

Privy Council Appeal No. 85 of 1925.

The Owners of the British Steamship "Foreric" and her Freight - *Appellants*

v.

The Owners of the Inter-Allied Italian Steamship "Belvedere" - *Respondents*

FROM

THE SUPREME COURT OF GIBRALTAR.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH MARCH, 1926.

Present at the Hearing :

LORD PHILLIMORE.

LORD MERRIVALE.

SIR ARTHUR CHANNELL.

Nautical Assessors :

ADMIRAL SIR R. NELSON OMMANEY, K.B.E.

COMMANDER L. W. BAYLDON, R.N.R.

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal from the judgment of the Supreme Court of Gibraltar (Admiralty Division), dated the 9th June, 1925, in an action tried before His Honour Sir Daniel T. Tudor, Chief Justice, assisted by nautical assessors, whereby the present appellants (the defendants in the action) were held liable to the present respondents (the plaintiffs in the action) for damages for a collision which had taken place in Gibraltar Bay in the early morning of the 3rd September, 1919, between the appellants' steamship "Foreric" and the respondents' steamship "Belvedere." The collision had taken place under unusual circumstances, and a third steamship had taken an important part in the events which happened on the night in question. That third steamship was then a British vessel named the "Sedburgh," but was shortly afterwards sold to Norwegian owners and her name was changed to the "Bur." She is referred to in the proceedings and judgment in the Court below and in this judgment as the "Sedburgh."

This action was commenced in the Admiralty Court of Gibraltar on the day after the collision. At a later stage the pleadings of the "Foreric" having put the blame for the collision on the "Sedburgh," leave was obtained to add the "Bur" (previously the "Sedburgh) and her owners as second defendants, and in an amended claim delivered by the respondents to the appellants, the damages for the collision were claimed, in the alternative, either against the "Foreric" or against the "Sedburgh" or against both as joint tortfeasors. The "Bur," however, never came again within the jurisdiction of the Court, and could not be served with the amended writ. After considerable delay, caused by this and other circumstances, the case came on for trial against the appellants, the owners of the "Foreric," as sole defendants. The story of the collision, the main facts of which were hardly in dispute, was as follows: Both the "Foreric" and the "Belvedere" were at anchor in Gibraltar Bay on the evening of the 2nd September, 1919. The "Foreric" is a steamer of 3,974 tons gross, 2,557 tons net register, 345 feet in length, with engines of 364 horse-power. The "Belvedere" is a steamship of 7,420 tons gross register and 412 feet in length. The "Sedburgh" is a steamship 4,343 tons gross register and 360 feet in length. On the evening of the 2nd September, 1919, the "Foreric" and the "Belvedere" were each at anchor in Gibraltar Bay. The "Foreric" was lying about five ships' lengths to the north-west of the north pier of Gibraltar Harbour in 15 fathoms of water to her port anchor, with 45 fathoms of chain out when she brought up, which was increased to 60 fathoms about 8 p.m. on the 2nd September, when the wind had increased to a fresh breeze from the south-west. The "Foreric" was lying with fires banked and steam kept at 140 lb. for short notice. It was in evidence that it would have taken 20 minutes to get steam enough to work the main engines. The auxiliaries would, of course, take less time. The "Belvedere" was lying about four and a half to five ships' lengths due south from the "Foreric," according to the estimate of the witnesses from the "Foreric," and about 500 yards due south according to the witnesses from the "Belvedere." The "Belvedere" was lying at single anchor during the day of the 2nd September, but let go her second anchor in the night after the wind had freshened. She was in 35 fathoms of water. She was an emigrant ship with a crew of 170 men and with 300 or more passengers on board. It is admitted that she had her riding lights burning brightly and that there was no fault whatever to be found with her throughout. She also had her cabins brightly lighted up for the passengers, and although it was a dark night she was a rather conspicuous object to all vessels anywhere near. There is a dispute as to the "Foreric's" riding lights being lighted. There were a good many witnesses giving different accounts as to these lights and speaking of different times, and it will be convenient to deal with their evidence separately and after the general narrative of what took place has been given,

