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*May 11, 12.
*Nov. 5.

JOHN B. McGILLIVRAY (PLAINTIFF) ..... APPELLANT;

AND

F. C. KIMBER AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Pilotage authority—Compulsory retirement of pilot—Judicial functions—Liability to action.

The pilotage authority in a pilotage district of Canada has not absolute and arbitrary power to cancel a pilot's licence, but can only do so after complaint and inquiry and proof on oath of incapacity.

If a pilotage authority, by resolution alone, without complaint, notice or investigation, declares a pilot to be dismissed "for neglect and incapacity" and thus prevents him from performing a pilot's duties, inasmuch as it failed to observe the statutory requirements respecting the proceedings for such dismissal it has not exercised judicial functions and is not protected from liability to an action by the pilot for damages. Fitzpatrick C.J. and Davies J. dissenting.

Per Duff J.—A by-law of a pilotage authority purporting to provide for the forfeiture of pilot's licences for incapacity could only have the effect, if at all, subject to the condition exacted by 433(*j*) of the "Shipping Act" that such incapacity should be "proved on oath before the pilotage authority" and a resolution of a pilotage authority pretending to dismiss a licensed pilot for incapacity without such proof on oath was legally inoperative; but as the resolution was intended to have and had the effect of preventing the pilot exercising his calling and since it was an act without justification or excuse it was actionable within the principle laid down by Bowen L.J. in *Mogul Steam Ship Co.* v. *McGregor* (23 Q.B.D. 598).

Per Duff J.—Section 433(*e*) of the "Shipping Act" does not empower a pilotage authority to limit the term of a pilot's licence to a period of one year.

Judgment of the Supreme Court of Nova Scotia (48 N.S. Rep. 280) reversed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin.

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APPEAL from a decision of the Supreme Court of Nova Scotia(1), reversing the judgment at the trial in favour of the plaintiff.

The questions raised for decision on this appeal are stated in the above head-note.

Mellish K.C., and *Finlay Macdonald K.C.* for the appellant. In passing the resolution for dismissal of the appellant the respondents were not acting judicially. See *Royal Aquarium, etc., Soc.* v. *Parkinson* (2); *Baird* v. *Wells*(3).

Even if they were acting as a quasi-judicial body they were not protected as they did not observe the formalities required by statute. Pollock on Torts (6 ed.), p. 120.

The record contains evidence of malice. See *Ferguson* v. *Earl of Kinnoull*(4), at p. 303.

Rogers K.C. for the respondents. The respondents were acting judicially. *Harman* v. *Tappenden*(5); *East River Gas-Light Co.* v. *Donnelly*(6).

THE CHIEF JUSTICE (dissenting).—In my opinion the judgment appealed from is right. There can, I think, be no doubt that in discharging the pilot the respondents were acting in a quasi-judicial capacity, and it is settled law that those acting in a judicial or quasi-judicial capacity incur no liability for acts performed within their jurisdiction unless actuated by malice. Many American cases indeed go so far as to hold that even malice will not affect the immunity of

(1) 48 N.S. Rep. 280.
(2) [1892] 1 Q.B. 431.
(3) 44 Ch. D. 661.
(4) 9 Cl. & F. 251.
(5) 1 East 555.
(6) 93 N.Y. 557, at p. 560.

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those performing such functions. It is unnecessary to consider this in the present instance as malice has not been charged.

This freedom from liability of those discharging quasi-judicial functions does not, of course, in any way prevent the courts interfering to review the proceedings. The courts do so in every variety of cases, quashing convictions, setting aside awards, granting mandamus such as would undoubtedly have been done on application in the present case. The proceedings by the Pilotage Authority were clearly irregular and the mandamus would have directed them to hear and determine the matter in a proper manner. Freedom from liability for the consequences of such acts is, however, precisely the protection which the law gives to those discharging such duties. Were it otherwise no one could venture to undertake the discharge of the duties of many public positions.

The appeal should be dismissed with costs.

DAVIES J. (dissenting).—I am of opinion that this appeal should be dismissed with costs. I accept the reasons for the judgment of the Supreme Court of Nova Scotia as delivered by Chief (then Mr.) Justice Graham allowing the appeal from the judgment of the trial judge and dismissing the plaintiff's action.

The gist or pith of the decision is that the acts of licensing and of withdrawing a licence of a pilot are quasi-judicial, that there is no contract of hiring, and that in the absence of proof of malice in the withdrawal of a licence no action will lie against the Pilot Commissioners.

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IDINGTON J.—This is an action by appellant who was duly qualified as a pilot and licensed as such in 1888, under the Pilotage Act, chapter 80 of the Revised Statutes of Canada, 1886, now, so far as amended and in force, forming part of the Canada Shipping Act, Revised Statutes of Canada, 1906, against respondents, who were appointed 13th May, 1912, the pilotage authority for the Port of Sydney.

