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FOWLES v. EASTERN AND AUSTRALIAN STEAMSHIP CO. LTD.

Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Barton* A.C.J. and *Powers* J. dissenting), that the appeal should be allowed.

By *Isaacs* J.—On the ground that the Government was not liable for the negligence of a duly qualified or licensed pilot.

By *Gavan Duffy* and *Rich* JJ.—On the ground that no satisfactory decision as to whether the Government was in fact carrying on the business of pilotage and the pilot was acting as its servant and agent in the conduct of such business, could be arrived at by means of the inferences that necessarily followed from the stated and admitted facts, and that the Court should not, under the power to draw inferences conferred by Order XXXVIII., r. 1, of the *Rules of the Supreme Court* (Qd.), draw other inferences which were a matter of individual opinion, the drawing of which is ordinarily and properly the function of a jury under the direction of a Judge or of a Judge sitting as a jury at the trial.

Order of the Supreme Court of Queensland: *Eastern and Australian Steamship Co. Ltd.* v. *Fowles*, (1913) S.R. (Qd.), 64, set aside.

APPEAL from the Supreme Court of Queensland.

In an action which was brought in the Supreme Court of Queensland by the Eastern and Australian Steamship Co. Ltd., and in which William Lambert Fowles was the nominal defendant on behalf of the Government of Queensland, the plaintiffs claimed £50,000 damages by reason of the stranding of the steamship *Eastern* (of which vessel they were the owners) in the port of Brisbane, on 25th January 1911, while under the control of one William Henry Maxwell, a duly appointed and licensed pilot, whom they had received on board in compliance with the provisions of the *Navigation Acts* 1876 to 1896 and the regulations thereunder,—they alleging that such stranding was due to the negligent and improper navigation of the vessel by Maxwell, and that he was the servant of the Government, and claiming that the Government was liable for the loss and damage suffered by them. In the defence the defendant denied the negligence and contended that the Government was not liable to the plaintiffs for any damage due to the negligence (if any) of Maxwell in the execution of his duty as pilot.

Pursuant to an order made, by consent of the parties, by *Real* J., a special case was stated asking the opinion of the Supreme Court upon the following questions:—

1. Assuming that the said stranding was due to the negligent or improper navigation of the said vessel by the said William Henry Maxwell in the execution of his duty as pilot in charge of the said vessel, is the Government of Queensland liable to the plaintiffs for the damage caused by the said stranding ?
2. By whom ought the costs of this special case to be paid ?

The Full Court answered the first question in the affirmative, and ordered the defendant to pay the plaintiffs' costs of the special case: *Eastern and Australian Steamship Co. Ltd.* v. *Fowles* (1).

From that decision the defendant now appealed to the High Court.

Further material facts sufficiently appear from the judgment of the Acting Chief Justice, hereunder.

O'Sullivan A.-G. for Queensland, *Stumm* K.C. and *Henchman*, for the appellant. The pilot Maxwell is a duly appointed officer and is in receipt of a fixed annual salary which is paid out of the revenue of the State, but the Governor in Council has only power to appoint when the pilot has been licensed by the Marine Board. The Governor in Council has power to remunerate the pilots in certain ways. They may be remunerated out of fees or by salary, or partly by fees and partly by salary. The definition of "pilot" in sec. 2 of the *Navigation Act of* 1876 differs from the definition in the *Merchant Shipping Act* in that the words "duly authorized" do not occur in the latter Act. [They referred to the *Navigation Act of* 1876, secs. 5, 7, 11, 12, 108, 113, 115, 117, 128 and 152.] By the *Port Dues Revision Act of* 1882 (46 Vict. No. 12) pilotage rates were increased, and light and other dues abolished.

The sections in the Queensland *Navigation Act* dealing with pilotage are practically the same as those in the English *Merchant Shipping Act*. [They also referred to *Public Service Act* 1896, secs. 3 and 16.

[BARTON A.C.J. In England pilots keep their fees, and only pay a certain percentage to Trinity House and an annual registra-

(1) (1913) S.R. (Qd.), 64.

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tion fee, which is just the point the respondents rely on as not happening here.]

If the Governor in Council had decided that the method of remuneration should be by fees, it would not be contended by the respondents that the Government would be liable. There is no change in the relationship existing between the Government and the pilot because the Government has selected the other method of payment: See *Actieselskabet Bannockburn* v. *Williams* (1); *Otago Harbour Board* v. *Cates* (2); *Holman* v. *Irvine Harbour Trustees* (3); *Parker* v. *North British Railway Co.* (4).

The ordinary doctrine of partnership involving agency does not arise, as the pilot is a statutory officer: *Guy* v. *Donald* (5). The determining question is the question of control: *Hall* v. *Lees* (6); *Hillyer v. Governors of St. Bartholomew's Hospital* (7); *Foote* v. *Directors of Greenock Hospital* (8).

[GAVAN DUFFY J. referred to *Smith* v. *Martin* (9).]

In the present case, it is submitted, the relationship of master and servant does not exist: See *Enever* v. *The King* (10); *Baume* v. *The Commonwealth* (11). In *Donovan* v. *Laing* (12) the owner received remuneration for the services of his servant.

Feez K.C. and *Real*, for the respondents. The question in this case is, what was the contract between the owners of the steamship *Eastern* and the Government of Queensland. Was it that the Government would perform the duty of piloting the vessel out of the port, or that it would provide some competent person to do that work? The position of the Government was not merely that of a pilotage authority, but there was a statutory obligation to pilot vessels without damage. The Government is in the same position as a private individual with respect to liability in tort and contract. [They referred to *Sydney Harbour Trust Commissioners* v. *Ryan* (13); *Mersey Docks Co.* v. *Gibbs* (14); *R.* v. *Williams* (15);

(1) 12 S.R. (N.S.W.), 665.
(2) 2 N.Z.L.R. (S.C.), 123.
(3) 4 Ct. of Sess. Cas. (4th ser.), 406.
(4) 25 Rettie, 1059.
(5) 203 U.S.R., 399.
(6) (1904) 2 K.B., 602.
(7) (1909) 2 K.B., 820.
(8) (1912) Ct. of Sess., 69.
(9) (1911) 2 K.B., 775, at p. 784.
(10) 3 C.L.R., 969.
(11) 4 C.L.R., 97.
(12) (1893) 1 Q.B., 629.
(13) 13 C.L.R., 358, at pp. 366, 368, 372.
(14) L.R. 1 H.L., 93.
(15) 9 A.C., 418.

Brabant & Co. v. *King* (1); *Shaw, Savill and Albion Co.* v. *Timaru Harbour Board* (2). Where the Government undertakes contractual obligations it must perform through some person, and here the respondents contend that the pilot was the agent of the Government. There are two classes of pilots in Queensland—the licensed pilots and the salaried pilots. The former find their own boats, &c.; the latter have everything found for them by the Government; further, the latter have to give the whole of their time to the Government even though they may not be on duty as pilots. The fundamental principle is that the Government is liable because the pilot is its servant: *Gilbert* v. *Corporation of Trinity House* (3).

[They also referred to the following cases:—*The Lion* (4); *The Eden* (5); *The Maria* (6).]

Stumm K.C., in reply, referred to *Smith* v. *Martin* (7); *Dudman* v. *Dublin Port and Docks Board* (8).

Cur. adv. vult.

The following judgments were read:—

June 16.

BARTON A.C.J. This is an appeal from an order of the Supreme Court whereby the Full Court answered in favour of the respondent company, who are the plaintiffs, certain questions submitted by way of special case in an action brought in pursuance of the *Claims against Government Act* against the appellant, who, as nominal defendant, represents the Government of Queensland. On 25th January 1911 the company's steamship *Eastern*, being about to put to sea from the port of Brisbane, received on board one William Henry Maxwell as pilot. While in his charge the vessel became stranded on Salamander Bank, within the limits of the port, and sustained damage. The company sues the Government for the damage, alleging negligent navigation on the part of the pilot, for the consequences of which it contends that the Government

(1) (1895) A.C., 632.
(2) 15 App. Cas., 429.
(3) 17 Q.B.D., 795, at p. 799.
(4) L.R. 2 P.C., 525.
(5) 2 Wm. Rob., 442.
(6) 1 Wm. Rob., 95.
(7) (1911) 2 K.B., 775, at p. 781.
(8) Ir. R. 7 C.L., 518.

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is responsible. The Government, among other defences, denies the negligence, and contends that it is not liable to the company for damage due to the negligence (if any) of the pilot in the duty which he undertook.

For the purposes of the special case we are not concerned with the allegation of negligence on the part of the pilot, causing damage. That is assumed, and the question is whether, on that assumption, the Government is responsible for the default of the pilot.

The plaintiff company of course concedes that if the pilot were merely a person licensed to practise that occupation by some independent public body lawfully authorized to license competent persons to exercise it, and if the pilot were plying his vocation for reward payable by shipmasters or owners to him, there would be no foundation for the claim as against the Government. But it contends that upon the facts agreed upon in the special case, together with the admissions, when considered in connection with the law of Queensland, the liability asserted is established; and the Full Court is of that opinion.

On 28th November 1899 the Marine Board of Queensland, from their office at Brisbane, reported to the Public Service Board the resignation of "Pilot Mackay of this Port," and recommended that "the vacant position" should be given to "Pilot Maxwell of Thursday Island," at a salary named. The Public Service Board recommended the appointment so advised to the Colonial Treasurer on 15th December 1899, and on the 20th of that month the Governor in Council, purporting to act "upon the recommendation of the Public Service Board," appointed Maxwell to be "Pilot, Brisbane"; and the appointment was gazetted on 23rd December. The appointment itself is silent as to salary, but Maxwell was paid the salary recommended out of the Consolidated Revenue, and has ever since been in the receipt of a salary so paid. On 13th March 1900 he was duly licensed by the Marine Board "to act as pilot for the port of Brisbane." Until after he was so licensed he did not act, and was not qualified to act, as a pilot for the port of Brisbane, but from the date of his licence he has acted as such pilot, and was so acting at the time of the stranding of the *Eastern*.

An extract from the Queensland Blue Book of 1911 is incorporated

by reference in the special case, and attached thereto. Under the heading "Treasury Department. Marine Department—Ports," it appears that Maxwell, at and after the 1st July 1911, was holding the office of "Pilot, Brisbane," at a salary there shown; that he was first appointed "under the Government of Queensland" on 2nd February 1878; that he was appointed to his present position on 20th December 1899; and that he was then receiving a salary in the office named.

Beyond his salary paid out of the Consolidated Revenue, Maxwell has received no other payment or fee for his services. All port pilotage rates, dues and charges were at the material time payable to and paid into the Consolidated Revenue, including all rates, dues and charges paid or levied in respect of the steamship *Eastern*. Besides the above facts, it was admitted on the part of the defendant that pilots, such as Maxwell, appointed by the Government, are classified in the professional division of the civil service, and that the Government supplies at its own cost the boats and crews employed by such appointed pilots, whom I shall call "port pilots"; while it does not supply boats or crews for those pilots who, though licensed by the Marine Board, are not appointed by the Government, and whom I shall call "coast pilots." Under Order XXXVIII., made under the *Judicature Act* in force in Queensland, a rule (No. 1) empowers the Court in dealing with special cases to draw inferences of fact.

The Statutes of Queensland applicable to this case are those relating to navigation and port dues, and to the public service, and I will now refer to such of their provisions and to such regulations of the Governor in Council as seem to me to be the most material, not confining myself to those relied upon by either party. I will refer first to the existing Statute on each of the two subjects, and then to the Statutes which preceded it.

The Marine Board is duly constituted and incorporated in exercise of the power conferred on the Governor in Council by the fifth section of the *Navigation Act of* 1876, which purports to consolidate and amend the laws relating to the Marine Board, navigation, pilotage, &c. The Board consists of a chairman and other members, the port master of Queensland for the time being (a Government officer) being the chairman. By the same section the

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Governor in Council may remove any member of the Board at pleasure, may fill up vacancies, and may fix the remuneration to be paid to the members.

Of the eight Parts into which the Act is divided, the first relates to "the Marine Board its powers and functions"; the second to "the Examination and Certificates of Masters, Mates and Engineers"; the third to "Steam Navigation and Regulation of Passenger Vessels"; the fourth to "Safety and Prevention of Accidents"; and the fifth to "Pilotage and Harbours."

By Part I., sec. 8, the Board is to be "subject to the general supervision and control of the Treasurer" of Queensland, and is to "fulfil and carry out any directions which may from time to time be given in writing by the said Treasurer touching any matter entrusted to or performed or authorized to be performed by the said Board." Section 11 provides that the Board shall, subject to the control of the Treasurer of Queensland, have power and authority, within the limits of its jurisdiction, "to carry out the provisions of the second, third and fourth Parts, and also of any other portion of this Act in which any power or authority is expressly or impliedly conferred upon such Board, and shall, when so directed by the Treasurer, or when the circumstances of the case may to them seem to render such a course necessary, inquire, or cause any inspector appointed under this Act or any other person to inquire, into any matter connected with" (*inter alia*) shipping, navigation, wrecks and casualties, pilots and pilotage; and the Board shall, when so directed or when they think it necessary, report the result of any such inquiry to the Treasurer. These two sections place the Board under the continuous control of a Minister of the Crown, whose written directions in respect of the exercise of any of their powers and duties they are bound to obey. Sec. 8, indeed, is sufficient for that purpose. Nevertheless, they have certain initiative and a few advisory functions.

Sec. 12 of the same Part authorizes the Governor in Council to "appoint such secretaries inspectors and other officers clerks and servants as he may deem necessary to carry into execution the provisions of this Act," and sec. 14 authorizes the Board, with the written consent of the Treasurer, to "select and employ such

. . . surveyors for the purpose of the third and fourth Parts of this Act and at such ports or places as they may think proper."

Parts II., III., and IV. give the Board powers, of course subject to the Treasurer's control and direction, in respect of their subject matters, but contain no provisions relevant to the present case. The management of the ports themselves, and their navigation and pilotage as part of such management, are in general vested in the Board, but only as agents of the Government in accordance with secs. 8 and 11, but certain powers belong to the Government apart from the instrumentality of the Board.

Coming to Part V. we find the Governor in Council authorized by sec. 108 to proclaim the limits of ports in Queensland, and authorized also " on the recommendation of the Board " to " make rules and regulations for the regulation safety and navigation of vessels and shipping in the same," and for other specified purposes.

It is convenient next to refer to sec. 128, by which " the Governor in Council may authorize the Board to have and to exercise the following powers—

> " (1) To grant licences to persons to act as pilots for any port or any portions of the coast of the Colony (2) To determine the qualifications to be required from persons applying for such licences (3) To make regulations for the proper conduct of such pilots and pilot service and for punishing any breach of such regulations by suspension or cancelling of such licences or by the infliction of penalties.

And the Governor in Council shall have power to decide how such licensed pilots are to be remunerated, and what proportion of the pilotage dues are to be received by such pilots, anything in this Act to the contrary notwithstanding."

Compulsory pilotage is prescribed by sec. 113: " The master of every vessel not exempt from pilotage, arriving at or off any port whereat any pilot shall have been appointed for the purpose of entering any of the said ports or harbours, shall deliver and give in charge such vessel to the duly qualified pilot who shall first board or go alongside of such vessel in order to conduct the same into port, and such pilot shall if required by such master produce his authority to act as such pilot, and no master of any such vessel shall proceed

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to sea from any of the said ports or quit his station or anchorage in any port, without receiving on board the harbour master or some pilot appointed as aforesaid to move or conduct the said vessel to sea." The harbour master is an officer of the Government. For entering or attempting to leave port in breach of this section, the master is liable to a penalty not exceeding £50.

As will be seen, all pilotage rates are to go into the Consolidated Revenue. By sec. 131 a vessel is not to be cleared at the Customs until the receipt from the harbour master at the port of clearance of a certificate of "the amount of harbour dues and wharfage rates pilot and other services upon which payment is due upon such vessel" under the Act, nor until the production by the master of the vessel of "a certificate from the shipping master to the effect that due payment has been made of all fees and other shipping charges," nor until "all rates and charges payable in respect of such vessel shall have been duly paid."

Sec. 152 penalizes any person who without due authority interferes with "any harbour master or pilot, or other duly authorized person acting on his behalf, in the execution of his duty."