in order to point out more clearly the materiality of the time to which each witness speaks. The "Foreric" changed her anchor watch at midnight, and at that time the second officer came on deck and took charge of the "Foreric" on the bridge, and an able seaman named Davies went on to the forecandle, and it would be his duty to trim and relight the riding lights if they required it. It would also, of course, be the duty of the second officer to see that Davies did this. At 12.30 a.m. the second officer saw a steamer approaching, which proved afterwards to be the "Sedburgh." She was coming approximately from the south-east, showing her starboard side light with her masthead light. The second officer became apprehensive that she was coming too close and was going to anchor too close. He does not state in his evidence what were the signs that she was going to anchor, but probably she would have been easing her engines and would have had a light on her forecandle which would be required for getting her anchor ready on a dark night. He went and called the captain, and as he passed the chief officer's cabin, on his way to the captain's, he called the chief officer first and then the captain, telling each of them that a steamer seemed to be going to anchor "on the top of them." As he left the captain's cabin he heard the "Sedburgh's" chain running out, showing that she had then anchored. The captain and chief officer hurried on deck, and all three went on the bridge. They found the "Sedburgh" swinging to her anchor, and as she had the wind on her port side, and probably the tide also, she rapidly came head to wind, and lay parallel to the "Foreric, and only about 30 to 50 feet off her, both vessels heading to the south-west wind. It was, of course, apparent to everyone on board both vessels that the "Sedburgh" could not lie where she was, but it would not be apparent that the anchors were foul, even if they then were. The "Sedburgh" had been coming in with a fresh fair wind. In order to keep steerage way on the vessel the captain would probably keep his engines going until he got to the place where he wanted his anchor to be in order that he might swing round to a good berth. If there is in such a case any fumbling with the anchor or any delay forward in letting it go at the instant the order is given, the ship with way on will quickly overrun the place intended. This is a thing which not unfrequently happens when a vessel is brought to an anchor without first getting her head to the wind, and as a rule it merely involves getting the anchor up again and moving. It was suggested by the plaintiffs' counsel that the "Foreric's" captain should not only have at once hailed the "Sedburgh," but also have at once ordered his own steam to be got up. Their Lordships are of opinion that each of these things was wholly unnecessary, and they are confirmed in this by the opinion of the nautical assessors who advised them. The captain of the "Foreric" naturally expected the captain of the "Sedburgh" to move at once, and that, in fact, is what he proceeded to do. He ordered the

engines to go ahead and the anchor to be hove up. The officers of the "Foreric" all admitted in cross-examination that they realised that the "Sedburgh" *might* have fouled the "Foreric's" anchor, but it was not very likely that it had, and the nautical assessors are of opinion that the "Foreric's" anchor had probably not then been picked up. The chain was undoubtedly hooked by the "Sedburgh's" anchor when it fell or when it was hove up again, but the assessors think it far more likely that the chain was picked up when the "Sedburgh" went ahead while heaving up her anchor, and according to the evidence crossed the bows of the "Foreric" from port to starboard with her anchor out of the ground but not at the bow. There was a fresh wind and the "Foreric" would be pulling at her chain, which would be leading well away from her bow and would be likely to be caught by the other anchor half-way up if she passed near enough. Now this is pointed out it certainly seems more probable than that the anchor had been fouled when the other one was first dropped, but it seems to make no practical difference. In no case was it incumbent on the "Foreric" to take any steps until it was known that the two anchors had fouled. That was shown by the "Foreric's" chain rattling at the brake after the "Sedburgh" had got under way. On that being heard all the officers rushed to the fore-castle, and finding the chain running out the chief officer with assistance tightened the brake and stopped it. It is said now that this was wrong and that the chain ought to have been allowed to run out to its full length, as it would be likely then to break at the clinch. But the "Foreric," having no steam up, would have been in a more serious position than she already was. She would have been drifting helplessly, and although she had still her starboard anchor, she would have already drifted a little, and it might be too close to some other vessel to have made it prudent to drop her starboard anchor, and without steam she could not choose her berth.