The respondents constituted an entirely new Board. Mr. Kimber, their secretary, testifies as follows:—

Q. You know the plaintiff here, John B. McGillivray ?

A. I do.

Q. Were you present at the meeting where it was decided to dispense with his services ?

A. Yes.

Q. When was that ?

A. June 13th, 1912.

Q. Who were present at that meeting ?

A. Vincent Mullins.

Q. He was chairman ?

A. He was elected chairman. There were present Commissioners Vooght, Desmond, Barrington and myself.

Q. Was that the first meeting you had ?

A. Yes, the first meeting.

Q. It was at that meeting you undertook to dispense with the services of the plaintiff ?

A. He was dropped from the list of pilots.

Q. Was that the meeting he was dismissed from the service ?

A. Yes.

Q. Is there a resolution there ?

A. Yes. "Moved by Com. Barrington, seconded by Com. Vooght that the following pilots should be dismissed from the service. Carried." John B. McGillivray is the first name.

Q. Is that all there is to it ?

A. Yes.

Q. And that resolution was carried ?

A. Yes.

Q. And Mr. McGillivray was dismissed ?

A. He was.

This resolution so read from the minute book is further evidenced by what I presume was intended

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for a certified copy filed as an exhibit. And apparently from that, after the motion was declared carried, there was added a note as follows: "P.S. Neglect and incompetency were the reasons for the above dismissal."

When this was done or how it came to be entered, we have no evidence of. And the book is not in the record. Appellant says he was notified to quit, that his services were no longer required and that he quit accordingly after seeing Mr. Kimber and Mr. Mullins, and being unable to get any information from either of them why he was dismissed.

There was no pretence of any accusation and inquiry in respect thereof, or of hearing the appellant, or calling upon him to answer for anything.

It seems later to have dawned upon some of these men that their proceedings were illegal. In August of the next year, in the absence of some of the more relentless members of the Board, the appellant was reinstated and acted as a pilot for some two or three months. The matter was again taken up pending such service, at a meeting on the 8th of October, 1913, when the following resolution was passed:—

Whereas after a meeting of the Board of Pilot Commissioners for the Port of Sydney held on August 4th, 1913, two only of the Commissioners being present, a resolution was irregularly introduced and adopted by the said two Commissioners and entry made of the same on the minutes of the doings of this Board, reappointing John B. McGillivray, George Spencer and Peter Rigby as Pilots for the Port of Sydney, although at a prior meeting of the Board, the said persons, having previously been pilots, had their commissions cancelled by an unanimous vote.

Be it therefore resolved that this Board declares itself in no way bound by the resolution irregularly introduced and purporting to have been adopted after said meeting of August 4th, and that it does not, and will not recognize the said John B. McGillivray,

George Spencer and Peter Rigby as pilots acting under the authority of this Board.

Be it further resolved that the Secretary be instructed to forthwith notify the said parties that the Board does not, and will not recognize them as pilots having any authority whatsoever from this Board. Carried.

The secretary accordingly notified the appellant that he would not be recognized as a pilot.

Later, on the 18th October, 1913, the secretary wrote the following letters:—

Sydney, N.S., October 18th, 1913.

D. A. McInnis, Esq.,
Member of Pilots' Finance Committee.

Dear Sir,—On the 7th inst. I notified John B. McGillivray and Peter Rigby, under instructions given me by a meeting of the Board of Commissioners held the previous day at North Sydney, that the Pilotage Authority did not and would not recognize them as pilots having any authority whatever from the Board.

I understand that both these men have reported for duty since receiving this notice, and I, therefore, give your Committee formal notice that neither of these men are clothed with any licence or authority from the Board to act as pilots of this port.

Yours truly,
F. C. KIMBER, *Secretary.*

It is upon these acts, done or brought about by the respondents, that appellant founds this action.

The learned trial judge maintained the action and assessed the damages at $1,800. The Appellate Court of Nova Scotia reversed this judgment on the ground that the respondents in so acting were discharging a quasi-judicial duty and hence not liable to any action for damages therefor, unless shewn to have been moved by malice.

It is necessary in order to understand and correctly appreciate the relations between the Board and the appellant to ascertain what his legal position was and the degree of authority they had over him.

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The "Pilotage Act" provided that before a man can act or be licensed as a pilot he must have served an apprenticeship. And then the Board had power to license him. Having done so he must register his licence with the collector of customs.

Section 28 of that Act under which appellant obtained his licence, after serving apprenticeship, is as follows:—

> Every pilot who had received a licence from a duly constituted authority in that behalf, before the commencement of this Act, may retain the same under and subject to the provisions of this Act, and shall, for the purposes of this Act, be a pilot licensed by the pilotage authority of the district to which his licence extends.

This section in substantially the same terms, and doubtless intended to be a continuation in force of said section, appears in section 448 of the "Canada Shipping Act" above referred to.

It seems quite clear from said section and the other sections bearing upon the question, that so long as a licensed pilot conformed to the regulations and had not been duly condemned for any of the offences for which the Board might try him, and suspend or dismiss him, he was (until sixty-five years of age) quite independent of the Board and entitled to follow his chosen calling and earn his livelihood thereby and as provided in section 38 of the "Pilotage Act," now section 459 of the "Shipping Act" secure the provisions he would be entitled, upon retirement, to claim thereunder for himself, his widow or child.