The Act to amend the *Navigation Act of* 1876, called the *Port Dues Revision Act of* 1882, is to be read and construed with that Act. It deals only with rates, dues and charges. The payment for pilotage is in most of the sections dealing with it called a "rate," but it is also called "pilotage dues" (sec. 3 (2)), or included in "dues" (secs. 4, *sub fin.*, 6 and 10), "dues and charges" (sec. 9), "dues or charges" (sec. 10). By sec. 3 every vessel "arriving from sea at, or departing to sea from, any anchorage named in the third Schedule" (which includes all sections of the port of Brisbane) must "pay the pilotage rates . . . prescribed" in that Schedule, except as modified in the section. By sec. 8 "all rates, dues, and charges paid or levied within the several ports of Queensland by virtue of this Act or the Fifth Part of the Principal Act, or any regulations made thereunder, shall be paid to the principal officer of Customs at the port where the same are levied; or, if there is no officer of Customs at a port, then to the harbour master or pilot; and shall be accounted for to the Treasurer and be by him paid into the Consolidated Revenue."

Another amending Act was passed in 1896, but it contains no provisions relevant to the matter in dispute.

The Governor in Council has made "Regulations relative to the Supervision, &c., of the Queensland Government Pilot Service," and also "Regulations for Inner Route and Torres Strait Pilot Service." By these he has authorized the Board to exercise as to port pilots and coast pilots respectively, the powers defined in sec. 128, sub-secs. (1) and (2). No authority was shown for the Board to make regulations for the purposes set forth in sub-sec. (3)—that is to say, for the proper conduct of such pilots and the pilot service, and the punishment of breaches of the regulations; but the Governor in Council has himself made regulations for those purposes. There is not among the regulations any scale of fees for port pilots, nor has the Governor in Council fixed under this section any general rate of remuneration for port pilots, such as Maxwell. Nor does it appear that the practice is to fix the salary to be paid to such a pilot by the Governor in Council who appoints him to his port. Such salaries are provided for on the Estimates. But the licensed pilots for Torres Straits and the Inner Route, who are in some of these regulations termed "coast pilots," are paid fees fixed by regulation, and the rates, dues and charges to be paid into the Consolidated Revenue, under sec. 8 of the *Port Dues Revision Act*, are those only which are "paid or levied within the several ports of Queensland," and do not include the fees of coast pilots. By one of the regulations applying to coast pilots (No. 12) they are to "find their own boats and vessels, and pay all expenses incurred in carrying out the pilot service." There is no such regulation as to port pilots, *i.e.*, those appointed by the Government, who, as we have seen, are supplied with boats, crews, &c., at the public cost. Thus the contrast between the positions of the two classes of pilots, in that the merely licensed pilots of the coast subsist on fees from the shipowners and the licensed pilots appointed by the Government for the ports subsist on a salary from the Crown, is accentuated. This difference is of importance in the light of the authorities. Assuming that the Government is not responsible for the default of a coast pilot, seeing that he is merely licensed to exercise his calling by the Government through its agent, the Marine Board; that he conducts his

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vocation at his own expense; that he is paid fees for his own profit by the shipowner: then the question becomes insistent whether a port pilot, appointed by the Government as well as licensed, whose appliances are provided by the Government, whom the shipowner is bound to receive and to whom he is bound to deliver his ship, and who is paid a Government salary and must not receive any other reward for his services, may negligently cast away a ship and yet not subject the Government to any liability for his Act? The omission of the Governor in Council to act under sec. 128 in deciding how licensed port pilots should be remunerated was probably due to the fact that other means of fixing the remuneration existed and were employed.

Several of the previous Acts dealing with navigation, shipping and pilotage, should be referred to. The first is the Act 3 Will. IV. No. 6, under which the Governor was empowered to grant licences to persons duly qualified to act as pilots for any of the ports and harbours of New South Wales, which, until 1859, embraced the territory now the State of Queensland. Every such licence was to "certify" for what port the licensee was "duly qualified to act as pilot" (sec. 12). A licensed pilot was thus a duly qualified pilot. Sec. 13 is almost in the same terms as sec. 113 of the Act of 1876, and provides for compulsory pilotage. In using the term "port wherein any pilot shall have been appointed," it evidently refers to that portion of the Governor's licence which certifies for what port the holder is duly qualified to act as pilot, and it is apparent that the effect of the licence under this Act was not only to authorize a duly qualified pilot to act as such, but to appoint him in or at a specified port. The provisions of this Act of 1832 render it clear that at that time the pilot was intended to take the "rates and charges of pilotage" for himself: See secs. 14 and 15 and Table B, which purports to be a "table of the rates of pilotage payable to licensed pilots . . . into and out of any port . . . for which a pilot shall be appointed." Starting, then, with this Act, we find the Governor authorized to issue a document which was at once a licence and an appointment to a port to a person entitled to receive his reward from the ship master and to keep it. The Act 7 Vict. No. 12 repealed Table B. of the Act of 1832, and substituted another table, the heading of

which again used the words "rates of pilotage payable to licensed pilots" and "port for which a pilot shall have been appointed." By sec. 16 "all sums collected under this Act and not otherwise specially appropriated shall go to Her Majesty Her heirs and successors for the public use of the said Colony." I think this Act did specially appropriate the pilotage rates to the use of the licensed pilots. So that, so far, the pilotage rates had not become public revenue; and this position is emphasized by the Act 14 Vict. No. 37, both sections of which show that the pilot was then entitled to the pilotage rates and dues, as well as to detention fees. The Act 22 Vict. No. 4, passed in the year before separation, recited that the pilotage rates were insufficient to maintain "the pilotage service" of New South Wales, and by sec. 8 all rates and dues were to be paid to the Collector of Customs or the pilot, and to be accounted for to the Treasury and paid into the Consolidated Revenue. The Governor in Council was empowered to make regulations prescribing how any pilots to be appointed under the Act should be remunerated, and whether by fixed salary, or partly by salary and partly by any and what proportion of rates and dues authorized by the Act, or wholly by the receipt of such rates and dues. So that the rates and dues now became part of the revenue, by sec. 8, while the remuneration of the members of "the pilotage service" became the affair of the Government. There was no provision for pilots to take fees from shipowners for their own use. By this Act the Governor was again empowered to grant licences to pilots. The first Act on this subject passed by the Parliament of Queensland after separation was the *Marine Board Act of* 1862, (26 Vict. No. 2), which repealed 22 Vict. No. 4. By sec. 2 the word "pilot" was defined to mean "any person not belonging to a vessel who has the conduct thereof." The expression "licensed pilot" was defined to mean "any person duly licensed by the Marine Board to conduct vessels to which he does not belong." The Governor in Council was now empowered to incorporate a Marine Board (sec. 4). By sec. 6 this Board was subjected to the "general supervision control and direction" of the Treasurer of the Colony, and was to fulfil and carry out any directions which might from time to time be given in writing by the Treasurer touching any

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matter entrusted to or performed or authorized to be performed by the Board. As has been seen, this provision is retained in the Act of 1876 (sec. 8). Thus the Marine Board, then as now, was bound to administer its duties under the continuous control of a Minister of the Crown, whose written directions as to the performance of the functions it was bound to obey. Sec. 9 of the Act of 1862 made the Marine Board "the department to undertake the general superintendence within its jurisdiction of all matters relating to . . . the 'licensing appointment and removal' of pilots, the maintenance of pilots' establishments, the punishment of persons acting as pilots without a licence, the amount save as herein provided of pilotage dues," &c.

This Act, by sec. 16, required that the pilotage and other rates, dues and charges paid or levied within the several ports of the Colony by virtue of the Act or any regulation thereunder should be accounted for and paid to the Treasurer and be by him paid into the Consolidated Revenue Fund, and, by sec. 17, it empowered the Governor in Council to determine how pilots to be appointed thereunder should be remunerated, using in that respect similar words to those of the repealed Act 22 Vict. No. 4. So that, while the Board could appoint or remove a pilot, the Governor in Council was to determine the remuneration of any pilot so appointed. It is to be observed that this Act, by secs. 9 and 17, seems to distinguish between the licensing and the appointment and removal of pilots, and that the Government was not called upon to provide for the remuneration of merely licensed pilots who were not also appointed.

The *Marine Board Act of* 1862 was repealed by the *Navigation Act of* 1876, now in force, and it is worthy of remark that the present Act does not leave to the Marine Board the powers which it had by virtue of sec. 9 of the repealed Act, though it keeps the Board under the control of the Treasurer. The corresponding provision of the present Act is sec. 128, which gives no power of appointment or removal to the Board, nor any direct power to license either port pilots or coast pilots. The Governor in Council may authorize it to exercise the powers contained in sub secs (1), (2) and (3). He has, in fact, only given it the powers of the first two sub-sections, which relate only to the licensing of both classes of pilots, and to

the determining of the qualifications of applicants. He has not authorized it to make any regulations under sub-sec. (3), and in fact has exercised the regulation-making power in that regard himself. Had the Governor in Council not given the Board the very limited powers it has under this section, the Board could not even have licensed a pilot. Then would any authority other than the Executive have had that power? And, as the Executive itself has not been granted power to delegate to any other authority the appointment and removal of pilots paid by the Government, what other authority than the Executive can exercise a power which one cannot suppose to have no existence at all? From 1869 to 1889 there was no statutory regulation of the civil service in Queensland, and wherever an office existed or was created, there was no authority save the Executive which could appoint or remove, unless a Statute vested it in other hands.

It was contended for the plaintiff company that pilots were among the "officers" whom sec. 12 of the Act of 1876 authorizes the Governor in Council to appoint. But the terms of the section do not strongly suggest this, nor does the position which the section occupies in Part I. of the Act. It is more probably a transference from the Board to the Governor in Council of the power of appointment and employment "with the consent of the Treasurer," given in sec. 8 of the Act of 1862, with the exception of the employment of surveyors (which sec. 14 of the Act of 1876 keeps in the hands of the Board for the purposes of Parts III. and IV.); and sec. 8 of the Act of 1862, when compared with sec. 9 of the same Act, seems intentionally to exclude what in the last-named section is called the "licensing appointment and removal of pilots."

The close resemblance between sec. 113 of the present Act and sec. 13 of the Act 3 Will. IV. No. 6 is apt to lead to a somewhat misleading conception of the later provision. Each must be read with the rest of the Statute in which it appears. Sec. 13 of the Act of 1832 occurred in conjunction with provisions from which it was apparent that the pilot, though his business was to some extent regulated by the legislature, was not a civil servant, nor in receipt of Government pay, but did his work for fees paid by the shipowner. The word "appointed" was used in that section in the sense of "licensed by

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the Governor," who did not appoint, because he did not engage the pilot to serve him, but only authorized him to work for shipowners. It is very different with sec. 113 of the present Act, for there the accompanying provisions clearly show that the appointed and licensed pilots of the ports are a distinct class from the merely licensed pilots of the coast, the former being paid salary by the Government for their work, and the latter being paid fees by the shipowners. The regulations cited to us make this distinction all the clearer. Each obtains his license from a sub-department of the Government. But the one has also a Government appointment in the true sense as a member of the "Queensland Government Pilot Service;" the other belongs to a different class, which obtains its emolument from the individuals who contract with it. Moreover, the compulsion of sec. 113 applies only to the ports and to the reception of the pilots who serve there under the Government.

This being, in my view, the effect of the legislation applying to pilots and pilotage, and to navigation so far as they are concerned in it, I turn now to the *Public Service Act of* 1896. Though I think that on the facts and enactments already mentioned, irrespective of the Public Service Acts, Maxwell was on 25th January 1911 lawfully in the paid employment of the Government as a port pilot, a consideration of the public service legislation makes this amply clear.

Sec. 2 of the *Public Service Act of* 1896 repeals the *Civil Service Act of* 1889 and an amending Act of 1891, but so as not to affect rights accrued, things done or contracted to be done, or, until their alteration or repeal, regulations made by the Civil Service Board under either of those Acts. The term "public service" or "service," by sec. 3, includes (of course for the purposes of the Act) "all persons in the public service in receipt of a fixed annual salary paid out of the Consolidated Revenue or out of any special fund," except certain specified classes, among which there is no mention of pilots, and except "any officer or class of officers excepted by the Governor in Council from the operation of this Act." The Governor in Council has not excepted pilots. As a person permanently employed and paid by the Government to do certain work, Maxwell was, apart from the operation of previous Acts relating to the ser-

vice, a "person in the public service" in the ordinary acceptation of the term, and as it existed before any statutory definition; and as such a person "in receipt of a fixed annual salary paid out of the Consolidated Revenue," and not within any of the exceptions, he was in the public service as defined in sec. 3. By the same section "officer" means and includes "any person employed in the public service as . . . defined"; so that Maxwell was an "officer" in the service. By sec. 4 the public service is to consist of two classified divisions, the professional and the ordinary, and an unclassified division, and each of the classified divisions shall consist of six classes and a probationary class. "The professional division shall include all officers appointed by the Governor in Council whose offices require in the person holding them some special skill or knowledge usually acquired only in some profession or occupation different from the ordinary routine of the public service." As an officer appointed by the Governor in Council, and having regard to the requirements of his office, Maxwell was an officer of this kind, and therefore a person fit to be classified in the professional division. The ordinary division is to include all officers appointed by the Governor in Council not comprised in the professional or the unclassified division. The unclassified division is to include all officers not appointed by the Governor in Council. The pilots—or at least the port pilots—have been classified in the professional division, and Maxwell has been placed in the third class. See sec. 5.

The Public Service Board appointed under sec. 6 are granted large powers of inspection and discipline as to the various departments of the service, but with respect to officers in the classified division enforced resignation or dismissal can only be imposed upon an officer by the Governor in Council (sec. 42). A most important provision is that of sec. 40, which enacts that "an officer shall not be dismissed or suffer any detriment in respect of his office except in the manner set forth in this Act." I may mention here that No. 13 of the Regulations of 1891, under sec. 128 of the *Navigation Act of* 1876, renders the approval and confirmation of the Treasurer, upon report, necessary for the infliction of punishment for misconduct or negligence upon a port pilot. It follows that after

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the passage of sec. 40, which repeats a similar provision in the repealed *Civil Service Act of* 1889 (which by sec. 1 defined the service in terms practically identical with those of sec. 3 of the Act of 1896), the Marine Board had no longer, and I doubt whether it ever had, any independent power of removing from the public service a pilot who had become a member of it, even if regulation 13 remained in force, which I doubt. If the cancellation of an appointed pilot's licence amounted to a removal, it seems to me that an uncontrolled power of cancellation can no longer have remained in the Marine Board, if it ever resided there, seeing that its exercise would practically have enabled them to nullify the effect of sections 40 and 42 of the Act of 1896. It is probable that the legislature framed these sections in the belief that if the Act of 1876 gave the Board any power to cancel an appointed or port pilot's licence, it was time to take away the power, or to leave it only as ancillary to his removal from the service.

As Maxwell appears to have received his first appointment under the Government in 1878, it is therefore advisable to look at some of the previous Acts dealing with the civil service. Two Civil Service Acts were passed in 1863, but were repealed in 1869, and we were informed that from that year until 1889 the civil service was left without statutory regulation, and Maxwell's appointment and service up to 1889 must have been under the general powers of the Government in that behalf, save so far as they were regulated by the *Navigation Act of* 1876. The Act of 1889 used similar definitions, and provided for a similar classification to those adopted in 1896, and the professional division was similarly defined. The Act was administered by a body called the Civil Service Board, with functions somewhat similar to those of the Public Service Board under the later Act, and secs. 33 and 36 are substantially, though not literally, identical with secs. 40 and 42 of the later Act. Maxwell was classified with other pilots in the professional division under this Act, and remained so classified up to the passing of the present Act, and the repealing section of the latter saves the rights which he had when it passed.

Taking all this legislation together, I cannot doubt that Maxwell, on 25th January 1911, was a permanent salaried and classified

officer in the public service employed by the Government as a pilot for the port of Brisbane.

Assuming, then, that after he took charge of the *Eastern* under the compulsory provisions of sec. 113 of the *Navigation Act* he was guilty of negligence as such pilot, is the Government responsible in damages for the consequences of his negligence? That question seems to me to involve three prior questions. The first is, whether upon the Statutes and the admitted facts there was such a relationship between the Government and the port pilots, that, in retaining the services of Maxwell at a salary, the Government employed him to perform the duties of a pilot as one of their servants. The second is, whether upon the Statutes and the admitted facts the Government, when it places a pilot on board a ship, undertakes any duty to the shipowner; and the third, if the second is answered in the affirmative, is, whether the duty undertaken by the Government was that of piloting the ship by its servant Maxwell with due care and skill.

