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Sept. 21.

*Suit No. 638 of 1867.*

Muhammad Yusuf ... .. *Plaintiff.*  
Peuinsula and Oriental Steam Navigation Company ... .. *Defendants.*

*Moving vessel in harbour—Pilot—Negligence of pilot—Onus probandi—Bombay Harbour Rules—Lights on vessels—Vessel's duty to show lights—Maritime Law—Act XXII. of 1855, Secs. 7 and 12.*

The taking of a steam vessel on a trial trip from Mazagon to the sea and back again is a moving or such vessel within the meaning of Sec. 12 of Act XXII. of 1855. For such a trip, therefore, the employment of a pilot is compulsory.

Where the employment of the pilot is compulsory on board a vessel, and, such pilot being on board, an accident happens through negligence in the management of the vessel, it lies upon the owners, in order to exempt themselves from liability, to show that the negligence causing the accident was that of the pilot. If such negligence is partly that of the master or crew, and partly that of the pilot, the owners are not exempted from liability.

If it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burden of proof which the law casts upon them.

Rules of Bombay Harbour with regard to the showing of lights by vessels in the harbour considered.

Independently of special regulation or legislation, there is no general obligation by maritime law on sailing vessels either under way or at anchor to carry a light throughout the night, although, for the sake of avoiding a misfortune, it may under particular circumstances, become their duty to carry or show a light.

Although that is so, yet the Court will go some way to treat the dark boat as one wrong-doer; and if a vessel be either under way or at anchor at night a channel, fairway, or ordinary track or path of other vessels, she is bound by general maritime law either to carry or to show a light, in order to indicate her position, when other vessels are approaching her, and in sufficient time to enable them to avoid her.

The pleadings and facts of this case sufficiently appear from the judgment of the Court. The hearing before WESTROPP, J., in a Division Court, concluded in June 1869.

The *Honorable J. I. White* (Advocate General) and *Marriott* for the plaintiff.

*Mayhew, McCulloch, and Branson* for the defendants.

*Cur. adv. vult.*

21st September 1869—Westropp, J. :—The plaintiff has brought this action to recover Rupees 25,000 as damages from the defendants for having, by their steam-ship *Emeu*, run down his vessel, called the *Khudabakash*, which in his plaint he describes as a bagalo of 800 candies burthen, and as having become a total wreck, and wholly lost by the negligent and unskilful navigation of the *Emeu* by the servants of the defendants.

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The plaint also alleges that the collision “ occurred on the evening of the 24th of November 1866, in the harbour of Bombay, near the fishing stakes off Mazagon, where the bagalo was lying at anchor for several days before and at the time of the collision”: and “the *Emeu*, being then navigated by the servants of the defendants, steamed up the harbour on the said evening after sunset, and struck the said bagalo so as to cut down the same to the water’s edge; and the said bagalo immediately afterwards turned over and sank; and at the time of the said collision the said bagalo had a proper light hung high over the deck, and in such a position as to be seen from a considerable distance from vessels approaching from all sides, and such and so placed as is usual in vessels of the class and size of the said bagalo in the harbour of Bombay, under the regulations in force in the said harbour; and the said bagalo was, at the time aforesaid, anchored in a proper place in the said harbour.” The crew were fortunately all saved.

That plaint was not filed until the 11th May 1867, a delay which the plaintiff accounts for by stating that his counsel mislaid his papers. At the mutual desire of the parties the hearing of the cause was frequently afterwards postponed.

The Company, in their written statement in defence, says :—

1. That, at the time of the collision, the *Emeu* was in the charge of a qualified pilot of the port of Bombay, and not in that of any officer or servant of the Company.

2. That the *Khudabakash* did not then carry a proper light, as required by the notice issued in that behalf by the Conservator of the Port.

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3. That there was not then a proper look-out kept on board the *Khudabakash*.

4. That she was then anchored in a dangerous and improper position, viz., in the fairway, by the wilful neglect of the plaintiff's servants, and contrary to the regulation in that behalf of the Commissioner of Customs issued under Act VI. of 1863. (No such regulation was given in evidence.)

5. That the collision and consequent damage were caused not by any want of care, diligence, or skill on the part of the Company's servants, but by the negligence of the plaintiff's servants, the master and crew of the *Khudabakash*.

6. That a Court of Inquiry, appointed by Government, consisting of the acting Senior Magistrate and acting Master Attendant and Conservator of the Port of Bombay, in December 1866, after an investigation of the circumstances of the collision, and hearing all the evidence adduced, decided that the collision was entirely owing to the fault and negligence of the plaintiff and his servants.

As to that sixth averment by way of defence, I must repeat what has already been said at the trial, that howsoever great respect this Court may entertain for the opinion of the Court of Inquiry, held under Acts I. of 1859 and XV. of 1863, its decision, so far from in any way binding this Court, is not even admissible in evidence in such an action as the present. This Court must, quite independently of that decision, arrive at its judgment upon the evidence adduced on the trial of this cause.

The issues originally settled were :—

1. Whether the defendants negligently and unskillfully navigated their steam-ship *Emcu* in manner and form as charged in the plaint.

2. Whether the fact (as to the absence of a proper light in the *Khudabakash*) alleged in the second paragraph of the written statement is true.

3. Whether the fact (as to a proper look-out not being kept on board the *Khudabakash*) alleged in the 3rd paragraph of the written statement is true.

4. Whether the 2nd and 3rd issues or either of them is or are material.

To those four issues the following were subsequently added, viz.:—

5. Whether the bagalo or vessel, in the plaint alleged to be the bagalo or vessel of the plaintiff, was the property of the plaintiff at the time of the collision in the plaint mentioned.

6. Whether the said bagalo or vessel, at the time of the said collision, had such a light, and in such a position, as in the plaint in that behalf alleged : and

7. Whether the said bagalo or vessel, at or previously to the time of the said collision, carried, or the plaintiff, or his servants, in or on board the said bagalo or vessel, showed a light in sufficient time to have enabled the said ship *Emue*, if properly and skilfully navigated by the defendants or their servants, to have avoided the said collision.

Section 12 of Act XXII. of 1855 enacts that—"In every port subject to this Act to which the provisions of this section shall be specially extended by any order of the Local Government, it shall be unlawful to move any vessel of the burthen of 200 tons or upwards, without having a Pilot, Harbour Master or Assistant of the Master Attendant or Harbour Master on board," &c., "unless authority in writing so to do has been obtained from the Conservator or some Officer empowered by such Conservator to give such authority; and if any vessel shall, except in a case of urgent necessity, be removed contrary to the provisions of this section, the master of such vessel shall be liable to a penalty not exceeding Rs 200 for every such offence, unless the master of the vessel shall upon application to the proper officer be unable to procure a Pilot, Harbour Master, or Assistant, &c., to go on board the said vessel."

The Government of Bombay, on the 30th December 1857, issued a notification declaring Bombay to be a port subject to Act XXII. of 1855. That notification was confirmed by the Governor General in Council, which confirmation was

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published in Bombay on the 29th August 1859, together with a notification by the Government of Bombay specially extending Sections 12, 28, 37, and 40 of Act XXII. of 1855 to the port of Bombay, and also containing certain Port Rules made by that Government, with the sanction of the Governor General in Council, under Act XXII. of 1855, of which the first Rule was :—

“No vessel, if above 200 tons, entering Bombay Harbour, shall run up amongst the shipping until she shall have received permission from the Master Attendant or other duly authorised person, but must anchor within and to the eastward of the inner Floating Light; and no such vessel anchored within the limits of the Port of Bombay shall move from one place to another within the port between sunset and sunrise without the special permission of the Master Attendant.”