There is no claim set up or pretended that he failed to conform to the regulations such as requiring payment of the annual licence fee and getting a renewal so called of the licence.

The Board had no arbitrary authority to interfere

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with that tenure of appellant's office or rights as a licensee. It is quite clear that they imagined they had such arbitrary authority and acted accordingly. They never dreamed of anything else. They never for a moment supposed they had a judicial duty to discharge. Indeed, it never occurred to them to imagine such a thing in pleading their defence herein or presenting their case at the trial.

It seems some one suggested a possibility of such a defence in the appellate court, but I can find no leave given or asked to amend the statement of defence. I am unable to see how under the law and facts they can claim such a defence as matter of course. Their defence on the pleadings was one of absolute authority and nothing else but what fell within the scope thereof.

I cannot say that a state of pleading, such as before us, with a glimpse into some of the vicious, and hence in law malicious, motives which impelled the mover of the resolution, can be properly remodelled at this stage in such a way as to import therein the defence of acting in quasi-judicial capacity and exclude the consideration of malice as being unproven.

Even if Mr. Justice Graham's holding that, where a quasi-judicial act is involved, malice must be pleaded and proved, be correct, it surely devolved on defendants to set up the claim of quasi-judicial authority instead of the absolute authority set up by the statement of defence. In that case it might have been incumbent on the appellant to have replied malice and proven it.

The mover of the resolution so far as he is concerned puts himself out of court in assigning, as follows, his reasons for acting:—

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Q. Why was John McGillivray dismissed ?

A. Well, I can give you my own reasons. I had two. One was political and I considered him a disgrace to the service.

Q. What was the political reason ?

A. I got it in the neck myself once and I thought I would return the compliment when I got the chance.

Q. You had been dismissed when the Liberals were in office and you thought you would return the compliment to him ?

A. That was one reason and one was just as strong as the other.

Although Mr. Kimber disclaims personal knowledge of appellant's politics he indicates some of the Board seemed incidentally moved by considerations relative thereto. The surprising thing is that on the issues presented we should find accidentally disclosed so much evidence of those indirect motives of action which constitute malice. If the issue had been raised on the pleadings we may, from this sample so disclosed, well imagine there may have been much more which the trial of such an issue might have brought forth.

Indeed, it is hard to understand how, unless moved by improper motives, any one in such a position looking at this part of the statute (of which a copy was to be given every pilot and of which every commissioner presumably knew something) could have conceived it his right or duty to dismiss a man unheard.

I cannot find it incumbent upon us to impute to the respondents a quasi-judicial character which they never supposed they had, or were required to have and have not pleaded.

The appeal should be allowed for these reasons alone.

But, in deference to the judgment appealed from and the chief argument presented here, let us examine the claim that what was done was of a quasi-judicial nature. To appreciate it correctly, there is nothing in

the statute, which gave the Board any power or authority it had, supporting the defence of absolute authority as pleaded. It is admitted, in argument, that the Board is not a corporation. It is, however, given power to frame by-laws subject to the provisions of the Act. That power is now contained in section 433, which in its first or operative clause is as follows:—

433. Subject to the provisions of this part, or of any Act for the time being in force in its pilotage district, every pilotage authority shall, within its district, have power, from time to time, by by-law confirmed by the Governor-in-Council, to, * * *

This is followed by sub-sections numbered from (*a*) to (*n*) defining such enumerated subjects as therein appear, over which the Board is given merely the initiative faculty of framing by-laws to be adopted by the Governor-in-Council, but nothing therein gives the Board any absolute or indeed any control.

I fail to see how anything done or supposed to be done under that section can by any chance be supposed to be a quasi-judicial exercise of power.

In sub-section (*j*), which is as follows:—

(*j*) Provide for the compulsory retirement of licensed pilots who have not attained the age of sixty-five years, proved on oath before the pilotage authority to be incapacitated by mental or bodily infirmity or by habits of drunkenness,

they are thus given power to frame by-laws in respect of the incapacities and offences which are most prominently put forward by defendants as palliating their conduct relative to appellant.

This section 433 and its sub-sections for the most part are identical with and taken from section 15 of the "Pilotage Act," which again was consolidated from the Act of 1873.

Under that Act there were in 1906 re-enacted and

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amended prior by-laws which contain all that is in evidence before us relative to the powers and duties of respondents under said section of the Act. So far as they had any judicial or quasi-judicial powers such must rest in said statutes and the by-laws so far as enacted within same.

These furnish no ground for the assertion of any judicial or quasi-judicial powers such as would in the remotest degree warrant the procedure adopted in the passing of the resolution quoted above or in the steps taken either in accord therewith or legitimately consequent thereupon.

I conclude, therefore, that all these steps so taken were without any colour of jurisdiction for such acts.

As the resolution in its terms fails to assign any cause for its passage, that should end such contention as set up.

