage authority shall make certain returns relating to the port or district within its jurisdiction, and amongst others the particulars specified in subdivision 2, viz., "The names and ages of all pilots or apprentices licensed or authorised to act by such authority, and all pilots or apprentices acting either mediately or immediately under such authority or not, whether so licensed or authorised or not." The defenders, founding on the expression "licensed or authorised," argued that they were entitled under the Act to "authorise" pilots, and that this meant a different thing from licensing them. I cannot think so. It appears to me that to "license" and to "authorise" pilots means the same and not different things. And, accordingly, the defenders could not point out in the Act any provision whatever for authorising pilots separately, and independently of licensing them. Nor could they say, and certainly the proof does not disclose, that any or what authority or appointment as pilots M'Gill and his two associates obtained from the defenders; all they could say was what their harbour-master stated when examined as a witness that M'Gill was engaged without apparently any inquiry or examination as to his qualifications, character, or experience, as a man-of-all-work about the harbour, that his proper character was that of hobbler rather than pilot, and that the defenders just employed him and his two comrades "as their servants at weekly wages."

But, if such is the true position and character of M'Gill—if the relation between him and the defenders is that of master and servant—I must own my inability to understand how the usual consequences and responsibilities resulting from that relation should not in the present instance be held to follow. Not only was M'Gill the defenders' servant, but he was acting and paid by them as such on the occasion and at the time when by his fault the pursuers' ship was injured. The maxim *qui facit per alium facit per se* clearly therefore applies, and the fault of M'Gill, the defenders' servant, must be held to be their own.

Nor do I think it can avail the defenders anything to say that they did not exact any pilotage or other dues from the pursuers for the services of M'Gill, for it is in evidence they were prepared to do so, and only abstained in consequence of M'Gill's services being the reverse of beneficial. The defenders' harbour-master Wilson says that he instructed the clerk to delete the charge for pilotage from the account which had been made out against the pursuers "because the pursuers' vessel got damaged by being brought in by the pilot."

But the defenders argued that there was no compulsory pilotage in connection with their harbour, and that the pilotage dues are payable whether the services of a pilot are taken or not. This may be so, but of what avail it can be to the defenders in the present case I fail to see. The pursuers desired to have a pilot; the defenders sent out, not a licensed or duly qualified pilot, as I think the pursuers were entitled to expect and were ready to pay for, but one of their own servants or hobblers working about the harbour on a wage of 21s. a-week; and that man, acting under the defenders' authority and instructions, took the command of the pursuer's ship, and by his faulty guidance of her caused the loss and damages now sued for.

It is in these circumstances that, in my opinion, the defenders' liability has been made out. The defenders undertook to bring the pursuers' ship safely into the harbour of Irvine, but in place of doing so, she was seriously injured through the fault of their servant, acting under their instructions. The Lord Ordinary has come to the conclusion that no liability has been established on the assumption, that the defenders are in an equally favourable position as if M'Gill had been a duly qualified or licensed pilot. It is here I feel myself, with much deference, obliged to differ from the Lord Ordinary. A duly qualified or licensed pilot is a public officer who obtains his certificate only after a careful examination of his qualifications by parties competent to judge of them. On being licensed he occupies an independent position, very much as a notary-public or messenger-at-arms does. The public constitute his master, and he is the servant of the public, like these and other public functionaries; and the usual consequences and responsibilities arising from the ordinary relation of master and servant do not arise. It was for this reason—a reason which has no application to the circumstances of the present case—that the harbour and pilotage authorities were assoilzied from liability in the case of *Ogilvie and Others* v. *The Magistrates of Edinburgh*, relied on so much by the Lord Ordinary. The action in that case appears to have been laid upon the allegation that the pilot whose fault was in question was appointed by the defenders—the Magistrates of Edinburgh—but it was not said that there was any irregularity or illegality in the appointment. But in sending M'Gill in the present case to take command of the pursuers' ship the defenders sent a man who had never been licensed as a pilot at all, and who occupied merely the position of one of their servants

working about the harbour, and in so sending that man the defenders contravened their own bye-laws, and especially the first of that branch of them, titled "Regulations for pilots at the harbour of Irvine," which is in these terms—"That no person shall act as a pilot for or on board of any vessel trading to or from the harbour of Irvine without being first duly licensed by the Harbour Trustees, and that under a penalty not exceeding £5 sterling for each offence, besides all damages and expenses that may be incurred, and every pilot shall upon his appointment find caution for his good behaviour and faithful discharge of his duties." But M'Gill had no license, and he never found caution for his good behaviour and faithful discharge of his duties.

Lord Gifford—This is a very important case, and attended with considerable difficulty. It involves in some of its aspects principles of wide application, and it has an important bearing on the general responsibility of harbour trustees, not only of the harbour of Irvine, but also of other harbour trustees similarly situated.