The first question has, I think, been answered by what I have already said. As to the second and third, the navigation law gave the Government a right to force a pilot upon the owners and masters of shipping entering and leaving the port. These laws and the Public Service Acts made the pilot, so forced upon owners and masters, a paid agent or servant of the Government under their Marine Board department. Is there a duty to be implied from the exercise of that right? I think that must be so. Was it, then, the duty to undertake with due care and skill the pilotage of such vessels, or was it only a duty to supply qualified pilots to those who were bound to accept the services of such officers? Many authorities were cited for each of these propositions, and I confess that it is not easy to say on which side the balance of argument rests.

In the first place, it must be remembered that payment for pilotage is made by the shipowner to the Government in the shape of rates. The shipowner does not contract with the pilot. In cases of compulsion under sec. 113, it is doubtful whether there is any contract even between the shipowner and the Government. (See, however, *Brabant & Co.* v. *King* (1).) The plaintiffs were compelled by law

(1) (1895) A.C., 632.

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to take a pilot, and compelled by law to pay pilotage rates or dues. There was neither a voluntary promise nor a voluntary consideration, and of course the owner is not responsible for the pilot's defaults when pilotage is compulsory: *The Maria* (1). If, indeed, there is a contract at all, the parties to it are the plaintiffs and the Government, and if there is a contract the case for the plaintiffs becomes the stronger. But does the absence of a contract, if it does not exist, relieve the Government of all duty to the plaintiffs in respect of the manner in which they execute the power given them by law? Surely they were under one of two duties, either that of seeing that the person they put in charge was a competent and qualified pilot, or that of seeing that the navigation of the ship by their agent was performed with due care and skill. If neither of these duties existed, it was competent to the Government to run the plaintiffs' ship aground without incurring any responsibility. If the duty of the Government was merely to supply a competent and qualified pilot, and they have in the present case performed that duty, the plaintiffs are without remedy. If, on the other hand, the Government took upon itself the business of pilotage and forced the plaintiffs to accept their pilot for the performance of that business, then the Government is responsible if in its performance the negligence of its agent or servant, the pilot, has damaged the plaintiffs' ship. If on such an assumption this were not so, the case of *Farnell* v. *Bowman* (2) would have been decided otherwise. Now, Maxwell was not acting as an independent pilot employed by the ship master or the owners, and merely licensed by the Government. He had long been a servant of the Government, employed by it alone, and paid a salary by it alone, a member of its civil service in the capacity of a pilot. We have seen that the port pilots were at one time a body of men who, being licensed by the Governor to ply their vocation, undertook the business of pilotage by way of private enterprise and received fees for their trouble. These fees were afterwards turned by Statute into pilotage rates, but were paid nevertheless to the pilots for their private emolument. While that state of things continued, a mere licence did not turn them into agents of the Government, but later Statutes took the pilotage

(1) 1 Wm. Rob., 95.

(2) 12 App. Cas., 643.

rates into the Public Treasury, and empowered the Government to fix the remuneration of the pilots. The Statutes also provided for the constitution of a Marine Board acting in the execution of its powers and functions under the control of the Crown. The same Statutes regulated the pilots in their duties after the manner of public servants, and provided for a pilotage service, and indeed, as was admitted, the Government supplied the port pilots with the instruments of their calling in the shape of boats maintained, and crews paid, at Government cost, while the admissions and the Regulations show that on the other hand the coast pilots were allowed to receive fees for themselves and had to find their own boats and crews. The port pilots were made regular officers of the Government service, paid from the public funds, though the department called the Marine Board managed the pilot service under the immediate control of the Government. The port pilots were classified under the public service laws according to salary as professional servants of the Government. Taking all these facts and provisions together, can one resist the conclusion that the Government undertook the business of pilotage into and out of the ports, and became responsible for any injury caused by the negligence of its agent in that business? The position is in my view described, *mutatis mutandis*, in the following passage from the judgment of Lord *Gifford* in the case of *Holman* v. *Irvine Harbour Trustees* (1):—

"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 of the circumstances of the case, including the terms of the various Statutes under which the Harbour Trustees acted, that Jeremiah McGill, on the occasion in question, was not acting as an independent pilot employed by the ship master or captain of the *Gertrude*, and merely licensed or authorized 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 defendants 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

(1) 4 Ct. of Sess. Cas. (4th ser.), 406.

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for default 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 default or negligence of the subordinate, just as if he had been acting himself." And I may add a later passage :—" The case is not different from what it would have been had the harbour belonged to a private individual, and managed for his own private emolument with or without statutory powers." That was not the case of an appointed licensed pilot, but in the special circumstances of that case a pilot licensed, let us say at Trinity House, did not become the servant of the defenders. This, however, was because the facts showed that the defenders had not undertaken the business of pilotage.

The *Navigation Act* of 1876 in Part V. vested the control of the various ports, including their navigation and pilotage, in the Government, whether through the Marine Board or through its other agencies, and for the purposes of meeting the expenses of such control empowered it to levy various rates, dues and charges, including pilotage rates. It seems to me that Parliament has placed these revenues in the hands of the Government to enable it to carry out the entire management of the ports and harbours, and such entire management includes the control of the whole business of pilotage, and not merely the supply of pilots.

I do not think that the case cited of *Parker* v. *North British Railway Company* (1) is applicable to the present position. The view on which the Court of Session in that case decided in favour of the plaintiff was that the damage to the plaintiff's ship was occasioned by the fault of the defendant company's servant, the harbour master, and not by that of the pilot, Richardson. The pilot, indeed, was not in the full sense a servant of the defendant company. To quote the Lord Justice Clerk :—" The company made arrangements by which qualified pilots were induced to attach themselves to their harbour. But I cannot hold that if any vessel was picked up by one of these pilots the company were responsible for him as their servant because they had an arrangement with him that, in respect of their providing him with a boat and a fixed weekly payment, he agreed to hand

(1) 25 Rettie, 1059.

them the fees he drew from ships which he boarded and piloted in." Lord *Trayner* said of the pilot:—"He was, to some extent perhaps, the servant of the defenders, but whether he can be regarded as their servant when performing duties which the defenders could neither compel him nor forbid him to perform, is a difficult question. On these two points I prefer to reserve my opinion, as in my view it is not necessary to decide them in order to dispose of this case." (In the present case one difference is that Pilot Maxwell was performing duties which the Government could compel him or forbid him to perform.) Lord *Moncrieff* said:—"If the accident were due solely to the fault of the pilot, I am not satisfied that the defenders would be liable. I do not think that in steering the *Genista* Richardson was acting as the defenders' servant. Their arrangement with him simply was that in order to secure his services for vessels coming to the port of Silloth, and as an inducement to vessels to come there, the defenders guaranteed remuneration up to a certain amount, he in return accounting to them for the whole of the fees drawn. I think that this arrangement was entirely outside his position as pilot, and that therefore it would not be safe to hold that he was acting as the defenders' servant when the accident occurred. That is my present impression, but it is not necessary to decide the question."

The Court of Session did not pronounce upon the alleged liability of the defendant company for the acts of the pilot. What they said on that subject was merely *obiter*, because the ground of the decision was the fault of the harbour master. The position of the pilot in that case was obviously different from the position of a port pilot such as Maxwell under the Statute law of Queensland. And, if the circumstances had been such as existed in the present case I venture to think that their Lordships would have expressed a different view. It is enough, however, to say that the case is plainly distinguishable.

The case of *Otago Harbour Board* v. *Cates* (1) was cited. There *Williams* J. decided that under the Harbour Acts of 1878 a Harbour Board is not responsible for the negligence of a duly licensed pilot appointed by the Board, even on the assumption that the pilotage

(1) 2 N.Z.L.R. (S.C.), 123.

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was compulsory and that therefore the owners are not liable. That decision was arrived at on the construction of a Statute which we did not have before us at the hearing of the appeal, and which I have not seen, but it does not seem to me from the judgment of his Honor that the New Zealand Act is coincident with the body of Statute law in question in this case. The question there was as to the liability of an independent Harbour Board; here the question is as to the liability of the Government. In the New Zealand case, upon the facts and the Statute, the Harbour Board was held to be free of responsibility as being delegated by the Crown merely to furnish a proper pilot service. The Marine Board are the delegates of the Crown in the present case, but they are not the defendants. The question of the liability of the Government here depends upon whether Parliament has vested in the Government entire control of the business of pilotage at the ports, and whether the Government has acted in that control through its servant. These are questions with which *Williams* J. was not concerned, and I cannot see the applicability of the case cited.

In *Gilbert* v. *Corporation of Trinity House* (1) the defendants were held, in view of the terms of the *Merchant Shipping Act* of 1854, and the extensive powers thereby granted to them, not to have been statutory servants of the Crown so as to exempt them from liability for an action for negligence in the performance of their duties. That case differs from the present by reason of the quasi-independent position of the corporation of Trinity House, under its great statutory powers. *Day* J., in giving judgment, said (2):— "The Trinity House, to my mind, is not in the position of a great officer of State. It is nothing more than an amalgamation by authority of State of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by Statute, but in no possible sense can it be deemed to represent the Crown." If the Marine Board of Queensland were in the position that Trinity House occupies, it might well be the defendant in this case instead of the Government, but so far from having the extensive powers vested in Trinity House

(1) 17 Q.B.D., 795. (2) 17 Q.B.D., 795, at p. 801.

by Statute, this Board is, under sec. 8 of the *Navigation Act*, from its inception an instrument of the Crown in the same sense that a superior civil servant is such an instrument, that is, subject to the control and direction of the Crown, and bound to obey its behests. The case cited, therefore, is no authority for the position that the Marine Board is responsible in this case, and if it is not, I think the Government is.

The case of *Shaw, Savill and Albion Co.* v. *Timaru Harbour Board* (1) does not, in my opinion, resemble the present. In that case there was a voluntary contract of pilotage between the plaintiffs who owned the ship, and the harbour master who was the servant of the defendant Board in that capacity. That body had no authority to make contracts of pilotage or to provide pilots, and their position was generally unlike that of the Government of Queensland in the present case. They had merely authority to license pilots. It was held that the Board was not responsible for the loss of the ship which occurred through the default of the Board's harbour master, who was acting, not in that capacity, but as a pilot engaged by the Board for the plaintiffs' ship. In their judgment the Judicial Committee thought that, once licensed, the pilot had to make his own bargain with the ship, and would incur in that contract of pilotage only his own personal liability for the due performance of his duty. The Statute and the Rules made under it seemed to their Lordships to be carefully worded so as to exclude the notion that the Harbour Board in its corporate capacity was acting as pilot for the vessels frequenting the harbour. In the present case the pilot could not make his own bargain with the ship, and the question is whether the Queensland Government, upon the Statutes as applied to the admitted circumstances, must be taken to act in the business of pilotage for vessels entering or leaving the port of Brisbane. There is a marked difference between the statutory position of the Government here, and that of the Harbour Board in the case cited.

We were referred to a judgment of the Supreme Court of New South Wales in the case of *Actieselskabet Bannockburn* v. *Williams* (2). That case was decided on demurrer, and turned largely on the provisions of the New South Wales *Navigation Act* 1901. If the

(1) 15 App. Cas., 429.

(2) 12 S.R. (N.S.W.), 665.

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Government of Queensland were, by itself or its Marine Board, merely a licensing authority without any duty beyond that of seeing that licenses were properly granted, there would be a strong parallel between the two cases; but whatever may be the result of the construction of the New South Wales Act, on which I pronounce no opinion, I think that the agreed facts and the Statutes in this case place the Government of Queensland in a position involving more than that degree of responsibility.

Hillyer v. *Governors of St. Bartholomew's Hospital* (1) was an action in which the governors of the hospital were sued for damages for injuries caused to a patient during an operation by the alleged negligence of a member of the hospital staff. It was held that the action was not maintainable, because the only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care in selecting the medical staff, and the relationship of master and servant does not exist between the governors and the medical officers who give their services at the hospital. That case, then, was decided upon the absence of the relationship of master and servant, which would be a sufficient reason to defeat this action if, in the face of the facts and the Statutes cited, it were held that Maxwell was not the servant of the Government. If he was not their servant, they were merely supplying a pilot; but if he was their servant, they were employing him to pilot the ship. The governors of a hospital do not undertake the medical treatment of patients through the agency of servants; they only undertake the duty of careful selection. I confess that I cannot find that the duty of the Government in the present case is so narrow.

Hall v. *Lees* (2) proceeded on a similar principle to the case last cited, and differs similarly from the present one.

In *Smith* v. *Martin and Kingston-upon-Hull Corporation* (3) the plaintiff, a girl of fourteen, attended a school provided by the defendant corporation, the local education authority. The defendant corporation appointed and paid the teachers, and could dismiss them. A teacher (the first-named defendant) directed the

(1) (1909) 2 K.B., 820. (2) (1904) 2 K.B., 602.
(3) (1911) 2 K.B., 775.

plaintiff during school hours to attend to a stove in the teachers' common room, and while she was carrying out this order her clothes caught fire and she was seriously burned. The Court of Appeal held, first, that the relation of master and servant existed between the defendant corporation and the teachers they employed; and, secondly, that the act of the teacher was within the scope of her employment, which was not strictly confined to teaching alone; and that therefore the defendant corporation were liable to the plaintiff for the consequences of the teacher's act, which a jury had found to be negligent. *Farwell* L.J. (1) summarized the statutory provisions governing the case, under which the corporation had powers and duties which included the duty of providing sufficient accommodation in their schools, the control and management of such schools and their maintenance and efficient keeping by the corporation. The teachers under these Statutes were appointed by the corporation at such salaries, paid by the corporation, as the corporation thought fit, and were removable at their pleasure. The corporation were bound by certain regulations of the Board of Education, but no regulation appeared which was material for the purposes of the case. *Farwell* L.J. went on to say (2):—"Under these circumstances all the incidents usually relied on to show the existence of the relationship of master and servant exist in this case: the teacher was engaged by the corporation and paid by them; she was under their control, and could be dismissed by them. The two cases relied on by the corporation (*Evans* v. *Liverpool Corporation* (3) and *Hillyer* v. *St. Bartholomew's Hospital* (4)) are entirely different." In principle, *Smith v. Martin* (5) resembles the present case. It seems to me that the real test is whether the relationship of master and servant exists. It did not exist in the two cases mentioned by *Farwell* L.J., and it did not exist in the full sense in *Hall* v. *Lees* (6), for there the nurses were not, in nursing the female plaintiff, acting as the servants of the defendants. It is true that the question of this relationship may in some cases be determined according to the nature of the duties to be performed by the alleged servant. But this is not so in a case like the present, where you

(1) (1911) 2 K.B., 775, at p. 783.
(2) (1911) 2 K.B., 775, at p. 784.
(3) (1906) 1 K.B. 160.
(4) (1909) 2 K.B., 820.
(5) (1911) 2 K.B., 775.
(6) (1904) 2 K.B., 602.

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have a Statute which necessarily and expressly makes the person whose negligence is alleged, the servant of the defendant in an employment within the scope of which the negligence occurred. The facts embodied in the special case and admissions are before us as if they had been found by a jury. The only question is the bearing of the Statutes and Regulations upon these facts, and that is in my judgment a mere question of law. Being of opinion that upon the facts not disputed the law constituted Maxwell the servant of the Government in the business of pilotage in such a sense that the maxim *Respondeat superior* applies, I am of opinion that, assuming negligence, the liability of the Government for the damage resulting from that negligence will have been established. I therefore think that the learned Judges of the Supreme Court gave the right answers to the questions, and that this appeal should be dismissed with costs.

ISAACS J. The Supreme Court held the Government liable on the ground that, as a matter of law, liability inevitably followed from the following circumstances stated by their Honors (1) :—" That they " (the respondents) " paid dues to the Government, or became liable to pay dues to the Government, for the pilotage services of the pilot Maxwell ; and that this pilot was appointed by the Government, paid by the Government, and employed by the Government solely for the purpose of rendering pilotage services."

The word " employed " is an elastic term, and capable of various significations according to its subject matter. A man may " employ " an independent contractor or a servant, and the terms of the employment may vary ; and so before we can predicate the effect of " employment," it is necessary to ascertain and examine the terms of it, express or implied : See, for instance, *Cameron* v. *Nystrom* (2). In *Holman* v. *Irvine Harbour Trustees* (3) Lord *Gifford* used the word " employment " with reference to pilots whom he considered independent officers.