If heed is to be paid to the postscript in way of assigning any cause "neglect and incompetency" are the only ones assigned for consideration. The said by-laws contain the following:—

> By-law No. 9.—Any pilot or apprentice incapacitated by mental or bodily infirmity, or by habits of drunkenness, shall forfeit his license, and not be at liberty to serve in the capacity of a licensed pilot, and any pilot or apprentice guilty of drunkenness and incapacity while on duty shall be suspended for three months.

It is not pretended in argument or apparent in evidence that there was any neglect save in occurrences at least two years old and those were at the time dealt with by the then Board.

In regard to the charge of drunkenness that seems answered in the same manner.

But habitual drunkenness though not assigned in the postscript to the resolution, is alleged in some of

the evidence. But how is that in law or in fact in any way so connected with the resolution and other acts of respondents complained of herein as to furnish ground for saying that the respondents were so acting in relation thereto as to maintain the pretence of quasi-judicial action ?

That as a ground of compulsory retirement is specifically provided for by the statute in section 433, sub-section (*j*) as hereinbefore quoted and in No. 9 by-law also quoted which must be read therewith.

Section 433, with sub-section (*j*) only enables the enactment of a by-law adapted to cases proved on oath before the pilotage authority.

The by-law No. 9 so enacted and apparently intended to be within said power of enactment cannot in law be extended beyond the powers given to enact it.

It might be treated as null by reason of being in excess of the power given. But I think the more reasonable interpretation of it is to presume it is intended to operate within the statute and to be resorted to conditionally upon proof, as required by the statute, under oath of the offence or incapacity from the causes assigned or habitual drunkenness.

So interpreted I fail to see how the respondents were given any semblance of jurisdiction to deal with such matters unless upon the production of proof upon oath, or in the trying of some of the specific cases for which the Act provides and, upon a finding thereby, prescribes dismissal or forfeiture of licence.

In every way one may look at the matter the respondents were acting entirely without jurisdiction and so acting must be held liable.

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In *The Marshalsea Case*(1), at page 76*a*, the case of one so acting is clearly distinguished from that where the person acting might have had jurisdiction over the subject matter or person, but erred in the mode of proceeding.

From that down to the present date the distinction has been observed. Many statutes have been enacted to protect magistrates who have acted in good faith, yet that protection has often failed.

The case of *Clark* v. *Woods*(2) is an illustration. But perhaps as curious as any is the case of *Jones* v. *Gurdon*(3), where, though there existed evidently good faith, yet from failure to comply with the conditions giving a right to act, the magistrate was held liable and the protecting Act held not to cover his case.

Foster v. *Dodd*(4) is of another type. Needless to multiply authorities of this kind extending in principle to every kind of inferior and domestic jurisdiction.

The error (beyond the apprehension of the pleading and issue raised) into which I respectfully submit the court below fell, in relying upon the cases cited there, was in not observing the distinction I have just pointed out.

There is another line of cases from *Ashby* v. *White*, fully set out in (5) (where note is made of the many cases illustrative of what is involved in the question therein decided), down to the present time, shewing that where the officer is seized of the business to be done, indeed, has it forced upon him to decide and

(1) 10 Coke, 68*b*.
(2) 2 Ex. 395.
(3) 2 Q.B. 600.
(4) L.R. 3 Q.B. 67.
(5) 1 Smith's L.C. (12 ed.) 266.

manifestly has a discretion or judgment to be exercised, he is, if acting without malice, free though mistaken.

These respondents never were seized of any business to be done in the doing of which they were discharging any duty relative to the appellant's tenure of his licence.

It occurs to me also that even if the resolution could by any stretch of the imagination be called a judgment of any kind, it was as such invalid for want of jurisdiction and all the acts which the respondents persisted in later, in way of executing their purpose, were mere ministerial acts, which had no valid judgment or order to justify acting thereupon, and hence rendered them liable to an action for damages.

They by these mere ministerial acts without a valid order to support them deprived appellant of the share he otherwise would have got in the funds distributed as well as of direct earnings.

Again it was suggested in argument as well as in the judgment appealed from that a mandamus was the only remedy. The doubt I expressed in the argument if such a remedy could be successfully sought as against those serving the Crown in the capacity the respondents were appointed for, has, as result of a very casual examination, increased, but I express no opinion in regard thereto.

The right to bring this action if, as I hold, the respondents acted without any jurisdiction, seems clear even if the remedy by way of mandamus was also open to appellant.

The many cases cited and others which though not cited I have looked at, seem to me to make it abundantly clear that we must have regard in considering

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such cases to the particular terms of the respective statutes in force bearing upon any such like question; and above all to the general purview of the statute in question, and the general principles of law such as I have adverted to.

So looking at the matter in question I have, for the reasons I have given, no doubt of the appellant's right of action herein. Indeed, there seems to have been such an entire absence of regard for and observation of the principles of natural justice that I am not surprised at the failure to find any exact precedent to guide us.