Their Lordships, with the concurrence of their nautical assessors, think it prudent for the "Foreric" to let her chain hold, if it would, but to stand by, ready for immediate action of some kind if it parted, and to see what the "Sedburgh" did. It was of course for the "Sedburgh" to get out somehow of the difficulty she had got both ships into. The captain of the "Foreric" did the obvious and only right thing at once in ordering steam to be got up as soon as possible. He and the chief officer hailed the "Sedburgh," and it is somewhat uncertain whether they were heard, and it is said that they should have used a megaphone or their steam whistle if they had steam enough. All this, however, was only to tell the captain of the "Sedburgh" what was happening, which he was certain to know in a few minutes even if he did not already. He had been heard to call from the bridge to the hands forward: "Is your anchor up?" The

answer to this was not heard, but it probably was: "No, it is foul." Even if the men heaving had not already found that their anchor was foul, they must have found it when it began to pull on the "Foreric's" chain and make it rattle at the brake. The captain was informed by the witness Knight that they were towing another vessel and his answer seems to show that he already knew it. It must have been known on each vessel very nearly at the same time that they were attached to each other by their anchors and cables having fouled, and if it was necessary, which in their Lordships' view it was not, to sever that connection by one of the two vessels sacrificing their anchor and cable, it was for the one which had steam up and could shift for herself to do so and not for the one which had no steam and would be helpless. It is impossible, therefore, to say that there was negligence on the part of the "Foreric" in not doing what she could towards slipping or parting her chain.

Passing to the account of the witnesses from the "Foreric," they say that whilst being dragged along, and before their steam was ready they suddenly saw the "Belvedere" right ahead of them and very close. The captain at once sent the second officer, who had just returned from ordering steam, to the bridge to see if the steam steering gear was workable, and if it was to put the helm hard a port. He, with considerable difficulty, the steam having condensed in it when first turned on, got it over, but the vessel did not answer to the port helm. Their lordships are advised by their nautical assessors that at the slow pace the vessel was going it was practically impossible that it could, and that there would not have been the least probability that it would have acted if someone had been sent to see to the helm earlier.

The "Foreric" struck the "Belvedere" nearly a right-angled blow about the forward bulkhead of No. 2 hold and abaft the fore rigging, which would be some distance in from the bow, though the exact distance is not stated. The witnesses from the "Foreric" think that their cable which had been dragging them along parted at the time of the collision by being nipped between the vessels. There was a mark made by it on the stem of the "Foreric," but it seems more likely that it must have parted immediately before the actual collision. There is said to have been no mark on the "Belvedere." Having regard to the fact that the "Sedburgh" passed ahead of the "Belvedere," very close to her, it follows that the first contact of the cable connecting the "Sedburgh" and the "Foreric" must have been with the cables by which the "Belvedere" was anchored with her two anchors. It seems a little odd that none of the witnesses from the "Belvedere" heard any noise or felt any jerk from this contact, but possibly it would not be very perceptible on board. They, however, had their attention engaged elsewhere. They had noticed a "dark mass" close to them and apparently approaching, and were trying to satisfy themselves as to what it

was. It was only when it was right into them that they were able to see it was a steamer. When it came into them they say there was no chain hanging over the bows and no mark of a chain afterwards on their vessel. It seems likely, therefore, that the chain had parted just before the collision from the strain of it across the stem of the "Foreric," the pull being at nearly right angles from the "Belvedere's" two cables to the stem of the "Foreric."

After the cable connecting the "Sedburgh" and "Foreric" had fouled the "Belvedere's" cable, as it must have done, the "Foreric" would have proceeded under the way already on her, and the strain on the cable across her stem, as well as across the "Belvedere's" cables, would have increased considerably, and probably it then parted and left its mark on the "Foreric's" stem before the actual collision between the vessels. Their Lordships are advised by their nautical assessors that in the short time (they calculate it to have been only two minutes) between the "Foreric" seeing the collision to be imminent and its happening, there was no time for the "Foreric" to have done anything which would have avoided it. It has been suggested that she should have slacked away on her cable, and simultaneously have dropped her starboard anchor. But the "Belvedere" was lying in 35 fathoms of water, and the anchor would, even if it had held at once, not have stopped her way in time, even in much shallower water.