The accident occurred near the conclusion of a trial trip made by the *Emeu* on the 24th November 1866. She had left the usual anchorage of the P. & O. Steam Company's ships at Mazagon about noon of that day, and proceeded to sea. The Company's Superintendent (Captain Henery), and a party of guests were on board, amongst whom was the then Master Attendant. On her return in the evening, some of the guests having been landed as she lay off the Apollo Bunder, the *Emeu* proceeded thence up the harbour towards her moorings at Mazagan. During the whole of the trip she was in charge of Mr. James Jameson, then Acting Senior Pilot of this harbour. He had been obtained for the purpose by requisition, on behalf of the defendants, made at the Master Attendant's Office on the previous day. These circumstances constitute, in my opinion, a substantial compliance with the rule which has been just quoted.

I also think that such a trip (being the whole length of the fairway from Mazagon to sea and back again) was, to all intents and purposes, within the scope of Section 12 of Act XXII. of 1855, and, therefore, that it was compulsory on the defendants to take a pilot for the purpose. This is of importance, because, as Dr. Lushington says, “the owners have been held liable in all cases whatever, when a pilot was on

board, except where the taking such pilot was compulsory ; or where the liability was taken away by legislation, as in the case of *Lucey v. Ingram*" (a). Such was the ruling in *The Attorney General v. Case* (b), *The Eden* (c), *The Earl of Auckland* (d), and *The Lion* (e).

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The extent to which such compulsion to take a pilot, or such exempting enactments protect the owners from responsibility, has been the subject of frequent discussion.

The repealed Statute on this subject, 6 Geo. IV., c. 125, s. 55, (which applied to England only,) enacted that no owner of master shall be answerable for the damage which shall happen from or by reason or means of the neglect, default, or incapacity of any licensed pilot duly acting in charge of the vessel under the provisions of the Statute.

In giving the judgment of the Privy Council in the case of *The Christiana* (f), which arose on that Statute, Baron Parke said:—"It was held, at first, in putting a construction upon this Statute, that if a pilot was on board, and there was a neglect in the navigation of the vessel, it was *prima facie* attributable to him, and that he and not the owner was responsible, unless it was shown that his orders were disobeyed. This is laid down in *Bennett v. Moita* (g). Subsequently a different and, we think, a more correct view of this subject was taken by Dr. Lushington, the Judge of the Admiralty Court, in the case of *The Protector* (h), when, on a full consideration of the question, it was held that the master and owners were *prima facie* liable, and that the *onus probandi* was thrown on them to show that the neglect was that of the pilot. In order then to free the owners in this case from responsibility, it was their duty to show that the neglect to send down the top-gallant yards, masts, &c., was the neglect of the pilot. Further, it was held in the case of *The Diana* (i), affirmed on appeal by this Court (j), that the owners were responsible

(a) 6 M. and W. 302; S. C. 4 Notes of Cases 463. (b) 3 Price 302.

(c) 4 Notes of Cases 460. (d) 1 Lush. 164. (e) Law Rep. 2 Adm. 102.

(f) 7 Mac. P. C. C. 172. (g) 7 Taunt. 258. (h) 1. W. Rob. 45.

(i) Ibid 181. (j) 4 Moo. P. C. C. 11.

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unless the neglect which caused the damage was solely that of the pilot. If it was the fault of both the pilot and the master or crew, the owners are still responsible. The question then is, whether the omission which is decided to have been the cause of collision in this case, has been shown by the appellants to be that of the pilot only. The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiency of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only"—and the same learned Judge adds: "There may be extraordinary occasions when the master would be justified in disobeying the commands of the pilot. If from sudden illness or intoxication he becomes incompetent to command, the supreme authority would revert to the master during the period of the pilot's temporary incapacity."

The present Statute law in the United Kingdom on this subject is the 388th Section of the Merchant Shipping Act of 1854, which enacts that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

One of the first cases on that enactment was that of *The Schwalbe* (k). The Court of Admiralty and the Privy Council there adhered to the principle applied in *The Christiana* to the former Act (6 Geo. IV., c. 125), and held that, under the new enactment, the burden of proving that the loss or damage was occasioned by the fault of the pilot still lay upon

(k) 1 Lush. 239; S. C. 14 Moo. P. C. C. 241, 9.

the owners. So also in *The Iona* (l), the Court of Admiralty, and afterwards, on appeal in 1867, the Privy Council, held that it is not enough to prove that there was fault or negligence on the pilot's part, and that if there has been also neglect on the part of the master and crew which has been conducive to the collision, *ex. gr.*, if they have not kept a good look-out, the owners are liable for the damage. The same principle was adopted in *The Minna* (m). In *The Velasquez* (n) Sir James Colville, in delivering judgment in 1867 on behalf of the Privy Council, referring to several of the cases already mentioned by me, and to some others of importance, gives an able summary of the present state of the law on the subject, which I now quote: "It has been established by a long course of decisions, both in the High Court of Admiralty and at this Board, that to entitle the owners of a ship, which is under the charge of a licensed pilot, to the benefit of the provision in the Act which exempts them from liability where the collision has been occasioned by the fault of the pilot, it lies upon them to prove that it was caused solely by his fault. To show to what extent this general burden lies upon the owners it is sufficient to cite the case of *The Schwalbe*." Sir J. Colville, after quoting part of the remarks of Lord Chelmsford in delivering the judgment of the Privy Council in *The Schwalbe*, continued thus: "Again, the cases have clearly established that if for any act or omission which contributed to the accident the master or crew is to blame,—then, although the pilot is also to blame, the owners are not exempted from liability. One of the strongest cases of that kind is that of *The Christiana*, for there every act of omission, (and there were several of them) which contributed to the accident, was an act for which the pilot was to blame: yet, inasmuch as for one of them, *viz.*, the omission to strike and haul down certain yards and masts, the master was held to be also in fault, the owners were not exonerated from liability. On the other hand, such cases as *The George* (o), and *The Atlas*

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(l) Law Rep. 1 P. C. C. 426. (m) L. R. 2 Adm. 97.

(n) L. R. 1 P. C. C. 494. (o) 4 Notes of Cases 161.

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(p), seem to show that if it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular, which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them. If however the evidence shows that there were acts of negligence on the part of the master and crew which may have contributed to the accident, as well as fault on the part of the pilot, the duty of showing that the former did not contribute in part to the accident seems to be involved in the obligation of the owners to prove that the *causa causans* of the collision was exclusively the fault of the pilot. *The Iona*, one of the most recent cases decided by this Committee, seems to go the full length of this proposition."

Before proceeding to the application, in the present case, of these rules of law relating to pilots, it will be convenient here to consider whether there was any legal obligation on the plaintiff or his servants, the crew of the *Khudabakash*, to carry or show a light in that vessel, circumstanced as she was upon the night of the collision.

On behalf of the defendants it has been contended that it was incumbent on *Khudabakash* to carry a light, and that the collision was solely occasioned by the absence of such a light. In support of that contention the defendants put in evidence the following notice:—

"all coasting craft and native boats of every denomination when at anchor, or sailing up or down the fairway, shall, between the hours of sunset and sunrise, exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon at a distance of at least one mile.

"(Signed) W. C. Barker, Captain, I. N.,

Master Attendant and Conservator of the Port.

"Bombay, 5th January 1859."

(p) 5 Ibid 50.