I was on the argument impressed with the possibility of the damages being excessive, and still am not free from doubt. But the details bearing thereon seemed to counsel to be irrelevant. The action was framed in error and all seemed agreed on the rectification that was made in that regard. Hence I assume the changes that took place, as I now find in the second year of the new Board, are not to be considered of any consequence. That change, however, might have made an arguable difference of view as to the amount of the damages. Appellant seems to have been restored to the list and probably this detail is of no consequence.

I think the appeal should be allowed with costs here and below and the judgment of the trial judge be restored.

DUFF J.—The appellant after a service of twenty-five years as a pilot in Sydney Harbour was summarily retired by the respondents, the "Sydney Pilotage Authority" constituted under the "Shipping Act," ch. 113, R.S.C., sec. 429. The appellant contends that the

proceedings of the respondents by which they professed to retire him from the list of pilots licensed to serve as such in Sydney Harbour was wrongful and inoperative in point of legal effect, but that the respondents by these proceedings in fact effectually prevented him serving as and earning the remuneration of a licensed pilot. The respondents in their defence alleged (in paragraph 6) that they "have absolute control" of pilots in Sydney Harbour "and the granting of licences to pilots in said waters with authority to appoint and dismiss such pilots"; and (by paragraph 8) that the appellant "was not wrongfully dismissed in the month of April, 1912, but that his

services * * * were dispensed with at a regular meeting of the said pilotage authority for good and sufficient reasons and *no licence was granted to said plaintiff to act as pilot for the season of* 1912 *and* 1913, *and said plaintiff was not entitled to receive a licence from said Board.*

The learned trial judge held that the respondents' attempt to justify the exclusion of the appellant from the list of pilots failed because any power they possessed to suspend or withdraw the appellant's licence could only be valid if exercised after proper inquiry which had admittedly not taken place. The full court reversed this judgment on the ground that the act of the respondents was the act of a body exercising judicial functions for which they were not accountable without proof of "malice."

I think this ground of decision cannot be sustained, but before discussing it it is desirable to consider a little more fully what the appellant's claim really is and the ground upon which it rests.

In June, 1912, the appellant was a pilot licensed under the "Shipping Act." The practice (the validity

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of which will demand a word of discussion) of this particular Pilotage Authority seems to have been to issue licences for a term limited according to the tenor of the licences to one year; and it was stated by the appellant and not disputed that this annual term expired in August of each year. On the 13th of June at a meeting of the Pilotage Authority a resolution was passed which is entered in the minutes in these terms:—

> Moved by Com. Barrington, seconded by Com. Vooght, that the following pilots be dismissed from the service. Carried.

And the appellant's is the first among the names which follow. The appellant says he was then "notified to quit" and that he acted on the notice.

The first point to consider in the case which the appellant advances is that this action of the Pilotage Authority, assuming it to have been in law inoperative, had nevertheless the intended effect of preventing him exercising his calling as a licensed pilot.

This point being of considerable importance I have examined the evidence closely in its bearings upon it and I think the appellant's contention is fairly made out.

That such was the intention has never been disputed and in the pleadings and at the trial the respondents contended that this act was legally effective for the purpose intended; the defendant alleges and Mr. Justice Graham expressly holds, speaking for the majority of the full court, that on the passing of this resolution the appellant "ceased to be a licensed pilot."

The "Shipping Act" contains provisions making it an offence for a

licensed pilot suspended or deprived of his licence or compelled to retire

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to fail to produce or deliver up his licence (sec. 534, see also sec. 451); for any person not a "licensed pilot" to pilot a ship (sec. 535); or for a licensed pilot to "act as a pilot whilst suspended" (sec. 550(*d*)). There is no evidence that the superintendent of pilots was communicated with; but the appellant no doubt assumed, and rightly assumed, that the respondents would take the steps necessary to give effect to this resolution. Having regard to the consequences which resistance (other than by legal proceedings simply) might entail if it should prove that the respondents were acting within their authority, the appellant acted wisely in not resorting to primitive methods of asserting his rights; and as to legal proceedings—at this stage it is enough to say that a legal contest with officials backed by the resources of the Government is not to be lightly undertaken by people in the appellant's position.

These considerations, together with the conduct of the respondents in October and November, 1913, to which I need not refer in detail, justify, I think, a finding that the respondents did in fact (as they intended to do) by this purported dismissal prevent the appellant from exercising his calling as a licensed pilot at least during the unexpired portion of the pending term.

The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility the consequences of this dismissal came to an end with the expiry of the term and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which being not only

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calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. Per Bowen L.J., *Mogul S.S. Co.* v. *McGregor*(1).

The justification pleaded and relied upon at the trial is stated in the two paragraphs of the statement of defence quoted above. It should be observed that in these paragraphs there is no suggestion that the respondents have exercised a judicial discretion and no such suggestion was made during the course of the trial.

The powers of the Pilotage Authority to deprive a licensed pilot of an unexpired license rest upon the provisions of sections 433, 550, 551, 552 and 553 of the "Shipping Act."