Their Lordships do not see what steps the "Foreric" could have taken until their steam was available which would have prevented the collision, and their nautical assessors are of the same opinion. It is said against the "Foreric" that she ought to have displayed the signals that they were being towed or that they were out of control. Their Lordships do not consider that this involuntary dragging was a "towing" within the meaning of the regulations, and vessels quietly at anchor cannot be expected to have two red lights ready trimmed for hoisting to show they are out of control in case of a stranger coming in the night and starting them on an involuntary voyage. Besides which, the exhibition of any lights on the "Foreric" would not have prevented the collision with the "Belvedere" at anchor. It is admitted that she was right not to slack her cables and there was nothing else she could have done, whatever any lights on the "Foreric" could have told her. If, unfortunately, the "Foreric" had met another vessel under way coming into the bay and had collided with her, the problem of which lights, if any, the "Foreric" should have been carrying might have had to be considered seriously. It has not in this case.

These being the circumstances of the collision it now becomes necessary to deal with the question of the burden of proof which was argued. According to clearly settled rules and cases there can be no doubt that on the "Belvedere" proving that she was

at anchor with proper lights and that the "Foreric" was in motion and came into collision with her, the burden was, in the first instance, on the "Foreric." It is seldom, however, that the decision as to the burden of proof does much towards the decision of any case, for it is so often easy to shift the burden back. Here their Lordships think that the "Foreric," on proof that she was not in motion under her own motive power or under the power of the elements, wind or tide, but by having been torn from her anchorage by another steamer and put and kept in motion until she came into collision, shifts the burden back, and makes it incumbent on the "Belvedere" at least to suggest some way in which the "Foreric" may have contributed to the collision and have become a joint tortfeasor. The rule as to the proof of matters more within the knowledge of one party than the other, laid down by Erle, C.J., in the Exchequer Chamber in the case of *Scott v. The London Dock Company* (34 L.J. Ex. 17) by analogy to an old pleading rule, was referred to in argument, and it would then apply to the particular matter suggested. It is doubtless for the "Foreric" to satisfy the tribunal which has to decide this case that she was at the material time carrying her regulation riding lights, a matter which has yet to be dealt with. That is really the only matter which admits of any substantial doubt in this case. The other matters raised as negligent have been disposed of incidentally when stating the facts, and they are almost all trivial and some almost ludicrous. The only one worth mentioning again, in addition to her riding lights, is whether the "Foreric" should have taken active steps to sever the connection between herself and the ship which was dragging her along, and which, by starboarding as she did, dragged her into the collision. Their Lordships, however, are, with the concurrence of their nautical assessors, of opinion that, although it would have prevented this particular collision, it would not have been prudent or seamanlike to have done so until her own steam was ready for her own use, as there would be danger of other collisions with vessels to leeward. As to that and all minor matters, the "Foreric" has satisfied the burden of proof, even if it is on her, and it remains only to consider the lights.

The question is whether the "Foreric's" riding lights were duly lighted at the time when the "Sedburgh" anchored so close to the "Foreric." It is first to be observed that all the probabilities are that they would be. Gibraltar is a place where vessels must frequently arrive and anchor in night time, and one of the last places where any shipowner or ship's captain would try to save a few pints of oil by not hoisting his riding lights. The "Foreric" was provided with oil lamps, which may, of course, go out occasionally, although the boatswain of the "Foreric," who had been on her several years, says they never had any trouble with the lamps. If, however, the lights were not burning at the critical time, it certainly must have been by reason of their