As to that notice, Mr. Cork, the Assistant Master attendant, in his evidence on behalf of the defendant, said: "It is part of my duty to see that the regulations as to lights are followed. This is the copy of a notice dated 5th January 1859, issued from the Master Attendant's Office as to lights. I have posted printed copies of that notice in Guzerati, Marathi, and English on Boree Bunder, Carnac Bunder, Chinch Bunder, Bhao Russel's Bunder, and all of the different Bunders from Grant Buildings to the Peninsular and Oriental Company's Docks. There has been no substantial change whatever made in this notice for the last ten years. Generally, according to the practice of our office, those notices are posted up twice a year. This (exhibit No. 2) is a printed copy for the year 1867. The notice for 1866 was printed in precisely the same manner, and was the same as this notice (No. 2) for 1867." On cross-examination he added: "I gave thirty or forty copies of the light notice to the syrang of the office in 1866 to be posted up. I did not see him posting them, but I saw several of them up after he had posted them."

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Exhibit No. 2, so far as it is in English, is as follows, the two other portions of it being translations in Guzerati and Marathi, of the English part.

"All Harbour Craft, Coasting or Sea-going Craft, European or Native, of whatever rig or denomination, when at anchor, or sailing up or down the fairway, shall, between the hours of sunset and sunrise, exhibit, where it can best be seen, but at height not exceeding twenty feet above the hull, a White Light in a Globular Lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light all round horizon at a distance of at least one mile.

"(Signed) J. Everard C. Pryce,

Acting Master Attendant and Conservator of the port.  
 "Office of the Master Attendant and Conservator of  
 the Port, Bombay, 1st January 1867." \* \* \*

There is not any evidence in this cause as to whether before Act XXII. of 1855 came into force, or in fact whether

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 v. or any local custom having the force of law as to carrying  
 Peninsula and lights, existed in the port of Bombay.  
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Act XXII. of 1855 is "an Act for the Regulation of Ports of Port Dues." The 6th Section empowered the Local Governor to appoint an officer to be Conservator of every port, &c., subject to the Act, but directed that in Ports where there is a Master Attendant such Master Attendant shall be the Conservator, and that "the Conservator shall be subject to the control of the Local Government may appoint." The 7th Section enacted that "The Local Government, with the sanction of the Governor General of India in Council, may from time to time make such Port Rules. Not inconsistent with this Act, as it may think necessary for any of the following purposes, namely"—Then followed thirteen items, of which the two last were as follows:—"12. For regulating the use of fires and lights within any such port. 13. For enforcing and regulating the use of signal lights by vessels at night in any such port, river, or channel." The 10th Section enacted that "The Conservator of any port subject to this Act may in respect of any vessel within such port, &c., give directions for carrying into effect any Port Rule in force within such Port." That is not a power for the Conservator to make new Port Rules but merely authorises him to give directions for carrying into effect Port Rules in force within the Port. Whether there was any rule or usage in Bombay Harbour in or before 1855 as to carrying lights at night, as already observed, does not appear. The Act (XXII, of 1855) does not in express terms abolish any such rule or usage if it existed. A new rule, duly made under the Act, would, however, so far as it was inconsistent with a former rule or usage, necessarily supersede it. Exhibit No.7, already, mentioned as comprising certain Port Rules, made by the Government of Bombay with the sanction of the Governor General in Council, and promulgated on the 29th August 1859, contained, in its 13th

Clause, the following rule:—"No private vessels are to hoist *signal lights* at night, or to fire any great guns or muskets at the hours of sunrise or sunset, or at any other time, *without permission*, excepting in cases when requiring assistance." The scope of that rule, and the intended meaning of the term "*signal lights*," as used in it, are not so clear as might be wished. That term, we have seen, occurs also in the 13th item of the 7th Section of the Act. The 12th item is conversant of "*fires and lights*." In it the word "*lights*" probably denotes lights used below or on deck, and the term "*signal lights*" used in the 13th item in all probability means lights used aloft. It would certainly include lights employed in what is ordinarily called signalling, *i.e.*, for conducting communications with other ships or with the shore, but it is not quite clear, and I offer no opinion upon the question, whether it would include a fixed light carried aloft during the night, in order to indicate the position of the vessel which carries it, with a general view to the prevention of collision of other vessels with her. I shall merely observe that I do not find the term "*signal lights*" used in the Admiralty Regulations (relating to lights carried for the purpose of preventing collision) made under the authority of the Statute 14 & 15 Vic., c. 79, s. 26, or in those made under the Merchant Shipping Act of 1854, section 295 (since repealed), or in the rules in Table C. of the Merchant Shipping Act of 1862. The word "*light*" only is used, and the prefix "*signal*" is omitted. Even, however, assuming that the Bombay Government Rule by "*signal lights*" intended to designate not only lights employed as a means of communication with other vessels or with the shore, but also lights carried aloft throughout the night to indicate the position of the vessel *carrying* them for the purpose of averting collision, it would, I think, be altogether straining the rule to hold that, by the prohibition to *hoist signal lights* by night, it was intended by the Bombay Government, under the sanction of the Government of India, to prevent a vessel from temporarily *showing* a light, say over the quarter or elsewhere, in order to give notice of her position to a vessel approaching her so nearly and steering such a course, as that collision must probably

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take place unless such a measure be resorted to. To hold that such a prohibition was intended would be, I think, not only to do violence to the language of the rule, but also to attribute to Government the unreasonable intention of denying to vessels the right of self-preservation on a sudden emergency, and, moreover, as I shall presently show, to abrogate, so far as regards the harbour of Bombay, a fixed principle of general maritime law.

Again, admitting that the Master Attendant cannot *immediately*, under Act XXII. of 1855, make a new or substantive rule, yet the rule, contained in clause 13 of the Government Rules, contemplates the hoisting of signal lights, whatever that term may mean, by vessels, with 'permission' or in cases when requiring assistance. The general administration of affairs connected with the harbour and shipping seems, on a purview of the Act and of the Government Rules founded upon it, to be vested in the Master Attendant, and, therefore, although the rule does not expressly say so, I think that the permission intended must be his permission. It appears unreasonable to suppose that any course so highly inconvenient as an application to Government itself for permission was intended. If they have no higher function, the Light Notices of 1859 and 1866 would operate at least as permission to the vessels described in those notices to carry a light. The words "or in cases when requiring assistance" suggest this observation:—That those words may mean that in a sudden emergency of any kind, a vessel may hoist a signal light. That is, no doubt, a somewhat free paraphrase for the expression "in cases when requiring assistance." Very probably what the framer of the rule intended to lay down by it was, that vessels in Bombay harbour should carry the lights to be prescribed, whatsoever they might be, by the Master Attendant, and no other lights except in cases of imperative necessity, and that in those cases they might hoist such lights as the special occasion might require. If this were the intention, the language of the rule has not been felicitously chosen, and be the intention what it may, the language is deficient in perspicuity, and needs amendment.