It is not suggested that any of these sections other than 433 has any relevancy here. Sec. 433 provides:—

433. Subject to the provisions of this part, or of any Act for the time being in force in its pilotage district, every pilotage authority shall, within its district, have power, from time to time, by by-law confirmed by the Governor-in-Council, to,—

(*d*) License pilots and, except in the pilotage district of Quebec, apprentices, and, except in the pilotage districts of Quebec, Montreal, Halifax and St. John, grant certificates to masters and mates to act as pilot, as hereinafter provided:—

(*e*) Fix the terms and conditions of granting licences to pilots and, except in the pilotage district of Quebec, apprentices, and, except in the pilotage districts of Quebec, Montreal, Halifax and St. John, the terms and conditions of granting such pilotage certificates, as are in this part mentioned, to masters and mates, and the fees payable for such licences and certificates and to regulate the number of pilots;

(*f*) Make regulations for the government of the pilots, and the masters and mates, if any, holding certificates from such pilotage

(1) 23 Q.B.D. 598.

authority, and for ensuring their good conduct and constant attendance to and effectual performance of their duty on board and on shore, and for the government of apprentices, and elsewhere than in the pilotage districts of Quebec, regulating the number of apprentices;

(*g*) Make rules for punishing any breach of such regulations by the withdrawal or suspension of the licence or certificate of the person guilty of such breach;

(*h*) Fix and alter the mode of remunerating the pilots licensed by such authority, and the amount and description of such remuneration, and the person or authority to whom the same shall be paid subject to the limitation respecting the pilotage district of Quebec in the next following section contained;

(*j*) Provide for the compulsory retirement of licensed pilots who have not attained the age of sixty-five years, proved on oath before the pilotage authority to be incapacitated by mental or bodily infirmity or by habits of drunkenness;

The by-laws passed under the authority of this section are before us and the only one we need consider is by-law No. 9 in these words:—

By-law No. 9.—Any pilot or apprentice incapacitated by mental or bodily infirmity, or by habits of drunkenness, shall forfeit his licence, and not be at liberty to serve in the capacity of a licensed pilot, and any pilot or apprentice guilty of drunkenness and incapacity while on duty shall be suspended for three months.

That is the only regulation touching the suspension or forfeiture of a pilot's certificate or the compulsory retiring of pilots which has been brought to our attention. It professes to make provision for the cases specifically dealt with in sub-section (*j*) and it can, I think, only go into effect subject to the condition laid down in that sub-section. The more general powers conferred by the earlier sub-sections cannot legitimately be brought into operation in order to declare that the "forfeiture" attached as a consequence by sub-sec. (*j*) to incapacity arising from the causes therein mentioned and proved as therein provided for, shall arise as a consequence of incapacity in fact

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whether the same is or is not evidenced as required by that sub-section; and it cannot be contended that an *ultra vires* by-law becomes valid in consequence of publication by force of sec. 437. It follows that if by-law 9 is a valid by-law the "forfeiture" takes place only when incapacity has been

proved on oath before the Pilotage Authority.

433(*j*) obviously imports inquiry of a judicial nature and notice and full opportunity to be heard as essential conditions of any valid decision or executive action upon the evidence adduced. It cannot successfully be invoked in support of the claim of absolute authority set up in the statement of defence. The justification relied on at the trial, therefore, fails.

In the Court of Appeal the judgment of the learned trial judge was reversed on the ground that as the Pilotage Authority in the acts complained of was exercising a judicial capacity, the appellant could only succeed by alleging and proving malice in fact. For two reasons that seems inadmissible.

First, it rests, I think, upon some misconception of the character and ground of the appellant's claim which are that the respondents are answerable in damages for intentionally preventing him pursuing his calling of a licensed pilot without lawful justification or excuse. The respondents not denying but admitting that they had done acts which were intended to have and had the effect of preventing the appellant acting as a licensed pilot, set up as I have said as justification for these acts an absolute power conferred upon them as Pilotage Authority to "dismiss licensed pilots." It was not alleged that the power was a judicial power or that in doing the acts complained of

they in fact exercised judicial functions; and the defendant's case at the trial failed, I repeat, simply because they were unable to shew the existence of any such absolute authority as that upon which they alleged they had acted. I do not think it was open to the respondents in the court of appeal to change face and take up the position that in what they did they were exercising judicial functions for which they were answerable only on proof of express malice. That is a position which ought to have been taken in the pleadings or at least at the trial when the appellant if so minded could have raised the question whether the respondents had acted otherwise than in good faith in the interests of the public service. The evidence now in the record is not calculated to convince one that the prosecution of a claim founded upon such a charge would have been a hopeless enterprise.

Secondly, assuming the respondents are entitled to rest upon the position in which they succeeded in the full court, I think the defence fails on the merits in both law and fact on the evidence as it now stands.

I have already said enough to shew that as the facts present themselves to my mind, it is sufficiently established that there was in fact no exercise of judicial function or of authority resting upon a judicial decision under section 433(*j*).