From the circumstances mentioned, the inference was deduced that the Government were principals in carrying on the business

(1) (1913) S.R. (Qd.), 64, at p. 70. (2) (1893) A.C., 308, at p. 309.
(3) 4 Ct. of Sess. Cas. (4th ser.), 406.

of piloting ships, and that the pilot in this case was their servant for whose negligence they were responsible. There is no such allegation as an ultimate fact in the special case, and its truth is strenuously contested. If, as a necessary implication, it is included in the circumstances stated—and as they are properly understood, which is essential—it of course enures to the benefit of the respondents ; but it is wholly beyond the province of the Court on this special case to proceed to try the question whether, altogether outside the mere legal effect of the Statutes and of the facts admitted, the Government in fact took up the business of ship pilots, and in fact contracted expressly or impliedly with shipowners to do the work, or, by some arrangement with the pilots not stated, became in effect their undisclosed principals. Such a state of facts was never contemplated by the case stated, and is not within it : See, for instance, *Mersey Dock Trustees* v. *Jones* (1) ; *Hills* v. *Hunt* (2). The point establishing the Government as an intentional trader would require for its determination as an inference, additional facts of a positive nature not dependent on statutory acts which were done under enactments passed for another purpose, and done by the Government as a regulative and administrative authority.

And, in addition, it would in my opinion require actual legislative permission to the Crown to become a trader as distinguished from an executive authority. I therefore do not enter upon any inquiry as to an outside trading business.

The Supreme Court has properly avoided that inquiry and treated the problem as I view it, viz. : Do the circumstances admitted by the parties and briefly stated in the judgment—and properly understood—with all the inferences of fact and law really appertaining to them, impose the responsibility contended for ?

This question—really a demurrer—we ought, I think, to answer definitely on the facts, which must be taken as the only relevant facts which either party desires to allege, and say whether they establish, as the plaintiffs claim, a liability on the part of the defendants. Order XXXVIII., r. 1, under which the case is stated, requires the parties to state such facts and documents as are necessary to enable the Supreme Court to " decide the questions

(1) 8 C.B.N.S., 114. (2) 15 C.B., 1, at p. 30.

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raised thereby," and sec. 6 of the *Judicature Act* (40 Vict. No. 6) requires the Supreme Court to decide the case; and we must, as I conceive, give the decision which we think that Court was bound to give.

The amending Act, 2 Geo. V., No. 5, has lessened the immediate importance of this case as a precedent in pilotage. But still, as *Real* J. truly says, the reasons and grounds upon which it is and must be decided are far reaching.

Besides other departments in which the same principle may easily be invoked, other States have pilotage laws very closely resembling those of Queensland; the Supreme Court, indeed, could find but little distinction between the Acts of Queensland and New South Wales. So far as I can see the Queensland Act is less stringent against the Crown contention than the New South Wales Act.

And, as matters stand, the Supreme Courts of those two States are in direct conflict upon this question.

Further, if there be an obligation on the Government to pilot ships, and if the Marine Board be treated as a mere obedient instrument acting for the Government, it seems to me to follow that the amending Act falls far short of granting the intended immunity to the Government.

There would still be liability for not supplying a pilot at all to a ship signalling for one, or for delay in doing so, or for the pilot being drunk and unable to act at all, or for his incompetency as distinguished from negligence. The Marine Board if a mere servant of the Government—and it is appointed and paid by it under the *Navigation Act* in a much more direct manner than the pilots—must, if negligently licensing a pilot, expose the Government to liability if the reasons relied on are correct.

Not only so, but a long vista of responsibility opens out in respect of all the various and far-reaching functions allotted to the Marine Board by the Act.

I turn now to the circumstances quoted from the judgments appealed from.

In the first place, it cannot, I apprehend, be laid down as a proposition of law that the facts shortly summarized by the Supreme Court of Queensland would necessarily create such liability, what-

ever other circumstances may exist. The case of *Evans* v. *Liverpool Corporation* (1) is a strong authority against such a proposition. There the doctor was engaged to "act under the *general* directions of the committee" (2); the defendants had power to charge the plaintiff with the expenses of his child's maintenance (3); and the Court found (4) that the doctor was an officer of the defendants and was paid an annual salary and in certain matters had to obey the directions of the committee. But he had a personal responsibility arising out of the nature of his occupation and duties, and that circumstance governed. Their Honors seem to feel the same principle applies here, for they say (5):—"We fail to understand how . . . the Executive Government of Queensland could enter into a pilotage contract otherwise than by undertaking to provide a competent agent or servant to perform the pilotage services in respect of which payment was to be made to them by the other party to the contract."

On the assumption of such a promise, there has been no breach, because it is admitted Maxwell was a competent, that is, a duly qualified or licensed pilot.

The respondents' argument here, however, carries the responsibility further, and as far as liability for negligence notwithstanding competency.

The pilotage cases were cited to us; and for various reasons in none of them was liability fixed on the authority sued.

On the whole those cases, particularly *Holman* v. *Irvine Harbour Trustees* (6); *Parker* v. *North British Railway Co.* (7); *Otago Harbour Board* v. *Cates* (8), and the *Bannockburn Case* (9), are quite unfavorable to the respondents' view, the last mentioned being in direct opposition.

It is unnecessary to examine these cases in detail. In all but the last one, the point now in issue was unnecessary to decide formally. But from *Holman's Case* (6), where the Statute was sufficiently similar to make the judicial reasoning useful, I collect the

(1) (1906) 1 K.B., 160.
(2) (1906) 1 K.B., 160, at p. 162.
(3) (1906) 1 K.B., 160, at p. 163.
(4) (1906) 1 K.B., 160, at p. 166.
(5) (1913) S.R. (Qd.), 61, at p. 70.
(6) 4 Ct. of Sess. Cas., (4th ser.), 406.
(7) 25 Rettie, 1059.
(8) 2 N.Z.L.R. (S.C.), 123.
(9) 12 S.R. (N.S.W.), 665.

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following opinions of the learned Judges :—(1) That the Board were bound under the Act to provide pilotage ; (2) that if they had duly "licensed" pilots, that duty would have been discharged ; (3) that a licensed pilot is an independent public officer, the granting of the licence being his "appointment" and constituting him "duly qualified" ; and (4) that in that event, notwithstanding the Board were authorized to demand and receive the pilotage dues, they would not have been responsible for the pilot's negligence. I will quote but one passage. The Lord Justice Clerk says :—"It is certain that a pilotage authority, having duly licensed a pilot, is not responsible for any fault he may commit. The licensing of a pilot is the *appointment* of a public officer."

In *Parker's Case* (1) and the *Otago Case* (2) stress was laid on the status of the pilot, and the latter case contains an accurate analysis of the reasoning in *Holman's Case* (3).

The decision of this matter of course depends on the effect of the Queensland Acts, but besides the mere textual examination of those enactments, there must be brought into consideration for their right interpretation, some long-established principles of the common law, which, in the absence of contrary provision by Statute, regulate the responsibility of one person for the acts and defaults of another.

In the first place, the law is clear that the relation of master and servant, in order to impose responsibility on the former for the acts of the latter—that is, apart from some contractual obligation for liability—imports that the former freely chooses his servant, and that the terms of his employment are that the latter is bound to receive and obey the orders of the former : See *Pollock on Torts*, 9th ed., p. 85. In this case that would mean the orders and directions of some superior departmental officer probably knowing nothing of navigation : See also *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (4), *per Blackburn* J. (5) quoting *Parke* B., and (6) quoting Lord *Brougham*. In *Waldock* v. *Winfield* (7) *Stirling* L.J. referred to the master's right of controlling the work as "the

(1) 25 Rettie, 1059.
(2) 2 N.Z.L.R. (S.C.), 123.
(3) 4 Ct. of Sess. Cas. (4th ser.), 406.
(4) L.R. 1 H.L., 95.
(5) L.R. 1 H.L., 93, at p. 114.
(6) L.R. 1 H.L., 93, at p. 117.
(7) (1901) 2 K.B., 596, at p. 605.

right of directing in what way it was to be done." See *per* Lord *Herschell* L.C. in *Cameron* v. *Nystrom* (1), where the Judicial Committee acted upon the principle that the alleged servant must be completely under the control and at the disposition of the alleged master before the latter can as such be held liable for the negligence of the former. And so is the law laid down by *Fletcher Moulton* L.J. and *Farwell* L.J. in *Smith* v. *Martin* (2). Applying this principle to the case of a pilot, the case of *The Halley* (3) laid it down that both by the common law of England and by Statute —where as here pilotage is compulsory—there is no liability of the owner of a vessel for injuries caused by the unskilled navigation of his vessel while under control of a pilot whom the owner was compelled to take on board, and in whose selection he had no choice. And this (4) is because responsibility in such case must be founded on the presumption " that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the owner." And so (5) if a pilot is entitled by law to supersede and does in fact supersede the master, the doctrine, *qui facit per alium facit per se*, cannot be applied.

By parity of reasoning, where the law, as here, requires a duly qualified and licensed pilot—a specific identifiable individuality or one of a limited number of such individualities, and no other—to take personal charge of a vessel, the principle above referred would seem, *primâ facie*, to negative the notion that another person, whether it be the Government or some other individual, is in contemplation of the same law permitted to do or is actually doing the work and controlling the pilot's actions. If that were so, the law would speak at the same moment with contrary voices. The Acts must be looked at to see whether the Government of Queensland is by law compelled to undertake, or is empowered to do and in fact has done what in law amounts to undertaking, in the words of Lord *Halsbury* L.C. in *Shaw, Savill and Albion Co.* v. *Timaru Harbour Board* (6), " in their corporate capacity to employ

(1) (1893) A.C., 308, at p. 312.
(2) (1911) 2 K.B., 775, at pp. 781-784.
(3) L.R. 2 P.C., 193.
(4) L.R. 2 P.C., 193, at p. 201.
(5) L.R. 2 P.C., 193, at p. 202.
(6) 15 App. Cas., 429, at p. 435.

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a person as pilot for the conduct and management of a particular vessel." The reference to "a particular vessel" is the important point.

If by any proper construction of the Statute the Government can be supposed to be undertaking any responsibility whatever to the shipowner, it still remains to be seen whether it can be taken to be more than promising to provide a competent pilot. There would in that event, as I have said, be no breach in the present case, because the pilot was competent—as shown by his licence for the port; he is admitted to be a "duly appointed and qualified pilot of the said port."

It was argued that the Government, having general control of pilotage and a general duty in respect of it, had a free choice, because it might have despatched any particular pilot to do this particular service, and therefore must be taken to have selected Pilot Maxwell. That, in my opinion, is answered in two ways. First, it will be found the Government had in fact no such authority. Regulation 4 places the duty on *the pilot on turn* to board the vessel and it would have been a breach of law for any departmental official to attempt to alter that, unless warranted by the regulations under the *Navigation Act*, which the Government do not make and cannot alter when made. And, next, any selection which the Government could conceivably make would necessarily be restricted to the limited class of pilots, licensed by the Marine Board, and that is met by the decision in the case of *The Hibernian* (1), where it was held that notwithstanding such a power of selection the restriction to the class operated to destroy the relation of master and servant which would arise in the case of a free choice made by the master.

On principle that must be so. Liberty merely to take one of two, where others might be preferred, offers no real freedom of choice; and somewhat to enlarge the circle of restriction while leaving the selection strictly confined to a few specified persons, and therefore still, in substance, compulsory, does not introduce the freedom postulated by the presumption on which responsibility is founded.

The case of the master of a ship, or chauffeur of a motor car,

(1) L.R. 4 P.C., 511, at pp. 518-519.

neither of whom holds any independent office or authority from or under the law, each of whom as between himself and his employer may be dismissed and controlled to the extent of being deprived of any authority to deal with his employer's property, whatever consequences may be thereupon incurred by the owner as between himself and the law, is so vitally different in fundamental position as to offer no analogy to that of pilot. As to the master of a ship see *Pollock on Torts* (*loc cit.*). The principles I have mentioned remain unaffected by such instances, and statutory language of a very distinct nature is, in my opinion, required to overcome them, and the question is whether such statutory language is to be found.

One observation is here necessary. If the facts admitted amounted to a voluntary entering upon the business of piloting ships, quite independently of and in addition to the functions of Government contemplated by the Statutes, including in that business the ordinary responsibility for the careful conduct of the persons actually performing the task—practically a guarantee of their carefulness,—then I do not deny a wholly different situation would arise. Then, though the law would still, as I view it, look to the pilot only as the proper agent to navigate the ship, yet as the Government chose to place itself in a *superadded relation* of contractual responsibility to the vessel, it might be bound to answer for the pilot's negligence. But no such allegation is made or intended, and no consideration for this additional and distinct liability appears.

The whole question is this—and the point must not be forgotten—whether reading the Statutes, and even adding to them the public service appointment and payment, and the supply of pilot boats and crews, the Government, in law, are to be considered, not by way of superadded obligation, but as their own real original obligation, the principals in the piloting of ships, and as such answering to the vessels for the negligence of the pilots as their servants, and their servants only.

In my opinion there is nothing in any Queensland Statute which contemplates, either imperatively or permissively, that the Government is to undertake the piloting of particular vessels, or to freely choose its servants for such a business; nor do I find anything which, consistently with accepted principles, places the licensed

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pilots in respect to the actual piloting of particular vessels in the relation of servants to the Government, for whose defaults the Government is responsible, both to the vessel employing the pilot, and, if so, then also to another vessel injured from which no dues are taken; nor do I think that the circumstances enumerated by the Supreme Court, with the additional fact conceded in argument, that the Government provides boats and crews to convey pilots to the scene of their operations, necessarily amount in fact to undertaking the business of piloting ships.

I would here refer to two cases which have been thought to assist the respondents, but which seem to me irrelevant.

Farnell v. *Bowman* (1) raised a simple issue. The defendant's demurrer admitted, for the purpose of the day, the plaintiff's allegations that the Government by its servants in fact trespassed and negligently lit fires on the plaintiff's land causing damage. Clearly a private individual or corporation would have been liable, and the only question was whether the Crown was liable to an action for an admitted tort. The Privy Council held that it was.

Brabant & Co. v. *King* (2) is the other case. It was admitted that the Government came into direct relation with the plaintiffs, by receiving into their own magazines the plaintiffs' property, and storing it, and charging a rent for storage. It was also admitted that the omission to take care was that of the Government by its acknowledged servants in that behalf. The defendants relied on the doctrine of non-feasance. The Privy Council held that their admitted acts constituted them bailees for hire.

I am unable to see how those cases bear on the present case, where the problem is practically reversed. The main position controverted is just what was conceded in those cases, viz., whether the Government itself ever came into direct relation with the plaintiffs, and whether the persons whose act or default is complained of were the servants of the Government in that behalf.

I therefore put those cases aside; and the only questions material I conclude in favour of the appellant. I shall state my reasons for these conclusions.

For the safety of the seafaring public and the better protection

(1) 12 App. Cas., 643. (2) (1895) A.C., 632.

of the ports of the State, the legislature in 1877 and 1896 have consolidated and amended the Statute law relating to navigation. The general oversight and supervision have been cast upon the Government, who have to find the administrative machinery for working the Act.

There are four sets of statutory provisions which are material to the present question :—(*a*) Matters involving expert knowledge and professional skill are not left by Parliament to the uncontrolled discretion of the Executive or any member of it. For these matters a Marine Board is interposed—the chairman being the port master, and though the other four members are not expressly required to have special qualifications, the Act could not be faithfully administered unless they had. The Board, though in one sense a Government department (sec. 13, and *cf. Merchant Shipping Act* 1894, sec. 713), possesses independent statutory jurisdiction and powers (secs. 10 and 11). To reduce it to a mere registry of Cabinet decisions would destroy its character. See, for instance, secs. 22, 37, 38, 40, 65, 93 and 141 of the Act of 1876, sec. 13 of the Act of 1896 and sec. 3 of the Act of 1911.

Sec. 108, the first under Part V., "Pilotage and Harbours," illustrates this, because, while allowing the Government full discretion as to delimiting ports geographically, it requires the recommendation of the Board for all practical regulations respecting navigation and public safety.

(*b*) Sec. 128 applies to pilots personally, the principle to which I have referred. The Government have no authority whatever to exercise the powers enacted in sub-secs. (1), (2) and (3) of that section. The Board alone can exercise them, albeit only when so authorized by the Governor in Council.