Whatever difficulty there may be in the construction of the rule, it, if known to the plaintiff, which I doubt, most certainly has not misled him into the belief that he was not bound to exhibit a light. He seems to have been acquainted with the Light Notices. At all events, in his plaint, as I have already mentioned, he studiously avers that "at the time of the said collision, the said bagalo had a proper light hung high over the deck, and in such a position as to be seen from a considerable distance from vessels approaching from all sides, and such and so placed as is usual of the class and size of the said bagalo in the harbour of Bombay under the regulations in force in the said harbour." As it may be contended that this averment, albeit on solemn affirmation, is mere surplusage in pleading, I have thus fully discussed the Port Rules of Government, and the Light Notices of the Master Attendant, and shall also presently refer to general maritime law with respect to lights; but the plaintiff did not limit himself to an averment in his plaint as to his vessel carrying a light. The main point to which the testimony of his witnesses was directed was the establishment of that alleged fact, and when giving his own evidence he, on cross-examination, said: "I knew the Sarkar's regulations about anchoring the bagalo, and also as to carrying a light, and therefore the light was lighted. My light was 17 feet from the hull, by the hull I mean the keel" (probably meaning keelson) "of the vessel. I don't know the regulation as to the height of the light, but I am in the habit of carrying a light. My light could be seen at the distance of a mile," and he said more to the same effect on re-examination. Whatever may be the true construction of the Port Rule made by Government as to signal lights, however small the legal value attachable to the Light Notices issued by the Master Attendant may be, I am satisfied, as already stated, that the Pcr. Rule was not intended to interfere or dispense with what I shall now proceed to show was required by general maritime law of a vessel so situated as the *Khudabakash* was on the night of the 24th April 1866, when the *Emeu* was approaching her.

From *The Rose* (q), *The Swea* (r), *The Sarak* (s),

(q) 2 Notes of Cases 101; S. C. 2 Wm. Rob. 2.

(r) 4 Notes of Cases 97 n. (s) Ibid, 98 n.

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*The Londonderry* (t), and *The Osmanli* (u), it would appear that independently of special regulation or legislation, there is no general obligation by maritime law, or what may perhaps not improperly be called the common law of the sea, on sailing vessels to carry a light throughout the night, although, under particular circumstances, for the sake of avoiding a misfortune, it may become their duty to carry or show a light.

In *The Londonderry* Mr. Justice Burton, in giving the judgment of the Court of Delegates in affirmance of the decision of the Court of Admiralty in Ireland, regretted that it was not incumbent on sailing vessels to hoist lights, and expressed a hope (since realised, so far as regards the United Kingdom), that the law may be reformed in that respect. In the case of *The Swea*, the vessel injured was at anchor in the Bristol Channel. Dr. Lushington said: "It has never been laid down by you (the Trinity Masters) as a general rule that a vessel at anchor should have a light at any time. But it is said it is the custom in the Bristol Channel to show a light. Custom is a very indefinite term. As I understand it in this case, it was a general practice, not that it is universally so." A light was held to be an unnecessary ingredient in that case, but I may observe that the injured vessel was lying at anchor at some distance below Cardiff, where the Bristol Channel is from ten to twelve miles in width. In *The Sarah*, the injured vessel was lying at anchor in the Downs, two miles from the Gull Light, and the same distance from the shore. Therefore neither *The Swea* nor *The Sarah* is in point here. *The Iron Duke* (v) is a case deserving of attention. She was a powerful iron steamer of 600 tons, carrying the Irish mail in 1844 from Kingstown, had three strong lights, one at her foremast-head, and one at each bow, and was going at full speed, above twelve knots per hour, the wind behind; there was only one man on the lookout standing upon a raised fore-castle. The night was dark, but not hazy. About ten miles from Point Lynas light she

(t) 4 Notes of Cases, Appx. XLII.

(u) 7 Notes of Cases 509.

(v) 4 Notes of Cases 94, 585.

came into collision with the *Parana*, a brig of 200 tons. The latter almost immediately went down, her master and five of the crew being drowned. She had a valuable cargo, carried no light aloft, was close-hauled on the starboard tack, and was going at the rate of four or five knots an hour. The mate saw the *Iron Duke* ten minutes before two o'clock A.M., six miles off, he returned to the deck some time afterwards, and then took the light (a good one) from the binnacle, and exhibited it for about five minutes over the nearest quarter. There was some uncertainty, however, as to the length of time during which the light was so shown, and it was not observed on board the *Iron Duke*. Dr. Lushington, after stating that there was no general rule that sailing vessels should carry a light, left it to the Trinity Masters to say whether, "if it was not the duty of the *Parana* to carry a light aloft, it was her duty to have exhibited a light, that is to say when deserying the steamer she ought to have been prepared with a light, and to have exhibited it." The Trinity Masters said "We think the *Parana* did nothing wrong. Our opinion is that she did show a light, although it was but a very short time before the collision. Sailing vessels are not required to show a light. There is a rule that if a vessel wants a pilot she shows a light, and it is the rule that pilots should show a light; but under common circumstances sailing vessels do not show lights, and are not required to do so. They then censured the *Iron Duke* for the speed at which she was propelled, with an insufficient look-out, in a space where many vessels were sailing to and from Liverpool, and the Court pronounced against her for the full damage, £18,000, and costs. The Privy Council on appeal affirmed the decision on the latter grounds, but took a different view from the Trinity Masters as to the obligation on the *Parana* to exhibit a light. Baron Parke delivered their judgment. After stating that the only question on which they had any serious doubt was whether the light was held out in due time; he said that, upon a careful review of the evidence, their Lordships thought it was, and then he proceeded thus: "They are not to be considered as sanctioning the proposition that it was not necessary for the crew of the *Parana* to exhibit a

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light in order to give notice to the steamer of the situation of their vessel, under the circumstances of the case." He then added that the mate and two other men of the *Parana* "all give evidence as to their understanding that this was their duty whenever a steamer was nearing their course, and I agree with the Solicitor General that, as it was the duty of the steamer to steer clear of the sailing vessel, *it is fair and reasonable, and common sense requires, that the sailing vessel should take this mode of giving to the crew of the steamer notice of its position, in order to enable it the better to perform its duty. But this need not be done till the steamer is nearing the course of the sailing vessel, and the persons navigating the sailing vessel have reasonable ground to believe there is a risk of coming in collision with her. If their Lordships adopt this rule, the evidence they think shows that sufficient was done in this case.*" He then referred to the facts which I have stated, and to the exhibition of the binnacle lamp over the quarter, and said: "The precise number of minutes, like any other question of time, is not, and cannot be, accurately proved; the witnesses differ about it; but a very short period was quite enough, if the light had been seen, to have enabled the steamer to alter her course, and have avoided the collision, when it is recollected that she was moving at the rate of twelve miles an hour, and consequently traversing a space of 352 yards in a single minute, and a minute before the collision the *Iron Duke* was at that distance from the *Parana*. Their Lordships therefore being perfectly satisfied that the crew of the steamer were to blame in not keeping the good look-out required on such a night and at such a speed, and thinking that no blame justly attaches to that of the brig, who did exhibit a light as soon as they had reason to believe it was required, are of opinion that the sentence of the Court below should be affirmed, and they cannot refuse to give the respondents their costs."

A case strongly resembling the present one is *The Victoria* (w). The *Victoria*, a collier brig of 163 tons, in January 1848, at half-past two A.M., ran down the *Three Betseys*

(w) 6 Notes of Cases, 176; S. C. 3 W.m. R. b. 49.