After very full and careful consideration, I have come to the conclusion that the Lord Ordinary's judgment cannot be sustained, but that the defenders, the Irvine Harbour Trustees, are liable in damages to the pursuers for the loss and injury which the pursuers sustained through the fault or negligence of Jeremiah M'Gill, who piloted the pursuers' vessel into Irvine Harbour on 10th September 1875, and I think that the pursuers are entitled to recover damages for these injuries against the Irvine Harbour Trustees, *qua* such trustees, and against the Public Harbour funds under the defenders' control. As to the amount of the damages, I am satisfied with the assessment and suggestion which the Lord Ordinary makes in his note, and I would propose that the pursuers should obtain decree for £240.

The short ground upon which I rest my opinion may be stated almost in a single sentence. I think upon the evidence and looking to the whole circumstances of the case, including the terms of the various statutes under which the Harbour Trustees acted, Jeremiah M'Gill on the occasion in question was not acting as an independent pilot employed by the shipmaster or captain of the "Gertrude," and merely licensed or authorised by the defenders, but was acting solely and simply as the servant of the defenders, employed by them alone and paid by them alone, and acting within the limits of the defenders' harbour in discharging a duty which the defenders themselves had undertaken to perform. Now, if this be so, I can see no reason for departing from the general rule, which makes a master who undertakes any piece of work liable for the fault or negligence of any servant or workman whom he directs to carry out the operations which he, the master, has undertaken. In short, a person who undertakes to do any piece of work by means of a subordinate employed by him is liable for the fault or negligence of the subordinate just as if he had been acting himself.

It is no doubt true that the Irvine Harbour Trustees are a public statutory body, created and constituted by Act of Parliament, vested with the harbour of Irvine and its whole works and pertinents, and entrusted with its management for the benefit of the publiic. But it is now quite fixed that such a position does not exempt the statutory trustees from liability for damages occasioned by the fault or negligence of the trustees' workmen, or of those whom they must necessarily employ in the management of the undertaking. The case is not different from what it would have been had the harbour belonged to a private individual, and been managed for his own private emolument, whether with or without statutory powers. It may be that in the case of public trustees their liability (where they do not bind themselves personally) will be limited to the funds under their control; but no question of this kind arises in the present case, in which the defenders are only concluded against as trustees, and not personally or individually.

The first material point to notice is the position of the defenders as Harbour Trustees under their statute of incorporation (36 and 37 Vict. cap 124). By this statute the defenders are vested with the harbour of Irvine, and the lands, works, and property connected therewith, and the limits of the harbour are by sec. 17 defined to include the bed or channel of the river Irvine in and through the harbour, and from the harbour to the bay of Irvine and the sea. The harbour of Irvine is in fact just a part of the river Irvine, and it is not immaterial to notice that the accident which occurred did not occur in the bay or in the open sea, but in the river, and within the limits which the statute fixes and defines as "the limits of the harbour."

Next, the defenders, the Harbour Trustees, are empowered by sec. 32 to demand and levy "for and in respect of vessels entering within or leaving the limits of the harbour" the various rates and duties, not exceeding the rates specified in Schedule A; and among these duties we find the entry—"Rates for Pilotage—For all vessels entering or leaving the harbour, per registered ton, twopence." Then by sec. 42 it is enacted that "The trustees shall apply all money received by them from the rates authorised to be levied by this Act . . . . for the following purposes;" and then the statute proceeds to enumerate the general harbour expenses which all harbour trustees must necessarily disburse, and in particular the "expense of the maintenance, repair, and management of the harbour, and works connected therewith."

On these clauses I have to remark, that it is only *qua* Harbour Trustees that the defenders are entitled to levy dues at all, and that no distinction is taken either in the Act or in the schedule annexed thereto between the dues leviable for "pilotage" and the dues leviable in respect of any other service or accommodation, nor is any distinction made as to the application of such dues. All the dues, including dues for pilotage, are to form one undivided fund, and are to be indiscriminately applied for general harbour expenses. This seems to be the express provision of the statute, and it would require something very precise either in the General or in the Special Acts to place the different kinds of dues in different categories—to constitute them separate and independent funds applicable respectively and exclusively to different purposes. In particular, there is no provision constituting the pilotage dues into a special fund applicable only to the payment of pilots, or to strict pilotage purposes. It might have made a material difference in the case if the

statute had provided or enacted that the pilotage dues should form a separate fund applicable, or held applicable to, and held in trust for, the pilots alone who might be licensed for the harbour, and that this fund should not be applied to any other purpose. I can find no such provision, and I think that any attempt to do this, even if this had been done, which it was not, would have been unwarranted by the provisions of the statute.