Those powers in logical order are: to determine the necessary qualifications of persons applying to be licensed for any particular port or portion of the coast; to grant licences to applicants; and to make regulations for the proper conduct of persons licensed as pilots and the pilot service, and for punishing the breach of those regulations, either by suspending the licence, or cancelling it, or by inflicting penalties.

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Up to that point the powers of the Board, if it is allowed to act at all, are exclusive.

It follows that pilots are subjected both as to the granting and deprivation of their licence, and the regulation of their conduct as pilots, to the *Navigation Act* and the Board's Regulations made under it and to those alone. Interference under public service regulations would be absurd and inconsistent. I would add that if navigation regulations are to be considered repealed by the public service regulations, so must sec. 128 itself be so considered.

(*c*) Sec. 128 also provides for remuneration, and is in my opinion in full force and justifies the Regulations. Fixing remuneration is not a matter of expert skill, but of policy and revenue, and has been appropriately left to the Government alone. But it is important to note that the power which Parliament conferred of deciding how pilots are to be remunerated is a power intended to be exercised by the Governor in Council, that is, by Order in Council under the *Navigation Act*, not under the *Public Service Act* or any other Act, and in no way affects the status of pilots as otherwise existing. The Government may exercise their discretion differently for different parts of Queensland, as, for instance, the Torres Straits pilots are to be paid in one way, and other pilots in another. But that is, as I say, apart from their status.

Notwithstanding anything in the Act to the contrary, as the section says, which includes the appropriation to the Consolidated Revenue of the pilotage dues among the other imposts (the repealed sec. 160 of the Act of 1876 and now sec. 8 of the Act of 1882) the Governor in Council might under that power appropriate all or part of those dues to the pilots. If such an order were made *simpliciter*, it is difficult to see how that would alter the status of the pilot. It is equally difficult to see how a decision to pay him a fixed sum by way of salary could affect it.

(*d*) By sec. 113 pilotage is made compulsory upon every non-exempt master entering or leaving port "whereat any pilot shall have been appointed."

In my opinion this section, properly construed and given effect to, is fatal to the respondents' case, for reasons inherent in the subject matter and to be presently mentioned. The respondents have

placed a construction upon it which I am unable to accept. They interpret the word "appointed" as referring to an appointment under the *Public Service Act*; and draw a distinction between a pilot so appointed and a pilot merely licensed and not appointed under the *Public Service Act*. I can see no trace of such distinction. In my opinion "appointed" and "duly qualified" and "authority" all refer to the licence mentioned in sec. 128. The word "appointed" is a common expression for a "licensed" pilot. It is so used in British Statutes of a like character. The judgments in *Holman's Case* confirm that sense, particularly where the Lord Justice Clerk (1) says "the licensing of a pilot is the appointment of a public officer." Lord *Ormidale* says that to "license" and to "authorize" pilots mean the same and not different things. Further on he says: "a duly qualified or licensed pilot is a public officer." So *per* Lord *Gifford*, who observes: "the words seem to be used as synonymous or explanatory of each other." This is important both as to sec. 113 and sec. 117.

The course of local legislation is in accordance with this.

The Act 6 Geo. IV. No. 10 (1825) made provision as to ports and harbours "wherein any pilot or pilots shall or may have been *appointed* in manner hereinafter mentioned." Then by sec. 2 it empowered the Governor himself to grant "licences" to such persons as he might "deem fit and qualified to act as pilots for such ports and harbours" as he thought necessary. The licence was to contain the name, age, stature, complexion and place of abode of every such pilot," and "certify that he is *duly qualified* to act as pilot for such port."

The grant of the licence was his "appointment," and the licence itself was his *authority*, to satisfy a master compelled to accept pilotage that he is delivering up his ship and all it contains to the duly qualified pilot. There we have at the very beginning the word "appointed" in its accepted sense.

Subsequent Acts were passed, but no change was made down to 1862 with regard to the Governor's direct power of appointment under this class of Act. In 1862 the *Marine Board Act* was passed creating a corporation, called the Marine Board, practically the same

(1) 4 Ct. of Sess. Cas. (4th ser.), 406, at p. 432.

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as the present. It was given the express power of the "licensing, appointing and removal" of pilots. "Licensing" and "appointing" are synonymous, and "removal" means the opposite of both. But appointment to the public service as ordinarily understood was in the hands of the Governor in Council, never in those of the Marine Board.

Apart from the effect of the "appointment" under the *Public Service Act* in the present case, I should think—were it not for the opposite view entertained by my learned brothers *Barton* and *Powers*—that it was quite clear the pilot on being licensed for the port of Brisbane was thereby "appointed" for that port within the meaning of the Navigation Acts, and was an independent pilot—independent, that is, of all control as to the navigation of the particular ship committed to his charge, except so far as regulations under the *Navigation Act* bound him.

Sec. 113 compels the master to deliver his ship to the first duly qualified—that is, licensed—pilot who shall board her. And, as the section compels the pilot, if required, to produce his "authority" so as to identify him, it follows that the duty is *personal*. Life and property are not to be handed over by the captain to anyone who is not shown to be authorized as a duly qualified pilot. And it follows, as I think necessarily, and this is the central feature of the situation, that in the performance of his responsible duty, no interference can be permitted by any departmental administrative superior.

How, then, does the fact of an appointment under the *Public Service Act* and the payment of a stated salary alter the positions? I have grave doubts whether a pilot is strictly in the public service at all, and whether the *Public Service Act* covers his case. But it may do so in the extended sense. The Audit Commissioner, the Sheriff, a police inspector, are all in the public service. But they have some personally official duties which are beyond the control of the administration, and for which the Government could not be held responsible. See *Enever* v. *The King* (1).

The appointment of a pilot under the *Public Service Act* and the payment to him of a salary under that appointment cannot, as I conceive, alter his status under the Navigation Acts, or attract to the

(1) 3 C.L.R., 969.

Government as a principal the functions specially entrusted to him personally. The cancellation of that appointment still leaves him a "licensed pilot," that is, an appointed pilot under the *Navigation Act*, and his removal is to be by the Board (sec. 128 of the Act of 1876 and sec. 3 of the Act of 1911).

The device of an appointment and payment under the *Public Service Act* is wholly collateral to the Navigation Acts, and has arisen in a manner and for a purpose easily traceable.

The Act of 6 Geo. IV. No. 10 was passed by the New South Wales legislature in 1825, and provided that the pilot's remuneration was to be fixed by committees nominated by the Governor, the approval of the Governor being required for the rates fixed. In 1832 the Act 3 Will. IV. No. 6 itself fixed the rates. In 1840 the Act 4 Vict. No. 4 increased pilotage rates for Port Phillip, now Victoria; in 1843 the Act 7 Vict. No. 12 altered the rates; and in 1850, by the Act 14 Vict. No. 37, the remuneration was again amended. In all these Statutes the rates were appropriated to the pilots themselves.

The Act 22 Vict. No. 4 (1858) marks a distinct change in the character of the pilot's remuneration. Under that Act the statutory attitude of the Government in relation to the matter is that which in substance continues to the present day. If there be any difference, it is that the later substitution of a statutory corporation with specified powers and duties, for the direct action of the Government in respect of the licensing and authorization of pilots, is in favour of the Government's contention. Sec. 3 of the Act of 1911 strengthens this difference. It is plain that if in point of law the Queensland Government now undertakes pilotage operations, *à fortiori* the New South Wales Government, to which the appellants have succeeded, did so then, though no one has ever heard the suggestion until the present claim and that of the *Bannockburn* (1). And so the Act I am now referring to is of the first importance. "Pilot establishments" were already for many years organized by the New South Wales Government under the control of a Pilot Board. The legislature had, as we have seen, from time to time amended the law as to pilotage rates, so as to provide a fair remuneration

(1) 12 S.R. (N.S.W.), 665.

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to pilots without unduly pressing upon the shipping coming to the young colony.

Up to 1858 the New South Wales Government had clearly assumed no responsibility for securing that remuneration, beyond obtaining enactments fixing a scale of payments to the pilots by ship masters direct.

Then comes the new Act. What was its purpose? The preamble is the index to the reason of the change. It recites:—"Whereas the pilotage rates as at present levied are insufficient to maintain the pilot establishments of New South Wales and it is expedient to increase the same and to impose certain harbour dues and to make other provisions for regulating the pilot establishments of the colony." Nothing whatever is said about the Government entering upon the business of piloting ships, or of subordinating the pilots to the position of mere servants of the Government. It enacts: (1) Increased pilotage rates (secs. 1 and 2); (2) these and all other rates authorized by the Act to be paid to the Collector of Customs, or, in his absence, the pilot, and to be then accounted for to the Treasurer and paid into the Consolidated Revenue Fund (sec. 8); (3) the Governor to grant licences to persons to act as pilots for any port; and to revoke them at pleasure; unlicensed persons except in case of urgent necessity acting as pilot to be liable to a penalty (sec. 9); (4) Governor in Council to have power to make regulations to carry out the Act and by them determine "how any pilots to be *appointed hereunder* shall be remunerated and whether by fixed salary or partly by salary and partly by any and what proportion of the rates and dues authorized by this Act or whether solely by the receipt of the whole of such rates and dues or of any and what part or proportion thereof And all such regulations when published in the *Government Gazette* shall have the force of law" (sec. 10).

The Queensland legislature, so far from taking greatly Executive powers, interposed the Marine Board by Act of 1862.

From all the legislation and other circumstances mentioned, I take the true legal conclusion to be that Parliament has finally kept two distinct aims in view. First, it preserves the well known and necessary status of a pilot, to whose functions the observations of

Parke B. in *Lucey* v. *Ingram* (1) are as applicable in Australia as in England. And while preserving that status it has placed the important duty of selecting, and controlling generally the conduct of, pilots in the hands of an expert and non-political board; giving the general oversight of the whole matter to the Government so that there shall be no lack of duly qualified pilots, and so that the special board shall perform the functions assigned to it by the law without going beyond the limits prescribed and, within those limits, shall act with due care and without unnecessary activity involving expense: *Cf. per* Sir *Gorell Barnes* P. in *The Bearn* (2).

And, next, it enacts that a better system of remunerating persons engaged in the recognized duties of pilots should be introduced in place of those which were found insufficient, so as to attract and keep properly qualified pilots without unduly pressing upon shipping. The precise method of doing this is left to the discretion of the Government, who have chosen the form of a fixed salary, and for convenience' sake, and probably also for the sake of Parliamentary control over expenditure, the device of formally appointing the pilots as public servants under the *Public Service Act* and fixing their salaries thereby has been adopted instead of an Order in Council. But it must be noted that an Appropriation Act does not create duties, or transfer functions, or vary the status of persons under the Acts, or repeal those Acts or create rights in third persons. The legislature by authorizing the remuneration to the pilots did not authorize direct trading by the Government.

Nor do I think the *Public Service Act* in any way derogates from the special legislation of the Navigation Acts. They regiment, discipline, and variously affect the rights and duties of those who are members of what is in fact the public service; but they do not enlarge the scope of that service. And under sec. 128 of the *Navigation Act* the Government are not authorized to remunerate any but pilots already "licensed" by the Marine Board, or, in other words, pilots already "appointed" within the meaning of sec. 113; and sec. 128 is the justification for the inclusion of the pilots in the Estimates. So that the two "appointments" are alike only in name; but to confuse them and lose sight of their real distinction

(1) 6 M. & W., 302, at p. 315. (2) (1906) P., 48, at p. 84.

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and several purposes, is to lead to what, with deference, I think a fatal misconception. The line of demarcation that separates them must be preserved. On the one side, the navigation side, stands the pilot in his relation to the public and his duty to the law, not under the obligation of conforming to Government commands as to how he shall perform his duties, but bound to navigate a ship requiring him, to the best of his ability and judgment. On the other side, the public service side, he stands in his relation to the Government, but only in respect of his salary, and perhaps some details quite outside and not inconsistent with his duties as a pilot. The Government, which is foreign to his personal duty, does not pass the line, either to license, remove or control. Whatever power or jurisdiction the Government or any member of it may have on the other side of the line is derived from the *Navigation Act* or regulations made under it, as in regulation 13, and not by virtue of the *Public Service Act*. On the navigation side the pilot is bound to obey the Acts, and the regulations made under them. So far as "appointment" depends on intention, the first regulation made under sec. 128 indicates that both Marine Board and Government intended that the licensing of pilots for a port should amount to an "appointment" for that port. It is really a recognition of the conventional meaning of the word in that connection.

Regulation 2 requires every pilot to strictly observe these and all Port and Harbour Regulations, and prevent by every means in his power any infringement of the same. This fixes the duty of obedience to the regulations under the *Navigation Act*.

Regulation 4 requires "the pilot on turn to board the first vessel requiring his services." This makes it the legal duty of the pilot who happens to be on turn to board the vessel. He is beyond the control of the Government regarded as a business concern, itself conducting pilotage operations and entitled as an employer to select any particular servant for a given operation, even from amongst the limited class of licensed pilots. It would be a breach of duty for a pilot to obey an order contrary to regulation 4.

The other regulations, particularly No. 13, emphasize the exceptional position of pilots, and, as I view the matter, render it impossible for a pilot to be subject to the administrative regula-

tions under the *Public Service Act* so as to make him the servant of the Government *quâ* the performance of his functions.

Besides the affirmative provisions of the regulations, there are some negative provisions in the Act itself which give additional force to these considerations. I refer to the latter portions of secs. 87 and 127. As to sec. 117, if a line of demarcation were to be drawn between appointed on the one hand and licensed on the other, it would mean that a pilot could be appointed without being licensed, which would be astonishing. And if the Inner Route and Torres Straits pilots are to be considered as merely "licensed" and not "appointed" within the meaning of sec. 113, the extraordinary consequence would be, that as to that part of Queensland there is no compulsory pilotage.

The provision which Government, under the authority of Parliament, makes to provide boats and crews, is evidently made because the salary is computed on the basis of the pilots not supplying these necessary facilities to reach the vessels they have to navigate, and that is perhaps because Government action and supervision may advantageously extend so far. But once the Government have placed the pilot on the vessel, they have reached the limit of their corporate action, and it is his personal duty and responsibility that then come into play, and no Government right of interference or responsibility for his default follows him on board.

Then the fact that dues are taken is, in my opinion, nothing to the point. They are an impost, and are taken, not by will of the Government, but by force of law, and do not create any personal or direct relation as to actual pilotage operations between the Government and the shipowner. In *Holman's Case* (1) the mere authority to demand and receive pilotage dues was not thought sufficient to make the defenders responsible for the pilot's negligence. And see as to this the *Otago Case* (2). See a case of exemption from this taxation in sec. 5 of the Act of 1882, and some common taxation enforcement provisions in secs. 3, 9 and 10 of the same Act. So far as they affect the construction of the Act they are a part provision for the necessary expenditure which the Government incurs in administering the Act by maintaining pilot establishments, and paying the pilots, but this

(1) 4 Ct. of Sess. Cas. (4th ser.), 406. (2) 2 N.Z.L.R. (S.C.), 123.

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is colourless as affecting the question at issue here. The appropriation of the dues to the revenue leaves the way open to the Executive to select the best and most effective means of remunerating the pilots. And the pilotage rates are (sec. 8 of the Act of 1882) payable primarily to Customs officers, now to any officer appointed to collect them (Act of 1901, 1 Edw. VII. No. 13), and only secondarily to the harbour master or pilot.

I would add at this point, that if Maxwell, the pilot, is to be taken as appointed under the *Public Service Act* to a position which, being professional, connotes independence of judgment, and discretion, and freedom from control in the manner of performing his duty, then there is nothing inconsistent with his status under the Navigation Acts, and the respondents' arguments lose their force.

For these reasons I see no ground for the asserted responsibility of the Government on the law as it stood when the events sued upon took place.

Since then, the Queensland Parliament has passed an amendment Act (2 Geo. V. No. 5) assented to 26th October 1911; and this Act, at first sight, caused me more hesitation than anything else in the case, though it was not pressed except as drawing a distinction hereafter referred to.