(also a collier), of 96 tons, cutting her down to the water's edge as she lay at anchor in the usual track of vessels in six fathoms water in the S.W. Reach, the middle light bearing N.E. by N., distant about two miles. Several other vessels lying at anchor in and about the same place (the Swin), which showed or carried lights, were safely passed by the *Victoria*, which was going at five to six knot. Dr. Lushington, after laying it down that the *onus probandi* lies with the vessel in motion, and that she is *prima facie* bound to show a sufficient cause for coming in contact with the vessel which was stationary, and therefore, comparatively helpless, also that there is no general obligation of maritime law on vessels at anchor to carry or exhibit a light "although circumstances may exist which would render it obligatory upon the master of a vessel at anchor to exhibit a light for his own safety and for the safety of other vessels," said that he entertained no doubt whatever that "no light was displayed on board the *Three Betseys* sufficient to warn other vessels approaching to the position in which she was anchored." He continued: "I now come to the more important consideration in the case, the decision of which must rest with you (the Trinity Masters), namely, whether, looking to the season of the year in which this collision took place, the state of the night, and the locality in which the *Three Betseys* was anchored, it was not obligatory upon the master, as a matter of reasonable precaution, to have carried and exhibited an efficient light. If you are of opinion that the carrying, and exhibiting such a light would have tended to prevent the collision, I cannot but think that it was a duty imposed upon him to have done so, and for this reason, that all persons are bound to take due and proper care to avoid an accident and no man can justly complain of an accident that happens to himself, if by reasonable and proper precaution he could have prevented it. That the carrying a light, upon the night when this collision took place, was a necessary and proper precaution is, in a certain degree, admitted by the persons on board the *Three Betseys*, because they state in their reply, to which I have already adverted, that they did carry a light in the first instance, and were about to renew

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it when the two vessels came into collision. If this be so, it appears to me that it was only owing to a want of proper care on their part that the light was not actually burning at the time.

These latter remarks as to the admission on the part of the *three Betseys* that the carrying a light was a necessary and proper precaution, apply still more strongly in the present case, in which the plaint and the evidence of the plaintiff and almost of his witnesses were specially directed to establish that the *Khudubakash* did carry a light.

The Trinity Mrsters were of opinion that the *Victoria* was to blame for proceeding through such a locality at too great a speed considering all the circumstances of the case, and that the *Three Betseys* was to blame for not having an effective light at the period of the collision. The court of Admiralty accordingly ruled that the damage must be divided between the two vessels.

A similar ruling was made in *The Saxonia v. The Eclipse (x)*. The collision between them occurred in the Solent in 1860, but though subsequent to the passing of the Merchant Shipping Act of 1854, the case was not decided upon that Act, or the Admiralty Regulation made under its 295th section with regard to lights, because the *Saxonia* was a foreign vessel. The general maritime law was resorted to. The *Saxonia* was a powerful steamer of 2,200 tons, going at the time at nine knots. The *Eclipse* was a British barque of 254 tons, on the port tack, close-hauled, and barely stemming the tide. The moon was about 43 hours past the full, but the night was cloudy and dark. The Privy Council held both vessels to blame, the *Eclipse* for not exhibiting in sufficient time an effective light to indicate her position,—she had a green straboard light, burning exceedingly dimly, and showed a flare-up light, but not until the collision was inevitable or almost so,—and the *Saxonia* for continuing her speed of nine knots until the collision, and for not easing and stopping her engines or giving way to the *Eclipse*,

(x) 1 Lushington 410; S.C. 8 Jur. N.S. 315.

Sir John Romilly, in giving the judgment of the Privy Council, said: "Though the close-hauled vessel is not bound to give way, she is nevertheless bound to show some proper and sufficient light, in sufficient time to enable the steam-ship or other vessel, whose duty it is to give way, to avoid any collision. No blame can attach to a vessel for running foul of another vessel, if it has been impossible to distinguish it until the collision was inevitable. This is not a question of green or red light, but of no light at all. *A vessel at anchor or a fishing boat is bound by the general rules of the sea to exhibit a light, so as to afford the vessels, whose duty it is to avoid her the means of doing so.*"

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The Lords of the Admiralty, in February 1858, made a Regulation, under s. 295 of the Merchant Shipping Act of 1854, that "All sea-going sailing vessels, when under way or being towed, shall, between sunset and sunrise exhibit a green light on the starboard side, and a red light on the port side," and on the 26th October 1858 declared that that regulation, so far as it related to the lights to be carried does not apply to open boats, or to vessels usually employed in fisheries. In *The Olivia (y)*, it was held by the Court of Admiralty in 1862 that though a fishing vessel was not bound to carry the coloured lights described by the Admiralty Regulation of February 1858, yet she was bound by maritime law to show a light in reasonable time to an approaching vessel, which latter being also to blame in another respect, the damage of the collision was divided between her and the fishing vessel whose proprietors brought the suit.

The three cases last mentioned were suits in the Court of Admiralty, and were all disposed of upon the general maritime law, and not upon any Statute or Admiralty Regulation founded upon a Statute. In each of the three, both vessels concerned were in fault. In *Dowell v. The Steam Navigation Company (z)*, Lord Campbell, C. J., said: "According to the rule which prevails in the Court of Admiralty in a case of collision, if both vessels are in fault, the loss is equally divided (See 12 Moore P. C. C, 331); but in a Court of

(y) 1 Lushington 497.

(z) 26 L. J. N. S. Q. B. 59-60.

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Common Law the plaintiff has no remedy if his negligence in any degree contributed to the accident,"(i. e., directly, not remotely, contributed to the accident.) The present suit has been brought as an ordinary civil action, and has not been entered as brought under our Admiralty jurisdiction. A question would have arisen, if it appeared that both the *Emeu* and the *Khudabakash* were in fault, whether the loss should be dealt with according to the Admiralty or the Common Law system. I shall not express any opinion upon that question, as, in the view which I take of this case, it does not arise. In *Dowell v. The Steam Navigation Company*, a collier brig was sunk by the *Trident* steamer, belonging to the defendants, in 1853. The steamer the jury found most to blame, as going at too great a speed on a dark night; but they also were of opinion that the collier was not seen by the steamer till within two or three ships' lengths, which arose from "the fault of the collier in not continuing the light till the danger was passed," and this the Court thought would be a good defence for the steamer at common law under the plea of not guilty.

And, independently of the Common Law, the Court also thought that it was good defence, because the collier did not properly observe the Admiralty Regulation, made under the authority of the 26th Section of the statute 14 & 15 Vic., c. 79 requiring "sailing vessels, approaching or being approached by any other vessel, to show a bright light, in such a position as can be seen by such vessel, and in sufficient time to avoid the collision," and the 28th Section of the same Statute speed that "if in any case of a collision" it appeared to be occasioned by the non-observance of the rule to be made" by the Lords of the Admiralty "with respect to the exhibition of lights the owner of the vessel by which any such rule has been infringed, shall not be entitled to recover any recompense whatsoever for any damage sustained by such vessel such collision, unless it appears to the Court, before which the case is tried that the circumstances of the case were such as to justify a departure from the rule."

An earlier case, *Morrison v. The General steam Navi-*

*gation Company* (a), decided upon the same Admiralty Regulation and Statute does not appear to have been cited in the last case. In November 1852 the *Albion*, a steamer belonging to the defendants, going at ten miles an hour, ran into the plaintiff's vessel *Valiant*, a collier brig, at 4 A. M., lying at anchor in the Thames, in Gravesend Reach, towards the south shore, near a place where colliers usually bring up. The Chief Baron (Pollock) directed the jury that the Admiralty Regulations applied to the lights of sailing vessels within the port of London; and, therefore, if the accident was owing to the *Valiant* not having a light while at anchor in the fairway, the plaintiff was not entitled to recover; that, if the accident was occasioned by negligence on both sides, neither party could maintain an action, and he put it to the jury whether the fact of the *Valiant* not having a light contributed to the accident, and whether she was in the fairway of the river. The jury found for the defendants, stating that the *Valiant* was in the fairway of the river, and that if she had a light it would have tended to lessen the danger. The Court of Exchequer unanimously refused to set that verdict aside. In giving their judgment, Pollock, C.B., said: "The point, as left to the jury, involved the question whether the defendants themselves had contributed to the accident by their own carelessness. We decidedly think that no change has been effected by the Admiralty regulations in this respect, and that persons navigating ships are bound to keep a look-out just as they were before these regulations were made; and if it could be clearly established that a vessel having no light had been run into by another vessel from sheer carelessness and negligence in not keeping a good look-out, we agree with the plaintiff's counsel that the injured party could recover. But here that matter was left to the jury, who distinctly found that the defendants' steam vessel was in a part of the stream where she had a right to be, and that the accident arose from the plaintiff's own negligence. The point was therefore left to them, substantially involving the law as it stood before the statute, and still is, namely,

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(a) 22 L. J. N. S. Exch. 233; S. C. 8 Exch. 733.