having gone out and not from their not having been provided. No witness is called from the "Sedburgh" to say that the lights were not alight when they arrived or that they were led by the absence of lights to let go their anchor nearer to the ship than they would have if she had had her proper lights. The witness who speaks about the lights at the earliest time is the second officer of the "Foreric," who was on the watch. He speaks early in his evidence of the two anchor lights, and it may be taken as certain that they were alight when he came on duty at midnight, only half an hour before the arrival of the "Sedburgh." If they had gone out then, he would most certainly have pointed it out to the officer whom he relieved, and they would have been relighted. Nothing of the kind is spoken of. The captain, the first officer and the boatswain of the "Foreric," who all came on deck after the captain had been called by the second officer, all speak of the riding lights being then alight. The four witnesses are all speaking of matters which they must know the truth about, and they must be committing perjury if it is not true. The next witness so far as regards the riding lights is Mr. Knight, the only witness from the "Sedburgh." He speaks clearly and decisively to the riding lights of the "Foreric" being alight, but he did not notice them before his ship began to drag the other vessel. Then he was quite clear and emphatic that they were alight. In fact, it was by the lights that he satisfied himself that the vessel was coming along with the "Sedburgh." He was cross-examined as to a statement he had made to another solicitor some time previously, and said that he did not know whether he had mentioned that the lights were alight, but that if he had not it was because he was not asked; that he only answered such questions as he was asked, but that he told the truth on each occasion, and that he was quite certain the lights were alight when his attention was called to them. In the course of a somewhat irregular discussion during the cross-examination he said that he knew that the mate of the "Sedburgh" had said that the "Foreric's" riding lights were not alight when he first saw that vessel. This, of course, was not admissible in evidence to prove that they were not alight. That mate was never called as a witness, nor was Davies the seaman who was on watch with the second officer of the "Foreric." This suggests the possibility that the lights had gone out when the "Sedburgh" first appeared, and that Davies lighted them before the captain and first officer were called. That, of course, would be more likely than that there never were any lights at all, but there is simply no evidence of it at all. The remaining evidence as to lights is that of two witnesses on the "Belvedere," who each speaks of seeing a "black mass" without any lights *on it* at all approaching them.

Those witnesses were, of course, trying to see whether that mass, whatever it was, was approaching them, and, of course, they were looking for side lights, not anchor lights. The mass

proved to be the "Foreric," and was quite close to them when first observed. When she collided with them her fore-castle deck proved to be considerably higher than the "Belvedere's" deck. The riding light was some 20 feet or more up her forestay above the fore-castle deck, and it would be a long way above the heads of the witnesses who say there were no lights. They may have not looked up to see them and may have been honestly mistaken, and were, in fact, right in saying that there were no lights *on* the dark mass. It would be of no importance whether the riding lights were, in fact, burning at this time, except so far as it had any bearing on the question whether these had been alight at the critical time when the "Sedburgh" was taking up her berth. All the "Foreric" witnesses, however, state positively that the riding lights were alight on the "Foreric" at the actual time of the collision. They are, therefore, in conflict with the "Belvedere's" witnesses, but they cannot be mistaken, whereas the "Belvedere's" can easily be and probably were. The absence both of Davies and of the mate of the "Sedburgh" is accounted for by the difficulty of tracing sailors, which applies somewhat more to a seaman than a mate. There is the further fact that the "Sedburgh," after pleading the absence of riding lights, which would have been a good defence, consented to judgment, and paid considerable damages to the "Foreric." The Chief Justice believed the witnesses from the "Belvedere," one of whom was examined before him and the other on commission, and their Lordships might not be prepared to differ from him if their doing so involved imputing dishonesty to witnesses whom he believed honest, but as their Lordships only think that those witnesses must have been mistaken and not dishonest, they see no reason why they should not give effect to what appears an overwhelming balance of evidence.

This appeal might perhaps have been decided on the simple ground that the "Sedburgh" was the entire direct cause of the collision, having regard to their Lordships' view as to the lights, which was the only substantial ground on which blame could be attributed to the "Foreric," but as other points have been argued, their Lordships have thought it right to state their views on them.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and that the action against the present appellants should be dismissed with costs and that they should have the costs of their appeal.

In the Privy Council.

THE OWNERS OF THE BRITISH STEAMSHIP
"FORERIC" AND HER FREIGHT

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THE OWNERS OF THE INTER-ALLIED
ITALIAN STEAMSHIP "BELVEDERE."

DELIVERED BY SIR ARTHUR CHANNELL.

Printed by
Harrisons & Sons, Ltd., St. Martin's Lane, W.C.2.
1926.