But, as we were informed, this Act was passed after two heavy claims had been made, and of course before there had been any judicial determination of the law, and while the ground of the claims was vigorously denied. The Act, therefore, cannot be regarded as any assent to a judicial interpretation of the former Act (see *Attorney-General for Victoria* v. *Melbourne Corporation* (1)); nor can it reasonably be looked upon as a declaration of liability for the existing claims. These the Government were then and are still resisting on the ground of non-liability for the pilot's negligence. The Act is, in my opinion, first, an amendment of the law by taking away (sec. 2 (1)) the civil liability of the pilot himself for negligence and improper navigation. His responsibility under Marine Board Regulations continues. It is also a precautionary declaration of non-liability of the Government for the pilot's fault—perhaps thought more advisable to add in view of the preceding sub-section,

(1) (1907) A.C., 469, at p. 474.

and in any case to prevent further claims in the event of an adverse decision in respect of the claims already made. The interpretation of the existing law is still for the Court.

Sub-sec. 3 leaves entirely open the question of liability under the prior law; and so, even if the legislature were under a misapprehension of what that law was, without authoritatively declaring it, the law remains as it was, and the Court must declare it as it really is.

The respondents contended that the Act drew a distinction between licensed and unlicensed pilots; and deduced from that a distinction between pilots "appointed" and "not appointed." The former, it was said, were recognized as "employed" by the Crown, and this was said to be an admission that the Crown carried on the business of piloting. I can only say I fail to follow either the premises or the conclusion. The words "any pilot in the employment of the Crown" refer to the pilots in fact "appointed" in a sense under the *Public Service Act*; but that is subject to what has already been said. The expression involves no such assumption as that which is necessary to the respondents' case. At most it would place the pilot in the same position as the doctor in *Evans* v. *Liverpool Corporation* (1) and *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2).

In my opinion the appeal should be allowed; the first question in the special case should be answered in the negative, and the second by saying the respondents should pay the costs of the special case.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. In this special case the Court is asked to say as a matter of law whether the Government of Queensland is responsible for the negligence of William Henry Maxwell, a pilot, in the navigation of a vessel in the port of Brisbane, if in fact he was negligent.

In the course of the argument it appeared that the alleged liability was based on the hypothesis that the Government of Queensland was carrying on the business of pilotage and was itself undertaking the pilotage of the vessel in question, and that the pilot, while

(1) (1906) 1 K.B., 160. (2) (1909) 2 K.B., 820.

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managing the navigation, was acting as the servant or agent of the Government.

On the examination of a number of Statutes and regulations submitted for the consideration of the Court, we have come to the conclusion that they contain nothing which compels the Government to carry on such a business, and nothing which prevents it from doing so. We are also of opinion that there is nothing in the nature of the duties to be performed by a pilot which is inconsistent with the existence of the relationship of master and servant between the Government and the pilot, with all the consequences that ordinarily follow from such a relationship. It follows from this that, in our opinion, the Government might in law have undertaken the liability which is imputed to it by the plaintiffs.

Should we go a step further and say whether it did in fact embark in the business of pilotage, and whether the pilot Maxwell was acting as its servant and agent in the conduct of such business? We are invited to determine this question by drawing inferences from the facts set out in the special case and some additional facts admitted by the parties during the argument. From these facts some inferences follow as a matter of course; some may be drawn one way or the other as a matter of individual opinion. We do not think that we can arrive at any satisfactory decision by means of inferences which necessarily follow from the facts. Should we, then, proceed to draw such inferences as recommend themselves to our minds, though they might not be acceptable to the minds of others? We think not. Were we to do so, we should be assuming the function which is ordinarily and properly performed by a jury under the direction of a Judge or by a Judge sitting as a jury at the trial—a function which was never intended to be exercised by the Supreme Court, or by this Court, under the power to draw inferences conferred by rule 1 of Order XXXVIII. of the *Rules of the Supreme Court* of Queensland.

The parties have not consented to any judgment being entered in accordance with, or as a result of, any answers that may be given to the questions submitted, and we have been informed that the case will in any event go down for trial on other issues of fact.

In our opinion the Court should decline to answer the questions

asked, should set aside the order of the Supreme Court, and should leave the mixed question of law and fact as to the liability of the defendants for the alleged negligence of the pilot to be disposed of with the other issues at the trial.

POWERS J. This appeal is from the unanimous judgment of the State Full Court of Queensland of 20th February last. The facts were set out in a special case, which concluded with questions submitted for the opinion of the Court.

The main question submitted was: "Assuming that the said stranding was due to the negligent navigation of the said vessel" (*Eastern*) "by the said William Henry Maxwell in the execution of his duty as pilot in charge of the said vessel, is the Government of Queensland liable to the plaintiffs for the damage caused by the said stranding?"

The special case was submitted to the Court under Order XXXVIII., rules 1-6 of the *Rules of the Supreme Court* of Queensland.

Rule 1 concludes with the following words:—"Upon the argument of the case the Court and the parties shall be at liberty to refer to the whole contents of any documents referred to therein, and the Court shall be at liberty to draw from the facts and documents stated in the case any inference, whether of fact or law, which might have been drawn therefrom if they had been proved at a trial."

Under that Order, I think this Court ought to express an opinion on the question submitted, and to say whether the Queensland Government is or is not legally liable to the plaintiffs on the facts stated and admitted. The special case was, of course, agreed to in order to avoid the expense of a trial.

The question submitted is a very important one, not only affecting the parties to this case, but also every Government in the Commonwealth.

After what has been said by my learned brothers, who have arrived at three different conclusions (differing as to the necessary inferences to be drawn in this case), I think it right to refer to the material facts admitted, to the history of the legislation and to the relevant pro-

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visions contained in the Acts and regulations in force; and to state fully the reasons why I agree with my learned brother *Barton* in holding that the Supreme Court was right.

On the facts stated in the special case, coupled with the documents submitted and the admissions made during the argument (to which I refer later on) and the provisions contained in the Acts and regulations also referred to, this Court was asked by counsel for the Crown to hold that the Government was not legally liable to the plaintiffs, assuming negligence of the pilot, for the following reasons:—

The Government had not taken over the pilotage or undertaken the work of pilots, but (pilotage being made compulsory) it had only provided qualified pilots licensed by the Marine Board—the pilots so licensed being under the control of the Marine Board of Queensland.

Further, the Statutes referred to did not cast on the Government the liability of carrying on, and did not even empower the Government to carry on, pilotage or the work of pilots.

The appointment of Maxwell under the *Public Service Act* was only formal, and did not affect his duties as a pilot.

It was further contended that even if the Government had taken over *pilotage*, and acted as pilots through its officers the pilots, it was not liable to the plaintiffs for two reasons: (*a*) the pilot had to carry out statutory duties and could not be controlled in the exercise of those duties by the Government; (*b*) the work of a pilot was so special that the Government (assuming it was the employer) would not be liable to the plaintiffs because the pilot had to exercise special skill and could not be controlled in the performance of his duties as pilot.

I agree that the decision of this matter depends on the facts stated in the case and admitted on the appeal with all necessary inferences, and on the effect of the Statutes and regulations to which the Court has been referred.

The facts set out in the special case include the following:—

The master of the *Eastern* was not exempt from pilotage, and the pilot, Maxwell, went on board the vessel, took charge as pilot thereof, and proceeded to move and conduct the said vessel to sea. The Governor in Council on 20th November 1899 appointed

Maxwell to be pilot, Brisbane, but he was not duly licensed by the Marine Board of Queensland to act as pilot for the port of Brisbane until 13th March 1900. The Marine Board, before the appointment, suggested to the secretary of the Public Service Board that the position should be given to the pilot Maxwell. (Strange words if the Board had the power of appointment.) The appointment of 23rd December 1899 reads :—" His Excellency the Lieutenant-Governor, with the advice of the Executive Council, and upon the recommendation of the Public Service Board has been pleased to appoint William Henry Maxwell to be pilot, Brisbane, in the room of John Mackay resigned." The vessel stranded and took ground within the limits of the port of Brisbane while in charge of Maxwell. Certain annexures to the special case show that Maxwell had been in the service since February 1878, and that he had held the position of pilot at Thursday Island, Queensland, from 1892 to December 1899. From and after 13th March 1900 Maxwell continued to be, and was on 25th January 1911 (the date of the stranding of the vessel), a pilot for the port of Brisbane. Maxwell as pilot was in receipt of a salary wholly paid out of the Queensland Government Consolidated Revenue Fund, and received no other remuneration or reward for his services. Maxwell's name appears in the Queensland Blue Book for 1911, which was annexed to the case; and in that annexure it appears that Maxwell's number on the Public Service List 1912 was 82P; Present Office—Pilot; Place—Brisbane.

All pilotage rates are paid into the Consolidated Revenue, and the Government derived no other pecuniary profit or advantage from the pilotage of the vessel by Maxwell.

The writ stated that the claim was for damages arising from negligent control and navigation and conduct to sea on 28th January 1911 of the vessel by the servant of the said Government.

Negligence is assumed for the purposes of the special case. Other facts mentioned by my learned brothers need not be repeated in this judgment.

The admissions made and accepted during the argument include the following :—(1) That the appointment of Maxwell in December 1899 above referred to was made under the *Public Service Act* 1896;

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(2) that Maxwell was a public servant; (3) that a proclamation had been issued in 1867 since which pilots had been treated as in the civil service and classified in the professional division; (4) that pilotage is and was compulsory at the port of Brisbane when the master of a vessel is not exempt from pilotage; (5) that the Government supplies the plant—that is, steamers and boats—for the pilots appointed by the Governor in Council, but does not supply the plant to pilots licensed under special regulations and not appointed by the Governor in Council.

In addition to the facts set out in the special case and the facts submitted and accepted on the appeal, the Court was referred by counsel for both parties, as a necessary part of the case, to (1) a pamphlet containing "Regulations to be observed in the ports and harbours of Queensland and other information connected with shipping;" (2) the different Harbour Pilotage, Marine Board and Navigation Acts passed since 6 Geo. IV. No. 10 (1825) to date; (3) the Civil Service and Public Service Acts passed in Queensland since 1861.

I have referred to most of the material facts stated in the special case, and to some of the admissions made and accepted during the hearing of the appeal. I now refer to some of the Acts and regulations to which counsel on both sides directed the attention of the Court to enable it to decide whether, on the facts and the Statutes and necessary inferences therefrom, the Government had or had not taken over the pilotage of vessels and undertaken the work of pilots, or only provided qualified pilots licensed by a licensing authority (the Marine Board). The material provisions of the Acts passed from 6 Geo. IV. No. 10 to the *Navigation Act of* 1876 have been fully dealt with by my brother *Barton* in his judgment, and I need not read them again.

I agree that under the Acts dealing with pilotage from 1832 to 1858, it is clear that (1) pilotage was compulsory; (2) the Government was only a licensing authority providing qualified pilots who made contracts with masters of vessels, the pilots receiving fixed pilotage fees for their own benefit.

The Act of 1858 (passed two years before Queensland became a separate colony), while continuing compulsory pilotage, changed this

arrangement or system of conducting pilotage. All pilotage rates were to be paid thereafter into Consolidated Revenue. Pilots not licensed by the Government were liable to a fine of £50 if they acted as pilots, and the Government was authorized by the Act to determine the pilot's remuneration, and whether it should be at a fixed salary or otherwise.

Payment of pilotage rates to the Crown was secured by providing that vessels should not be cleared until such rates were paid.

Queensland took over the system in 1860. In 1862 the *Marine Board Act of* 1862 was passed. Under this Act the same system appears to have been continued with exceptions already mentioned in the judgments delivered, particularly in secs. 6, 8 and 9.

By sec. 6 the Board was subjected to the general supervision, control and direction of the Treasurer of the Colony and to fulfil and carry out any direction which the Treasurer might from time to time give to them in writing touching any matter entrusted to them or performed or authorized to be performed by the said Board.

By sec. 8 the Board could, with the consent of the Treasurer, appoint certain named officers of the Board and other officers (except solicitors).

By sec. 9 the Board was to be the department to undertake (*inter alia*) the licensing, appointment and removal of pilots, the maintenance of pilot establishments, the punishment of persons acting as pilots without a licence, the amount (save as therein provided) of pilotage dues, &c., and to make such rules and regulations subject to the approval of the Governor in Council as it might deem necessary for the better carrying out of the powers thereby conferred on it, and to appoint fines for the enforcement thereof.

At the time this Act was passed no *Civil Service Act* had been passed in Queensland, and the appointment and removal as well as the licensing of pilots was left in the hands of the Marine Board as a department, subject to the control and direction of the Government.

The first *Civil Service Act* was passed in 1863, to which I shall refer later on.

In 1870 the *Pilotage Act of* 1870 (34 Vict. No. 14) was passed, but no material alteration was made by that Act.

In 1876 the Queensland legislature passed the *Navigation Act of*

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1876, which repealed all Acts then in force dealing with pilots and pilotage from 7 Will. IV. No. 2 to 34 Vict. No. 14. This Act is still in force.

Under this Act pilotage is still compulsory, and all moneys received for pilotage rates are to be paid into Consolidated Revenue.

I need not repeat the sections already quoted in the judgments delivered, or refer at present to any sections except those which show how the *Navigation Act of* 1876 differs materially from the *Marine Board Act of* 1862.

The Act, in my opinion, greatly modifies the powers given to the Marine Board by the *Marine Board Act of* 1862, so far as pilots and pilotage are concerned, in the following ways (amongst others):— (Sec. 4) The Governor in Council instead of the Board has to appoint the secretaries, inspectors and other officers, clerks and servants of the Board necessary for carrying into execution the provisions of the Act (sec. 12). The Board is to continue to be the department wherein the business of the shipping offices should be conducted (sec. 13)—pilotage not being mentioned. The powers and authorities of the Board are to be subject to the Treasurer. The Board is authorized within the limits of its jurisdiction (sec. 11) to carry out the provisions of the second, third and fourth Parts of the Act and such other portion of the Act in which any power or authority is expressly or impliedly conferred upon such Board, but the Board is not expressly authorized to carry out the provisions of Part V., secs. 108-152, including pilotage.

Parts II., III. and IV., referred to in sec. 11 are: (II.) Examinations and Certificates of Masters Mates and Engineers (secs. 22-42); (III.) Steam Navigation and Regulation of Passenger Vessels (secs. 43-79); (IV.) Safety and Prevention of Accidents (sec. 80-107).

The Marine Board is given the fullest powers to deal with Parts II., III. and IV. (secs. 22-107); but the legislature omitted to give the Board any similar powers as to pilots and pilotage, but only authorized the Governor in Council to give the Board limited powers, and then subject to the Government control.

The powers directly given to the Board by sec. 9 of the *Marine Board Act of* 1862 as to licensing, appointing and removal of pilots, the maintenance of pilot establishments, the punishment of persons

acting as pilots without licences, &c., were taken away by the repeal of that Act without giving to the Board directly any of the powers mentioned.

The only power given by the Act as to the matters referred to (except to the Board to recommend to the Treasurer) is to the Governor in Council, by sec. 128, to authorize the Marine Board to do certain of acts mentioned in sec. 9 of the *Marine Board Act of* 1862, not including the appointment or removal of pilots.

The authority of the Governor in Council to give those limited powers to the Board does not appear to have been exercised at all until the Regulations of 1891 were passed (16 years after the Act was passed), and the regulations then passed by the Governor in Council only give the Marine Board power to license pilots: See regulations, pp. 44 to 46 of the "Regulations Pamphlet." The Governor in Council, or the Marine Board with the approval of the Governor in Council, by these regulations did not place the pilots under the control of the Board.

The regulations referred to are headed "Regulations relative to the Supervision, &c., of the Queensland Government Pilot Service," (see p. 43), and the applications approved of are only for licences to persons in the "Queensland Government Pilot Service" (see Form Schedule A., "Regulations Pamphlet," p. 46).

The licence when issued under these regulations is clearly intended only for the purpose of certifying to the competency of the person employed or to be employed in the Queensland Government pilot service.

The granting of a licence to act as a pilot under this application appears to me to only evidence the fitness of the licensee; and his right to so act is no more than a granting of a master's certificate under the provisions of sec. 23 of the *Navigation Act*, or a licence to take charge of a vessel under sec. 65 of the same Act.

Under sec. 128 the Governor in Council may authorize the Board "to make regulations for the proper conduct of such pilots and pilot service and for punishing any breach of such regulations by suspension or cancelling of such licence or by the infliction of penalties."

Counsel for the Crown failed to show the Court that the Governor

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in Council had under sec. 128 ever authorized the Board to make regulations for the punishing by the Board of any breach of such regulations by suspension or cancellation of licences or by the infliction of penalties.

The only regulation submitted was regulation 15 (Regulations Pamphlet, p. 45), under which the Board has only power to inquire into any charge against a pilot and report with recommendations to the Treasurer.