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that if the conduct of the party complaining has either occasioned, or contributed to the occasioning of the loss, he is no more entitled to recover now than he would have been before the statute was passed, and these regulations made."

The doctrine laid down by the Privy Council in *The Telegraph (b)* substantially agrees with that of the Court of Exchequer. They held that the regulations must be literally complied with, and that if a collision occurs *which is attributable to a departure from the regulations*, the party so departing cannot recover damages.

But Sir John Patteson, in delivering the judgment of the Council, said:—"Now, as admitted in argument, it is not departure from the regulations which would preclude a vessel from recovering altogether, unless that was the occasion of the collision. It might be a light night, so that a vessel could be seen without a light, or there might be misconduct on the part of the other vessel, and in these and other cases that might be put, the party would be entitled to recover, although the regulations had not been complied with. (Acc. 1 Spink 31, 17 Jur. 1037, Swabey 88, 10 Moore P. C. C. 472.) The collision must be clearly traced to a departure from the regulations, and it is our desire that it should be understood that those who depart from them do so at their own peril." (Acc. 1 Spink 96, 298, 18 Jur. 296, Swabey 20, 101, 120, 465, 519, 2 Jur. N. S. 620.) The regulation required that vessels at anchor in a roadstead or fairway should exhibit a light at the masthead. The *Palermo* barque was at anchor at 10 p.m., in a proper place, in Belfast Lough, in the fairway however, with a light hoisted not at the masthead, but in the larboard mizen rigging. The *Telegraph* steamer, going along at a proper speed, and with a good look-out, ran into the *Palermo*. Dr. Lushington, with the advice of the Trinity Masters, decreed in favour of the *Palermo*, but the Privy Council reversed that decree with costs, being of opinion that the accident was attributable to the *Palermo's* departure from the regulation in not placing her light at the masthead.

(b) 8 Moo. P. C. C. 167, 176.

*Morgan v. Sim* (c), decided on the 15th December 1857 by the Privy Council, the members present being Lord Wensleydale, Mr. Pemberton Leigh (Lord Kingsdown), and Sir John Dodson—a very strong Court, who affirmed the decision of Dr. Lushington in the Admiralty Court—was much relied upon for the defendants. The *City of London*, steamer, on her way from London to Aberdeen, ran into the *Celerity* smack. The latter went down head foremost in less than two minutes—the mate and an apprentice were drowned; the master and the rest of the crew were saved. The smack neither carried nor showed a light. The collision occurred at seven o'clock in the evening, the smack being hove to at the mouth of the Thames, at the lower part of the Gunfleet sand, to reef her mainsail. The weather was clear, the moon shining brightly, and the wind was blowing hard. Dr. Lushington directed the Trinity Masters that it was not because it was a bright night that it was unnecessary to obey the Admiralty's regulation, made under the Statute 14 and 15 Vict., c. 79, s. 295, requiring the exhibition of a light by a vessel hove-to. He, in substance, put two questions to them; 1.—Whether, there was a good lookout on board the steamer. 2.—Whether, if there had been a light exhibited on board the smack, the steamer would have seen it, and so, in all probability, have avoided the collision. The Trinity Masters were of opinion that there were no circumstances to justify the smack's departure from the regulation, and that, if a light had been shown, there would, in all probability, have been no collision. This, Dr. Lushington held, a good defence, and decreed for the steamer with costs. In his judgment, given on behalf of the Privy Council, affirming that decree, Lord Wensleydale, after noticing that the Trinity Masters had not distinctly answered the first question, said “but they have answered very distinctly the second question—which is also an answer to the appellant's case—namely, that, if a light had been shown there would, in all probability, have been no collision,” and added: “The Sailing Masters before the Privy Council were not satisfied

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(c) Swabey 248. 11 Moore, P. C. C. 307.

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on the evidence that the steamer was to blame, but were satisfied upon the other question that if a light had been exhibited on board the smack, then in all probability, the collision would have been avoided." The Privy Council there clearly held that the *onus probandi* lay upon the party seeking to recover compensation for damage occasioned by a collision, and that he must establish that the loss was attributable to the neglect or default of the other party.

I have thus fully reviewed the leading English authorities on the subject of lights because they appear to me to show a growing disposition on the part of the English Courts to insist strictly on the exhibition of lights, in cases arising as well on the general maritime law as on the Admiralty Regulation, where that course is likely to avert collisions.

It has been seen that the cases are divisible into two classes: 1—Those governed by general maritime law. 2—Those governed by Admiralty Regulations founded on Statutes. This latter class is not so directly applicable to the present case as the first class, even if I assume that the Light Notices issued by the Master Attendant may be considered as deriving authority from Act XXII. of 1855. That Act contains no such stringent clauses as the 28th section of the Statutes 14 & 15 Vic., c. 79, and s. 208 of the Merchant Shipping Act of 1854, or as Sections 29 and 32 of the Merchant Shipping Act of 1862, which Act has superseded the Admiralty Regulations, and contains in its Table C. the rules at present in force in the United Kingdom as to the lights which steamers, sailing vessels in motion or at anchor, and fishing vessels, and open boats shall carry or exhibit. So far, however, as the cases upon the Admiralty Regulations and upon those statutes involve general principles, they are worthy of attention in this case. Of the decisions quoted, the most apposite here are those which were based on general maritime law only.

In the second edition of Pritchard's Admiralty Digest, Vol I., are collected some Irish (page 146, paras, 173, 177, page 152, para. 221.) and several American cases (pages 145, 146, notes 64, 65, 68, 69, 71, 72, 74, 76, 77), the result of which

may be shortly stated as similar to that of the English cases—viz, that although there is no general rule of maritime law (independently of positive regulation or enactment) that a sailing vessel either under way or at anchor must at night always carry a light, yet that the Court will go some way to treat the dark boat as the wrong-doer, and that if a vessel be either under way or at anchor at night in a channel, fairway, or ordinary track or path of other vessels, she is bound by general maritime law either to carry or to show a light, in order to indicate her position when other vessels are approaching, and in sufficient time to enable them to avoid her; and that if common prudence require that a vessel lying in a particular place should show a light, it will be no excuse that the common practice of the harbour or river is to neglect to do so.