As I read the Act, therefore, the Harbour Trustees themselves undertake to provide pilotage within the limits of the harbour—that is, practically within the river for about a mile, just as they undertake to provide wharfage, buoys, and lights, and the other accommodation required by vessels discharging or taking in cargo; and the dues, whether leviable on vessels, on goods, or for pilotage, form one common and undivided fund, and are made indiscriminately applicable to the general harbour purposes.

But then it is said the Irvine Harbour Trustees are specially appointed by sec. 47 "a pilotage authority and local authority within the meaning of 'The Merchant Shipping Act 1854,' and the Acts amending the same," and it is enacted that they "shall have all the powers conferred by those Acts on pilotage authorities and on local authorities;" and the defenders maintain that it is solely as a pilotage authority, and not as Harbour Trustees, that they authorised Jeremiah M'Gill to act as pilot, that they paid him his wages out of the pilotage dues, and that they are no way responsible either for his skill or for his actings.

It is quite true that the defenders are by their Act appointed to be a pilotage authority and a local authority, although what is exactly meant by local authority has not been explained, unless it means that they shall be a local marine board under the Merchant Shipping Act. The defenders, however, are certainly a pilotage authority under that Act. On turning to the statute for the powers and duties of pilotage authorities, I find that they discharge *quasi* judicial powers regarding the licensing and in reference to the employment of pilots. Section 331 of the Act gives the pilotage authority power to fix the qualifications of pilots, to make regulations as to licensing pilot-boats and pilots and apprentices, and to fix the prices or remuneration to be demanded by licensed pilots, and to make a variety of other regulations relating to pilotage; but all such regulations and bye-laws must be submitted to the Board of Trade and laid before Parliament.

In the present case it does not appear that the defenders *qua* pilotage authorities have exercised any one of the statutory powers conferred upon them as such—that is, as a pilotage authority they have not made any regulations fixing the qualifications of licensed pilots either as to skill, age, or otherwise, and have not instituted any examination of pilots whatever. They have not granted a single license or a single written authority to a single licensed or authorised pilot—in particular Jeremiah M'Gill held no license, no written authority, and underwent no trial or examination of any kind as to his qualifications. The defenders *qua* pilotage authority have issued no bye-laws or regulations of any kind, and have not fixed in any way the rates of remuneration which, in the words of the statute, licensed pilots are to be entitled to demand. The only bye-laws produced appear to have been enacted under the provisions of one of the General Harbour Acts, and it has not been shewn that they were ever adopted by minute or otherwise as bye-laws of the pilotage authority, and they have never been confirmed as such. But even if these bye-laws were to be held as enacted by the pilotage authority and duly approved, the first law provides that no person shall act as pilot without being first duly licensed, and without finding caution, and the General Statute provides, section 349, that every licensed, that is "qualified," pilot shall receive a license containing a variety of particulars, which license must be duly registered, and which license must be produced (section 351) to every person to whom he tenders his services. Of course it is plain that the licence required by the statute must be in writing. In no other way can it fulfil the statutory requisite. Mere verbal authority as equivalent to a license is out of the question. The defenders, supposing them to be acting as pilotage authorities, never granted a license at all of any kind, and on their own shewing every time they employed M'Gill or any of their other hobblers they contravened their own bye-laws.

The truth is, that although appointed a pilotage authority the defenders have never really acted as such, except apparently in making certain returns which were called for by the Board of Trade. Whether these returns were properly made or could have been demanded by law, or how far they are accurate, we are not called on to determine. Plainly they are inaccurate in one respect, viz., In so far as they describe M'Gill and the other hobblers as licensed or authorised under the pilotage authority when they held no such license or authority. I may say also that if the pilotage dues are to be held as levied by the pilotage authority for behoof of the pilots, I see no warrant for charging on them any part of the general expenses of the harbour, such as quays, lights, repairs, &c. The utmost that the pilots could be charged with would be the expense of pilot boats and piloting apparatus. The rest of the pilotage dues would belong to the pilots themselves, and would, in the words of the statute, be demandable by them subject to superannuation or widows' fund, if such were established, and to the expense of management; but on this matter we are not called on to decide. In reference to the expression in the statute "licensed or authorised," the distinction may perhaps refer to apprentices, apprentices being mentioned as well as pilots in the same clause; but the broad distinction is established between "qualified pilot," which means a person duly licensed by any pilotage authority, and "unqualified pilot" or pilot, which means a person not licensed and not belonging to a ship, but who has the conduct thereof (§ 2). I see no warrant in the statute for holding that the pilotage authority are to grant two kinds of licenses, the one a license with the statutory requisites, and the other a mere authority, the meaning and effect of which is nowhere defined. The words seem generally to be used as synonymous or explanatory of each other.