As to the regulations for the proper conduct of such pilots and pilot service, the only regulations submitted to the Court are the few regulations set out on pp. 44-46 of the "Regulations Pamphlet."

These regulations do not appear to me to interfere in any material way with any provision of the *Public Service Act* for the control of public servants, but are special to part of the work of a pilot only. It is well known that all departments have special regulations, but the officers remain public servants subject to the general *Public Service Act* and regulations.

The suspension of a pilot under rule 13 has to be by the harbour master, a Government officer, not by the Marine Board.

The Marine Board is not authorized to punish pilots for any offence committed by them in the execution of their duties as pilots. To allow the Board to do so at the time this action was instituted, would have been inconsistent with the *Public Service Act* (to which I refer later on), which protects Government officers from suffering detriment or punishment for offences committed by them except in accordance with that Act.

Under the *Navigation Act of* 1876, sec. 108, the Governor in Council, not the Board, is to define the limits and the boundaries of ports, and on the recommendation of the Board may make rules for (*inter alia*) regulation, safety and navigation of vessels and shipping, &c.

By sec. 114 the Governor in Council on the same recommendation may alter the signals fixed for requisitions of pilots.

The pilotage rates not fixed by the Act are to be fixed by the Governor in Council.

Even under sec. 128 any powers the Board can exercise as to

pilots and pilotage are dependent on the authority of the Governor in Council.

Under sec. 128 the Governor in Council may authorize the Board to grant licences to persons to act as pilots for any port, not to appoint or remove them.

The Court was also referred to the *Navigation Acts Amendment Act of* 1911. This is an Act passed before any decision of any Court on the question of the liability of the Government for the negligent acts of a pilot, and before the writ in this case was issued; but it was admitted it was passed after two claims had been made against the Government for damages caused by the negligence of pilots—one being the claim in question.

Counsel for the respondents relied on this Act to show: (1) that the legislature dealt with the pilots as in the employment of the Government; (2) that the Act was passed to relieve the Government from liability in future for damage caused by the negligence of pilots; (3) that sec. 1 refers to pilots in the employment of the Crown, and sub-sec. 2 refers to any pilot.

This difference, they contended, was necessary, because some pilots are licensed by the Marine Board who are not the Government servants.

Licensed pilots not in the employment of the Crown are licensed by the Marine Board under special regulations for special service (see p. 47 of the "Regulations Pamphlet"), and a limited number of licences only are to be issued (see Regulations). These pilots are allowed to receive the pilotage rates fixed by the Governor in Council and to retain them for their own benefit. They are not appointed by the Governor in Council.

These regulations were authorized under the proviso to sec. 128 to which reference has been made by my brother *Barton*.

The Marine Board is authorized in the case of misconduct or of neglect of any of these special pilots not in the Government service to suspend or cancel his licence (not to investigate and report only to the Treasurer as in the case of the Government pilots). The licensed pilots (not appointed by the Governor in Council) receive the pilotage rates for their own use, and they have to provide their own boats and vessels. The Government provides all boats and vessels used in the

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Government pilot service so far as it is carried out by the pilots appointed by the Governor in Council.

In the case of special pilots referred to, not appointed by the Governor in Council, the Government may not have done more than provide qualified pilots.

Counsel for the Crown contended that the appointment of the pilot under the *Public Service Act* is only formal, and does not affect his position as a pilot because he is licensed by, and is under the control of, the Marine Board.

I do not see from any fact, Statute or regulation submitted to the Court that any provision has been made for the appointment, promotion, dismissal or punishment of pilots except under the Civil Service and Public Service Acts.

The only inference to be drawn from the *Navigation Act of* 1876 and the Regulations thereunder is, I think, that pilots are entirely under the control of the Governor in Council direct or by delegation through the Marine Board, and not under the control of the Marine Board.

Respondents claimed that the pilots were officers under the Civil Service and Public Service Acts mentioned to the Court, and therefore entitled to the benefit of the provisions of those Acts.

The first Act passed in Queensland dealing with the civil service was the *Civil Service Act of* 1863 (27 Vict. No. 18), to establish an equitable and uniform system of appointment, promotion and dismissal of officers, &c.

The pilots in the Government pilot service in 1863 previously appointed by the Governor in Council were, in my opinion, officers in the public service under that Act. See particularly sec. 3 already referred to.

It was, however, admitted during the argument that pilots were classified in the professional division of the civil service in 1867, if not before, and have continued to be so classified since.

The *Civil Service Act of* 1863 was repealed in 1869, except as to rights of officers thereunder.

Maxwell, the pilot in this case, was appointed in February 1878. No new Civil Service Act was passed until 1889.

In 1889 the *Civil Service Act of* 1889 (53 Vict. No. 10) was passed.

On the passing of this Act Maxwell was, in my opinion, an officer in the civil service, that is, a person employed in the civil service as therein defined (see sections already quoted). If he was not such an officer at that time, he certainly was on his appointment after the Act was in force, as pilot at Thursday Island, in 1892.

Under secs. 33, 35 and 40, an officer could not be dismissed or suffer any other penalty or be suspended for improper conduct, incompetency, neglect of duty or breaches of the Act or regulations, except in accordance with the Act; and under sec. 36 the Governor in Council might, after inquiry and report, acquit or punish by dismissal or otherwise.

By sec. 36 the Governor in Council, after inquiry and report of the Public Service Board, had power to acquit or punish any officer.

Sec. 40 declared that if any officer was negligent or careless in the discharge of his duties in minor matters the permanent head of the department might impose a penalty not exceeding £5, but in such a case the officer could appeal to the Public Service Board.

If, therefore, the Marine Board had by the Act of 1876 any power to punish pilots, which I do not think they had, that power was taken away by this Act and placed either in the hands of the Governor in Council or in the hands of the permanent head of the department.

Sec. 58.—All officers of the civil service had to contribute 4 per cent. per annum of their salary to a superannuation fund and were entitled to the benefit of such fund on retirement.

In 1896 the *Public Service Act of* 1896 was passed, repealing the *Civil Service Act of* 1889, but re-enacting its important provisions. The important relevant sections have already been quoted by my learned brothers.

Sec. 1 of the *Public Service Act* includes all persons in the public service in receipt of a fixed annual salary paid out of the Consolidated Revenue or out of any special fund, with certain exceptions mentioned. Pilots are not included in the exceptions, and have not been specially exempted.

Under this Act the same class of officers are included in the professional division as in the professional division under the *Civil Service Act of* 1889. It was admitted that Maxwell was appointed

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by the Governor in Council under this Act, and that he is classified as in the professional division.

Sec. 40 provides that an officer shall not be dismissed or suffer any detriment in respect of his office, except in manner set forth in this Act.

Similar provisions to those in the Act of 1889 are contained in this Act as to punishment or dismissal only by the Governor in Council after inquiry and report, except in minor cases where the permanent head of the department can fine an officer a sum not exceeding £5.

Whatever the effect of the regulations under the *Navigation Act* had in 1891, after the *Public Service Act of* 1896 was passed, pilots in the Government service appointed under that Act could only suffer detriment in the manner therein set forth.

By the *Public Service Amendment Act of* 1901, sec. 5, members of the Executive Council were constituted the Public Service Board.

From 1901 pilots appointed under the *Public Service Act of* 1896 are, therefore, directly responsible as to the Executive Council.

The only inferences to be drawn from the Acts mentioned, in my opinion, are: that a pilot appointed by the Governor in Council under the *Public Service Act of* 1896 is employed in a public service, namely, in the Queensland Government pilot service; that he is under the control of the Government; and that he can only be appointed, promoted, reprimanded, punished or dismissed for incapacity, incompetency, or misconduct or any other reason, by the permanent head of his department or by the Governor in Council in accordance with the provisions of that Act.

If the plaintiffs had been foolish enough to sue the Marine Board as the pilotage authority, it is clear the Board would have answered: —"We only licensed Maxwell nearly three months after he had been appointed pilot, Brisbane, by the Governor in Council, at an annual salary of £220. We do not pay his salary; we do not receive pilotage fees. We cannot control the pilot who is a public servant under the provisions of the *Public Service Act*. We cannot punish him in any way; in fact all we can do is to license him. If we believe him incapable because of age, want of sight, or for any other reason, we can only report to the Treasurer. Even if we believe him to be

negligent in the performance of his duty, or guilty of misconduct, we can only inquire and report it to the Treasurer. We are only empowered by the Act to inquire (see sec. 11). We only license persons in or for the Queensland Government pilot service."

The Marine Board is clearly not the employer, and it would have been exonerated from liability on the ground that it only had power to license the pilot; and, when licensed, the pilot was bound as a public servant to obey the orders of the Executive Government who appointed him and his officers. The pilotage cases referred to on the argument apply to the Marine Board, but not to the Government as employer.

The *Public Service Act of* 1896 compels all officers to obey the orders of the Government, and the heads of the department, and to observe all regulations passed under those Acts not inconsistent with special regulations affecting any department, and to devote the whole of their time to the public service.

Under the *Public Service Act* pilots are appointed, dismissed or retired, and only under that Act.

Under that Act leave of absence and other privileges are granted, and only in accordance with that Act can any officer suffer any detriment. The duties (not statutory) of all officers are fixed and their hours of attendance set out by regulations under that Act.

On the other hand (see Navigation Acts and Regulations), the Marine Board can cancel licences of masters, mates, engineers, and of pilots not appointed by the Governor in Council and of licensed boatmen. The Board can cancel masters' certificates of exemption from pilotage and certificates that vessels are fit to go to sea, &c.

Whether the Government did or did not take over the work of pilotage under 22 Vic. No. 14, or under the Queensland *Marine Board Act of* 1862, it appears to me that on the only construction to be placed on the *Navigation Act of* 1876 the legislature empowered the Government to do so, and the only inference to be drawn from the laws mentioned and facts stated and admitted is that the Government exercised that right. On the facts stated and admitted, and the necessary inferences therefrom, the Government of Queensland, in my opinion, at the date of the stranding of the vessel had taken over the pilot service, and had undertaken the work of pilots, and

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Maxwell was at all material times a servant of the Government appointed as pilot, and subject to its control.

Once the position of the Government as employer and the pilot as a servant who is under the control of the Government is established, the case of *R.* v. *Williams* (1) applies. It is said in the judgment in that case (2) :—" The main question is, whether there was a breach on the part of the Executive Government of that duty which the law would have cast upon private persons maintaining the staiths or wharf and inviting ships to visit them in the same manner in which the Executive Government are shown to have done." See also *Farnell* v. *Bowman* (3) and *Sydney Harbour Trust Commissioners* v. *Ryan* (4). In the latter case the learned Chief Justice of this Court, said (5) :—" I am of opinion that, when the Government of New South Wales engages, either in its own name or through the agency of a corporation created for the purpose, in enterprises which in former times were only carried on by individuals, it is subject to the same liabilities, and is governed by the same laws, to and by which individuals are subject and governed under the same circumstances."

The Executive Government being liable (if an employer) in the same way as any ordinary employer would be, the following cases go to show that in this case the Government is liable for the negligence of its servant the pilot.

In *Gilbert* v. *Trinity House Corporation* (6), *Day* J. said :— " I entertain no doubt whatever on the first point. The law is plain that whosoever undertakes the performance of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether the person is guilty of negligence by himself or by his servants. If he elects to perform the

(1) 9 A.C., 418.
(2) 9 A.C., 418, at p. 427.
(3) 12 A.C., 643.
(4) 13 C.L.R., 358.
(5) 13 C.L.R., 358, at p. 366.
(6) 17 Q.B.D., 795, at p. 799.

duties by his servants, if in the nature of things he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own."

In *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1) *Blackburn* J., in delivering the joint opinion of all the Judges who heard the argument, said (2) :—" Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman* v. *Burnett* (3), where Mr. Baron *Parke* says :—' Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey ; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist.' "

In *Hedley* v. *Pinkney & Sons' Steamship Co. Ltd.* (4) Lord *Esher* said :—" The ordinary rule of law is that a person is liable for the negligence of his servant, and the plaintiff must therefore begin by proving that the captain is a servant of the owners. To my mind that is proved beyond a doubt, because the captain is appointed and paid by them and can be dismissed by them, so that he is in the ordinary sense of the word a servant. If the owners were present on board he would be bound to obey their orders, even to the destruction of their property."

In *Smith* v. *Martin and Kingston-upon-Hull Corporation* (5) it was held, " first, that the relation of master and servant existed between the local education authority and the teachers employed by them ; and, secondly, that the act of the teacher was

(1) L.R. 1 H.L., 93.
(2) L.R. 1 H.L., 93, at p. 114.
(3) 6 M. & W., 499, at p. 509.
(4) 66 L.T.N.S., 71, at p. 73.
(5) (1911) 2 K.B., 775.

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within the scope of her employment, which was not strictly confined to teaching alone; and that therefore the defendant corporation was liable to the plaintiff for the consequences of the teacher's negligent act." In the course of the judgment *Fletcher Moulton* L.J. said (1) :—" It is true that they exercised this control and management through an education committee, but that would not alter the responsibility," and *Farwell* L.J. said (2) :—" It is true that the Board of Education issues regulations which bind the corporation, but no regulation material for any purpose that we have to consider has been called to our attention, nor am I aware of any regulation." Under these circumstances all the incidents usually relied on to show the existence of the relationship of master and servant exist in this case : the teacher was engaged by the corporation and paid by them, she was under their control and could be dismissed by them.

The case of *Brabant & Co.* v *King* (3) has been referred to by counsel for both parties. Unless the Government has undertaken pilotage and Maxwell, the pilot, was the servant of the Government while performing his work as pilot, I do not think that that case applies. It was not decided on the ground that storage was compulsory, in the first instance, but because the Government as a bailee for hire was negligent.

The other contentions raised by the appellant are, to my mind, more difficult to answer, namely, " assuming the Government had taken over the work of pilotage and acted as pilots through their officers, it is not liable to the plaintiffs. The first ground was that the pilot had to carry out statutory duties, and had to exercise a discretion in connection therewith, and could not therefore be controlled in those duties by his employer (the Government).

On the authority of *Enever* v. *The King* (4) and *Baume* v. *The Commonwealth* (5) and other cases referred to, to the same effect, that would be a good answer to the claim if the cases were alike; but, personally, I cannot find any statutory duty imposed on pilots which would relieve the Government from responsibility in this case.

(1) (1911) 2 K.B., 775, at p. 781.
(2) (1911) 2 K.B., 775, at p. 784.
(3) (1895) A.C., 632.
(4) 3 C.L.R., 969.
(5) 4 C.L.R., 97.

Statutory duties were imposed on the pilot by secs. 124 and 127 of the *Navigation Act of* 1876, and, if by the exercise of the statutory duties referred to, by the pilot, any person suffered damage, the Government would not be liable, because the pilot had to exercise a discretion specially imposed on him by the Act, in the special circumstances therein mentioned. Even if the special duties imposed upon the pilot by the regulations referred to—made by or with the Government's consent—would relieve the Government from liability, I do not see any statutory duty imposed on him by the regulations submitted, to relieve the Government in this case.

Baume v. *The Commonwealth* (1) shows that a Government may be liable for the acts of a collector of Customs done in the ordinary performance of his important duties, although it is not liable for damage caused by delay by the same officer in passing an entry—because he had to exercise a discretion directly imposed upon him specially by Statute before passing the entry.

In this case the Statute does not state how the work of pilotage is to be carried out, or that the pilot is to exercise any discretion in connection with any particular part of his work. It leaves him, so far as the Act is concerned, once he starts to pilot the vessel, as open to act under instructions of his employer—or to disregard them, if he takes the risk of doing so—as a master of a vessel (who holds a certificate of exemption from pilotage) is to act under instructions from his employer.

I think the defendant has failed to establish his freedom from liability on this ground.

As to the second ground, namely, that the Government is not liable for damage done by a licensed pilot because the work of the pilot requires special skill and is of such a special character that he cannot be controlled or directed by his employer in the performance of his work. I fully concur with what my learned brother *Barton* has said, where he deals with this important question, and with every word of the judgment of *Real* J. from the words, "These cases, and others," down to the end (2).

Cases were referred to in support of the contention of the defen-

(1) 4 C.L.R., 97.

(2) (1913) S.R. (Qd.), 64, at pp. 83-86.

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dant, but they were all decided under the special circumstances of the particular case before the Court at the time.