The *Khudabakash* was, beyond all doubt, anchored in the fairway, about two or three cables' lengths to the south of the fishing stakes, and directly in the path of vessels proceeding towards the P. and O. Company's moorings and thence up the harbour. She lay four or five cables' lengths south of the southward most of the P. and O. Company's moorings, and about a mile to E.S.E. of Gibbet (Cross) Island. A cable's length is 120 fathoms (240 yards). A European ship lay between her and Gibbet Island. Mr. Cork, the first Assistant Master Attendant, says that the narrowest part of the fairway in the harbour is abreast of Gibbet Island. It extends about one mile due east, he says, from that island. The *Khudabakash* lay outside all of the other barges, of which there were many lying at anchor between her and the Mazagon shore. The night was what sailors describe as a clear dark night. Captain Anderson, who then commanded the *Emeu*, adds that it was rather hazy down upon the water. The *Emeu* was proceeding at the pace called "dead slow" from off the Apollo Bunder up harbour in the direction of her moorings. "Dead slow" with the *Emeu* is said to be about three knots per hour, her half-speed being about five knots. Captain Anderson says that she was steaming badly. Captain Henry, who was on board, but not taking any part in the navigation, said indeed

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that she might at the time have been going at half-speed, but he does not speak at all positively on that point, and adds, that he did not pay particular attention to it. David Bilham, the carpenter of the *Emeu*, said that she was going at a tidy pace through the water, he did not know whether at full-speed or not, but he thought not. I prefer, however, on this point the evidence of Captain Anderson, and of the pilot, whose business it was to give the order as to the rate of speed, and who must have been cognisant of it. They both say positively that she was going dead slow, and Mr. Mowbray Robinson, the third officer of the *Emeu*, also says that she was going quite slow. It is not denied that she had the proper lights up which the law requires a steamer to carry. The state of tide was young flood, which had just begun to make, and the shipping at anchor, including the *Khudabakash*, were beginning to swing with it. She therefore was lying partly across the tideway, with her head towards Boree Bunder, and thus nearly presented her broadside to a vessel coming up harbour. At that part of the fairway where the collision occurred the pilot has deposed (and his evidence on that point has not been impeached) that the *Emeu* could not at that time of tide have had more than two feet of water under her keel. There is reason to believe that the harbour is silting up in that locality. There was little or no wind. Shortly after the *Emeu* left the vicinity of the Apollo Bunder, the pilot, who up to that time had been on the bridge with Captain Anderson, finding it had become too dark to see well ahead from that position, proposed to go to the fore-castle, in order that he might see more distinctly. Captain Anderson assenting, the pilot went to the fore-castle, Captain Anderson remaining on the bridge to attend to the steering, the wheel being on the bridge. The pilot joined the chief officer, Mr. Smith, on the port side of the fore-castle, who was on the look-out there. The pilot was not quite positive as to the time, but was under the impression that the collision took place about 20 or 25 minutes after he so joined the chief officer. The third officer, and Archbold, the gunner, were on the look-out on the starboard side of the fore-castle. A native seaman was stationed on the

jib-boom, also on the look-out. He and Archbold have not been produced at the trial, and I should certainly have preferred that they had been. But it has been stated that both of them were in attendance at the Court of Inquiry, and that Archbold was examined there. An attempt was made at the trial before me to give, on behalf of the plaintiff, evidence of something which Archbold is alleged to have said at the Court of Inquiry, but such a course being contrary to the rules of evidence, permission was refused. [Here the reasons for the absence of Archbold and Mr. Smith, the chief officer of the *Emeu*, were discussed by the Court, and held to be sufficient].

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The pilot and third officer who were on the look-out, and the carpenter, Bilham, who was also on the fore-castle, in readiness to let go the anchor, and Captain Anderson have been examined for the defence. They are unanimous in stating that the *Khudabakash* did not carry or display any light, that is to say, until, the pilot says, about two seconds before the *Emeu* struck her, when a torch was held up over her port side. He is unable to speak with precision as to time, but says that, about five or ten seconds previously to the collision, the *Khudabakash* was, by the third officer, reported to the chief officer, and to him before he saw her, but, certainly, the pilot adds, not in sufficient time to enable him to keep clear of her. He proceeds: "Almost the next instant after she was reported I heard the noise (a shout raised by the crew of the *Khudabakash*) which I have mentioned. I ordered the helm to be put hard a port. To the best of my knowledge that was done. That was the right thing to do under the circumstances, in order to go under her stern, as she was swinging with her head towards Boree Bunder. When I first saw the bagalo there was no light whatever on it; if there had been a lamp lighted a foot square we should have seen it. About two seconds before we struck her they showed a torch over her port side (the side nearest the *Emeu*). We struck her about 10 or 12 feet, or perhaps a little more from the night-heads, and a short distance before the foremast." The order to port the helm, it is not denied,

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was a proper order under the circumstances for the purpose of going, if possible, astern of *Khudabakash*, which was what her crew called out to the *Emeu* to do.

On cross-examination, the pilot, after describing the position of the *Khudabakash*, said: "There was a ship lying nearer to Gibbet Island. To avoid the ship I had to port the helm, and keep further to the eastward, and, in so doing, the bagalo being right in the way, we came upon it;" and again, "I think it was the third officer or the warrant officer on the starboard side who first reported her. She was reported first to the chief officer, with whom I was then standing on the port side of the forecastle. She was, I believe, in fact seen by the persons on both sides almost simultaneously. We could have reversed the engines, and we did so. I gave the order to port the helm and to turn astern (*i.e.*, reverse the engines) almost in one breath." I should here observe that an order to port or starboard the helm being on board the *Emeu* conveyed to the persons on the bridge by coloured lights exhibited on the forecaste, would reach them more rapidly than an order to stop or reverse the engines, which should be passed on to them by word of mouth. Captain Henry stated that he perceived that the engines stopped before the collision actually took place. He, the pilot, and Captain Anderson all concur in saying that if the *Emeu* had been going at half-speed at the moment of the collision she must have cut the *Khudabakash* in two or run right over her. Captain Anderson says that, "reversing the engines will check the way, but will not instantly stop it in the case of a large and powerful steamer. The *Emeu* had some cargo on board, to the best of my recollection she was half laden." I may here remark that the circumstance of her having cargo on board would cause her to hold her way longer than if she were unladen, and would increase the difficulty of stopping her. Captain Andersen added, "I saw that the helm was put hard a port without any loss of time whatever, when the signal was made from the forecastle." In a previous part of his evidence he said: "We did port the helm. That might be a minute or less before the collision. It was a very short time,—almost

immediately after porting the helm the engines were stopped. I don't remember whether they were reversed." This was because immediately on the stopping of the engines Captain Anderson left the bridge, and went forward. Mr. Mowbray Robinson, the third officer of the *Emeu*, who gave his evidence with great caution and fairness, was, in consequence of his position on the starboard side of the forecabin, and of his being the person on board the *Emeu* who first sighted the *Khudabakash*, a witness of much importance. The substance of his evidence, as gathered from his direct, cross, and re-examination, was that he first saw her outside the shipping and in the fairway nearly ahead, but slightly on the starboard bow of the *Emeu*, at a distance of 200 or 300 yards from that vessel. He immediately reported the *Khudabakash* to the chief officer, who was standing on the port side of the *Emeu*, close to the pilot. Mr. Robinson did not know whether the pilot heard him do so. The chief officer gave no order, nor was it his business to give any. It was the pilot's duty to give the necessary orders. Mr. Robinson heard the pilot give an order to port the helm, and almost in the same breath to turn asterr. There was not then time to avoid the collision. The pilot's order to port the helm was given a very short time after Mr. Robinson had reported her, but as he thought not until he had time to return to his post on the port side. Mr. Robinson was of opinion, but would not positively swear, that if the helm of the *Emeu* had been ported when he first reported the *Khudabakash*, the *Emeu* might have cleared her. The *Emeu* was going so slowly, viz., three or four knots an hour, that it was possible she might not, although the probability was that she would, have answered her helm with sufficient readiness to clear the *Khudabakash*. His report to the chief officer was made about three minutes before the collision. Mr. Robinson saw no light in the *Khudabakash* when he first sighted her, or even afterwards, when the *Emeu* had come within twenty or thirty yards of her. He added that the *Emeu* would take a longer time to answer her helm in such shallow water as that in which she was, than in deeper water.