The defenders, as the pilotage authority of Irvine, never having appointed licensed pilots, and never having granted any written licenses of any kind, it only remains to inquire what was the position held and occupied by Jeremiah M'Gill and the other hobblers, as they are called, who

were engaged in connection with Irvine harbour. Now, I have no difficulty in answering this question upon the evidence. I think it proved that they were simply the servants of the Harbour Trustees, engaged by the Harbour Trustees at weekly wages of £1 each per week, for which wages they gave their whole time to the service of the harbour, under the direction of the Trustees and their harbour-master. In particular, I think it is proved that Jeremiah M'Gill in conducting the "Gertrude" into the harbour was acting solely as the servant of the defenders, and that he must be held as such in any question between the pursuers and the defenders. There was no contract between the pursuers and M'Gill as an independent pilot. M'Gill had no claim upon the pursuers for pilotage fee or remuneration of any kind. The ship dealt with the harbour authorities alone, to whom they paid or incurred the pilotage dues, in return for which the harbour trustees undertook to supply the pilotage. Still further, the work done by M'Gill was not done in the open sea where any licensed pilot might have offered his services, but within the limits of the defenders' harbour, in territory where the defenders alone were supreme, and from which they might exclude all excepting their own servants, and those connected with the ships they had received into their harbour. M'Gill and the other hobblers were sent to the pursuers' ship by the defenders or their harbour-master, under whose entire and sole control the whole hobblers were.

Difficult questions might arise if M'Gill, in the course of piloting the defenders' ship, had, by his fault or negligence occasioned injury to third parties—for example to other ships in the harbour, or to members of the public—and it is possible that in a question with such third parties he might have been held the servant of the "Gertrude," or of her owners. No such question arises here, and it is enough for the decision of the present case that; as in a question between the pursuers and defenders, M'Gill was acting solely as the servant of the harbour-trustees.

In illustration of my ground of judgment—suppose that the "Gertrude," instead of being piloted into the harbour by M'Gill, had been towed into the harbour by the defenders' tug steamer, and that the accident had occurred solely through the fault of the tug or of those in charge of her. In such a case I think the defenders would be liable. The tug steamer was the defenders' exclusive property, furnished and equipped by them, and under the control and charge solely of the servants of the harbour-trustees. By the published table of dues, the defenders exact so much for towage, and they apparently make this charge against vessels of the "Gertrude's" size whether the tug steamer is required or not. I should entertain no doubt that the defenders are liable for the negligence or blunders of their tug-master whom they employ, and of whose skill and qualifications they alone are cognisant. On precisely the same grounds, I think they are liable for the fault or blunder of Jeremiah M'Gill.

In short, the moment the conclusion is reached that Jeremiah M'Gill, on the occasion in question, was acting not as an independent pilot selected and employed by the Captain of the "Gertrude," but simply and solely as the servant of the Harbour Trustees, this is enough for the decision of the case, and upon this single ground I think the defenders are liable for the proved damages.

Lord Justice-Clerk—This is an important case and all the more important if it be true, as we were told by the bar, that the practice followed by the Irvine Harbour Trustees is a common practice in the harbours on our coast. If the Pilotage Acts after being adopted are performed in form only and not in spirit, I trust the effect of our judgment may be to create greater vigilance on the part of pilotage authorities. I am of opinion that the Harbour Trustees undertook the duty of piloting the pursuers' vessel safely into the harbour of Irvine in consideration of the pilotage dues, which are applied to the ordinary purposes of the harbour. It is a general rule, whenever for a certain consideration two parties agree that one of them shall perform a certain duty, it is the duty of that party to perform it with proper caution and with skill, and whether he performs it by himself or by his servant he is liable to the party in the event of anything going wrong. Now, the defenders did not sufficiently perform that duty by sending out and entrusting Jeremiah M'Gill with the navigation of the pursuers' vessel, seeing he was not a licensed pilot and that he acted solely as the servant of the defenders. No doubt, if they had duly licensed a pilot and given him the authority and *status* contemplated by the Act, they would have discharged the duty implied by the contract. I do not say whether the pilotage authorities are bound or have power to make regulations, or whether the trustees would be liable if on an emergency, when no licensed pilots are to be had, they do the best they can and send out a man not sufficiently qualified and not having a license. Here however there was no attempt to obey the Pilotage Act, and although the defenders say in their own regulations that "no man shall act as a pilot without a license," yet it is clear that by their fault or neglect they failed to give effect to that regulation.

The Court pronounced the following interlocutor:—

> The Lords having heard counsel on the reclaiming note for John Holman and others against Lord Shand's interlocutor of 15th November 1876, Recal the said interlocutor: Find the pursuers entitled to damages as libelled, and assess the same at £240, with interest thereon from the date of citation, and decern against the defenders for payment of the same, with expenses, and remit to the Auditor to tax the same and to report."

Counsel for Pursuers—Guthrie Smith—Keir. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defenders—Trayner—Mackintosh. Agents—Morton Neilson, & Smart, W.S.