In the many cases referred to during the argument I do not know of any case which was decided against the plaintiff on the ground that the work of a pilot was so exceptional that the employer was released from liability on that ground. On the contrary, in some of the cases referred to during the argument it was held that the employer was liable for damage done by a pilot, whether licensed or not, if the maxim *respondeat superior* applied in the particular case.

Cooper C.J., who read the judgment of *Chubb* J., *Shand* J. and himself, said (1) :—" In the case of *Shaw, Savill and Albion Co.* v. *Timaru Harbour Board* (2) the Privy Council do not seem to have entertained any doubt that if the Timaru Harbour Board had been authorized to enter into pilotage contracts, it would have been responsible for the default of the person employed by it to act as pilot."

In the case of *Otago Harbour Board* v. *Cates* (3), which was strongly relied on by the appellant, *Williams* J. (4) said :—" It is abundantly clear that in such a case " (where pilotage was not compulsory) " the owners would be responsible for the acts of the pilot, because they voluntarily gave their vessels in charge to a person of their own selecting. The owners being liable, and the maxim *respondeat superior* applying as between them and the pilot."

In the case of *Owners of the Lion* v. *Owners of the Yorktown* (5) the Privy Council held that it is not compulsory on a passenger ship to take a licensed pilot on board when she is not carrying passengers ; and the owners are responsible for the negligence of the pilot when they are not compellable to put him in charge of their vessel.

In the case of *The Eden* (6) Dr. *Lushington* said (7) :—" I am of opinion that the pilot in this case having been taken on board not by compulsion, the owners of the *Eden* are responsible for the

(1) (1913) S.R. (Qd.), 64, at p. 70.
(2) 15 App. Cas., 429.
(3) 2 N.Z.L.R. (S.C.), 123.
(4) 2 N.Z.L.R (S.C.), 123, at p. 126.
(5) L.R. 2 P.C., 525.
(6) 2 Wm. Rob., 442.
(7) 2 Wm. Rob., 442, at p. 449.

damage in question, and I do not see that they are relieved from that responsibility by any Act of Parliament." See the case of *Holman* v. *Irvine Harbour Trustees* (1), from which my brother the Acting Chief Justice has already quoted Lord *Gifford's* remarks on this point.

In the performance of his work a pilot, of course, exercises the skill of a skilled employé, and it may not be wise to control him in the performance of that work, but, in this respect, he does not differ from many other servants doing skilled work for whose acts the master is responsible.

As a pilot is a public servant, under the *Public Service Act of* 1896, he can be directed as to his duties, not statutory, by the head of his department; he can be suspended at any time, even while doing duty as a pilot—although it would be foolish to suspend or interfere with it at such a time; but it would not be an unlawful interference by his employer, the Government. If the harbour master had been on board the *Eastern*, there is no doubt he could have legally suspended the pilot and taken charge himself.

The pilot's authority is conferred on him by the Government, which appoints him and controls all his actions, and can suspend, punish or dismiss him—not by the Marine Board, which only grants him a licence; and that authority conferred by the Government on the pilot, can be suspended or taken away at any time by the Government.

The test, I hold, is not whether the Crown can safely control or direct a pilot in the exercise of his special work, but whether it can legally do so. It would be physically impossible for the Crown to directly control the work of a great many of its servants, such as drivers of post office motor cars, masters of vessels, railway experts. electrical engineers, radio-telegraphy experts, &c.

The master of a ship is undoubtedly the servant of the owner, and the owner is liable for the master's acts, yet the owner cannot safely control the master in the navigation of the ship; legally he can do so.

Now, it is well known that the majority of the masters on the Australian coast hold certificates of exemption from pilotage, and

(1) 4 Ct. of Sess. Cas. (4th ser.), 406.

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have to exercise exactly the same skill as a pilot when they enter the different ports. This is specially referred to by the late *O'Connor* J., a member of this Court, as President of the Commonwealth Court of Conciliation and Arbitration in *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners Association* (1). He says (2) :—" It would be impossible to carry on the inter-State and coastal steamship service if it were necessary to employ a pilot on every occasion when a steamer is to be navigated in or out of a harbour, river, or roadstead. It is a necessary condition of carrying on the trade of such steamers that their master should be able to take them in and out of any Australian port at any hour of the day or night. Under the laws of all the States, pilots must be employed for such work, and pilotage fees paid, unless the master holds a certificate exempting him from pilotage. In that class of trade, therefore, the exempt certificate becomes a necessary part of the master's equipment for his daily work. No doubt a large proportion of the work of master in the coastal and inter-State trade consists in navigating pilotage waters—generally the most trying and responsible of a master's duties. . . . . But where the performance of this class of duty is of almost daily or nightly occurrence it is difficult to see how this can be separated from his other duties in order to apportion a value to it."

I do not think it could be rightly contended that an owner, because the master of his vessel holds a certificate of exemption, is free from liability if the master causes injury ; and yet it is just as impossible for the owner to properly control his specially skilled master, as it is for the Crown to properly control the pilot, who is as skilled as the master only so far as the pilotage of one port is concerned.

The difficulty of finding a case in which a defendant has been held liable for the negligence of a licensed pilot under circumstances similar to this case is explained by *Real* J. in his judgment, where he points out (3) :—" Pilotage, until recently, was, so far as the doing of the work of pilotage, a mere matter of contract between subjects." He also said (4) :—" I am not aware that such a contention

(1) 1 C.A.R., 1.
(2) 1 C.A.R., 1, at pp. 23, 24.
(3) (1913) S.R. (Qd.), 64, at p. 85.
(4) (1913) S.R. (Qd.), 64, at p. 82.

has ever been urged, when what is called pilotage authority is admittedly merely a licensing authority, and in the long history of maritime law the pilotage authority will, I think, be found up to a very recent date to be a licensing authority only. (See English Statutes, 5 Geo. II. c. 20; 48 Geo. III. c. 104; 52 Geo. III. c. 39; 6 Geo. IV. c. 125, and 17 and 18 Vict. c. 104; and *Shaw, Savill and Albion Co.* v. *Timaru Harbour Board* (1), as to the authority and duty of what would be called the pilotage authority under the New Zealand Statute considered in that case)."

I do not think, on the facts of this case, that *Hillyer's Case* (2) or *Evans* v. *Liverpool Corporation* (3), or any of that class of case, applies.

The case of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2) was pressed on the Court by the counsel for the appellant, and especially referred to in the judgment of the Supreme Court of New South Wales in *Actieselskabet Bannockburn* v. *Williams* (4). The difference between this case and *Hillyer's Case* is shown by the remark of *Farwell* L.J. (5), where he said :—" The first question then is, Were any of the persons present at the examination servants of the defendants ? "

Later on he said :—" The true relation of the parties is, in my opinion, well stated by the Chief Justice in *Glavin* v. *Rhode Island Hospital* (6), where the Chief Justice said : ' Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation ? We think not. If A. out of charity employs a physician to attend B., his sick neighbour, the physician does not become A.'s servant, and A., if he has been duly careful in selecting him, will not be answerable to B. for his malpractice. The reason is that A. does not undertake to treat B. through the agency of the physician, but only to procure for B. the services of the physician. The relation of master and servant is not established between A. and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this

(1) 15 App. Cas., 429.
(2) (1909) 2 K.B., 820.
(3) (1906) 1 K.B., 160.
(4) 12 S.R. (N.S.W.), 665.
(5) (1909) 2 K.B., 820, at p. 825.
(6) 34 Am. R., 675, at p. 679.

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power not because they are its servants but because of its control of the hospital where their services are rendered.' "

Before I conclude I think it right to mention the three pilotage cases specially referred to as very favourable to the appellant's view, namely, *Otago Harbour Board* v. *Cates* (1); the *Bannockburn Case* (2); *Holman* v. *Irvine Harbour Trustees* (3).

In the case of *Otago Harbour Board* v. *Cates* it was held that "under the *Harbours Act* of 1878 a Harbour Board is not responsible for the negligence of a duly licensed pilot. *Semble*, that under the *Harbours Act* of 1878, pilotage is not compulsory."

In the above case the Government received the pilotage rates, not the Harbour Board direct.

The learned Judge, *Williams* J. said (4):—"Now, apart from the peculiar nature of the office of pilot, there are indications in the *Harbours Act* from which an inference might be drawn that it was not the intention of the legislature to make Harbour Boards liable in cases of this nature. In ports where there is no Harbour Board the Governor has the powers of a Harbour Board, including, of course, the appointment and payment of pilots. It is clear that if a vessel were in charge of a pilot appointed by the Crown no action would lie against the Crown for his negligence, whether such negligence resulted in running down another vessel or in causing some injury to the vessel on which he was employed. Why, then, it may be argued, should an injured person have a remedy in one case when he has none in the other? "

The statement that the Government would not be liable if the pilot was appointed by the Government was, of course, because the Government could not be sued for such a tort in New Zealand under the Crown Suits Act in force there.

The decision in this case was clearly based on the particular Acts under which the Harbour Board was established.

In the *Actieselskabet Bannockburn* v. *Williams* (2), referred to as the *Bannockburn Case*, it was held that the New South Wales Government was not liable for the negligence of a licensed pilot in the navigation of a ship of which he is in charge. My brother

(1) 2 N.Z.L.R. (S.C.), 123.
(2) 12 S.R. (N.S.W.), 665.
(3) 4 Ct. of Sess. Cas. (4th ser.), 406.
(4) 2 N.Z.L.R. (S.C.), 123, at p. 129.

Barton and the Judges of the Supreme Court have pointed out that the facts of that case differ from those in this case and the Navigation Acts of New South Wales and Queensland differ.

Real J. said (1):—"That counsel should in that case seek to convince the Court that the Government was liable is not surprising. (See sec. 71 of the New South Wales Act). I have not gone carefully through that Act, and probably there are other sections in it which account for the judgment," a copy of which judgment, he said, had been supplied to them. The Chief Justice of New South Wales, in delivering judgment said (2):—"Under the *Navigation Act of* 1901 the pilotage authority for this State was to be an officer 'appointed by the Governor, to be called the Superintendent of the Department of Navigation, who shall act under the control of the Treasurer.' That is under sec. 6. Under sec. 7 the Superintendent was invested with full power to undertake the superintendence of certain matters, including the licensing and appointment and removal of pilots."

The licensing authority—the Marine Board—in Queensland after the repeal of the *Marine Board Act of* 1862 was not invested with the powers mentioned.

In *Holman* v. *Irvine Harbour Trustees* (3) most of the facts are very similar to the facts in this present case, and I think it right to quote at length from the judgment. Lord *Gifford* said:—"What was the position held and occupied by Jeremiah McGill 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 proves 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 McGill 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 defenders. There was no contract between the

(1) (1913) S.R. (Qd.), 64, at p. 82. (2) 12 S.R. (N.S.W.), 665, at p. 668.
(3) 4 Ct. of Sess. Cas. (4th ser.), 406.

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pursuers and McGill as an independent pilot. McGill had no claim upon the pursuers for pilotage fees 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 McGill 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. McGill 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."

Lord Justice *Clark* said :—" With regard to the case itself, my observations will be confined to two points. First, I am of opinion that the Irvine Harbour Trustees undertook the duty of piloting this vessel into the harbour of Irvine, in consideration of certain payments to be made by the vessel using the harbour which are directed by their own local Statute to be applied for harbour purposes—that is to say, the relation between this vessel the *Gertrude* and the Harbour Commissioners was one of contract, under which the vessel was bound to pay pilotage dues, and the Commissioners in return undertook the safe pilotage of the vessel."

The question was raised during the argument as to whether the pilotage rates were moneys charged for services of the pilot.

See secs. 110, 114 and 118 of the *Navigation Act of* 1876 and secs. 3 (5), 4 and 6 of the *Port Dues Revision Act of* 1882, referring to employment of the Government pilots, and payment of pilotage rates where the services of the pilot are required.

All the Acts from 1832 to 1876 have references to payment of pilotage rates for the pilot's services.

It was also contended that the Government was not liable under compulsory pilotage, because the owner was not liable for damage done by a licensed pilot when in charge of a vessel under compulsory pilotage. In the one case the owner is compelled to accept a competent or incompetent pilot ; but in the other the Government is the employer of the pilot, receives the remuneration for his services,

decides his qualifications, and the owner of the vessel must accept his services. The Government is not, I think, relieved from responsibility simply because the pilot's services are forced on the owner.

It was contended strongly that licensing and appointment of pilots are the same thing. So they are under the English Acts, where there is power to appoint, license and remove. It was the same under the *Marine Board Act of* 1862, where there was power as a department to appoint, license and remove pilots, but it is not so under the *Navigation Act*, wherein there is only power in the Governor in Council to authorize the Board to grant licences, and not to appoint or dismiss pilots.

My brother *Isaacs* has referred to the limited choice the Government had in the matter of pilots, because *qualified* pilots only are available and the order in which the pilots are to go on board is fixed by regulation. The Act only limits it to "qualified" pilots. Whatever limit of choice the Government had because of the regulations in question, it was responsible for—not the owners of the vessels; the limitation was made by or with the consent of the Government.

I cannot agree with the view that the Government is relieved from responsibility because the choice of pilots was to some extent limited under the circumstances mentioned, especially as the owners were compelled to employ one of the pilots made available by the Government.

The pilot in the Queensland Government service was a public servant, exercising his calling, not for himself but for the Government which employed him, and he was bound to devote his whole time to its service.

It must not be forgotten that the master of the *Eastern* was compelled to take on board his vessel (before proceeding to sea) either the harbour master or some pilot appointee as aforesaid (see sec. 113 of the *Navigation Act of* 1876) to move or conduct the said vessel to sea.

The harbour master is a Government officer, so is the pilot. The harbour master need not be a licensed pilot or a pilot at all.

Can it be conceived that if the harbour master had been sent to do the work, the Government would have been liable for his

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negligence, and yet it is not liable because it sent one of its pilots? Both officers would have to do the same skilled work for the Government. I think the Government would be liable in either case for the reasons already mentioned.

I am of opinion that the Full Court of Queensland was right, that the appeal should be dismissed, and that the answer to the first question should be in the affirmative.

BARTON A.C.J. The judgments that have been read leave the case in a rather unusual position. Two Justices are for dismissing the appeal and affirming the judgment of the Supreme Court. One Justice is for allowing the appeal and reversing the judgment. Two Justices are not in favour of either affirmance or reversal; they think the questions cannot be answered without usurping the province of a jury or of a Judge empowered to find the facts, and in that sense they think the judgment of the Supreme Court is wrong. A reversal of the judgment is something more than setting it aside: it means the displacement of the judgment complained of and the substitution of another of an opposite character; but it involves the opinion that it is wrong, and should, at least, be set aside.

The order of the Court will, therefore, be that the order appealed from be set aside, costs of the special case here and in the Supreme Court to be costs in the cause.

Order appealed from set aside. Costs of the special case in the High Court and in the Supreme Court to be costs in the cause.

Solicitor, for appellant, *T. W. McCawley*, Crown Solicitor, Brisbane.

Solicitors, for respondents, *Thynne & Macartney*, Brisbane.

N. McG.

[HIGH COURT OF AUSTRALIA.]

MACDERMOTT . . . . . APPELLANT;
DEFENDANT,

AND

CORRIE AND ANOTHER, TRUSTEES OF THE ACCLIMATIZATION SOCIETY OF QUEENSLAND } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 23, 24; *May* 2.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Crown grants—Restrictions on alienation and user of land—Resumption for public purposes—Value of land—Basis of valuation—Arbitration—Award.

The Acclimatization Society of Queensland were the grantees of land subject to conditions and reservations and to extensive restrictions on the use and the alienation of it, and a right in the Crown to resume the land or any part of it which might be required at any time for any public purpose—the value of the land resumed to be paid to the party entitled thereto at a valuation to be fixed by arbitration.

Held (*Powers* J. dissenting), that the value to be so fixed and paid on the resumption of the land by the Crown under the grant was the value to the Society of their interest in the land and not its value to the Crown or to those for whom the Crown was acquiring the land; and that in ascertaining such value the conditions, reservations and restrictions should be taken into consideration as affecting the Society's market.

Stebbing v. *Metropolitan Board of Works*, L.R. 6. Q.B., 37, followed.

Judgment of the Supreme Court of Queensland: *In re The King and the Acclimatization Society of Queensland*; *Corrie and Vidgen* v. *MacDermott*, (1913) S.R. (Qd.), 10, reversed.

APPEAL from the Supreme Court of Queensland.