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The evidence of the pilot shows distinctly that he did hear Mr. Robinson report the *Khudabakash* to the chief officer.

The plaintiff deposed that the *Khudabakash* carried always at night a bright light in a large lantern, visible all round for a mile, and that previously to his going on shore, about six p. m. on the evening of the collision, he had seen that light suspended aloft from one of the yards in its usual place between the masts. The four witnesses, who alleged that they were seamen on board the *Khudabakash* at the time of the collision, also deposed to the same effect as to the nature and position of the light.

Six other witnesses, who alleged that they were on board other native craft in the vicinity of the *Khudabakash* at the time of the collision, also depose that the *Khudabakash* was then carrying a good light, visible at a considerable distance.

I am aware of its having been said by Dr. Lushington in *The Vivid* (7 Notes of Cases 129, 130) and other cases (1 Spink 17,213) that "parties may swear that they did not see a light, but that never can be received as evidence in opposition to those who say that they showed a light; because both statements may be true. The light may have been exhibited, and those on board the steamer may not have seen it." That may be very good doctrine where there is no reason for supposing that the witnesses on one side are inferior in credibility to those on the other, but it would be dangerous, and especially so in this country, to act upon such a rule without discrimination.

[His Lordship here reviewed in detail the circumstances which led him to disbelieve the evidence of the plaintiff and his witnesses on this point.]

Assuming, however, what I cannot at all admit, that the *Khudabakash*, situated as she was in the fairway, was not bound in law to display in sufficient time even a temporary light when the *Emeu* was approaching, the plaintiff is not, in my opinion entitled to succeed in this action. Mr. Robinson, one of the look-out, did, when the *Emeu* was at a distance of 200 or 300 yards from the *Khudabakash*, report the latter to

the chief officer in the presence and hearing of the pilot. Taking into consideration that the *Khudabakash* was a small vessel, neither carried nor showed any light, I think that, on a clear dark night, with, as Captain Anderson says, some haze down upon the water, 200 or 300 yards was about as far as the look-out on board the *Emeu* could be expected to descry the *Khudabakash*. I don't forget that Captain Anderson said that a man keeping a proper look-out might possibly have seen a bagalo at 300 or 400 yards distance without a light. He added, however, that he was not prepared to swear that he must have seen her. Upon a bare conjecture, thus qualified, as to the possibility of seeing a bagalo at 300 or 400 yards without a light, although proceeding from one of the defendants' officers, it would be impossible, where the small vessel in this case was actually descried and reported when 200 or 300 yards off, to found an opinion that the master or crew of the *Emeu* were in fault. I must say, as Dr. Lushington said in a case mentioned in the *The Velasquez* by Sir J. Colvile, I mean *The George* (for Notes of Cases 163): "But in order to render the owners responsible for the damage done, I must be enabled to come to the clear conclusion that there was actual neglect or want of due care on the part of the master or crew, for if the evidence be nicely balanced, I can not pronounce affirmatively, so as to saddle the owners with the consequences of this unfortunate collision." There was pilot on board the *George*. Looking at the evidence of Mr. Robinson, I must say that if there were any default on the part of the *Emeu*, it was the default of the pilot, and not of the master or crew. The pilot heard Mr. Robinson report the *Khudabakash*, and, as already mentioned, Mr. Robinson says that the order to port helm and reverse the engines, if given immediately on that report being made, might have enabled the *Emeu* to clear the *Khudabakash*; but, though those orders were given shortly after the report was made, they were not given until Mr. Robinson had returned to his station on the port side, or in sufficient time to avert the collision. Captain Anderson also says that the order to port was given only about a minute before the collision,

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Going so slowly as the *Emeu* was, she could not have traversed a space of 200 or 300 yards in that time. If Mr. Robinson be right, as I believe him to be, as to the distance at which the *Khudabaksh* was when he reported her, it is evident that the order to port was not given until some time afterwards. Here then was some slight delay on the part of the pilot, whose duty it was to give the orders. The cases already cited as to pilots, including *The Atlas* (5 Notes of cases 50), also mentioned by Sir J. Colvile in *The Velasquez*, show that in such a state of facts, there not being evidence enough to fix any blame upon the master or crew of the *Emeu*, the defendants, her owners, are exonerated. I do not however decide, nor did Mr. Robinson or Captain Anderson positively assert, that beyond all doubt the pilot could have avoided the collision. The slow pace at which very properly the *Emeu* was going, the shallowness of the water and consequent ground attraction, and the fact that such current as there was in the tide, was with her, would all tend to render her immediate obedience to the helm doubtful, and to make it possible that, even supposing it to have been, as the pilot says it was, put hard to port when Mr. Robinson reported the *Khudabakash*, the *Emue* might not have sufficiently answered it within 200 or 300 yards to go clear of her.

The first issue, as to the alleged negligence of the defendants, must be found for them in the negative. It is unnecessary to come to any finding on the 2nd, 3rd, and 4th issues. The 5th, as to whether the *Khudabakash* was the property of the plaintiff, must be found for him, and in the affirmative. The 6th issue, as to the truth of the statement of the plaintiff that the *Khudabakash* had a light in the position alleged in the plaint, and the 7th, as to whether a light was carried or shown on board the *Khudabakash* in sufficient time to enable the *Emeu* to have avoided her, must respectively be found for the defendants, and in the negative.

The decree therefore must be for the defendants, and without costs, as their learned Counsel now present, Mr. Branson, does not ask for costs. The plaintiff being probably in humble circumstances, Mr. Branson has taken a considerable

rate and proper course, although, if pressed to give costs to the defendants, I might have had some difficulty in refusing such a request, inasmuch as I have reluctantly arrived at the conclusion that there has been, on the part of the plaintiff, both false swearing and subornation. His case has been very ably argued for him by the learned Advocate General, but the facts do not admit of success.

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*Judgment for defendants without costs.*

Attorney for the plaintiff—*G. S. Judge.*

Attorneys for the defendants—*Manistry and Hurrell.*

Aug. 10.

*In re* INDIAN REGISTRATION ACT, 1866, and in the matter of the petition of BAKATRAM BADRINATH.

*Registration—Promissory note signed by single partner in name of firm—Special agreement under Sec. 52 of Registration Act—Liability of copartners—Act XX. of 1866, Secs. 52 and 53.*

The managing partner of a firm executed a promissory note in name of his firm in favour of the petitioner, and specially registered the note under Sec. 52 of the Indian Registration Act, 1866 signing the special agreement also in the name of his firm.

Held, that, under Sec. 53, the petitioner was only entitled to a decree against the partner who actually signed the note and special agreement.

The petitioner, on the 4th March 1869, applied to Westropp, J., in Chambers, under Sec. 53 of the Indian Registration Act, 1866, for an order to draw up a decree in favour of the petitioner, and against the defendant's firm of "Magniram Sahebaram and Company" for Rs. 10,874-7-6, with interest and costs.

The petition, upon which the order was sought, stated that, on the 23rd February 1869, Hazarimal Magniram, partner in the firm of "Magniram Sahebaram," executed an obligation for the payment on demand of Rs. 10,874-7-6 to the petitioner.

That the obligation was duly registered under Act XX. of 1866, and at the same time the following agreement was endorsed upon it:—