As to the law, assuming there had been an intention to exercise authority under by-law 9 since there was no hearing, no evidence on oath, no judicial determination, it follows that no "forfeiture," to use the language of the by-law, took place and consequently there is nothing amounting to a justification of the

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so called dismissal; which is, therefore, an actionable wrong under the principle of the *Mogul Steamship Company's Case*(1). Moreover, the rule is sufficiently established that persons in the position of the respondents exercising quasi-judicial powers are only protected from civil liability if they observe the statutory rules conditioning their powers as well as the rules of natural justice. *Wood* v. *Woad*(2); *Riopelle* v. *City of Montreal*(3), and see the judgment of Buckley L.J. in *Ex parte Arlidge*(4), and the judgment of Lord Macnaghten in *Herron* v. *Rathmines and Rathgar Improvement Commissioners*(5), at page 523.

I have not, of course, overlooked the argument of Mr. Rogers founded upon authorities relating to the responsibility of the judicial officers strictly so called, judges of the inferior courts and magistrates. Generally, no doubt, in the absence of bad faith such judicial officers are not responsible for harm caused by acts otherwise wrongful when such acts are judicial acts done in the course of some judicial proceeding in which the officer has jurisdiction as regards the persons affected, and the matter before him is some matter with which he has authority judicially to deal. No authority has been cited, however, for the extension of this principle to protect administrative officers such as the respondents from the consequences of injurious acts for which authority is wanting owing to the omission of the essential statutory prerequisites. Even as regards the acts of judicial officers strictly so called in respect of matters in which there is juris-

(1) 23 Q.B.D. 598.
(2) L.R. 9 Ex. 190.
(3) 44 Can. S.C.R. 579.
(4) [1914] 1 K.B. 160.
(5) [1892] A.C. 498.

diction over the person affected as well as over the subject matter where the jurisdiction is purely statutory, the statutory conditions must be observed at the peril of the officer, assuming, at all events, that he is under no mistake as to the facts. Thus, a magistrate being empowered by a statute to issue a warrant on complaint in writing before him on oath, the issue of a warrant in the absence of evidence on oath is an act for the consequences of which he is civilly responsible. *Morgan* v. *Hughes*(1); see also *Jones* v. *Gurdon*(2).

There remains the question of damages. A preliminary point arises touching the appellant's tenure of office. The practice of the Sydney Pilotage Authority (we have no information as to the origin of it) has been apparently, as I have said, to issue licences expressed to be for a term of one year. I can find no authority in the statute for imposing this limitation. In the by-laws produced there is nothing touching the point and having regard to the express provisions of section 454, I think that section 433(*e*) relating to "the terms and conditions of granting licences" does not authorize the imposition of any limit upon the duration of the term for which the license is to be in force. The relevant statutory provisions appear to be sections 445, 448, 452, and 454. (It may be observed in passing that the judgment of the trial judge seems to involve a finding that the appellant was not within the operation of section 462. An application before the delivery of judgment in this appeal for leave to adduce further evidence on this point was rejected on the ground that no adequate rea-

(1) 2 T.R. 225.
(2) 2 Q.B. 600.

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son was shewn for the admission of further evidence at that stage.)

Section 454 authorizes pilotage authorities to limit the period for which any licence shall be in force to a period of not less than two years. But our attention has not been called to any authority for limiting the period to one year. I am inclined to think that the words inserted in the licence granted to the appellant professing to provide that the licence shall only be in force for one year must be treated as inoperative. But, at all events, if it must be assumed that the Pilotage Authority intended to grant a valid licence, and if the proper assumption is that the intention was to grant a licence only for the minimum period permitted by the law, then, on that assumption, each of the licences must be treated as a licence valid for a period of two years.

On these assumptions the appellant's licence held by him in June, 1912, did not expire until August, 1913, and the position taken by the respondents in their statement of defence and sustained by the full court that the appellant ceased in law to be a licensed pilot after June, 1912, necessarily fails.

Assuming that the proper course is to treat the appellant's licence as a licence limited as to duration under section 454, and that the discretion to renew, conferred upon the Pilotage Authority by sub-section (*b*) of that section, is an absolute and not a judicial discretion; it would still, I think, be wrong to deal with the question of damages on the footing of the consequences of the proceedings in 1912 having ceased to operate with the expiry of the licence in August, 1913. The proceedings in evidence in August, October and November of 1913, shew that the majority of the

Board insisted at that time on treating the appellant as compulsorily retired from the service and disqualified from holding a licence. This loss of status and the prejudice thereby occasioned him in his character of applicant for a licence in August, 1913, is one of the consequences natural and intended of the respondents' conduct in respect of which the appellant is entitled to reparation.

On this footing the appellant would not be entitled to recover compensation *nominatim* for the loss of prospective earnings in the season of 1913-14. But without deciding whether or not the appellant's position was that of a licensee with a licence limited as to time under section 454, I still think the damages found by the learned trial judge are not excessive. Apart altogether from the right to reparation just mentioned this is emphatically not a case for measuring damages with nicety.

There was some suggestion, although I do not think it was seriously pressed, that substantial damages ought not to be awarded on the ground that the evidence shews the appellant's habits to have been so notorious that, if there had been an investigation conducted as the law required, the respondents must have reached the conclusion judicially that the appellant was incapacitated as an inebriate. But the findings of the learned trial judge dispose of this contention effectually. Not only does the finding as to damages tacitly involve a rejection of any such contention, but the learned judge explicitly holds that the appellant had successfully repelled the attack upon his character. The statements of some of the respondents must be evaluated in light of the fact that they were seeking some refuge from legal

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responsibility and of the strong suspicion, not to say probability, that the respondents as a whole whatever may have been their beliefs as to the appellant's conduct, were not free in the impeached proceedings from the influence of other motives than a desire to elevate the character of the pilotage service. In this aspect of the case it is eminently one in which the view of the trial judge ought to guide a court of appeal.

Two further points are suggested.

First, that the acts by which the respondents professed to "dismiss" the appellant from the service being legally void no damages can be recovered. Secondly, that the appellant should have had recourse to mandamus and can only recover such damages as could not have been prevented by resorting to that remedy. As to the first of these points. This is not a case like *Wood* v. *Woad*(1), where a member of a partnership complained of an illegal decision of a domestic tribunal professing to exclude him from the benefits of the partnership. This decision having been invalid in law and no special damage having been proved, it was held that as damage was the gist of the plaintiff's action he must fail. It is unnecessary to repeat what I have said above in order to dispose of this point.

As to the second: I have already said sufficient to indicate my view that the respondents cannot complain that the appellant did not take legal proceedings to compel them specifically to execute their duties or rather to refrain from wronging him in order to reduce the damages to which he might eventually prove to be entitled.

(1) L.R. 9 Ex. 190.

The appeal should be allowed and the judgment of the trial judge restored.

ANGLIN J.—I assume, as was contended on their behalf, that when acting within the ambit of the jurisdiction conferred upon them, the defendants are entitled to the immunities of a quasi-judicial body. But after a careful consideration of the duties and powers of the Pilotage Authority, their relations to pilots, the relevant provisions of the "Canada Shipping Act," and all the circumstances of the present case, I have reached the conclusion that in directing the cancellation of the plaintiff's licence, the defendants neither acted, nor professed to act in the discharge of a quasi-judicial function, but exercised an assumed absolute and arbitrary power to dismiss the plaintiff or to cancel his licence, without complaint, notice or investigation. Having regard to sections 433(*j*), 514, 550(*e*), 552 and 553 of the "Canada Shipping Act" (R.S.C., ch. 113), I think it is clear that the Pilotage Authority did not possess any such absolute power. The relationship of master and servant does not exist between the Board and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory and arises only after it has been satisfied either by a quasi-judicial investigation, held after fair notice has been given the pilot and he has had a reasonable opportunity to make his defence (and in cases not within sections 552-3 it would seem that the Board must take testimony upon oath), or by the production of a conviction thereof made by a competent

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tribunal, that the commission of an offence subjecting the pilot to cancellation of his licence has been established. The plaintiff had a clear and definite interest in the earnings of the body of pilots to which he belonged. His sharing in those earnings depended upon the continuance of his licence. The principles which govern the action of such a body as the Pilotage Authority in dealing with charges which, if established, may entail forfeiture of licence, are those which the courts have applied in such cases as *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*(1), at page 539; *Fisher* v. *Keane*(2); *Labouchère* v. *Earl of Wharncliffe*(3); *Béland* v. *L'Union St. Thomas*(4).

There is some evidence which indicates that the defendants' action in cancelling the plaintiff's licence was induced by motives other than zeal for the public welfare, and a finding of malice on their part would not entirely lack support. It is, however, unnecessary to deal with this aspect of the case.

In ordering the cancellation of the plaintiff's licence the defendants, in my opinion, proceeded without jurisdiction. They committed an unwarranted and illegal act which subjected them to liability to the plaintiff for such damages as he sustained as a natural and direct consequence thereof.

The learned trial judge assessed these damages at $1,800. The plaintiff's loss was, no doubt, substantial; but, with respect, I incline to think the evidence does not warrant so large a verdict. The plaintiff was bound to minimize his loss by seeking other employ-

(1) [1906] A.C. 535.
(2) 11 Ch. D. 353.
(3) 13 Ch. D. 346.
(4) 19 O.R. 747.

ment. This he does not appear to have made any great effort to obtain. His conduct was by no means above reproach and it may be that the cancellation of his licence was not undeserved. Had the Board proceeded judicially and in accord with the requirements of natural justice its action could not have been reviewed. It is certainly difficult, however, to determine with any degree of accuracy what amount of compensation should be awarded. My learned colleagues, with whom I agree in allowing this appeal, think the plaintiff entitled to the full amount of the damages awarded by the learned trial judge. It may be that as wrongdoers the defendants are not in a position to ask that the amount of the damages to which the plaintiff is entitled should be closely scrutinized. Their course of action was undoubtedly high-handed. On the whole, while not entirely satisfied with the amount allowed, I am not prepared to dissent on the quantum of damages.

Appeal allowed with costs.

Solicitor for the appellant: *Finlay Macdonald.*

Solicitor for the respondents: *Joseph Macdonald.*